Neutral Citation No. [2010] NICC 43 | *Ref:* **McCL7960**

Judgment: approved by the Court for handing down | *Delivered:* **30/09/10**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

Sitting at Belfast

_____

THE QUEEN

-v-

GARY JONES

_____

RULING NO. 2: NO CASE TO ANSWER

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McCLOSKEY J

I INTRODUCTION

[1] This ruling determines an application by the Defendant at the close of the prosecution case for a verdict of not guilty on the ground that he has no case to answer.

Background

[2] The Defendant is charged with one count of doing an act with intent to cause an explosion and a further count of possession of an explosive substance with intent to endanger life, contrary to Sections 3(1)(a) and 3(1)(b) respectively of the Explosive Substances Act 1883 ("*the 1883 Act*"). The history of this prosecution is as follows:

(a) On 27th October 2006, following a trial before Morgan J, the Defendant was acquitted of attempted murder (then the first count on the indictment) and convicted of causing an explosion, contrary to Section 2 of the 1883 Act [no longer alleged] . He was sentenced to 14 years imprisonment.

(b) In a reserved judgment delivered on 5th July 2007, the Court of Appeal allowed the Defendant's appeal and ordered a retrial.

(c) The Defendant's first re-trial was aborted, with no outcome. As a result, this is his second re-trial.

(d) On 28th May 2010, the court (Hart J) conducted a pre-trial review. On that occasion, it was represented that there were no outstanding applications and both prosecution and defence were ready for trial. A fresh trial date in June 2010 was allocated.

(e) The scheduled retrial of the Defendant did not proceed in the event and a new retrial date of 7th September 2010 was allocated.

[3] The Defendant's retrial began (on 14th September 2010), the delay occasioned by a combination of the court's involvement in another unfinished trial and significant prosecution witness difficulties). From the outset of the trial, an application to stay the indictment as an abuse of process was signalled. That particular application was inextricably linked with a series of evolving disclosure requests by the defence and, while it has been reduced to the form of written submissions and has been considered in outline by the court, it has not yet formally and finally materialised. At this juncture, the prosecution case having closed, it is overtaken by the present application and stands deferred.

II THE PROSECUTION CASE

[4] The following four paragraphs contain a résumé of the written outline of the prosecution case helpfully provided by Mrs. McKay (of counsel) at the outset of the trial. The prosecution case revolves around the alleged conduct of the Defendant and the activities of a white Ford Transit van on 21st July 1998 in the vicinity of Monaghan Street, Newry. It is alleged that after 4.30pm on this date the van was driven into a laneway which separates Nos. 25 and 27 Monaghan Street and provides access to an area of waste ground commonly used as a makeshift car park. Upon turning into this access the van had a minor collision with a parked vehicle. The van then adopted a parked position in the area of waste ground. A male person, whom the Crown say is the Defendant, was seen coming from the area of the van. He was challenged by another male, Mr. Lennon, who had observed the collision. When the Defendant refused to stop, Mr. Lennon attempted to restrain him physically. During the ensuing struggle, the Defendant wriggled out of his jumper and denim jacket and left the scene hastily.

[5] The minor vehicular collision was the impetus for a call to the police and certain officers attended the scene. A police vehicle drove it into the waste ground and two officers disembarked, in close proximity to the parked van. One of them noticed something peculiar about its roof. At this stage, there was a bang akin to an

explosion, emitting an object through the roof of the van which came to rest on the ground a short distance away. This object did not explode. There were no casualties.

[6] The prosecution say that the Defendant drove the van into the waste ground and parked it there, with a view to launching a mortar attack on the nearby police station, which is separated from the waste ground by a wall. The van was positioned accordingly. In the event, the attack failed. While the explosive device was duly launched from the van, it travelled a very short distance only (a few metres) and did not detonate. It is claimed that this was a viable device which, on detonation, was capable of endangering life or causing serious damage to property. It is suggested that both the van and its number plates had been stolen during previ9ous days.

[7] The prosecution case also rests on forensic evidence the focus whereof is the aforementioned white jumper. It is alleged that on 13th December 2004 (over six years after the event), following arrest buccal swabs were obtained from the Defendant. These were matched against a blood stain found on the jumper, giving rise to the analysis that the chances that the DNA contained in both did not originate from the Defendant are less than one in a billion. It is further highlighted that the Defendant failed to make any response when questioned during interview and when confronted by material items of physical evidence, giving rise to an invitation to the court to make an inference adverse to him.

