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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/01/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

RICHARD DAVID McCARTAN and BARRY DAVID SKINNER

Before Kerr LCJ, Campbell LJ and Morgan J

KERR LCJ

Introduction

[1] These are appeals against conviction by Richard David McCartan and Barry David Skinner who were convicted by Higgins J, sitting without a jury at Belfast Crown Court on 28 June 2006, of the murder of Alexander McKinley on 12 October 2002. They were both sentenced to life imprisonment. The appellants submit that their convictions should be quashed on the basis that they are unsafe.

Factual background

[2] Mr McKinley was shot by a gunman as he sat in the driving seat of his car in Euston Street in East Belfast shortly before 9 pm on 7 October 2002. He was taken to the Royal Victoria Hospital and treated there but he died on 12 October 2002. The cause of death was a gunshot wound to the head.

[3] The deceased man had left the home of his girlfriend, Kathleen Knox, in North Belfast at around 7.15 pm on 7 October 2002. He was driving his black MR2 sports car. He went alone to the QE1 snooker club on the Castlereagh Road in East Belfast, and from there he telephoned his girlfriend at about 8 pm. He was contacted on his mobile telephone at 8.48 pm by

another mobile telephone whose number was ********008 ("008"). It was the Crown's case that this was Mr McCartan's telephone. It was asserted that, at the time that the telephone call was made, Mr McCartan was in the area of the snooker club and Euston Street. After receiving that call, Mr McKinley left the snooker club, drove the short distance to Euston Street and parked outside No 95.

[4] In Euston Street, a witness saw a car parked alongside Mr McKinley's vehicle and observed a male person alight from the front passenger seat of that car, move around the back of the car and of the MR2 and then approach the driver's door of the MR2. He leaned through the driver's door window, and two shots were then heard. The male person ran off, and the car from which he had emerged was driven off at speed. Shortly after 8.55 pm, a policeman, who knew Mr Skinner, saw him near the junction of Castlereagh Street and Castlereagh Road, a short distance from the shooting. On the Crown case, the witness who had given an account of the shooting described the male person who went to the driver's door of Mr McKinley's car as having very similar physical characteristics to Mr Skinner.

[5] Expert telephone call mapping evidence was adduced by the prosecution which, the Crown claimed, demonstrated that Mr McCartan and Mr Skinner's mobile phones had been used in the Tullycarnet area of Belfast shortly before 6 pm on 7 October 2002. The telephones were used again in the area of Belfast where the shooting happened, shortly after 6 pm and it was claimed that the accused remained in that area until very shortly after the shooting had occurred, and then moved rapidly back to the Tullycarnet area.

[6] Registration documents for a Peugeot car, which bore Mr McCartan's fingerprint, were found in the driver's door pocket of the MR2 car. Mr McKinley had recently given his girlfriend's Fiesta car and a sum of money to Mr McCartan and Mr Skinner in exchange for the Peugeot car. That transaction had been completed by telephone and this involved contact between all three men on 4 October 2002. The vehicle registration documents for the two cars had not been exchanged, however, and it was the prosecution case that an arrangement had been made for Mr McKinley to meet Mr McCartan and Mr Skinner on the evening of 7 October to exchange those documents.

[7] Mr McKinley's mobile telephone, number ********268 ("268"), was found on the front passenger seat of the MR2. Among the names and numbers stored on the memory of that telephone were the names "Ricky" and "Skinner M", with their mobile telephone numbers. It was not in dispute that Mr McKinley had been friendly with Mr McCartan and Mr Skinner; they had known each other, and spent time together on regular occasions in the past. But Mr McCartan denied that the mobile telephone number recorded in Mr McKinley's mobile against the name "Ricky", ********008' ("008"), was his.

[8] There had been extensive mobile telephone contact earlier on 7 October 2002 between Mr McCartan and Mr McKinley. Six calls were recorded as coming from Mr McKinley to Mr McCartan and three from Mr McCartan to Mr McKinley, the last of these being the call at 8.48 pm. There had also been extensive mobile telephone contact between Mr McCartan and Mr McKinley in the preceding days. Between 4 and 7 October 2002 a total of twenty-eight calls were recorded. There had also been mobile telephone contact between Mr McKinley and Mr Skinner during the same period - seven calls on 4 October 2002 and one call on 5 October 2002 from Mr McKinley to Mr Skinner.

