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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

ICOS No: 18/72668

Delivered: 24/02/2020

IN THE CROWN COURT SITTING AT DUNGANNON

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THE QUEEN

v

STEPHEN McKINNEY

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RULING - ADMISSIBILITY OF ABE INTERVIEWS

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Mr R Weir QC and Mr M Chambers appeared on behalf of the Prosecution  
Mr M O'Rourke QC and Mr M McCann (instructed by Oliver Roche, Solicitors) appeared  
on behalf of the Defendant

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McBRIDE J

**Introduction**

[1] This ruling relates to the admissibility of two significant witness ABE interviews of the defendant conducted by police officers on 27 April 2017 and 30 April 2017. The interviews were audio and video recorded. No caution was administered to the defendant prior to either interview.

[2] The Crown indicated that it intended to adduce these interviews as evidence and wished to refer to them in their opening and later have them played and viewed by the jury. The defence challenged the admissibility of the interviews before the Crown opening. Counsel agreed and the court accepted that the challenge should be treated as raising matters for a "voir dire" or trial within a trial and accordingly the court heard evidence and counsel's submissions on admissibility in the absence of the jury.

[3] The court expresses its gratitude for the very helpful oral and written submissions made by all counsel which were of much assistance to the court.

## **The Application**

[4] The defendant seeks to have the two interviews excluded under the provisions of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 on the grounds that the police committed significant and substantial breaches of the PACE code and acted in bad faith by:

- (a) Failing to inform the defendant that he was suspected of involvement in his wife's death.
- (b) Failing to caution him and advise him of his right to have a solicitor present.
- (c) Advising the defendant's solicitor who specifically queried whether the defendant was under suspicion that he was not a suspect.

## **Chronology**

[5] The following chronology is based on the evidence given by the various police officers and, in particular, the Occurrence Entry Log report (the OEL) which was a computer generated document which contained entries of actions taken by police officers in relation to this case and also included comments, reports, letters, test results and statements.

- (a) On 13 April 2017 at 01:20 hours the defendant made a 999 call stating that his wife, Lu Na McKinney, had fallen into the water from a boat moored at a jetty at Devenish Island on Lough Erne.
- (b) Police attended the scene and observed a Manor House Marine boat, Noble Cadet 2 No: 4056 tied to the jetty. A female was observed in the water close to the stern of the boat.
- (c) With the assistance of the RNLI crew police lifted the female out of the water, CPR was performed and she was then transferred by life boat and ambulance to the South Western Area Hospital, Enniskillen.
- (d) The defendant and his two young children were brought back from the Island on a separate boat and conveyed to the South Western Area Hospital at Enniskillen by ambulance.
- (e) Lu Na McKinney was pronounced dead at 02:52 hours on 13 April 2017.
- (f) Detective Inspector Stevenson, the senior investigating officer in the local CID team, was briefed on the incident at 08:00 hours on 13 April. He immediately set in train various routine enquiries and set up various agencies to come and capture evidence at the scene. In addition, he appraised the major investigation team ("MIT"). At that time MIT indicated it did not require to

be involved and requested CID to continue the investigation until all preliminary enquiries were made, the post-mortem was performed and the preliminary cause of death established. As appears from the OEL log as of 13 April 2017 the police were treating Lu Na McKinney's death as a tragic incident of drowning.