III THE EVIDENCE

[8] This chapter of the judgment is not designed as a verbatim rehearsal of all the evidence adduced. Rather, its purpose is to highlight and summarise the salient features thereof. Bearing in mind that this is a trial by judge alone, both prosecution and defence were given an opportunity to address the court on the question of whether the contents of this chapter have any material omissions or errors. A draft was provided to the parties to this purpose and the Chapter was finalised subsequently.

Civilian Witnesses

[9] **Finbar Lennon** gave evidence that in July 1998 he worked as an office manager in premises abutting both Monaghan Street (Newry) and an entry providing access to an area of waste ground, which he described as "*full of crap all the time*". During a meeting with a client inside the office premises, he was alerted by a noise from outside and went out to investigate. He encountered an irate man complaining about his car having been struck. Mr. Lennon wondered whether the gate positioned at the entrance to the entry (for which his firm was responsible) had been in some way involved. He confirmed that he did not see any other vehicle, nor did he recall seeing any vehicle either entering the waste ground or positioned therein.

[10] Some five to ten minutes later, Mr. Lennon and others were attempting to retrieve their cars from the waste ground. However, they were not permitted to do so, on account of a cream or white coloured parked van. He saw no one in the vicinity of the van. Continuing, he recounted that he spoke to "*a young lad*". He described this person as "*a cub … a young fellow*", aged between seventeen and nineteen years, wearing a monkey hat and a hard hat. Mr. Lennon testified that *he* is now aged forty-two years (and was, hence, aged thirty at the material time). When asked whether this other male person was of the same age, he replied "*certainly not*". The other male person's height was five feet, six inches to five feet, eight inches and he was of slim build. He did not recognise this person. He "*supposed that he got a look at his face.*" The hard hat suggested to Mr. Lennon that he was one of the firm's workers, who frequented this area thus attired.

[11] Mr. Lennon testified that he confronted this young male person. Where did this encounter occur? Mr. Lennon testified that the "*young lad*" was "*coming through the entrance on to Monaghan Street*". He "*thought*" that he spoke to him "*just to the left hand side of the gate*". He was unable to say from where the other person had come. Mr. Lennon, upon confronting him, asked him whether he had "*hit the car on his way into the yard*". This elicited no reply. The other person did not stop and kept walking. Mr. Lennon "*thought*" that he repeated his question. Then, he "*thought*" he grabbed the other person and he "*thought*" that he was "*left with a coat*". This occurred in the vicinity of what he described as "*the amusement arcade*": with the assistance of Photograph No. 3, he appeared to indicate the brown coloured frontage to the left of the yard entrance, though no definite marking was made.. He testified that the coat was dropped to the ground, but did not specify precisely where this occurred. He did not recall being "*left*" with anything else.

[12] Mr. Lennon attested to his belief that the damaged parked car was positioned to the right hand side of the gate. Again, he was vague about its precise position. He was unaware of any other access to or egress from the waste ground. He mentioned a link fence situated on the left side of the waste ground (viewed from the street entrance). Later that evening, he made a statement in the police station. The possibility of an identification parade was at no time canvassed. He would have willingly participated in such an exercise.

[13] The witness statement of **Leo O'Neill** was read to the court, pursuant to a hearsay order made under Article 20 of the Criminal Evidence (Northern Ireland) Order 2004. This contains the following salient passages:

> "*It was about 17.00 hours when I was walking along Monaghan Street when at the entrance to Dunne's old car park I saw a van turning into the car park and heard a crunch. I realised the van had struck an Escort parked at the roadside. I saw the van drive up and turn into the right at the top. There was a big man with a mobile phone there but*

I am not sure if he saw the crash. Anyway I then noticed a man wearing a yellow hard hat, jeans and maybe a denim jacket with a light coloured jumper or something underneath came walking down from the back of the car park. The big man with the phone tackled this man when he came onto the street. I had told the man with the mobile phone that the van had hit the Escort car. The big man grabbed the fella wearing the hard hat and a struggle ensued …

During the struggle the man's jacket and jumper came off and his yellow hat fell off. This man then ran off down Monaghan Street…

A small man came out of the Post Office, Savages and I understand it was his Escort car that was hit."