[9] In the period between 4 and 7 October 2002 Mr Skinner and Mr McCartan made no fewer than thirty-four telephone calls to each other. On 7 October 2002, Mr Skinner rang Mr McCartan at 6.11 pm, and Mr McCartan rang Mr Skinner at 8.55pm, when, according to the prosecution, both men were in the area where the shooting took place.

[10] At 1140am on 28 October 2002 a parked Honda motor car was observed in Vion Close, Tullycarnet, Dundonald. At 1205pm it was driven along Vion Close and turned onto King's Road. There it was stopped by police and the male driver identified himself, falsely, as Herbert Roy. Later it was put to him, and he accepted, that his true identity was Richard David McCartan, one of the appellants in this appeal. A girl called Isobel Laing (and known as 'Izzy') was with Mr McCartan in the car. Later on 28 October her home was searched and a workplace name tag was found. It was in the name of Izzy Laing and on the reverse was written 'Ricky ********008' ("008").

[11] In police interviews Mr McCartan claimed an absence of memory as to his whereabouts and activity at the time of the shooting. He did not offer an explanation for his fingerprint being on the Peugeot tax book. During one interview, while being asked about his presence in the area of the shooting as indicated by telephone call mapping evidence, he inquired, "How close can these people tie me down to this area". He also said that "[the] next time [I] would use a pay phone". The latter comment the Crown claimed was especially significant. The case made on behalf of Mr McCartan was that this was obviously a joke, albeit not a very humorous one and a plainly inappropriate remark to make.

[12] When he was interviewed, Mr Skinner gave an account of having left the Tullycarnet area on foot at around 6.45 pm on 7 October 2002, having walked from there with the intention of going to his mother's house in Euston Street. He said that he had heard gunshots when at the junction of the Castlereagh Road and Clara Street (which is relatively near to Euston Street). He then made his way back, again on foot, to Tullycarnet. The prosecution claimed that this account was entirely at odds with the appellant's

movements established by the call mapping evidence. Mr Skinner claimed to have lost his mobile telephone at his aunt's house on the day of the shooting.

The prosecution case on the trial

(a) The joint enterprise

[13] It was the Crown case that Mr McCartan and Mr Skinner acted in concert, as a joint enterprise, to cause Mr McKinley to be present in Euston Street so that he might there be shot; that he was shot by Mr Skinner, and that accordingly Mr McCartan and Mr Skinner were each guilty of the murder of Alexander McKinley. The trial judge accepted that the appellants had acted in concert to murder Mr McKinley but was not persuaded that it had been established to the requisite standard that Mr Skinner had shot Mr McKinley.

[14] Much of the appeal was preoccupied with the claim that the trial judge had convicted the appellants on a ground that had not been advanced by the prosecution and it is therefore necessary to set out some passages from the Crown opening; from submissions made on behalf of the prosecution and the defence on the application for a direction of no case to answer; and from the closing submissions of prosecuting counsel.

[15] In opening the case for the prosecution, Mr Hunter QC said: -

> "It is the Crown case that McCartan and Skinner acted in concert as a joint enterprise to cause McKinley to be present in Euston Street so that he might be shot, and that McKinley was thereby caused to be at Euston Street where he was shot by Skinner, and that accordingly McCartan and Skinner are each guilty of the murder of Alexander McKinley".

[16] Although it was not referred to in the opening, during the trial the case was made against Mr McCartan that he had been the driver of the vehicle that had drawn alongside Mr McKinley's car and that, after Mr Skinner had alighted from it and shot Mr McKinley, he had driven that car away at speed.

[17] In submitting that there was no case for his client (Mr McCartan) to answer, Mr Dermot Fee QC made the following statement: -

> "The Crown case is that Mr Skinner was the gunman and there was some agreement or arrangement between McCartan and Skinner to, as they put it, cause Mr McKinley to be in Euston Street."