- (g) In the early hours of 13 April 2017 Detective Constable McCabe spoke to the defendant at the South Area Hospital in Enniskillen and recorded his account of what happened. The defendant stated that the family had travelled to the Manor House Marina from their home in Donegal for a two-night boat break. They travelled to Devenish Island, the children went to bed, his wife later took a sleeping tablet and they later retired to bed. His wife awoke saying the boat was moving, she put on her coat and went out onto the deck. He followed closely behind her and saw her fall into the water. He jumped into the water but was unable to save her. He then climbed back on to the boat and dialled 999. He advised that the children remained asleep throughout the incident until the police arrived. The police search of the boat recovered Zopiclone tablets. The defendant advised Detective Constable McCabe that he purchased the Zopiclone online for his wife.
- (h) On 14 April 2017, Phillip McKinney, the defendant's uncle, contacted police to voice concerns about the serious financial and property problems in the marriage and raised questions in relation to the death.
- (i) On the same date the CID discussed the case with MIT but MIT refused to get involved at that stage.
- (j) The police continued with further financial enquiries and sought recovery of the defendant's computer.
- (k) On 14 April a statement of evidence was prepared and sent to the Guards to enable the Guards to seek a warrant to search the defendant's home.
- (l) On 15 April the An Garda Síochána searched the defendant's home and seized a laptop and a quantity of Zopiclone. The defendant disclosed to the Guards that sometimes when under the influence of this drug his wife would become unstable and had in the past wandered off.
- (m) On 16 April the police seized beer cans on the boat and separated the liquid to facilitate potential forensic analysis of the contents to determine if there was evidence to indicate that a prescribed or un-prescribed drug may have been added to the alcohol consumed by the deceased while on the boat.
- (n) Detective Inspector McGrory of MIT contacted Detective Inspector Stevenson on 15 April. They discussed the case at length and Detective Inspector

McGrory reported up to Detective Superintendent Geddis of MIT. He declined to get involved at that time.

- (o) Post mortem results were then received on 17 April indicating the preliminary cause of death was fresh water drowning.
- (p) On 17 April 2017 at 16:26 hours Detective Inspector Stevenson recorded the following on the OEL log:

“The defendant is now a suspect in respect of importing and supplying a Class C drug to his wife knowing that they have made her unstable and prone to wondering in the past which would possibly lead to him being culpable for her manslaughter. He is now a suspect in this case but much evidence is still to be gathered so he will not be interviewed at this time.”
- (q) On 18 April examination of a Sony tablet revealed evidence of it having been “cleaned” on three separate occasions. Further on 18 April the An Garda Siochana reported that on 13 April 2017 a lady had called the Guards and reported that she was very concerned about the incident as she was aware from the deceased that the marriage had lots of difficulties and she was in fear of her husband. The lady went on to say that the deceased was terrified of water, could not swim and would never go near water.
- (r) On 19 April analysis of the phone revealed a Skype conversation which took place in 2014 when the parties lived in China. This conversation indicated the marriage was in difficulties and the defendant may have been having an affair.
- (s) On 22 April DI Stevenson prepared a “Summary of Facts Current Status of Investigation” report.
- (t) On 24 April D/Constable McCabe was telephoned by the defendant who said that he could make a statement. She advised him that the police needed to speak to him in relation to the drugs that were found on the boat and any interview would need to be done under caution.
- (u) On 26 April MIT took over responsibility for the investigation and DI McGrory assumed responsibility as the senior investigating officer into the death of Lu Na McKinney.
- (v) On 26 April at 14:10, after reviewing the OEL log and Detective Inspector Stevenson’s report, DI McGrory directed that the defendant be treated as a significant witness and that he be interviewed and the interview visually

recorded. He then detailed a list of questions to be covered in the ABE interview.

- (w) On 26 April DCI McCabe contacted the defendant and advised him that he would be spoken to as a witness and not under caution.
- (x) On 27 April at 11am DI Stevenson gave a briefing at Enniskillen Police Station which was attended by DI McGrory and DI Pat O'Donnell from the Guards.
- (y) The defendant was interviewed on 27 April by DC McCabe and DC Una Ryan. The interview was not completed that day.
- (z) On 28 April toxicology results indicated that Zopiclone was present in the deceased's blood and the levels were slightly elevated above what would be considered normal.
- (aa) The second interview with the defendant was conducted on 30 April 2017.
- (bb) On 11 May DI McGrory designated the defendant as a suspect.

### **The Evidence**

[6] The court heard evidence from PC Wayne Robinson, DI Trevor Stevenson, DI David McGrory, DC Ian McCabe, DC Una Ryan, all from the PSNI and DI Pat O'Donnell from An Garda Siochana. In addition the court watched the two ABE interviews.

#### ***PC Wayne Robinson***

[7] PC Robinson gave unchallenged evidence that he was one of the officers who responded to the emergency call to go to Devenish Island and he adopted as his evidence a number of statements which he had made which set out details of what he had done and what he had seen on 13 April 2017.