[14] The evidence of **Kevin Matthews** was also read to the court. He recounts that on 21st July 1998, he was in the premises of Messrs. Lovell and McAlinden, Monaghan Street, Newry where he was talking to Mr. Lennon. Both went outside upon hearing a loud noise. This witness observed a damaged Ford Escort vehicle. He then recounts the following:

"*As I looked up into the car park I saw a man walking down towards us. I would not see a Transit van. As far as I could see he looked frightened. He was wearing a blue denim jacket, jeans and shoes. I could see he wore goggles and I believe some sort of scarf under a hard hat. Although this hat subsequently fell off him and is yellow I thought my first impression was that it was red. Anyway Finbar tackled him asking what was going on as he approached. The man then made to run off but was caught by Finbar. There was a brief struggle and the man wiggled out of his jacket, got free and ran off past Savages Post Office. I was standing inside the car park entrance at this time …*

Other than the clothes I have described I can only add that the man from the van wouldn't be very tall maybe five feet nine inches and skinny. Also I did not hear any bang from an explosion whilst at the car park".

[15] **Michael McAnulty** gave evidence that on 21st July 1998 he parked his Ford Escort on Monaghan Street, close to the "Dunne's Yard" entrance (the appellation "Dunne's Yard" clearly equates with the waste ground/makeshift car park in question). Then he joined a queue inside the nearby Post Office. Next, he heard "*a bit of a thump*" and went out. He observed that the front driver's side of his vehicle had been damaged. A small crowd gathered and police drove into the yard,

following which they began dispersing members of the public. There was a man on a mobile phone. Then he heard a small bang.

[16] **Thomas Conlon** gave evidence that on 20th July 1998 he made a report to police of the theft of a new Izuzu Trooper jeep and number plates from his premises at Loughbrook Industrial Estate, Newry, where he operated a commercial vehicle hire business. He was uncertain about the purchase and provenance of this vehicle. It was recovered by the police in Craigavon some months later.

Police Witnesses

[17] **Constable Rennie** testified that at 17.05 hours on 21st July 1998 he entered the waste ground in question, accompanied by three other constables. The witness was positioned "*out towards the street entrance*". There he observed a white Transit van, parked in the bottom right corner a short distance from a wall separating the waste ground from Corrie Square RUC Station, towards which the vehicle was pointing. His view of the vehicle was unobstructed. Constables Hazlett and McAnespie were positioned closest to it. Very quickly after their arrival, there was a muffled explosion, the roof of the van opened and a gas canister was emitted. He believed that this was a mortar attack. In due course, he departed the scene at approximately 6.40pm. He saw no photographer or mapper arrive. He had no log keeping duties and could not say whether any log was compiled.

[18] **Constable Hazlett** testified (in common with Constable Rennie) that the advent of the police at the scene was precipitated by a "hit and run" accident report. This witness noted the presence of broken glass on the roadway, in line with the aforementioned entrance. He entered the waste ground and observed a white Transit van there. Something unusual about its roof caught his attention. He was standing about five feet from the van, positioned on the ledge of the police vehicle, where from he could see that the roof had been altered. He also observed a covering of tinfoil on each of the van's rear windows. Next, a "*tube*" came out of the roof, travelling in the direction of the adjacent police station car park. It traversed the separating wall and landed in the station car park. He entertained no doubt about this. He believed this to be a mortar bomb. The van was *not* in the position depicted in the album of photographs adduced in evidence [photographs 3 and 4 in particular].

[19] **Constable McAnespie** gave evidence that he and Constable Rennie attended the aforementioned scene on 21st July 1998, at around 4.55pm on 21st July 1998. A white Ford Transit van was parked at the rear of the waste ground, facing Corrie Square RUC Station. As he approached the van, there was a loud explosion and he observed a large mortar launch from its rear, landing unexploded a short distance away. He believed this to be a mortar bomb. In the aftermath, he seized and retained a yellow builder's helmet, a blue denim jacket and a white jumper [exhibit PMcA 3]. These items were positioned to the left hand side of the yard entrance, against the wall, viewed from the perspective of Monaghan Street. They were

definitely inside (i.e. beyond) the gate, close to the white wall sign visible in one of the photographs [No. 3 - I interpose that this sign is plainly located a short distance beyond the span of the entrance gate in its open position]. Upon returning to Ardmore RUC Station, he conveyed these items to a civilian scenes of crime officer, Mr. Wilkinson. On Mr. Wilkinson's instruction, the constable prepared a white control nylon bag [PMcA 6].