[18] Mr P T McDonald QC, who appeared for Mr Skinner, was present during Mr Fee's submissions and adopted them for the purpose of advancing the claim that there was no case for his client to answer. It may safely be assumed, therefore, that he did not take issue with Mr Fee's description of the Crown case as being "some agreement or arrangement" between the appellants to cause Mr McKinley to be in Euston Street.

[19] In resisting the application for a direction Mr Hunter spent a significant amount of time on the telephone traffic between Mr McCartan and Mr McKinley and Mr McCartan and Mr Skinner. Obviously, this evidence was germane to what might be described as 'the anterior case' against the appellants *i.e.* the case that they had caused Mr McKinley to go to Euston Street. It had no direct relevance to the specific case against them (*qua* shooter and driver).

[20] In reply to Mr Hunter's submissions, Mr Fee dealt with the telephone calls that were alleged to have come from his client, Mr McCartan, to Mr McKinley just before the shooting. He sought to persuade the judge to discount those on the basis that it had not been established that the telephone was being used by Mr McCartan. It is important to note, however, that he did not suggest that this was irrelevant material. Both Mr Fee and Mr McDonald also spent a considerable amount of time in their reply to Mr Hunter's submission dealing with the evidence of Kathleen Knox and of what the deceased was reported to have said to her about meeting Mr McCartan and Mr Skinner. The principal, if not indeed exclusive, relevance of this was to the anterior case.

[21] In closing the case for the Crown, Mr Murphy QC adopted all the submissions that Mr Hunter had made in his opening and in resisting the application for a direction. Mr Murphy referred to the proposed meeting on the evening of his death between Mr McKinley, Mr Skinner and Mr McCartan and said, "… it is reasonable to conclude that [the proposed transfer of the car documents] was the lure to bring McKinney to his death and Skinner and McCartan are inextricably linked, we say, to that transaction." Counsel then developed that theme in the following passage: -

> "[Mr McKinley] then spoke to Kathy Knox just after 8pm, according to her, and vouched for by the phone evidence … to say that he couldn't get to meet McCartan. One might reasonably conclude that at that stage where these difficulties were arising, that the plan to shoot McKinley was being put into operation to take effect that night. Of these calls, my Lord, the most stark, glaring and, we say, most unexplained piece of evidence

> against McCartan, unexplained by him, is that the call that brought McKinley to his death from the QE1 snooker club to Euston Street, was made, we say, by McCartan only minutes before he was shot. And that call links him further in to that transaction used to lure McKinley to his death."

[22] The direct relevance of this passage is to the anterior case. It has no immediate significance in relation to the particular case that Mr Skinner was the gunman and Mr McCartan the car driver. That it was linked to the general case made against the appellants rather than the specific roles that they were alleged to have played is also clear from Mr Murphy's later reference to "the strong links that connect [the defendants] … to the lure of McKinley to his death".

[23] An important exchange between the judge and Mr Murphy occurred towards the end of the latter's closing. It is necessary to set this out in full: -

> "Judge: When you say guilty of the murder of Mr McKinley, is it the only inference that may be drawn from the evidence that Skinner was the gunman? You put it in more general terms.
>
> Mr Murphy: I think in Mr Hunter's submissions he has starkly set out the scenario which the prosecution suggest, my Lord, that bears most accurately upon the evidence that's been presented.
>
> Judge: Well, is that the only interpretation of the evidence which might involve participation in the murder?
>
> Mr Murphy: My Lord, I don't necessarily say that it's the only interpretation.
>
> Judge: Well, what are the alternatives? I think that the defence are entitled to know.
>
> Mr Murphy: Well, my Lord, I don't feel it would be appropriate, having in a sense pinned our colours to the mast that Skinner was the gunman, to attempt to create a role for him outside that, my Lord. It appears upon the evidence that that is the most appropriate and direct involvement that he had.

> Judge: You say it is the most appropriate, but is it the only one?
>
> Mr Murphy: My Lord, it would always be open, I respectfully submit, to the tribunal of fact to reach a conclusion that an accused was involved in the commission, directly involved in the commission of the murder by, in some manner, by another role, my Lord. Whether it be assisting in luring someone to the area, being lookout, giving directions. But on the evidence that we have, my Lord, we have directed the court and I don't want to shy away from that, as it were, as to a specific factual scenario, but I do accept, my Lord, that it would be always open to the tribunal of fact to consider all of the possible roles that a defendant have (*sic*) had in the commission of any offence."

