

IN THE CROWN COURT SITTING IN BELFAST

THE QUEEN

-v-

PAUL ANTHONY McCAUGHERTY
DERMOT DECLAN GREGORY
(aka Michael Dermot)

HART J

[1] The defendants are charged with various offences connected with an operation carried out by the Security Service which commenced in August 2004 and culminated in the arrested of both defendants and their former co-defendant Desmond Paul Kearns, in June 2006. It will be necessary to consider the evidence relating to the charges in greater detail later in this judgment but it is necessary to say something about the history and nature of the operation in order to place the charges in context.

[2] The initial stage of the operation involved a freelance agent called Amir. He was freelance in that he was employed by the Security Service on an occasional basis when required and paid a daily fee for each day he was required. During this operation he was used as a covert human intelligence source or CHIS, and played the role of someone who was prepared to sell cheap but genuine cigarettes and other items such as laptops or cheap clothes. He was given the code name Amir and was supervised by, and worked with, various employees of the Security Service who were throughout the proceedings only referred to by their personal identification number eg 3522, 3583 etcetera. As well as Amir, there were a number of other CHISs who played minor parts in this operation, and to whom it is unnecessary to refer. However, one who played a major part in the operation was Ali, and his evidence is central to the case against McCaugherty, and important to that against Gregory. Ali's role was to pose as an arms dealer who could supply weapons. All of the prosecution witnesses who were members of the Security Service were granted anonymity by the Court as were Amir, Ali and the other CHISs, although in

the event not all of the anonymous witnesses were required to give evidence. Those who did disclosed their true identity to the court by writing down their names. These have been placed in sealed envelopes but not disclosed to anyone except myself.

[3] Kearns was jointly charged with McCaugherty; on Count 1 with conspiracy to possess explosives contrary to Article 9(1) of The Criminal Attempts and Conspiracy (Northern Ireland) Order and Section 3(1)(b) of the Explosive Substances Act 1883; and on Count 2 with conspiracy to possess firearms and ammunition, contrary to Article 9 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Article 58(1) of the Firearms (Northern Ireland) Order 2004. For the reasons set out in my ruling of the 17th June 2010, I ordered that the proceedings against Kearns should be stayed for an abuse of process, but Mr Gordon Kerr QC (who appears for the prosecution with Mr McDowell) submitted at the conclusion of the case that that did not mean McCaugherty could not be guilty of conspiracy for two reasons, (a) the finding was that Kearns was entrapped, not that he did not take part in a conspiracy with McCaugherty, (b) it is apparent from many of McCaugherty's statements that were recorded during his meetings with Ali that McCaugherty was a member of an organisation that wanted to purchase munitions in the form of arms, ammunition and explosives and throughout was acting on their behalf.

[4] Mr Colton QC (who appears with Mr Doran for McCaugherty) did not take issue with these propositions. So far as (a) is concerned, Mr Kerr's submission appears to be in accordance with the outcome of the DPP v Shannon [1975] AC 717, but I do not have to consider it further because (b), there is ample evidence to suggest that McCaugherty was acting with others whose identities are unknown, and the particulars of offence in both counts 1 and 2 allege that Kearns and McCaugherty "...conspired together and with other persons not before the Court". I am satisfied that the granting of a stay on the grounds of entrapment against Kearns is not a bar to the conviction of McCaugherty on these counts where he was jointly charged with Kearns.

[5] I propose to consider the case against McCaugherty first. I am satisfied (and when I say satisfied in this judgment I mean that I am satisfied beyond reasonable doubt) that McCaugherty was one of the principal targets, and eventually the principal target of this operation. Amir agreed that he was the target as he made clear to Mr Pownall for Kearns during cross-examination on 11th May 2010 at page 26:

"Question: Absolutely, let's not beat around the bush
the target was McCaugherty?

Answer: Absolutely.

Question: Absolutely? So the plan as far as you were concerned was, we are going to get to McCaugherty through Kearns?

Answer: We knew they were friends".

[6] A more authoritative and nuanced explanation of the objectives of the operation was given by 3522 who was the controlling officer for Operation Nair from its inception until late September 2005 when he moved to another section. See the 9th June 2010 at page 34:

"The background, my Lord, to the investigation was that a number of members of the Real IRA were reported to be involved in a range of weapons procurement activity. I was shown intelligence which I am not sure that I am at liberty to go into in great detail but can expand on if you wish, my Lord, but which essentially indicated that Paul McCaugherty appeared to be central to this activity and a number of his associates were involved in activity that looked like weapons procurement. We know from precedent and other operations and some indicators that there is an established link between Republican related cigarette smuggling and criminality and weapons procurement and we observed that Desmond Kearns was making periodic visits to continental Europe on what looked like cigarette smuggling activity. And the objective of the operation therefore, was to provide what coverage and intelligence reporting we could to support the investigation to establish was there any conspiracy, if so who was involved in it and if so to look for opportunities to disrupt that activity and I assessed that the most suitable way to try to acquire that coverage would be to try to cultivate Desmond Kearns in order to engage him in a relationship where we could see something of what he was up to with a view to seeing first of all in his case what was that and was it anything that contravened national security and over and above that could we learn anything about the activities of McCaugherty or associates"

[7] On 27th May 2005, at defence Exhibit 3 page 25, 3522 commented that, "Our aim has been to cultivate [Kearns] in order to gain his trust, in the hope that he might think our role players were useful contacts and therefore introduce them to McCaugherty".

[8] I am satisfied that there is no real inconsistency between Amir's description of the objective of the operation and that of 3522, and whether or not McCaugherty was the sole objective of the operation at its inception, he was a very important objective from the beginning and became the main objective. I am further satisfied that the decision to embark upon this operation was justified because the intelligence referred to by 3522 in the passage just quoted, that the operation was properly authorised and supervised by 3522 and those who were responsible for the operation after he moved to another section, and that the necessary authorisations were given under the Regulation of Investigatory Powers Act 2000. I have already considered these matters in my ruling on 17th June 2010, and it is convenient at this point to refer to the remaining issues raised by Mr Colton in support of the application for a stay of the proceedings on the basis that McCaugherty was entrapped, an application he repeated at the conclusion of the case.

[9] As I stated in my ruling, my conclusion at that stage was based solely on the prosecution case, and that it was still open to McCaugherty to give and call evidence if he wishes in his defence, and that in such circumstances I would not be able to arrive at a verdict until I had heard all of the evidence, and the submissions that maybe made on behalf of both McCaugherty and Gregory. Neither has given or called evidence as they are entitled to. However, that means that there is no evidence to contradict the prosecution evidence, and I am satisfied that there is no reason to alter or depart from my ruling of the 17th June 2010. In particular I am satisfied that there is no evidence to suggest that McCaugherty was subject to any inducement or that there is any basis for believing that Ali, or Amir for that matter, did anything other than offer McCaugherty an opportunity to commit these offences. I am further satisfied for reasons that will appear later in this judgment, that McCaugherty freely took advantage of that opportunity.