[20] The evidence of Robert Wilkinson, scenes of crime officer, was read to the court:

> "*On 21st July 1998 at 19.10 hours I received the following items from Constable P McAnespie, they were bagged and labelled as: PMcA 1 – one yellow builder's helmet, PMcA 2 – one blue denim jacket, PMcA 3 – one white jumper, PMcA 4 – pen removed from denim jacket, PMcA 5 – tissue removed from denim jacket, PMcA 6 – control nylon bag for items PMcA 1 – 5*".

As appears from the outline of the Crown case – paragraph [7], *supra* – exhibit **PMcA 3,** the white jumper, is the critical item.

[21] **Andrew Jones,** a civilian mapping officer, gave evidence that on 22nd July 1998 he prepared a map of the area in question [Reference No. 367/98]. This was duly proved in evidence. He could not recall the precise time of his attendance or whether anyone else was present. He was unable to say whether the white van was visible from outside the Monaghan Street entrance. He agreed that the position of the van depicted in photograph No. 1 differs from the depiction in his map. He did not fully inspect the perimeter of the waste ground. Thus he could not say whether it had any *further* means of access/egress. His map also depicts the position of a gas cylinder, adjacent to the white van. The album of photographs [exhibit GS1] was proved by Gordon Steele, who testified that they were taken by him at an unspecified time on 22nd July 1998.

[22] Evidence was given by **Detective Inspector Forde** and **Detective Constable Young** about the arrest and ensuing police interviews of the Defendant, on 24th March 1999. [This was the first of three separate arrests of the Defendant, spanning a period of some six years]. The subject matter of this exercise was the Defendant's suspected involvement in a mortar attack on Corry Square RUC Station, Newry. Mr. Forde had a supervisory role. He testified that the officer with overarching responsibility was Detective Chief Superintendent McBurney, with whom he liaised. Another male person, Eamon Magill, was arrested simultaneously. The "on the ground" responsibility for taking fingerprints and samples from the two arrested persons – or not doing so, as the case may be – rested with Mr. Forde.

[23] Evidence was also given about the **second** arrest of the Defendant almost six years later, on 13th December 2004. **Detective Chief Inspector Williamson** testified

that this was precipitated by a review of the various outstanding terrorist cases initiated by him in his role of Newry and Mourne District Crime Manager, in October 2003. This particular incident was brought to his attention by Detective Superintendent Baxter, senior investigating officer in the Omagh Bomb case. Police gave consideration to the possibility of a link between the two incidents, concluding that no direct link existed. He suggested that there had been no earlier review of this incident following the Defendant's initial arrest and release. He asserted that he had sought and obtained legal advice, due to some uncertainty about the legality of rearresting the Defendant. The advice was provided swiftly. He recalled that a planned rearrest of the Defendant was cancelled for some operational reason. He agreed that on 2nd February 2004, the Defendant's residential premises were searched, but no arrest was effected. He did not challenge the suggestion that when the Defendant was rearrested on 13th December 2004, he underwent only one interview, of 25 minutes duration. Detective Sergeant McGregor had responsibility for operational matters pertaining to the Defendant's rearrest. This witness was transferred to another post in late 2004.

[24] During the Defendant's **second** arrest, on 13th December 2004, two buccal swabs were taken from him. On 22nd December 2004, these were delivered to the Forensic Science Agency ("FSA") by **Constable Robinson**. On 17th February 2005, the same officer collected exhibits PMcA 1 – 5 from FSA. On 23rd February 2005, this officer brought these exhibits to Antrim Serious Crime Suite. The exhibits were shown to the Defendant during interviews (following his third arrest).

[25] Evidence about the Defendant's **third** arrest was given by **Detective Constable McKee**, who interviewed the Defendant on 22nd February 2005. During interview, the Defendant provided his name, stated that he was not a member of any illegal organisation and said nothing else. The witness referred to the corresponding custody record, in this context. He confirmed that this contained a description of the Defendant as being five feet, ten inches tall with a date of birth of 14th April 1967. During interviews, a DNA profile match was put to the Defendant. The witness confirmed that the Defendant had no criminal record at that time.

Bomb Analysis and Forensic Evidence

[26] **Captain Saunders** attended the scene at around 6.55pm on 21st July 1998. When he arrived, the white van was not visible from the street. ["IED" denotes "Improvised Explosive Device"]. The IED Incident Report relating to his attendance and inspection was adopted as his evidence, without objection. The text of this report includes the following material passages:

> "*EOD action recovered a MK15 improvised mortar system consisting of the following:*
>
> *(a) MK 19 timing and power unit …*

(b) Propulsion unit …

(c) Mortar baseplate and launch tube …

(d) Launch platform …

(e) MK 15/3 type mortar bomb. The mortar bomb consisted of the following components:

(i) Bomb body … constructed from two gas cylinders welded together.