(b) The circumstantial case

[24] The prosecution at all times accepted that the case against the appellants depended on circumstantial evidence. Notwithstanding the description given by the eyewitness of the appearance of the man who carried out the shooting or the presence of Mr McCartan's fingerprint on the registration documents of the Peugeot motor car, there was no evidence that directly connected the appellants to the murder of Mr McKinley.

[25] The following were the principal strands of evidence on which the Crown relied to advance the circumstantial case: -

1. Mr McCartan, Mr Skinner and Mr McKinley knew each other before the murder. They socialised together from time to time.
2. In the week before he was murdered, Mr McKinley had arranged with Mr Skinner and Mr McCartan that he would exchange a Fiesta car for a Peugeot car in part payment for the Peugeot.
3. The registration documents of the vehicles had not been exchanged before the day of the murder. There was therefore occasion for the three protagonists to meet.
4. Mr McKinley told his girlfriend that he was going to see Mr McCartan. He later telephoned to say that he had been unable to meet him.
5. Within an hour of that telephone call, Mr McKinley received a telephone call from Mr McCartan and shortly after that he left the snooker club and drove to Euston Street. Some minutes later he was shot there.

6. There had been contact between the mobile telephones belonging to Mr Skinner and Mr McCartan before and immediately after the shooting.
7. The telephone call evidence indicated that both were in the Tullycarnet area of Belfast earlier in the evening of the shooting; that they had both moved from there to the area where the shooting took place and there was contact between their two telephones shortly after 6pm; that they remained in that area until immediately after the shooting but left it promptly thereafter.
8. Mr Skinner was seen a short distance from where the shooting had taken place shortly after it.
9. The registration documents for the Peugeot car were found in the driver's door pocket of the deceased's MR2 car after the shooting and these bore Mr McCartan's fingerprint.
10. Mr McCartan professed to be unable to remember where he had been on the night that Mr McKinley (with whom he had socialised on a number of occasions) had been killed and made what appeared to be frankly inculpatory statements about the significance of the telephone call evidence.
11. Mr Skinner gave a lying account of his movements during the crucial period immediately before the shooting took place.

The judge's findings

[26] The judge made these findings in relation to Mr McCartan: -

> "[76] In the case of McCartan – he was to meet McKinley on Monday 7 October, McKinley set off to do so, the phone calls by McKinley to McCartan, the last phone call by McCartan to McKinley just before his death, the presence of the vehicle registration documents for the Peugeot, McCartan's fingerprint on those documents, his movement from the area of the Dundonald cell site to the area of the Ballymacarrat cell site, his presence round that area for a period of time, his contact by mobile phone with Skinner a short time after the shooting had occurred, the presence of Skinner in the area, McCartan's swift movement from the Ballymacarrat area south and eastward towards the area of the Dundonald cell site, McCartan's attempt to evade detection by the police by the use of a false name, his lies to the police about his mobile phone, the discredited story that he was under the influence of alcohol ands drugs, his attempts to avoid ownership and possession of the mobile phone 008, his interest in

> the detail of the cell site analysis at interview, his remark that the next time he would use a pay phone and his failure to give evidence and provide an explanation for all these facts. It is clear that there was a joint enterprise over a period of time to kill Alexander McKinley which involved luring him to Euston Street by mobile phone for the exchange of the vehicle registration documents, where he was shot. The planning and execution of it involved a number of person[s] in excess of two. The prosecution suggestion that McCartan drove the dark car in Euston Street and that Skinner was the gunman is not established with sufficient certainty. The combination of the factors I have mentioned in this judgment and the failure of the defendant McCartan to provide an explanation for them satisfy me that McCartan was a party to that joint enterprise and was aware of the details of it and by his phone calls and his presence in the area at least, lent assistance to and encouraged it and is therefore guilty of the murder of Alexander McKinley. These factors are not consistent with any other rational conclusion nor was one suggested other than that the circumstances were insufficiently strong and could not satisfy the tribunal of fact of guilt beyond a reasonable doubt."