#### ***DI Stevenson***

[8] Detective Inspector Stevenson is a Detective Inspector in the local CID at Enniskillen. He is a very experienced officer who has worked in CID for 14 years. On 13 April 2017 he was advised about the incident and as the senior investigating officer he set in train various enquiries and set up agencies to capture evidence at the scene.

[9] On 22 April 2017 he prepared a "Summary of Facts on the Current Status of the Investigation report" for his DCI. After setting out the timeline of events he then noted a number of anomalies in the investigation to date. Under the heading "Suspect" he inserted the name of the defendant and listed two offences including

importation and supply of a Class C drug and manslaughter. Under the heading "Current hypothesis of the SIO" he stated:

- "(1) Lu Na McKinney died in a tragic drowning accident.
- (2) Stephen McKinney caused the manslaughter of his wife by procuring and supplying drugs to her knowing that they had caused her to become unstable in the past and wonder off on one occasion.
- (3) Stephen McKinney murdered his wife."

[10] Under cross-examination he denied that the defendant was under suspicion from the outset and stated that all his lines of enquiry were designed to investigate the death and to preserve evidence as experience had taught him that cases can escalate into homicide investigations. By the time of his report on 22 April and, as stated by him in that report, he readily accepted that he considered the defendant was a suspect for drug offences and manslaughter. He denied however that he was a suspect for murder. He stated that this was something he was not ruling out but at that stage he had no grounds to support it. Although DI Stevenson had not planned to interview the defendant at that stage he accepted that if he had interviewed him he would have cautioned him before the interview. He further advised the court that he had briefed MIT throughout the investigation on the basis that they may need to take on the investigation as he had limited resources.

[11] I found DI Stevenson to be an impressive witness. He is a very experienced officer who understood the importance of pursuing all lines of enquiry and preserving evidence as he knew from experience cases could escalate. I am satisfied that he did not consider that a crime had been committed until 17 April 2017 as appears from his records in the OEL log. By 22 April 2017 he advised his senior officer that he considered the defendant was a suspect for drug offences and manslaughter. He readily conceded that if he had interviewed the defendant on 27 April and 30 April he would have cautioned him before the interview.

### **Detective Superintendent McGrory**

[12] DS McGrory was at the relevant time a Detective Inspector in MIT. He became formally involved on 26 April when he was appointed senior investigating officer and was provided with DI Stevenson's report. Prior to receiving this report he had had a lengthy telephone conversation with DI Stevenson on 15 April. His first step as senior investigation officer was to review DI Stevenson's report and look through the OEL log. After reviewing these documents he recorded in his Investigator's Notebook at 14:10 on 26 April as follows:

“I am concerned that this tragic incident occurred 13 days ago and the only witness to the event, Stephen McKinney, has not been interviewed formally in order for police to have a full understanding of what happened.”

[13] He then directed that the defendant be treated as a significant witness and be interviewed by ABE and he set out the topics to be covered by the ABE which included:

- (i) Reasons for trip – new job, anniversary?
- (ii) Probe how Lu Na fell into water (fine detail).
- (iii) How did Stephen get out of water (fine detail)?
- (iv) The Zopiclone – how long had Lu Na been taking it? Any reaction/side effects?
- (v) State of marriage.
- (vi) Show photographs of boat etc.

[14] He then appointed various officers to assist him in the investigation. On 27 April he attended Enniskillen Police Station for a briefing by DI Stevenson and he recorded a number of notes from that meeting. Following the briefing he recorded his working hypotheses as:

- (i) Accidental drowning.
- (ii) Suicide.
- (iii) Murder.

[15] His rationale for murder is recorded as follows:

“Stephen was in relationships with other women. The only way he could live his life the way he sought to was to plan the boat trip with the intention of murdering his wife by berthing on the remote side of the island, creating a set of circumstances that would get Lu Na out on to the rear deck whereby he pushed her into the lake in order to drown her as she could not swim. He would then gain house, money, kids and the freedom to do as he wants.”