[10] I now turn to consider the elements of the charges, and counts 1 and 2 can be conveniently considered together. For the purpose of the present case it is enough to say that they require the prosecution to prove beyond a reasonable doubt that McCaugherty agreed with others to illegally obtain munitions in the form of explosives, detonators, rocket launchers, firearms and accessories such as silencers and ammunition. These items were to be bought illegally in Europe and then smuggled into Northern Ireland where they were to be used by the Real IRA. An essential element in the offences of conspiracy is that the prosecution must show McCaugherty not only agreed this plan with others unknown, but intended that he would play some part in carrying out the plan. The prosecution case is based upon the recordings of the conversations between himself and Ali, the transcripts of which they say show that he played an active and prominent role in the plot because it was he, who travelled to various destinations with the

intention of buying munitions; discussed a shopping list of items with Ali; negotiated the price to be paid; made detailed plans for smuggling the weapons; and made a number of substantial part payments towards the total contract price before he was arrested. That there was never going to be a delivery of munitions and that the entire operation was a sham, does not mean that McCaugherty cannot be guilty of these charges if they are otherwise proved.

[11] In effect the prosecution say that this was a sting, an operation that deceived McCaugherty into thinking that Ali was a genuine arms dealer with whom he wanted to do business when Ali was nothing of the sort. It is immaterial that the organisation with which McCaugherty was associated may be popularly known as the Real IRA, in law it is the IRA. See *R.v. Z* [2005] 1 AC 265.

[12] The prosecution evidence is that Ali and McCaugherty met each other on six occasions at various locations in Amsterdam, Istanbul, Bruges and again in Amsterdam, and there were also a number of short telephone calls between them. The first meeting took place on 4th December 2005 in Amsterdam and the last was on the 13th June 2006, also in Amsterdam. Each of the face to face meetings were tape recorded, and parts of some were also recorded on video. The phone conversations were also recorded. Ali's evidence that the person he was talking to on each occasion was McCaugherty was not challenged, and having listened to the tapes and viewed the video tapes I am satisfied that it was McCaugherty. Because of his size he is an unmistakable figure, and his face also appears on video tape, and there can be no doubt that he was the person to whom Ali was speaking on all of these occasions.

[13] I do not propose to refer to everything in the transcripts of the meetings which run to hundreds of pages, rather I would highlight some of the most significant remarks.

[14] Their first meeting was in Amsterdam on 4th December 2005, and it is evident from an early stage that McCaugherty was anxious to acquire munitions, saying at page 1065: "What we need is more high tech stuff", although much of the remainder of the discussion is somewhat harder to decipher, and in parts inaudible. However arrangements were made for a meeting in Turkey.

[15] The next two meetings take place in Istanbul on 28th and 31st January 2006. During the meeting of 28th January McCaugherty makes several significant comments about the resources available to himself and his associates. For example, page 1184 "That's what we want", and page 1219 "We can get the drivers".

[16] He also says "we" did various things in the past in terms which unmistakably infer that he was involved personally. On one of those occasions he says, at page 1195: "A few years ago we got armaments from Slovakia" and at page 1222, "When we were moving some of the stuff from America".

[17] During the conversation his interest in weapons and explosives is unmistakable, as at page 1211 and 1213 where he asks about the weight of the warhead of the weapon being described by Ali, and refers to Semtex in the course of a discussion about these and AK47s.

[18] Other matters discussed relate to methods of delivery, at page 1215 and 1219, and finally Ali goes through McCaugherty's shopping list of arms and explosives at page 1226, to which McCaugherty agrees saying at page 1227, "That was more than enough", and asking for a copy of the list at page 1228.

[19] The next meeting also took place in Istanbul namely on 31st January 2006. Throughout this lengthy meeting McCaugherty talked at length in an expansive and uninhibited fashion, taking Ali completely into his confidence about the Real IRA and their corroborative activities with other terrorist groups. In the light of later developments it is ironic that he spoke at length about his suspicions of Amir's bona fides, and at page 1528 even referred to the possibility that Ali might be an agent, but said he again discounted it, having twice said earlier at page 1472, "We trust you implicitly".

[20] Ali's recollection as set out in his evidence in chief on 25th May 2010 at page 10 was that they discussed and agreed the supply of 100 kilograms of plastic explosive; 20 AK47 assault rifles; 20 RPGs; 10 sniper rifles and 20 pistols for a total price of 104,000 Euro. The transcript of the conversation during this meeting is inaudible in parts, and these details do not appear as clearly as this account suggests, although there are some fragmentary references that support his evidence. At page 1503 there is a reference to 100 kilos which appears from the context to refer to plastic explosive, and at page 1604, McCaugherty says: "So it is with the hundred kilos we can perfect dozens and dozens and dozens of devices". It is clear from the context of this remark that "devices" refers to explosive devices.

[21] Ali's evidence was not challenged, and given that there are references on other occasions to the total price to be paid, I am satisfied that Ali's evidence about the types and numbers of weapons, and the quantity of explosives discussed during this meeting is reliable and credible. I am satisfied that his evidence is correct.

[22] Much of the remainder of the discussion related to detailed consideration of how the items were to be smuggled from the continent, McCaugherty saying at page 1495:

"Ali: Anyway are you happy with my offer that is okay? Tim: I am, yeah that is grand, yeah. It's, it's less than we would have expected, we would have expected (inaudible) Ali: Don't change (inaudible) please. Tim: There will be no changes, but what we leave here with today will be set in stone".

I should explain that McCaugherty referred to himself as Tim throughout, and on a number of occasions he and Ali agreed that McCaugherty would use other names when phone calls or texts were being exchanged. (See pages 1548 and 1549).

[23] At page 1557 McCaugherty said to Ali: "Yea, yea. You see it depends what route we are going to go down, we need to nail down are we going to freight, by sea or by land". Although much time was devoted to discussing how delivery from the continent could be arranged, McCaugherty returned to the topic of weapons, and at page 1590 asked if it would be out of the question to have two pistols delivered with silencers. It is also significant that payment was discussed, McCaugherty saying at page 1472 that although it would be a problem if paying the money up front was required, payment in instalments was not a problem:

"TIM: ... Well we need, we have no control over the amount or numbers of people that you divulge this information to. We trust you implicitly that it stays, we, as I said to you only one person knows the full ins and outs.

ALI: (Inaudible).

TIM: Yea, yea.

ALI: (Inaudible) trust.

TIM: Yea.

ALI: (Inaudible) my brother.

TIM: Yea. There is only, one person above me knows the full workings of this. Others know bit parts but would not be able to.

ALI: No details.

TIM: Configure it all, would would know that they're supplying money, it's for some reason but aren't and won't be aware of what I'm going to use the money for. All I h, all I and we have to eh secure to them is that there's something at the end of it, you know. But the money eh as I said the money in

instalments is not a problem, it would be a problem if we had someone that was needing the full amount up front. In instalments the way that we.

ALI: No, no, no.

TIM: We can, we can operate, we operate on a very small budget".

[24] The fourth meeting between McCaugherty and Ali took place in Bruges in Belgium on the 27th of February 2006, and Ali's evidence was that during the meeting McCaugherty gave him an extremely heavy bag and was told that there was money in it, saying "ten", which Ali took to be either 10% or 10,000 Euro. In the event the bag was found to contain 18,000 Euro, and that is the subject of Count 4, using money for the purposes of terrorism. Ali's evidence is to be found on the 26th of May 2010 at page 5. During the recorded conversation McCaugherty referred to the bag at page 1753:

"TIM: Well, that's that there Ali if you want to bring it with you.