[27] In relation to Mr Skinner, the following findings were made: -

> "[77] In the case of Skinner – his presence in the best coverage area of the cell site at Dundonald and that presence around the same time as McCartan was within that area, his movement from that area to the area of Ballymacarrat, the relatively similar movement in time and place of McCartan, the presence of the vehicle registration documents for the Peugeot in the MR2 which came from him, his presence in the area immediately after the shooting, his mobile phone contact before and after the killing with McCartan who was in contact with McKinley and who was involved in the joint enterprise to kill McKinley, the mobile phone contact closely related in time to the killing particularly with others who were in contact with McCartan, his lies to the police particularly about

> his movements and more particularly relating to the loss of his mobile phone, his swift movement tracked via his mobile phone from the Ballymacarrat area to the east and the best coverage area of the Dundonald cell site. The combination of the factors I have mentioned in this judgment and the failure of the defendant Skinner to provide an explanation for them satisfy me that Skinner was a party to that joint enterprise by and was aware of the details of it and by the provision of the vehicle documents, his phone calls and his presence in the area at least, he assisted and encouraged that joint enterprise and is therefore guilty of the murder of Alexander McKinley. These factors are not consistent with any other rational conclusion nor was one suggested other than that the circumstances were insufficiently strong and could not satisfy the tribunal of fact of guilt beyond a reasonable doubt."

[28] The appellants did not give evidence. The judge drew a strong inference against them on this account. He dealt with this issue in paragraphs [60] and [61] as follows: -

> "[60] Neither of the defendants [has] given evidence. That is their right. They are entitled to remain silent and to require the prosecution to prove their guilt. It cannot be assumed a defendant is guilty merely because he has not given evidence. The defendants have not given evidence at this trial to undermine, contradict or explain the evidence put forward by the prosecution. They rely on their answers in interview. Their failure to give evidence can count against them. Not in the sense that conviction can follow on their failure to give evidence alone or indeed mainly, but because the court may draw the conclusion that they have not given evidence because they have no answer to the case made by the prosecution or none that would bear examination. Therefore it may be treated as some additional support for the case made by the prosecution. But it should not be so treated unless it is a fair and proper conclusion to draw from their failure to give evidence, and the court is satisfied that the prosecution's case is so strong that it clearly calls for an answer by a

> defendant and the only sensible explanation for his silence is that he has no answer to that case or none that would bear examination.
>
> [61] In this instance the defence have submitted that the prosecution evidence is such that no answer or explanation is necessary. I do not agree. The prosecution evidence is such that it calls for an answer and the failure of the defendants to give evidence should be treated as additional support for the prosecution case."

[29] The judge returned to the theme at paragraph [71] where he said: -

> "[71] I draw a very clear inference from the failure of the defendants to give evidence that they have no answer to the prosecution case ranged against them or none that would stand up to cross-examination. I also draw the inference that the events proved by the prosecution are related to the murder of McKinley and connected to each other. If there was an innocent explanation for the phone call to McKinley from McCartan and the presence of Skinner outside the King Richard Bar and the cell site analysis of the mobile phones a sensible and innocent man would give it. None has been given or suggested. Instead the defendants prevaricated with the police in interview, often saying 'no comment' when a pertinent question was asked. It is significant they resorted to this instead of denials that may later be proved to be untrue. 'No comment' is not a denial. It is more akin to 'I do not have an answer to that at this time'."

The appeal

[30] The centrepiece of the appeal for both appellants was that the judge had found them guilty on a basis which the Crown had not relied on in its presentation of the prosecution case. It was claimed that they were not given the opportunity to meet what their counsel described as the "alternative case". On behalf of Mr McCartan a number of discrete arguments were also presented by Mr Fee on some of the issues outlined in paragraph [25] above. It is convenient to deal with these first. Mr McDonald presented a general argument that the delay in bringing this case to trial required this court to question whether the case against the Mr Skinner would have been proceeded

with, had it been a trial before a judge and jury. We shall deal briefly with that argument after considering the specific issues raised by Mr Fee.