[16] On 28 April he received the preliminary toxicology results. It was only on 11 May that he designated the defendant a suspect and at that stage he set out 16 grounds as his rationale for so doing.

[17] Under cross-examination this witness consistently stated that he did not direct a caution to be administered because he was not satisfied at that stage a crime had been committed. He accepted the defendant should have been cautioned in relation to the drug offences but he considered this was an entirely separate matter.

[18] I found DI McGrory's evidence to be unsatisfactory in many respects and, in particular, when he gave answers which later were shown to be contrary to his interests he stated that he had made an error or that his answers were a slip of the tongue. I am unable to accept DI McGrory's evidence that he did not consider the defendant to be a suspect on 26 April for the following reasons:

- (i) He never set out in writing why he disagreed with DI Stevenson's analysis and when asked he was unable to articulate any reason why the defendant was not a suspect for manslaughter given that he had told the police he had acquired Zopiclone over the internet and this had the effect of making his wife wander off in the past.
- (ii) His notes record that the ABE would not be used for examination-in-chief. Under cross-examination he conceded that as of 26 April he was at least contemplating a criminal trial and I therefore find that he was actually treating the defendant as a suspect.
- (iii) The list of issues to be covered in the ABE included matters which demonstrated this witness did have suspicions that the defendant was involved in his wife's death and this is the only reason he wanted questions asked about, for example, the state of the marriage, how the defendant got out of the water etc. Such a list of questions is more typical of a caution interview than an ABE interview.
- (iv) I am also satisfied that he did link the drugs and the death as evidenced by the fact the ABE interviews were to cover questions about the drugs and their effect on the deceased. In addition, I find the OEL log and DI Stevenson's report clearly set out the link between the drugs and the death and therefore this witness did appreciate the link and how this made the defendant a suspect at least for manslaughter.
- (v) On 26 April 2017 this witness's hypotheses included murder.
- (vi) When this witness eventually designated the defendant as a suspect the reasons for so doing were not new. All of them were known by him on 26 April.

(vii) In cross-examination when asked regarding computer deletions, he said he wanted to ascertain details of this as part of the investigation into the suspicious death of Lu Na. He then corrected this and said it was a slip of the tongue and the death was not suspicious. I do not accept that this was a slip of the tongue but rather an accurate expression of what he thought at the time.

[19] I therefore find that this witness did consider the defendant was a suspect and by conducting an ABE interview without rendering a caution he paid scant regard to the provision of the PACE codes.

### **Detective Inspector Pat O'Donnell, An Garda Siochana**

[20] Detective Inspector O'Donnell is based in Letterkenny. He was contacted by DI Stevenson on 14 April 2017 regarding the incident and was advised that the defendant purchased the drugs. Once the statement of evidence was provided he obtained a warrant and thereafter a search of the defendant's home was conducted. He then handed over the laptop and the drugs to the PSNI on 25 August. Under cross-examination he denied that his enquiries related to the death. He said that he was investigating offences relating to drugs committed within his jurisdiction based on intelligence provided by the PSNI.

[21] I found this witness to be a straightforward witness and I accept his evidence. Although I consider the PSNI had established a link between the drugs and the death of Lu Na McKinney, DI O'Donnell did not because as he stated he had no knowledge that the deceased had taken the drugs and there was no evidence before the court to show that he did have such knowledge.

### **Detective Constable McCabe**

[22] DC McCabe is a Detective Constable based in Enniskillen. She was the first police officer to speak to the defendant and she took an account from him at 3:30am on the morning of 13 April. When she became aware later that day that Zopiclone had been found on the boat she again spoke to the defendant who advised he had ordered the drugs over the internet for his wife. On 14 April she then completed a statement so the Guards could search the defendant's home and at that stage she understood that a computer was seized and handed to the police the next day. Subsequently, she was in touch with the defendant with regard to making arrangements to interview the children and on 24 April she advised the defendant when he told her he wanted to make a statement that due to concerns about the supply of drugs she would speak to him under caution. On 27 April she was directed to conduct an ABE interview with the defendant along with DC Una Ryan. Her opinion was not sought but she felt uncomfortable with the circumstances as she considered on the basis of the information known to her that the interview should have been under caution. She had concerns regarding the drugs and the impact this had in relation to the death. Notwithstanding this she conducted the ABE interview

because MIT and her senior officers had made this decision and advised her to do so and she simply did what she was told.