ALI: I'll find it, what is in it.

TIM: What's inside that there now you can discard it. There's two lead plates.

ALI: Okay.

TIM: (Inaudible).

ALI: Sorry.

TIM: (Inaudible) inside that there (inaudible) if you want to take that double bag off it.

ALI: Yea.

TIM: That's why it's so heavy.

ALI: Paper, there's paper inside.

TIM: Yea, yea but there's two lead plates. But they're they're they're lead plates for scanners, in case that they're scanned those lead plates affect the...".

The original transcription read "affect" but it was accepted that it should have read "deflect". Earlier at page 1750 McCaugherty had said that he had eighteen thousand Euro, and I am satisfied that he gave this amount to Ali on the 27th of February 2006.

[25] The fifth meeting between McCaugherty and Ali took place in Bruges on the 3rd of May 2006. During the meeting there were very detailed discussions about how, when and where the arms and explosives were to be delivered by Ali and his associates, and because Ali was to arrange transportation to an agreed destination near Cherbourg, it was agreed that this would be included in the total price. At pages 2013 and 2014 Ali can be heard asking McCaugherty how much is here now, to

which McCaugherty replies, 10, and then goes on to confirm that he is now so far given Ali "28" (ie 28,000 Euro).

[26] The total of the consignment to include transport is then discussed:

"ALI: Okay. So you gave me, you gave me.

TIM: You've got twenty eight so far.

ALI: I've got twenty eight.

TIM: Yea.

ALI: The total is one.

TIM: Forty ishhhh.

ALI: Uhm. With the transport.

TIM: Yea, yea, yea, yea".

[27] During the conversation McCaugherty also indicated that he wanted to add further weapons to the order. Ali's evidence on the 27th of May 2010 was that in the extract from their conversation at page 2015 and 2016, set out below, McCaugherty was referring to Armburst launchers which had been referred to before. This was a sophisticated shoulder launched rocket with a warhead designed to attack armoured vehicles, and its particular advantage was that it was designed in such a way that the operator could fire it in a confined space.

"ALI: You wanted to add.

TIM: Yea.

ALI: Uh.

TIM: Yea. We want that, yea.

ALI: (Inaudible) that's a (inaudible).

TIM: Yea.

ALI: (Inaudible).

TIM: Yea.

ALI: So you want four of those.

TIM: Eh four of this and (inaudible).

ALI: No, no that's (inaudible).

TIM: (Inaudible).

ALI: Three. Three thousand each.

TIM: Two would near do us.

TIM: Yea because they will only be going at a specialised thing (inaudible) common target you know.

ALI: People I know they use it daily.

TIM: Yea, yea.

ALI: You know (laughs).

TIM: Yea, yea.

ALI: Now come on you don't know how efficient that is.

TIM: Oh exactly yea.
ALI: You can't you can't believe it (inaudible).
TIM: Inaudible.
ALI: They said they were nothing else that's the best.
TIM: Yea, yea.
ALI: Because once you give them they say ah I want this.
TIM: What we want to do is an armoured personnel carrier with that and if it goes through it as it should we will have developed.
ALI: It will not, not like this.
TIM: Yea.
ALI: (Inaudible).
TIM: (Inaudible) yea, yea. You see our war's a slightly different than the war you were used to our.
ALI: Well you're not holding territory that's for sure.
TIM: Yea, yea, but ours is a, a.
ALI: (Inaudible).
TIM: A bit of a (inaudible) bit of a, bit of a boxing match you know.
ALI: (Inaudible).
TIM: You know take a step forward, take a step back".

[28] I am satisfied that on this occasion McCaugherty paid over a further 10,050 Euro, which is the subject of Count 5, and made further arrangements with Ali for the delivery of the arms and ammunition.

[29] The sixth and final meeting between the two men took place in Amsterdam on the 13th June 2006. It will be necessary to refer again to this meeting and to the meeting of the 3rd of May 2006 when considering Counts 7 and 8 relating to the property in Alvor in Portugal, but I propose to refer at this stage to those parts of the conversation that refer expressly to the plan to import weapons and explosives that had been discussed between Ali and McCaugherty at their previous meetings.

[30] First of all Ali's evidence was that during this meeting he received a further payment from McCaugherty in the form of Euros contained in what he described on the 27th of May 2010 at page 8 as a "banana belt" which was like a small belt with money. In the transcripts at page 2393 there occurs the following exchange.

"ALI: (Inaudible) pay fifteen thousand Euros now.
TIM: Yes, yea.
ALI: For hold.

TIM: I have eighteen here for you so eh and then after your holidays I'll meet you again, you're going on holiday next week".

[31] I am satisfied that the payment which was found to be 17,920 Euro, when it was counted later, was made by McCaugherty as a further instalment of the purchase price in order that the consignment would be delivered despite there now being a delay due to difficulties in arranging delivery until later in the year because McCaugherty's associates were unable to provide a lorry to carry the goods in time. This is the subject of Count 6.

[32] Finally, I need only to refer to a remark made by McCaugherty to Ali at page 2400:

"TIM: Explosives. So the first time that they go to use it they get caught what does that tell you.

ALI: Of course.

TIM: I know what it tells me (inaudible) infiltrated and.

ALI: Yea, yes.

TIM: The police will let you carry out.

ALI: Do stupid things yea.

TIM: Do stupid things.

ALI: As soon as you do something well.

TIM: Yes, they'll let you do stupid things that they know will come to no fruition.

ALI: Yea.

TIM: So we cut out the stupid stuff. We are waiting and planning and scheming and plotting and the icing on our cake is this delivery".

[33] The final words are the culmination of a lengthy account by McCaugherty of the contrast between the actions of his associates and those of another group that shared their objectives. The prosecution rely on the recordings of all of these meetings to prove not just the conspiracy counts, but Count 3, belonging to a proscribed organization and Counts 4, 5 and 6, using the three payments already referred to for the purposes of terrorism.

[34] The prosecution also rely upon the fact that McCaugherty did not give evidence, and invite the Court to draw an adverse inference as to his guilt under Article 4(4)(a) of the Criminal Evidence (Northern Ireland) Order 1988 (the 1988 Order) which provides that the Court, in determining whether the accused is guilty of the offences with which he is charged "may draw such inferences as appear proper from the failure of the accused to give evidence". It is well established that the Court or a jury has a discretion as to whether it should draw an adverse inference, see R.v. Gary

Jones [2007] NICA 28 at [29]. I consider that it is appropriate to draw such an inference in the present case. I am satisfied that the case against the defendant on each of the counts is an extremely compelling one, and that the only sensible explanation for his failure to do so is because he has no answer to give to that case.