(ii) Main filling. Approximately 79 kg of probable HME, possible ANS.

(iii) Booster charge. Consisted of a length of steel pipe … A length of approximately 1488 mn improvised cord detonating was secured to the body of the booster with adhesive tape. It was fed through the centre booster tube and was connected to the fuze.

(iv) Fuze. A standard MK 10/4 improvised percussion fuze was fitted. It contained a point 22 RF cartridge and a possible commercial CIL plain detonator. The detonator was taped to the improvised cord detonating. Approximately 2500 m of steel cable was attached between the pin of the fuze and the mortar baseplate."

[27] Elaborating, Captain Saunders explained that this was an unexploded mortar bomb. His task was to render it safe by removal of the fuze and contents. This included removing the home made explosive substances from inside the ejected gas cylinder. The explosive substance was possibly ammonium nitrate based and he placed this in plastic bags. He described this as "*a viable device*", adding that the "*explosive train*" was complete. The fuze was improvised and relatively simple in nature, designed to detonate the explosives. This type of fuze had been used in other bombing incidents. The timer power unit was also in common usage. The dismantling operation occupied some fifteen hours in total. He opined that the bomb had failed to explode due to a defect in the propulsion unit and/or the expenditure of energy required to pierce the roof of the vehicle and/or the angle of impact between the bomb and the ground.

[28] **Gordon McMillen**, a Principal Scientific Officer of the FSA, testified that on 22nd July 1998 the FSA received certain items from Constable Johnston and Mr. Wilkinson. These included exhibit PMcA 3, consisting of one white jumper. This item was to be examined for the purpose of ascertaining whether it exhibited any explosive residues. This particular examination did not involve this witness (see the evidence of Ms Boyce, *infra*). The two reports compiled by this officer concentrate

mainly on the explosive device. His analysis of and commentary upon its various components largely mirror that of Captain Saunders. Both of Mr. McMillen's reports were adopted as his evidence in chief and read to the court. The second report contains the following passage:

> "*The detonator … was of commercial origin …*
>
> *I have no reason to doubt its viability …*
>
> *No detonating cord was received at this laboratory, however photographs show this to be present in the device. See Nos. 7, 8 and 33 in album RVH 1121-06 …*".

[29] Elaborating, Mr. McMillen testified that all of the components required for a viable, fully functioning explosive device were present. In particular, the explosive substance contained the requisite combination of ammonium nitrate (i.e. fertilizer), calcium carbonate and sugar. The three photographs highlighted in Mr. McMillen's second report (see the excerpt quoted above) were not proved by him or any other witness. During the presentation of the prosecution case, in the context of cross-examination, a defence exhibit was received. This is an album consisting of 40 photographs and bearing on its cover the inscription "RVH 1121-06". In cross-examination, this witness confirmed the following:

(a) The items received by FSA did not include a detonating cord.

(b) Absent a detonating cord this type of device is not viable.

(c) The van was not examined for explosive traces.

(d) The inside of the Fiat car was swabbed, with negative results.

[30] **Brian Irwin** a Registered Forensic Practitioner employed by FSA, gave evidence about the scientific examination and testing of exhibit PMcA 3 (the aforementioned white jumper) which, together with a buccal swab attributed to the Defendant, was received from Detective Constable Robinson on 22nd December 2004. Mr. Irwin's report was adopted in his evidence in the conventional manner viz. by uncontentious leading questioning in examination-in-chief and was read to the court. The purpose of his examination was "*… to seek evidence by way of DNA profiling which might help support or refute*" the Defendant's suspected involvement in the Monaghan Street bombing incident. His report concluded:

> "*A full* [SGM plus] *profile was obtained from the jumper sample. Full* [SGM plus] *profiles were obtained from the reference samples submitted and each could be distinguished from the others. The test results from the bloodstain on the jumper matched those obtained from the sample attributed to Jones. A calculation based on NI population survey data*

> *shows that the combination of characteristics observed in the staining on the jumper would be expected to arise in fewer than one in a billion males unrelated to him*".

Mr. Irwin completed his testing on 7th January 2005, informed police verbally of his findings and compiled his report on the same date.