[23] I accept this officer's evidence. She considered the defendant was a suspect and ought to have been cautioned. Nonetheless, she conducted the interview without a caution because as a Detective Constable she felt she could not disobey the direction given by her superior officers. I therefore do not find that she acted in bad faith or deliberately set out to deceive the defendant.

### **Detective Constable Una Ryan**

[24] DC Ryan is a Detective Constable in MIT. She was asked to conduct the ABE interview. She confirmed that the defendant's solicitor prior to the first interview asked whether the defendant was a suspect and she confirmed that he was not. She further confirmed that no solicitor was present at the second interview.

[25] The defence submit that this witness deliberately deceived the defendant when she told him he was not a suspect. I do not make such a finding. I consider that this witness as an experienced ABE interviewer made a deliberate decision not to obtain extensive information prior to the interview about the case as she was aware from her experience that such information could contaminate an ABE interview as it could cause her to improperly ask leading questions. I therefore find it was her genuine belief that the defendant was not a suspect. I therefore find that there was no bad faith on her part.

### **Relevant Law**

[26] PACE Code C10 sets out when a caution must be given. It provides:

"10.1 A person whom there are grounds to suspect of an offence, see Note 10A, must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect's answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g.:

- (a) solely to establish their identity or ownership of any vehicle;
- (b) to obtain information in accordance with any relevant statutory requirement,

- (c) in furtherance of the proper and effective conduct of a search,
- (d) to seek verification of a written record.

10.2 Whenever a person not under arrest is initially cautioned, or reminded that they are under caution, that person must at the same time be told they are not under arrest and must be informed of the provisions of paragraphs 3.16 which explains how they may obtain legal advice according to whether they are at a police station or elsewhere.”

[27] PACE guidance notes at paragraphs 10A and B state:

“10A There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it.

10B An arrested person must be given sufficient information to enable them to understand that they have been deprived of their liberty and the reason they have been arrested. The suspect must also be informed of the reason or reasons why the arrest is considered necessary. Vague or technical language should be avoided.”

[28] The relevant EU Directive is 2012/13/EU on the Right to Information in Criminal Proceedings. Counsel accepted that its provisions were reflected in Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 and the Code. Article 76 provides:

“76.1 In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

### **Relevant Principles regarding the application of Article 76**

[29] There are two stages in the application of Article 76. Firstly, the court must determine the circumstances in which the evidence came to be obtained and secondly, the court must determine whether admission of the evidence would have

an adverse effect upon the fairness of the proceedings. Each case is fact specific and due to the infinite variety of circumstances it is undesirable to attempt any general guidance as to how the judge's discretion should be exercised. From the authorities provided to the court I consider that the following principles emerge which apply to the exercise of the court's discretion:

- (a) Evidence obtained in breach of the Code may be excluded under Article 76.
- (b) The extent to which the breach of the Code will trigger the exercise of the judge's discretion to exclude evidence is case specific but the phrase 'significant and substantial' has been used in a number of cases including *Keenan* [1990] 90 Cr App R 1, *Walsh* [1990] 91 C App R 161 and *Kirk* 2001] 1 C App R 400. In *Walsh* the court held where there were significant and substantial breaches of Section 56 (which is the English equivalent of Article 76) and the Codes of Practice then prima facie the standards of fairness set by Parliament have not been met. In *Keenan* the court stated:

"If the breaches are significant we think it makes good sense to exclude them."
- (c) The absence of a caution in circumstances where it should have been administered will normally amount to a significant and substantial breach of the Code – See *Walsh*, *R v, Kirk* and *Keenan*.
- (d) Not every breach of the Code will justify the exclusion of the evidence under Article 76. It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police. Significant and substantial breaches do not automatically result in the material being excluded but in such cases the court must be astute to ensure that there is no possibility of unfairness arising.
- (e) Bad faith on the part of police officers will usually lead to the exclusion of the evidence. Good faith will not however excuse serious breaches of the Act or Code.
- (f) The court should have regard to the rationale of the provisions in the Code and the extent to which the breach is likely to dispute that rationale.
- (g) If there is a breach of a Code or the Act and the judge admits the evidence reasons for so doing should be given.