The registration documents

[31] Mr Fee suggested that there was no evidence that the tax book had been handed over at the time of the shooting. The eye witness had stated that the person who had discharged the shot had approached the driver's window of the victim's car, had placed his left hand on the car, reached in with his right hand, brought his left hand up and the shooting took place. Mr Fee pointed out that the witness did not claim to have seen the handover of any material. It had been the Crown case that Mr McKinley had given Mr Skinner the registration documents and vehicle hand book of the Fiesta motor car. Ms Knox had stated that she had told Mr McKinley on the evening of 7 October to take the tax book for the Fiesta with him when he was going to meet Mr McCartan. She later discovered that the tax book and the vehicle log book were no longer in her house and the implication from the Crown case was that they had been handed over just before Mr McKinley was shot but there was, said Mr Fee, no evidence of this and the eye witness's account appeared to suggest otherwise.

[32] As to the presence of the fingerprint of Mr McCartan on the registration documents, this merely showed that he had handled the Peugeot tax book at some time but nothing more than that, Mr Fee argued. If the Peugeot car was being supplied to Mr McKinley by Mr McCartan and Mr Skinner, the presence of the fingerprint would not be surprising. In any event, the fingerprint was found on the inside of the document rather than its external surface. This would indicate that it had not been handled by Mr McCartan immediately before the shooting.

[33] The trial judge did not make any specific findings in relation to the fingerprint. The only reference to it in what might be described as 'the findings section of his judgment' (paragraphs [76] and [77]) is that it was found on the registration documents. The judge did not invest this finding with any particular significance, although he had said earlier in his judgment – at paragraph [70] – that it was a remarkable coincidence that the fingerprint was found on the tax book.

[34] Given that it had not been challenged that there was to be an exchange of vehicle documents between Mr McKinley on the one hand and Mr McCartan and Mr Skinner on the other, it is perhaps not especially untoward that Mr McCartan's fingerprint was found on the registration book for the Peugeot. But the judge does not appear to have laid especial reliance on this fact. What is of significance in relation to the fingerprint, however, is the way that Mr McCartan dealt with this in interview. When asked whether he had any knowledge of the Ford Fiesta motor vehicle, he replied, 'No comment'.

When asked why his fingerprint had been found on the tax book for the Peugeot car he made the same reply. He was then asked if the detectives could take 'no comment' as meaning that he had no explanation and he replied 'you can take it whatever way you want. I've told you all I want to say'. He also said 'Ask your questions, get it over and fucking done with, I can't be annoyed with it'. It was suggested to him that he had the tax book and that he had telephoned Mr McKinley to tell him to come over and he would give it to him; that the tax book was handed through the windscreen and then he was shot. He replied 'no comment'.

[35] The innocent explanation that Mr Fee suggested was available to explain the presence of the fingerprint was never proffered by Mr McCartan and this failure reveals its true significance, in our judgement. His determined refusal during interview to acknowledge the registration documents or to admit to having handled them provides important support for the drawing of an adverse inference against him.

The attribution of telephone 008 to Mr McCartan

[36] Mr Fee submitted that, while the evidence concerning the telephone number of this mobile telephone pointed towards its belonging to Mr McCartan, it was not sufficient to connect his client to the telephone 008. We do not accept that submission. Mr McCartan claimed to be unable to remember his telephone number when he was interviewed about this; he accepted that the 008 telephone could have been his but said that he had sold his telephone a few weeks previously. But the record of 'Ricky' against the number of this telephone in Mr McKinley's mobile phone and on the workplace name tag of Isobel Laing was ample evidence that Mr McCartan did indeed own that telephone, in our judgment. Again, his failure to give evidence on this crucial issue fully warranted the drawing of an adverse inference against him.

The cell site analysis

[37] An expert in this field, David Sanderson, gave evidence, submitted a report on the subject and made a Power Point presentation to the court. Mr Fee suggested that Mr Sanderson's evidence established that (a) call mapping was carried out in respect of telephone 008 (attributed to Mr McCartan) and telephone 301 (attributed to Mr Skinner); (b) call mapping provides an approximate indication of where a mobile phone was when a call was made; (c) call mapping is used primarily to show the likely movement of a cellular phone with a general indication of location; (d) the cellular phone may be anywhere within the best serving coverage of the sector; (e) there is boundary overlap between sectors served by different masts; (f) the extent of the best serving coverage sector is unknown; (g) the indication of movement of the person using the telephone is no more than consistent with a suggested

pattern of progress – it cannot establish positively that the user of the telephone in fact moved in the mooted direction; (h) calls 15, 16 and 17 from 008 at 20.53: 20.55: 20.55 were made when the telephone was not in the vicinity of Euston Street.