[35] So far as Count 3 is concerned, to establish that a person who has not expressly admitted that he or she is a member of a proscribed organization, the prosecution must prove to the requisite criminal standard that the words or actions, or both, of the defendant establish that the defendant was a member, and not merely a sympathiser of that organization between the dates alleged in the particulars of offence. So far as Counts 4, 5 and 6 are concerned, the prosecution must prove to the criminal standard that the money handed over by the defendant to Ali on each of the three occasions was being used by him for the purposes of terrorism as defined in Section 63 and Section 16(1) of the Terrorism Act 2000. This may be inferred from the words and actions of the defendant, or both, provided that the inference is capable of establishing the offence to the criminal standard of proof beyond reasonable doubt.

[36] It is of particular significance that throughout the six meetings between himself and Ali, McCaugherty repeatedly uses the word "we" when describing the objectives of those with whom he was associated, not just in the course of the enterprise he was engaged in at that time, but in the context of earlier actions which were unmistakably related to terrorist activity. I have already referred to some of these, and I need only do so again briefly. In Amsterdam on the 4th of December 2005 at page 1065 he said "what we need is more high tech stuff". In Istanbul on the 28th of January 2006 he said at page 1219 "we can get the drivers" and at page 1195 "a few years ago we got armaments from Slovakia". In Istanbul on the 31st of January 2006 he twice said at page 1472 "we trust you implicitly". At page 1604 he said "so it is with the hundred kilos we can perfect dozens and dozens and dozens of devices". At page 1495 when asked by Ali was he happy with Ali's offer he responded that he was, and "it's, it's less than we would have expected, we would have expected (inaudible)". I also refer to the remark he made during the last meeting when he said "so we cut out the stupid stuff. We are waiting and planning and scheming and plotting and the icing on our cake is this delivery".

[37] From the context and content of McCaugherty's remarks throughout each of these meetings; and the extracts I have quoted and referred to are merely a representative sample of many such remarks or passages; it can be seen that McCaugherty describes his actions in terms which unmistakably infer that he was one of a group of terrorists who were determined to buy arms and explosives so that they could carry out attacks on members of the Security Forces in Northern Ireland. It can also be inferred that his role was

to contact a person whom he believed was an arms dealer, who turned out to be Ali, and who would be in a position to supply those arms and explosives. There is ample evidence from McCaugherty's own words that he made what he thought was a deal with Ali to provide specific quantities of arms and explosives, and that part of the deal would involve the arms and explosives being transported across Europe to a destination near Cherbourg nominated by McCaugherty. Another part of the deal he thought he was making with Ali required McCaugherty to make various payments on account towards the total cost of the purchase and transportation of what was intended to be a sizeable quantity of arms and explosives, and to that end the evidence shows that he made the three payments totalling 45,970 Euro in cash to Ali for this purpose.

[38] Whether or not McCaugherty had the necessary technical knowledge of the capabilities of each of the items he wanted to buy, and he made some remarks implying that he was not himself an expert in these matters, he certainly represented himself as being a prominent and trusted member of the organization on whose behalf he was acting, as can be seen from the following.

[39] On the 31st of January 2006 he referred at length to his suspicions about Amir not being genuine, and to the link between himself and Kearns. At page 1529 he then remarked:

"TIM: Eh, there is only a tenuous link between.

John is my life long friend right, now the authorities would know, the authorities would know what I, what I am, right. They would not be aware of the extent, but would know of the circles that I move, but I have a wide circles of friends of which John is one and 99% of my friends are not.

ALI: Not (inaudible).

TIM: Involved. So yes, the authorities would say well he only moves in a certain circle, that is positive of it, em I have as many friends outside of the work that I do, the they they can't connect everyone to the work that I do.

I have only a small, because John only does small bits and pieces for me like shipping some (inaudible) for me, hiding it for me, supplying some money sometimes, like lending us a car. Small bit parts, you know so.

What softened the bite is the authorities, the British, what interest would they have in a small time cigarette man like John, knowing that they did know, that he

only does it for like pocket money and knowing that I do not involve him in the working of the organization.

ALI: How many times thin (inaudible).

TIM: I would say four or five, off-hand. I can, John will lift me from the airport I'll be able to find that out tomorrow morning.

(Pause)

TIM: It's just something, it's just something that I, as I say I I hate going over the same ground, but it worried me at the time, still is at the back of my mind. On our next visit yourself and myself we'll know, I'll have it exactly the movements that John made, where he went to, where he met Amir, how many times via phone or anything else that they did speak.

ALI: I will have as well (inaudible).

TIM: If you could have the same information we should be able to put the two bits of paper

ALI: Together.

TIM: Together and if both don't go side by side there may be a problem, but until such times our business goes on because only you and me are aware of the inner secrets of it. But it is something that I think needs addressed".

[40] Finally, on the 13th June 2006 during the discussions relating to the possible assassination of General Sir Michael Rose, McCaugherty said that "the contact would be kept between yourself and myself, two people know my immediate superior". See page 2420. On the 3rd of May 2006 at page 2010 after a lengthy description by him of the property which at that time he said was in Bulgaria, he remarked that "...nothing has changed there's no undue attention being paid to our members" and at page 2012 he said "well yes my immediate superior knows about it and he says". These statements imply that McCaugherty was a senior member of what he referred to as "my organization".

[41] At this stage I must refer to part of the evidence relating to the Portuguese property which is the subject matter of Counts 7 and 8, although it will be necessary to refer to that evidence in greater detail when I turn to consider those charges. In her evidence on the 3rd of June 2010 Teresa Murphy, who was at one time Teresa Connell, described how two men came to her house and said to her "we are from the IRA". They said that the property in Portugal belonged to the IRA and showed her a photocopy of the deeds to that property. She described one of the two men as "very overweight, tall and baldy", although she was unable to say what his height was. She was not asked to identify McCaugherty in Court, but

he is bald and very overweight indeed. Her description of the man fits his appearance very well.

[42] Teresa Murphy's account is not the only evidence implicating McCaugherty in the events relating to the Portuguese property, because Ali's evidence was that McCaugherty showed him some deeds of a property in Portugal. See the 27th of May 2010, page 4. During the meeting of the 13th June 2006 McCaugherty described how Teresa Connell was approached about these deeds and why, in the following passage from page 2379 to page 2381:

"TIM: Well wait till I show you what that cost and how we got that. These are all official stat, bank statements you know.

ALI: (Inaudible).

TIM: This is the money, this person here lent this person the money but in from the year 2000 until the present she never gave him one fucking penny of any profits out of the.

ALI: Uhm.

TIM: The restaurant or nothing, so he gave her a total a hundred and sixty-three thousand Euro.

ALI: One six three.

TIM: Yes, plus money to buy an apar, the money to put down as a down payment on an apartment. We have went to her, I actually went to her.

ALI: If she has, does she have any connections with.

TIM: No fuck all.

ALI: With strong boys around.

TIM: No.

ALI: Nothing.

TIM: Nothing. I went to her last Thursday, she was fucking about she wouldn't she gave him, I told him to go and ask her for the deeds that's what she sent down as the deeds, it's a photocopy of the inside page of that.

ALI: This is, this doesn't look like.

TIM: No that has to come.

ALI: (Inaudible).

ALI: Means the.

TIM: See we only got it on Friday and we haven't had time.

ALI: The renting value.

TIM: We hadn't got time to, she has it leased out to a Dutch man according to the front of it and she

received seven hundred Sterling per month in rental.
It's in Alvor in Portugal.