### **Consideration**

[30] Two issues arise for consideration:

- (i) should a caution have been administered before the defendant's interviews;  
and
- (ii) if so, should the court exercise its discretion under Article 76 to exclude the interviews?

**Question 1 - Should a caution have been administered?**

[31] In accordance with *Nelson and Rose* [1998] 2 Cr App R 399 the appropriate time to administer the caution is when on an objective test there are grounds for suspicion falling short of evidence supporting a prima facie case of guilt that an offence has been committed by the person in question. An objective test must therefore be applied when considering whether there are grounds to suspect a person of an offence so as to require a caution to be given under Code C 10 - see *Williams* [2012] EWCA Crim 264.

**Were there grounds to suspect the defendant of an offence?**

[32] I am satisfied on the basis of the evidence that the objective test is met given the wealth of material which indicated the defendant was under suspicion for a number of offences including drug offences, manslaughter and possibly murder. At the date of the interviews material was available to the police which included the following:

- Scene of crime evidence.
- Concerns expressed by the defendant's uncle who raised questions about the drowning.
- Concerns expressed by an unknown female in Donegal regarding the state of the marriage and the circumstances of the death.
- The fact the deceased had taken Zopiclone which the defendant had ordered online and which he advised An Garda Siochana had caused the deceased to become unstable and to wander off in the past.
- The fact that the report on the computer and phone included a cleared history.
- Skype conversations which indicated that the defendant may be having an affair
- A toxicology report indicating raised levels of Zopiclone.

I am satisfied that this material was sufficient objectively speaking to render the defendant a suspect of drug offences and, of at least, manslaughter, if not murder.

[33] Secondly this was the unequivocal view expressed by DI Stevenson, a very experienced CID officer, in his report dated 22 April 2017. In setting out his rationale for his view that the defendant was a suspect for importation and supply of drugs and manslaughter he relied on all the evidence available to the police at that date, which included the evidence I have set out above. Thirdly, the fact that MIT assumed control of the case on 25 April having previously declined on two previous occasions, I find as evidence that MIT considered that at that stage a serious crime had been committed and as the defendant was the only possible perpetrator he must have been a suspect. Fourthly, DI McGrory accepted the defendant was a suspect in respect of the importation of drugs. Despite his evidence that the drugs were entirely separate to the death I consider that objectively speaking the drugs were intimately intertwined with the death, especially given the statement made by the defendant to An Garda Siochana that in the past drugs had caused his wife to wander off. Fifthly, I find that subjectively a number of police officers viewed the defendant as a suspect. DI Stevenson set this out clearly in his report. DC McCabe stated this in the OEL log and in her evidence. Although Detective Inspector McGrory denied this was his subjective view I have found that he did view the defendant as a suspect because of: the evidence available at the date of the interviews; the issues he posed for the ABE interviews; his working hypotheses included manslaughter and murder; and the fact that when he did render the defendant a suspect no new material had emerged for him to come to that conclusion.

[34] Accordingly, and as was accepted by DC McCabe and DI Stevenson, I find a caution ought to have been administered before the interviews.

### **Question 2 - Should the court exercise its discretion to exclude the evidence?**

[35] The Crown seeks to admit the two ABE interviews which were obtained in circumstances where a caution ought to have been administered. If a caution had been administered the defendant would have been made aware of the true nature of the investigation and he would have had to decide whether he wished to have a solicitor present and whether to answer the questions which the police posed. These rights, which are now enshrined in the Code, have existed for centuries in our legal system and are fundamental pillars of the protections put in place to protect an accused and are therefore fundamental to fairness in the criminal process. Therefore, by its very nature failure to administer a caution, I consider, is a significant and substantial breach of the Code. Crown Counsel did not demur from this position.