[31] **Margaret Boyce**, a FSA Senior Scientific Officer and forensic biologist gave evidence of biological examinations of exhibits PMcA 1-5 inclusive. Her examination-in-chief was conducted in the same way as that of Messsrs. McMillen and Irwin. According to her report, these items were "*received on 22 July, from R. Wilkinson*". Her evidence focussed particularly on the forensic examination of exhibit PMcA 3 (the white jumper). The purpose of the examination was framed in the following terms:

> "*Biological examinations were carried out to determine whether or not there was any scientific evidence to indicate the circumstances surrounding the mortar attack in Newry on 21st July 1998*".

Elaborating, Ms Boyce explained that the examination was designed in particular to establish the identity of any possible wearer of the items of clothing concerned. Her report describes the outcome of the examination of the white jumper in the following terms:

> "*One small spot of blood was found on the inside left back of the collar of the jumper. The blood was removed and submitted for DNA analysis. The blood was of male origin and a full profile was obtained. It was added to the Northern Ireland DNA database. No hits have been obtained to date.*"

Thus the blood could not be linked to any person at that time.

[32] Ms Boyce acknowledged that the vintage of the blood spot could not be determined. It would be extinguished by normal machine washing. Thus it must have materialised subsequent to the last washing of the garment. In cross-examination and in response to questions from the court, the following scenarios were either put to or identified by this witness as possible explanations for the blood spot on the collar of the garment:

(a) Primary contact between the wearer and the garment.

(b) Airborne transmission of blood, whether in the form of droplets or (insofar as different) a single drop, from a source external to the garment and making contact with same.

(c) Direct contact between the jumper and a bloodstained source, whether human or otherwise (in effect, two distinct scenarios).

(d) So-called "secondary contact" i.e. initial transmission of the blood from its original source to an intermediate point of contact, followed by further contact between the latter and the garment.

Ms Boyce described the last of these four scenarios as the *least likely*, given the very small amount of blood involved and the absence of any sign of smearing. She ranked the other three possible scenarios in terms of equal probability viz. she considered none of them to be more likely than the other. According to her evidence, scenarios (b) and (c) are conceivable and are reasonable possibilities.

IV GOVERNING PRINCIPLES

[33] The principles which govern the determination of this application are well established and uncontroversial. The decision of the Court of Appeal in ***Chief Constable of PSNI –v- LO*** [2006] NICA 3 is especially apposite in the present context, which is that of a non-jury trial. In that case, the applicable principles were formulated by the Lord Chief Justice in the following terms:

> *"**[13]** In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of Galbraith but with the modification that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the accused's guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in Hassan, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.*
>
> ***[14]** The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a*

reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

[34] In ***The Queen –v- Courtney*** [2007] NICA 6, the Court of Appeal reiterated that the decision in ***The Queen Galbraith*** [1981] 73 Cr. App. R 124 remains the *locus classicus*:

> *"[18] The judgment in Galbraith remains the locus classicus for the exposition of the principles to be applied in determining whether a direction of no case to answer should be made. This is how Lord Lane CJ described it: -*
>
> > *"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*"

The judgment in ***Courtney*** also contains certain material pronouncements on the topic of circumstantial evidence:

> *"**[20]** Where, as in this case, the prosecution rely on circumstantial evidence to establish the defendant's guilt, it is well established that a particular approach to the evaluation of the evidence is required. This is perhaps still best encapsulated in the well known passage from the judgment of Pollock CB in R v Exall [1866] 4 F&F 922 at 928; 176 ER 850 at 853 (endorsed in this jurisdiction by the Court of Appeal in R v Meehan No 2 [1991] 6 NIJB 1): -*

> *"What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise . . . Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence -- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.""*.

The Lord Chief Justice revisited this theme at a later stage of his judgment:

> *"**[31]** We can quite understand how the judge came to focus on the evidence of the McCulloughs and Mr Hagan since the claim that they made was the centrepiece of the Crown case. But we consider that he was wrong to isolate this evidence from the remainder of the Crown case.* ***In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case.****"*

[My emphasis].

V THE COMPETING ARGUMENTS

[35] The court has had the benefit of carefully compiled skeleton arguments, duly augmented by counsel's oral submissions. The gravamen of the defence application is rehearsed in counsels' skeleton argument in these terms :

(a) The Crown case depends on a single piece of evidence:- that item PMCA3, a jumper, lifted by Constable McAnespie from inside the gate, on the left hand side, of the Corry Square car park, on 21st July 1998, following a failed mortar attack, had on it a small spot of the accused's blood.