ALI: And how long has this been going.

TIM: From the year 2000.

ALI: Six years.

TIM: Yea.

ALI: How much, how much.

TIM: Seven hundred I think that's very, that's what she told me, that's all she would say.

ALI: Euros.

TIM: Yep. Is that, we, sure we don't know.

ALI: I, I, I mean.

TIM: We don't.

ALI: I mean don't I can just guess.

TIM: No.

ALI: Don't, I mean don't take it.

TIM: To, to me I would think it's very, very, very shy of the money. See we only got that on Thursday or Friday and we haven't had time to give it to someone Portuguese to translate you know.

ALI: Actually this it is a description of a flat because I, I can understand.

TIM: Yes.

ALI: (Inaudible) mean, means square metres.

TIM: Yes. Now this is only a wee small you know.

ALI: It's not small it's one one nine.

TIM: Is that big.

ALI: One hundred and nineteen square metres.

TIM: Aye but money you see I didn't know.

ALI: No, no, a hundred and nineteen square metres.

TIM: Yes. Yea and is these the amounts of money or what is, see we have to I do know a Portuguese person that lives at home but I haven't seen him he will, he will translate that every word of it for me you know it's just that I haven't seen him. So we have been given this once we, once we secure all the paperwork, that's only one part of it, the other parts once we secure all the paperwork this person here that owned it.

ALI: Yea.

TIM: Has given us the property.

ALI: Ok, ok.

TIM: But we have to recover the property.

ALI: Ok.

TIM: If you know what I mean. But he has given us.

ALI: (Inaudible) what (inaudible) now.

TIM: That to me is one hundred and forty thousand Euro.

ALI: Yea.

TIM: Just at a glance.

ALI: Well (inaudible).

TIM: But the money that he has given her amounts to 163,000. But she left to go to Portugal to recover the, the eh contracts that were signed.

ALI: Yeah.

TIM: And she was to deliver them today to this person that gave her the money. We went to her and we put a gun to her head and told her fucking deliver, blah blah blah".

[43] Although Teresa Murphy said in her evidence in chief that she had been approached to surrender the deeds of the property in Portugal in June 2005, I am satisfied that she is mistaken and that she was approached in June 2006 because on 13th June 2006, McCaugherty described what he had done and it is clear from his account that he was describing what had happened a very short time before, saying that he'd only got the deeds "last Thursday or Friday" and that he spoke to her "last Thursday" in the passage just quoted.

[44] The details in that passage about his approaching her, and the details he said came from her about the rental that was paid, provide strong and convincing evidence that McCaugherty was one of the men who approached Teresa Connell, as she was then, and told her that they were from the IRA. The remarks are also convincing evidence in relation to all of the charges against McCaugherty that "the organisation" he referred to throughout his meetings with Ali was the IRA. His remark that "we put a gun to her head" is supported by her evidence that they threatened to shoot her and she was terrified out of her wits. (See 3rd June 2010 at page 73).

[45] Finally, there is other circumstantial evidence which provides substantial support for the prosecution case that McCaugherty was deeply involved in obtaining the deeds of the property in Portugal for the IRA. First of all, a document found in his home when it was searched by the police on 19th June 2006. This is now Exhibit 6 (see Constable Kerr at page 533 and Detective Constable McKee at page 680). This consists of details of a personal nature about Teresa Murphy written by Gregory. Secondly, McCaugherty's right and left thumb prints were found on Exhibit 78, also referred to as Exhibit 7, the documents relating to the transfer of funds by Gregory to Teresa Connell to buy the Portuguese property produced by McCaugherty to Ali on 27th May 2006.

[46] Having considered all of the evidence, and in particular those parts to which I have specifically referred and the inferences that can be properly drawn from the evidence, and taking into account that there is no evidence from or on behalf of McCaugherty that would contradict, displace or weaken those inferences, I am satisfied that the prosecution have proved the following matters beyond a reasonable doubt.

(1) That throughout the period covered by the charges McCaugherty was a leading member of a proscribed organisation, namely the IRA.

(2) During that period and in that capacity, he travelled from his home in Lurgan to the various locations in Amsterdam, Bruges and Istanbul where he met Ali on the various occasions I have described.

(3) His purpose in doing so was to purchase arms and explosives for the IRA, and to enable him to do so he was provided by the IRA with and paid over to Ali, 45,970 Euro in cash in three payments.

(4) During these meetings he made what he thought was an agreement on behalf of the IRA to buy a significant quantity of arms and explosives from Ali, and these payments were intended to be part payment for the arms and explosives he thought he was buying.

(5) As part of that agreement he discussed elaborate plans with Ali, and made detailed arrangements with Ali, for the delivery of the arms and explosives to an address near Cherbourg with the intention that the arms and explosives would be smuggled from France to Ireland in a suitable lorry provided by McCaugherty and the IRA.

(6) Although unknown to McCaugherty the entire operation he discussed with Ali was an elaborate and successful hoax which completely fooled McCaugherty into thinking that Ali was a genuine arms dealer, at all times McCaugherty was anxious and determined to buy arms and explosives for the IRA, and thought that he was going to be successful in doing so.

(7) This was not a situation where McCaugherty was persuaded or pressurised by Ali or any other agent of the state into committing a crime he would not otherwise have committed. This operation gave him the opportunity to commit a series of crimes that he would have taken if a genuine arms dealer had offered him the opportunity to commit the same crimes. He freely took advantage of the opportunity presented to him by the operation of which Ali was an essential part, and he was not entrapped into committing or induced to commit, these offences in any improper or reprehensible fashion by Ali or any of those associated with this operation.

I am satisfied that the prosecution have proved counts 1, 2, 3, 4, 5 and 6 beyond a reasonable doubt and I find McCaugherty guilty on each of those counts.

[47] Both McCaugherty and Gregory are separately charged on counts 7 and 8 respectively, with entering into an arrangement to make property available for the purposes of terrorism, the property being a restaurant in Alvor in the Algarve in Portugal, contrary to Section 63 and Section 17 of

the Terrorism Act 2000. The prosecution case is that this had been purchased by Teresa Murphy, then Teresa Connell, and her then boyfriend Owen McNamee in their names, although all the money for the purchase was provided by Gregory. It was put in their names so that the true ownership would be concealed from one of Gregory's then girlfriends. The property was run by Teresa Murphy and Owen McNamee for sometime until 2006, when the prosecution allege the IRA sought to gain control of the property and obtained the deeds in circumstances which are controversial and will be considered later.

[48] Although McCaugherty and Gregory are separately charged in relation to the property, as Mr Kerr QC explained in opening the case: "The prosecution will say that the purpose of taking possession was to raise funds for a terrorist linked organisation" and I propose to refer to the evidence against McCaugherty first, although it will be necessary to refer to his version when dealing with Gregory's case for reasons that will become apparent as there are links between the evidence against both.