[36] As the case law indicates significant and substantial breaches of the Code normally lead to the exclusion of the evidence because, prima facie, the standards of

fairness set by Parliament have not been met. As was stated in *Keenan* where there has been a significant and substantial breach:

“It makes good sense to exclude them. That clearly is not a matter of rote, in other words any breach will not automatically result, if significant and substantial, in the relevant material being excluded but it does indicate the way the court should approach such breaches and be astute to ensure that there is no possibility of unfairness arising.”

[37] Crown Counsel submitted that no unfairness arose by admitting the ABE evidence in this case because:

- (i) The defendant was not subject to oppression.
- (ii) He had a solicitor present.
- (iii) He did not make any admissions of guilt.
- (iv) He would not have exercised his right to silence in any event as demonstrated by his frequent references to what he said in the ABE interviews in his subsequent PACE interviews. Therefore, Crown Counsel submitted that administering the caution in these circumstances would not have made any difference.

[38] The Crown submitted that even if a caution ought to have been administered it did not automatically follow that the ABE interviews should be excluded. The Crown relied on the cases of *Senior* [2004] EWCA Crim 454 and *Gill* [2003] EWCA Crim 2256 as authorities for admission of interviews even when no caution was administered as fairness did not require exclusion of the interviews.

[39] I have watched the ABE interviews and accept that there was no oppression of the defendant. I also note that he had a solicitor present at the first interview. He did not, however, have a solicitor present at the second interview. I consider, however, that the role of the solicitor in advising and protecting the defendant was undermined when the solicitor was advised the defendant was not under caution. Consequently, the role undertaken by the solicitor in such circumstances is very different from the role adopted when a solicitor is acting for a person who is under suspicion of a serious crime such as murder.

[40] The defendant did not make any admissions of guilt in the ABE interviews. Nonetheless, the Crown is seeking to rely on these interviews and this must be on the basis that they are probative of guilt and therefore adverse to the defendant.

[41] As to whether the defendant would have exercised his right to silence requires the court to speculate. The fact the defendant subsequently referred to the ABE interviews in his PACE interviews may be because he would not have exercised his right to silence. There may be, however, other reasons why he did this. In addition, I consider the fact that his solicitor asked if he was a suspect shows that this was a factor in the defendant's thinking as to whether he would participate in the ABE interviews and therefore it may be that if he had been cautioned he may not have participated in the interviews. Therefore, at this stage it is my view that the court cannot find that the failure to administer the caution would have made no difference.

[42] Further, I find that the fact that the defendant gave an account to the police in the immediate aftermath and said similar things to others does not of itself mean no prejudice would accrue to the defendant if the ABE interviews were later admitted. As stated in *R v Keenan*:

“If the rest of the evidence is strong then it may make no difference to the eventual result if he excludes the evidence. In cases where the rest of the evidence is weak or non-existent that is just the situation where the temptation to do what the provisions are aimed to prevent is greatest and the protection of the rules most needed.”

[43] Therefore, I consider that it is difficult to calculate the adverse impact that this may have had on fairness and the court is enjoined to exclude evidence if there is a possibility of unfairness. I have carefully considered the authorities of *Senior* and *Gill*. I consider that these cases can be distinguished from the present case on the facts. They both relate to specific examples of Revenue and Custom officers questioning suspects, suspected of being drug couriers. In such cases very different considerations apply.

## **Conclusion**

[44] I consider that the failure to caution the defendant together with the misleading and inaccurate assurance given to him that he was not a suspect would have a serious adverse effect on the fairness of the proceedings and I exclude the ABE interviews on this basis.

[45] In light of this finding it is not necessary for the court to determine whether the police officers acted in bad faith. If it had been necessary for the reasons already set out I consider that the interviewing officers did not act in bad faith. They simply did what they were told to do by their superiors. I have already set out my view that I consider Detective Inspector McGrory did consider the defendant was a suspect and notwithstanding this he directed that he be interviewed as a significant

witness and therefore I am satisfied that he had scant regard to the provisions of the Code.

[46] In all these circumstances I consider that the evidence should be excluded as its admission would have an adverse effect on the fairness of the proceedings.