(b) Crown counsel in opening the case, said that the Court would hear evidence to the effect that Mr. Finbar Lennon had grappled with a male person, who had exited the car park, whom he suspected of causing damage to a parked car. The Court was told that, in extricating himself, this male person had divested himself of a jacket, a jumper and a hard hat. This clothing had been identified to Constable McAnespie who seized it and in due course it was delivered to FSANI for examination.

(c) In the result, the Court did not hear evidence from Mr. Lennon relating to a jumper. He thought the male person had struggled out of his coat.

(d) Mr. Lennon did not give evidence of identifying any clothing to Constable McAnespie

(e) Constable McAnespie did not give evidence of Mr. Lennon identifying any clothing to him.

(f) Mr. Kevin Matthews, a bystander, whose evidence was read, makes no mention of a jumper.

(g) The only evidential reference to a jumper is contained in the statement of Mr. Leo O'Neill, now deceased, another bystander, who states 'during the struggle the man's jacket and jumper came off and his yellow hat fell off'. His evidence was admitted as hearsay, following his death. It provides the single strand of evidence by which the Crown case hangs.

(h) There is a break in the continuity relating to exhibit PMCA 3, the jumper, which break is fatal to the Crown case. Constable McAnespie hands items PMCA1-6 (including PMCA3) to Robert Wilkinson, SOCO. Mr. Wilkinson receives them. The evidence of Margaret Boyce, forensic scientist, is that the items are received in the laboratory (FSANI) between 22nd July 1998 and 24th August 1998. Crucially, there is no evidence as to how the items were transported from Mr. Wilkinson's custody on 21st July to FSANI , where they were received on an unknown date on or before 24th August (or indeed where they were, and in whose custody, in the interim.)

(i) Even if PMCA 3 could properly be linked to a male person exiting the car park, and there was no break in continuity, the proper concessions made by Margaret Boyce, forensic scientist, in her evidence are such that the blood spot on the jumper cannot, without more, properly sustain a conviction. She accepts that it is equally likely that the blood was deposited by airborne transmission (or by dropping, to the extent that that is different) as by direct contact with the accused. While she considers secondary transfer to be less likely she accepts that it is a reasonable possibility. She accepts that the blood spot cannot be dated. The most that can be said is that it was deposited since the jumper was last washed. It is thus impossible for the tribunal of fact to determine, particularly when considering a moveable object, when, or in what circumstances, the blood spot came to be on the jumper. Equally, it is entirely possible that an accused person would not know how such a spot of blood came to be deposited on an item.

(j) In a case depending entirely on one piece of evidence (or one circumstance) it is relevant to consider, at this stage, circumstances which contraindicate guilt. In this case, there is nothing to connect the accused to the Ford Transit van, or it to him. There is nothing to connect the items PMCA1-5 to the said van, or the van to any of them. Apart from the blood spot, there is nothing to connect the accused to the items PMCA1-5, or any of them to him. The accused's height has been given (from the custody record) as 5ft 10ins and his year of birth as 1967. Mr. Lennon's evidence of the male person's height was, having refreshed his memory from his witness statement, 5ft 6ins-5ft 8ins.The accused is the same age as Mr. Lennon (who gave his present age as 42), yet he described the male person as a 'young lad', 'a cub', 17to 18 (years old) and when asked if he thought he was a man the same age as himself replied that he 'certainly was not'.

(k) If, contrary to the above submissions, there is evidence to link the accused to the van and its contents, it is clear from the evidence of Mr. McMillen, FSANI, that no detonating cord was received in the laboratory and there is no evidence of detonating cord being present in the device. Mr. McMillen conceded that, absent detonating cord, the device is not viable. It is submitted, accordingly, that there is an unbridgeable gap in the proofs required to establish the factual basis for Count 1 and, at least, the intent element in Count 2.

(l) The provisions of Article 3 of the Criminal Evidence (NI) Order 1988 are not engaged.

[36] Based on the above critique of the evidence adduced by the prosecution, five discrete submissions are advanced on behalf of the Defendant:

(a) The evidence fails to establish that the mortar bomb was a viable device.

(b) There is no evidence linking the Defendant to the van or its contents or vice versa.

(c) The only evidence establishing any link between the departing male and a jumper emanates from a witness (Mr. O'Neill) who is deceased. This evidence is untested by cross-examination and is intrinsically slender in any event.

(d) The spot of blood on the white jumper was deposited at a time and in a place and circumstances which are unknown. Per Ms Boyce, it may have been deposited by airborne transmission or, possibly, by secondary transfer.