[49] The case against McCaugherty can be stated relatively simply. It is that in the second last meeting between himself and Ali that took place in Bruges, McCaugherty asked Ali whether it would be possible for Ali to help him in the disposal of a property in Bulgaria. This is discussed at some length between pages 2004 and 2009, and it is clear that McCaugherty appears to have a somewhat scanty grasp of all of the details, although whether that was entirely genuine or he was deliberately concealing some details from Ali until he could gauge Ali's reaction, maybe arguable. In particular he says the property was in Bulgaria. However, a number of other points emerge from his description:

- (1) The money for the purchase came from "a person connected to us", that is McCaugherty and his associates.
- (2) A woman laundered the purchase money for that person by purchasing the property.
- (3) The person has written his investment off "as a bad debt".
- (4) The person "told us last week that he will give us it because he does, he simply does not want her to have it ..."
- (5) McCaugherty makes it clear that his organisation intended to acquire the property, saying "We were actually (inaudible) to get it off her". Page 2006.
- (6) The person is apparently to meet his former girlfriend again in a couple of weeks. Page 2006.
- (7) McCaugherty's organisation told him the day before he left "To ask whether it could be sold on" and "If we get the deeds to the property can it be used at a future date".
- (8) Ali indicates that he is willing to help for a commission, and McCaugherty implies that his organisation would also share in the

proceeds, saying that they would take their commission "in produce", which could mean in arms or explosives.

[50] It is not entirely clear whether the "person" referred to at this stage is Owen McNamee or Gregory in the light of later events, but it does appear that McCaugherty has only been told about this property the day before he left to travel to Bruges for this meeting. Nevertheless what has been said so far suggests that McCaugherty's organisation, that is the IRA, are interested in acquiring the deeds to the property.

[51] McCaugherty returned to the matter again at the next and final meeting with Ali in Amsterdam on 13th June 2006. It emerged that the property is not in Bulgaria but in Portugal and McCaugherty produced the deeds to the property. As will appear when I refer to Teresa Connell's evidence, the deeds had left her possession a very short time before the 13th June 2006 and the inevitable inference is that they had only been in McCaugherty's possession for a few days before he handed them to Ali on the 13th June. I have already set out a lengthy passage between pages 2379 and 2381 in which McCaugherty explains how he came by them, and I have referred to Teresa Murphy's evidence implicating McCaugherty as one of the two men who went to her house and said they were from the IRA, and these matters are equally relevant to this charge. As can be seen from the above passage, at page 2381 McCaugherty says twice that the owner of the property has given it to his organisation. That "we have to recover the property" and he says how he "actually went to her" and "we went to her and put a gun to her head". Teresa Murphy did not allege that a gun was put to her head or even produced, and McCaugherty may have been speaking figuratively rather than literally at that time but his account conveys an unmistakable air of menace which corresponds with the effect of the visit of the men upon him. Such was the effect upon her that she immediately flew to Portugal to get the rental contract or lease relating to the tenancy of the premises which were let for £700 sterling a month.

[52] That it was the intention of McCaugherty and his associates to then dispose of the property and appropriate the proceeds is beyond doubt. At page 2383 he said, "We need to get the contract and get her to relinquish any control she may have (inaudible)", and he then identified her as Teresa Connell. Just before that at page 2382, there is to be found the following passage in which McCaugherty explains what the ultimate objective of this exercise is:

"Tim: It's a great amount of money if we just liquidate it and you know and we will do because she has nowhere to go, she has no, she has no great amounts of money herself, she can't go anywhere, her family's at home we know who they are, where they

live, what they do. But I just thought you might have knew.

Ali: I, I will, I will.

Tim: Portuguese language or something just to that's why I said I would show you it and just proof that I wasn't bullshitting you and that we do actually intend to getting this property you know. But it is no good to us where it is because you know what good's a hou, we want to liquidate it into.

Ali: Yea, into cash, yeah.

Tim: Yea, but in the year 2000 if that, if he gave her a 163,000 in today's money that has to be worth at lease 200 thousand if not more.

Ali: Yea properties have gone up everywhere.

Tim: Yea yea".

[53] I consider that the evidence is overwhelming that McCaugherty was directly and personally involved in obtaining the deeds to the property in Portugal from Teresa Murphy and that the reason why the deeds were to be obtained was to enable the IRA to obtain control of the property so that it could be sold and the proceeds used in whole or in part for terrorist purposes by the IRA. I am satisfied that McCaugherty was concerned in an arrangement whereby the deeds of the Panda restaurant were made available to the IRA and that he knew that they would be used for the purposes of terrorism, and I find him guilty on Count 7.

[54] I now turn to consider the case against Gregory on the single count he faces, but because both Mr Kerr for the prosecution and more particularly Mr Magee, (who appears with Mr Kevin Magill for Gregory) in his submission referred to parts of McCaugherty's statements to Ali, when considering the case against Gregory it is appropriate to consider whether I can take McCaugherty's out of court statements into account for or against Gregory. Mr Kerr submitted that I could and should because McCaugherty and Gregory were involved in a joint enterprise or conspiracy to make the Portuguese property available to the IRA. Mr Magee did not demur from this, indeed he relied on some of McCaugherty's remarks in support of Gregory's defence of duress.

[55] Whether or not a defendant is charged jointly with another in the same charge, the acts and declarations in relation to a common offence, or a series of offences, of one person maybe admissible in respect of another person where the evidence establishes that there was an agreement to engage in a common design provided that the existence of the joint enterprise can be proved by other evidence. See the discussion in Murphy on Evidence, 10th edition, pages 293 to 295 and the cases cited therein.

[56] Whilst this principle is usually relied upon to show the guilt of B in the light of A's statements, there is no reason in principle why B cannot rely on an exculpatory inference from something A said. This is not a case where the defence seek to rely on an out of court confession completely exonerating Gregory of the type considered in R.v. Gorski [2009] NICC 66, rather Mr Magee points to parts of McCaugherty's statements and actions as indicating that Gregory's account is more credible. I accept that Gregory can rely on what McCaugherty said in relation to the Portuguese property, just as the prosecution can also rely on McCaugherty's statements against Gregory, provided in either case that the existence of the joint enterprise can be established independently of the statements and actions of McCaugherty. See Dickson CJ in Tripodi -v- R [1961] 104 CLR 1 at page 6, cited with approval in R.v. Grey [1995] 2 Cr App R at pages 128-129. Whether there is a wider principle as suggested in Murphy at page 294, is a question I do not have to consider because I am satisfied that Gregory was concerned in an arrangement as a result of which the title deeds to the Panda Restaurant were to be made available to the IRA for the purposes of terrorism. As I shall explain, that is not really in dispute, and as Mr Magee accepted in his closing submissions, Gregory's defence is primarily that he was acting under duress when he gave the men who came to his home the information he required to trace Teresa Murphy and take the deeds from her.

[57] In order to set Gregory's actions in context, it is necessary to say something about a number of matters that were accepted by Teresa Murphy or were the subject of formal admissions by the prosecution and defence, or were not disputed by Gregory when Teresa Murphy gave evidence.

[58] She described how she and her then boyfriend Owen McNamee purchased the restaurant called the Panda Restaurant in Alvor in Portugal in their names although Gregory provided the money to buy it. It was put in her name and McNamee's name because Gregory wanted to conceal his ownership of the money from H. She and Gregory had been in a relationship that turned sour, so much so that in July 1999 he was charged with her rape, although that charge was ultimately withdrawn. She also claimed criminal injury compensation in respect of the alleged rape.