(e) There is no evidence that exhibit PMcA 3 (the jumper) was identified to Constable McAnespie by Mr. Lennon or anyone else.

(f) There are breaks in the continuity evidence relating to the jumper which are fatal to the prosecution case.

[37] Miss McDermott's submissions also draw attention to the following passage in ***The Queen –v- Hoey*** [2007] NICC 49:

> *"[46] The Defence submit, correctly in my judgment, that it is for the prosecution to establish the integrity and freedom from possible contamination of each item throughout the entirety of the period between seizure and any examination relied upon. They contend, and I accept the contention, that the court must be satisfied by the prosecution witnesses and supporting documents that all dealings with each relevant exhibit have been satisfactorily accounted for from the moment of its seizure until the moment when any evidential sample relied upon by the prosecution is taken from it and that by a method and in conditions that are shown to have been reliable. This means that each person who has dealt with the item in the intervening period must be ascertainable and be able to demonstrate by reference to some proper system of bagging, labelling, and recording that the item has been preserved at every stage free from the suspicion of interference or contamination. For this purpose they must be able to demonstrate how and when and under what conditions and with what object and by what means and in whose presence he or she examined the item. Only if all these requirements have been satisfactorily vouched can a tribunal*

have confidence in the reliability of any forensic findings said to have been derived from any examination of the item."

Having formulated the appropriate standard in these terms, Weir J concluded:

"[61] … I am not in the least satisfied in relation to any one of the items upon which reliance is sought to be placed for the results of their LCN DNA examinations that the integrity of any of those items prior to its examination for that purpose has been established by the evidence. Accordingly I find that that DNA evidence, the third and final strand remaining in the prosecution case, cannot satisfy me either beyond a reasonable doubt or to any other acceptable standard."

Ms McDermott also reminded the court of the decision in ***The Queen –v- McGlinchey*** [1985] NI 435.

[38] The replying submissions of Mrs. McKay on behalf of the Crown highlighted in particular:

(a) The evidence of Mr. McNeill (paragraph [12] *supra*).

(b) The evidence of Mr. Matthews (paragraph [13], *supra*).

(c) The evidence of Mr. Lennon.

(d) The combined evidence of Constable McAnespie and Mr. Wilkinson. It is submitted in particular that the evidence of these witnesses, in conjunction with that of Ms Boyce, establishes sufficiently the "continuity" of exhibit PMcA 3.

Furthermore, the court is invited to infer that the male person accosted by Mr. Lennon was the driver of the offending van. Any discrepancy between the description of the Defendant in the first custody record and the physical descriptions provided in the evidence of civilian witnesses (Mr. Lennon) is attributed to the male person's attire, the speed of his movements and the passage of time. Finally, it is submitted that the technical and scientific evidence establishes that the device left at the scene was a viable bomb.

VI CONCLUSIONS

[39] I remind myself that this is an application for a direction of no case to answer. The application is to be determined in accordance with the principles enunciated in paragraphs [33] – [34] above. I am mindful that an exercise of evaluating all the evidence and making concluded determinations and findings at this stage, viewed through the prism of whether I have a reasonable doubt about the Defendant's guilt,

is inappropriate. The test is whether the evidence adduced by the prosecution is so intrinsically frail and inadequate that it could not properly support a conviction, applying the criminal standard. I am obliged to consider the evidence in its totality, as emphasized in ***Courtney***, paragraph [31].

[40] I have come to the conclusion that the central pillars of the Defendant's application do not, either individually or together, satisfy the governing test. I consider that the various strands of evidence on which the prosecution case is constructed, viewed collectively, constitute evidence against the Defendant which is capable of convicting him to the criminal standard. Applying the governing principles, it is open to me to accede to the defence application only if I conclude that the evidence, considered both in its individual components and as a whole, could not properly support a conviction. Such a conclusion is permissible only in those exceptional cases where, at this stage of the trial, the tribunal is satisfied that there is no possibility of being convinced to the criminal standard on the basis of the evidence adduced. It is trite to observe that the hurdle confronting any Defendant in this context is an elevated one.

[41] I conclude that the Defendant's application fails to overcome the applicable threshold and must, therefore, be dismissed.

[42] At this juncture, there are two further extant applications before the court. The first is an application for a secondary disclosure order under Section 8 of the Criminal Procedure an Investigations Act 1996. The second is an application for an order staying the prosecution as an abuse of the court's process. I accept the submission that the latter application could be to some extent informed by or dependent upon the former and I shall, therefore, proceed in this sequence.