[59] Subsequently Gregory had a relationship with A and they had a child. There was a lengthy and extremely bitter court battle between them in both Northern Ireland and in the Republic of Ireland over access to and custody of the child. This eventually resulted with custody of the child being awarded to Gregory. Teresa Murphy, who was on close and friendly terms with Gregory, accepted that Gregory was obsessed by the custody dispute.

[60] At the time of the purchase of the Portuguese property McNamee was a good friend of Gregory, and worked for him in Gregory's scrap yard business at Concession Road, Cullaville, County Armagh. Gregory told him that he wanted to hide the money from the lady, and presumably that was H. However, it seems that during his relationship with A he was also anxious to ensure that she did not acquire any interest in the Portuguese property and so he did not want to marry her.

[61] Owen McNamee did not pull his weight in the running of the restaurant and drank heavily. Although Teresa Murphy worked hard to make the business a success the restaurant was not a success and the property was rented out for £700 sterling a month, although it appears to be the case that none of this went to Gregory. Her relationship with McNamee deteriorated, although it seems from her description of events in June 2006, that she was still in some sort of a relationship with him at that time.

[62] She says that Gregory asked her for the deeds of the property which she had in her handbag. At McNamee's suggestion she did not give Gregory the originals but sent or gave him photocopies. This, and her account of how she parted with the deeds, does not entirely accord with what Gregory told the police. I have already explained that she said that two men, one of whom I am satisfied was McCaugherty, came to her home, told her they were from the IRA, that the property in Portugal belonged to the IRA, and showed her a photocopy of the deeds to that property, that must have been the photocopy she gave Gregory.

[63] In the account Gregory gave to the police, he described how he handed over the deeds to men who told him they were the IRA in the following passage at pages 4730 and 4731:

"Gregory: I just took them all in. Says I, I have a [child] here so I don't want any hassle. They says that's right, how's [the child] doing. They seemed to know about my [child] you know. Police: Uh-huh. Gregory: They says we want to help you. They says we, we know you've a place in Portugal and you're getting a bit of trouble with that cunt McNamee and (inaudible). They says that McNamee fella's approached us to sell us that place. These people said to me you know, Cummna Na hEireann when they introduced they says (inaudible) which means IRA basically you know. Says we're going to help you, you know what I mean, but you have to give us information but we'll get this place back for you. Says I, I basically don't want any help, I, I'll just have to sort it out myself. Like I'm, when I get the thing

sorted out with my [child] I was going to go through legal terms and to fight my case I wanted my [child], the case (inaudible) about my [child]. But they said they'd help me for a fee you know, I have to give them a donation basically.

Police: Uh-huh.

Gregory: But they more or less asked, they were telling me like. I shit myself to tell you the truth. One of them you know and he didn't produce the gun, but he gave me the impression he mightn't had, he might a had a gun in his thing or he might not, he gave me the impression he had a gun. One of them was about five foot eight, big heavy set fella, reddish hair could you see reddish hair just at the side you know like, but he was (inaudible). He didn't, he only done a wee bit of the talking. But the skinnish boy he was about six foot, he spoke with a Dubl, or with the, the reddish hair boy spoke with a sort of Dublin accent, this boy had a sort of mixed up accent sort of wee bit Belfast accent and I think he was trying to put on a sort of an accent you know what I mean.

Police, uh-huh.

Gregory: But he was more threatening you know what I mean. He said he give us whatever help there the details of the whole place, we'll we'll sort it out for you. So I just got him the details and that, and he says right Dermot whatever you think the details of the people here, their addresses and that stuff, so I did, I shit myself I've a [child] there, I'm on my own. I don't know, as I say I don't know, I am having the trouble I was having like you know what I mean. I was only after getting my [child] back when I won my [child] (inaudible) that Christmas you see, you know what I mean. I did it, anybody all I care about now was my [child].

Police: Uh-huh.

Gregory: My property I didn't give a fuck about my property there that was that much hassle with it. So the next thing I knew then I was lifted on the 19th there. My life's upside down. My accounts are seized, everything's seized, I can't you know what I'm living like a, I'm living like a (inaudible) I'm getting hand outs from my sister-in-law but basically that's why I come to you today just to explain that.

Police: Uh-huh

Gregory: But I feel that Seamus Kenna(inaudible) is part of it.

Police: Uh-huh.

Gregory: He's basically connected a with the Continuity IRA from what I'm led to believe do you know what I mean.

Police: Uh-huh.

Gregory: I've been trying to suss him out because he's a bad cunt like at the end of the day.

Police: Uh-huh.

Gregory: I don't nothing on him. But it's just to do with my connection with his sister. And previously to that before the Omagh bomb he called in my yard looking a light for an Almera and I think it was a Nissan Almera was involved in the scouting of that I watched the program about that whether it has any bearing or he called looking a secondhand headlight for or a sidelight for an Almera at that time just I watched the documentary".

[64] There can be no doubt from this account that Gregory gave the men who told him they were the IRA details of Teresa Murphy and her family and he admitted that he had written these out. In that interview he denied that Teresa Murphy put a photocopy of the deeds through his door but I prefer her evidence and I am satisfied that she did.

[65] He said that the men said that they would help him for a fee, for a donation, and I am satisfied from his admissions that he knew that in an essential element in the process these men were describing to him involved the IRA getting possession of the deeds, and that at the very least they would receive money from him for helping him to regain control of his property. That being the case, subject to the issue of duress, I am satisfied that the prosecution have proved the elements of Count 8. I am satisfied that Gregory's admissions and the evidence of Teresa Murphy show that Gregory was involved in a joint enterprise to pass the deeds to the IRA because, irrespective of the issue of duress, Gregory knew the IRA wanted to obtain possession of the deeds. He was facilitating this by giving them the details in the note he wrote out (Exhibit 6) because Teresa Murphy had not sent him the original deeds in response to his request that she do so, although she said she would have given them to Gregory if he had called and asked her for them. See 3rd June 2010 at pages 70 and 71.

[66] As stated earlier, Mr Magee said in his closing submission that the defence of Gregory was primarily that of duress. It is not disputed that duress can be a defence to this charge, nor is it disputed that a defendant who wishes to rely on the defence must raise the defence. In this case

Gregory explicitly said at page 4756 that he acted under duress when he wrote down all the details he had, by which he presumably meant the details found in McCaugherty's house to which I will refer in due course. At page 4732 he earlier said "I never gave these permission to do anything. I write all my details down in fear, no way did I give them permission to do it". I accept this is sufficient to raise the defence of duress.

[67] There is no dispute that as the defence of duress has been raised that the onus rests on the prosecution to prove beyond reasonable doubt that Gregory was not acting under duress when he gave these men all the documents, these being the documents relating to the transfer of funds to Portugal as well as the details relating to Teresa Murphy and her family.

[68] When considering whether the prosecution have proved beyond reasonable doubt that Gregory was not acting under duress, I must take into account in his favour that he is a man of good character when considering the credibility of the exculpatory statements he made to the police on the 23rd of November 2006, and the weight I should attach to them.

[69] I must also take into account that his good character may mean that he was less likely than otherwise might be the case to have committed this crime. At this point it is convenient to refer to the fact that Gregory did not give evidence and whether the Court should draw an adverse inference against him, because he did not do so under Article 4(4)(a) of the Criminal Evidence (Northern Ireland) Order 1988.

[70] Mr Kerr referred to the defendant having given an explanation to the police, and said that he was not pressing the submission that an adverse reference should be drawn. In his written submissions Mr Magee submitted "that where a person of good character has given a detailed account to police the tribunal of fact should be loathe to draw an inference from his choosing not to give evidence in trial".

[71] When considering whether an adverse inference should be drawn one of the relevant considerations is the nature of the defence. In this case it is duress, and where that is relied upon I consider that I should bear in mind Lord Bingham's approval in R.v. Hasan [2005] 4 All E R at 685 at [22] of the observations of the Supreme Court of Canada in R.v. Ruzic that:

"Verification of a spurious claim of duress may prove difficult. Hence, courts should be alive to the need to apply reasonable, but strict standards for the application of the defence".

[72] By its very nature duress will be advanced, predominantly, if not almost invariably, in a situation where there is no independent evidence as to what was said or done to a defendant to cause him or her to act as he or she did. In these circumstances it is not unreasonable to expect a defendant to give evidence if there is a prima facie case against him. The fact that he or she may be of previously good character is only one factor to be taken into account when deciding whether to draw an adverse account. Another may be the attitude of the prosecution. The decision, however, remains that of the tribunal of fact, and the tribunal of fact has a discretion in the matter. See R.v. Jones cited earlier.

[73] I consider that it is proper to hold Gregory's failure to give evidence against him when deciding whether he is guilty, and that it is fair to do so. The prosecution case clearly calls for an answer by him, and I am satisfied that the only sensible explanation for his failure to give evidence is that he has no answer, or none that could bear examination, to a number of questions that arise on his account, and to which I shall refer later. I remind myself that I should not find Gregory guilty only, or mainly, because he did not give evidence, but I may take it into account as some additional support for the prosecution case when deciding whether his account to the police is, or may be, true.

[74] Mr Magee referred to Hasan and R. v. Hutchinson [2006] NICA 47, and posed the following question for the Court, namely:

"Is it a reasonable possibility that Declan Gregory, a 37 year old man of hitherto good character, might have been driven to do what he did because he genuinely and reasonably believed that if he did not do so he or his young child [...] would there and then or in the future be killed or seriously injured?"

I accept that this is an appropriate formulation of the issue for the Court, bearing in mind that it is for the prosecution to disprove this possibility beyond reasonable doubt.

[75] I consider it highly unlikely that Gregory purchased this property with IRA money. First of all, Teresa Murphy's evidence confirms his account to the police that he took very little interest in the property after it was bought. If the IRA put up the money one would have expected them to take more determined steps to check on their investment over several years. Secondly, the entire tenor of McCaugherty's explanation to Ali of his organization's interest in the property is that the owner of the property had given it to McCaugherty's organization and they intended to get it. Thus on the 13th June 2006 he said to Ali: "Once we secure all the paperwork the

person here that owned it...has given us the property...but we have to recover the property".

[76] This was not the only occasion McCaugherty said to Ali that his organization (that is the IRA) had been given the property by its owner. When McCaugherty first brought it up on the 3rd of May 2006 he said at page 2004 that the owner "has written it off as a bad debt"; at page 2006 "it's lost to him"; and at page 2008:

"TIM: Yea, yea, now I, I know, now I know for a fact there is a property, he told us last week that he will give us it because he does, he simply is.

ALI: (Inaudible).

TIM: He simply does not want her to have it, he's fucked off with her you know, he doesn't want her to have it but he doesn't care it's no good to him he's never going to go to Bulgaria or.

ALI: There are people who do this for money they take. TIM: Yea.

ALI: Ten, fifteen percent of the value.

TIM: Yea.

ALI: You know.

TIM: We have done".

[77] However, McCaugherty's remarks cut both ways so far as Gregory is concerned. Whilst they can support the case that the property was his, they can also support the case that he gave it to the IRA because it was no good to him and he was determined that his former girlfriend and mother of his child could not get it.

[78] While some aspects of Gregory's account of the visit to his house by men who said they were from the IRA, and his assertion that he was frightened for his [child], have a certain plausibility, there are several significant questions raised by it.

- (1) Why did he not just go to Teresa Murphy in person and ask her to give him the deeds? After all, according to her they were on good terms with each other, and she'd baby-sat his child on occasions. Was he trying to keep a distance from her?
- (2) Why did she say that she delivered the photocopies to his house if, as he claims, that is untrue?
- (3) He gives conflicting accounts of the number of men who came to his house, saying 2, then 4, then reverting to 2.
- (4) Did he expect to have to pay the IRA something by way of a fee or a donation (page 4730) in order to retrieve his property, and was he prepared to do so in order to get his property back?

- (5) Did he give the property to the IRA, as McCaugherty said to Ali?
- (6) Did he discuss with Teresa Murphy selling the Portuguese property so that he could invest in Bulgaria, a short time before the men came to her house on the 3rd of June 2006, as her uncontradicted evidence stated?
- (7) Was it not the case that he enlisted the help of the IRA to get his property back because he was angry that he was getting no return on his investment although several years had gone past?
- (8) What steps did he take when he visited them in Portugal, or at any other time, to find out details of how the business was going?

[79] When considering the strength of the case against the defendant's claim that he acted under duress there are two further matters that have to be taken into account. The first is why Gregory provided so much information about Teresa Murphy and members of her family found on the note found in McCaugherty's house? Not only did he give her Northern Ireland landline number, as well as her Portuguese mobile number, but he gave the name and Northern Ireland landline number of one daughter, the name of another daughter, and details about her son. This certainly suggests that Gregory knew a great deal about her family, thus confirming her evidence that they had been on good terms. It could also suggest that he was anxious to help the menace much as possible without doing what otherwise might be thought obvious, namely, to go to her again and ask her for the deeds himself. Was that because he was prepared to willingly provide these men with as much information as he could to further the objective of regaining his property whilst remaining at one remove so that he could conceal his involvement?

[80] The second matter is that his fingerprints were found on one of the 79 x 100 Euro notes that were part of the 354 Euro notes of all denominations that made up the bundle of 17,920 Euros McCaugherty gave Ali on the 13th June 2006. As Mr Rainey accepted, there is no way of establishing in what circumstances Gregory's fingerprints got on that note, but it is a striking coincidence that he handled one of 79 high denomination notes that made up part of what was intended to be a further payment on account for the purchase and delivery of a significant quantity of arms and explosives being purchased by a man in whose house was found the note I have already referred to, and who bragged to Ali that he had gone to Teresa Connell's house to make her hand over the deeds.

[81] Although Gregory's statement that he was so obsessed with the custody battle over his [child] may well be true, and that may have led him to neglect his business interests, the combined affect of the various other matters to which I have referred is such that the prosecution have satisfied me beyond reasonable doubt that he did not act under duress in his dealings with the IRA, and I find him guilty on Count 8.