[38] On the basis of this evidence Mr Fee argued that the cell site analysis did no more than provide a very imprecise indication of general movements. In the absence of a capacity to identify a precise location of the telephone within the area of best coverage it was not possible to provide any precise indication of travel direction. We are disposed to accept that Mr Fee has correctly identified the limitations that apply to the cell site analysis. As he has acknowledged, however, it *does provide a general indication of the movements* of the users of the telephones. If the appellants followed a different pattern of movements on the day in question, it was open to them to give evidence about those movements and to explain where they had been at the critical time in relation to the shooting. Their failure to do so, combined with the general indication that the cell site analysis provided, constituted strong evidence against them that their movements were as indicated by that analysis. In Mr McCartan's case, his inquiry of the interviewing police officers as to how precisely he could be tied down to a particular area was also, in our judgement, extremely telling.

The remark about the pay phone

[39] Towards the end of the interview that ended at 3.24pm on 2 March 2004 Mr McCartan made the remark "I'll use a payphone next time (laughs). Flip sake." At a subsequent interview he said that this was a "joke". Mr Fee suggested that the judge had placed unwarranted weight on this remark.

[40] We do not accept that submission. Nothing that the judge said indicates that he laid particular emphasis on this item of evidence. In any event, as a purported joke, the remark is distinctly lacking in obvious humour. Quite apart from that, however, it should be viewed in the context in which it was made. It was uttered by Mr McCartan immediately after he had inquired as to how precisely his movements could be tracked by the cell site analysis. Again, his failure to give evidence to support the case made on his behalf that this was no more than an amusing, innocuous comment provides strong support for the conclusion that it was nothing of the kind.

The evidence of Kathleen Knox

[41] The statements of Ms Knox were read as evidence in the trial, having been admitted at a pre-trial hearing by Deeny J under article 20 (2) (e) of the Criminal Justice (Northern Ireland) Order 2004. Mr Fee claimed that the trial judge failed to have sufficient regard to the fact that the defence had no opportunity to test her account by cross examination and failed to give

sufficient weight to the circumstance that some of her comments were based on conjecture or speculation. He also alluded to the fact that she did not mention that Mr McCartan was involved in the car exchange until the last of the four statements made by her on 9 May 2003. Finally, he criticised the judge for failing to comment on the evidence of a Detective Constable McCabe who expressed reservations about her knowledge of events and surprise at some of her comments.

[42] At paragraph [3] of his judgment, Higgins J acknowledged that the credibility of Ms Knox was in issue. He dealt extensively with her statements and the circumstances in which they were taken and admitted in evidence in paragraphs [22] to [31]. The judge then considered the appellants' arguments that reliance should not be placed on the statements in paragraphs [52] to [55]. In the last of these paragraphs he expressly stated that he had borne in mind that she had not given evidence and been subject to cross-examination. The judge also dealt fully with the fact that much of the material contained in Ms Knox's statements contained hearsay evidence in the form of reports as to what Mr McKinley had told her and he explained carefully why he had decided that this could be received and relied on. The fact that the witness did not refer to the exchange of registration documents until her final statement does not appear to us to derogate at all from the credibility of her account. On the contrary, if she had made that a prominent feature of her first statement to the police, one might have raised some question about it, although even then it is difficult to see how this would impinge on the believability of the account. So far as the views of the detective constable are concerned, we consider it highly questionable whether he should have been permitted to give this evidence but, in any event, the judge's failure to refer to it is in our view in no way untoward. We reject the criticisms of the judge's treatment of Ms Knox's evidence.

The delay in bringing the case to trial

[43] Mr McDonald made a number of sweeping – but, we regret to say, unsubstantiated – claims that there was undue delay in proceeding with the trial against the appellants. He appeared to suggest, but did not explicitly articulate, an ulterior motive on the part of the prosecuting authorities for the delay. He claimed that the case would not have proceeded if it had not been a non-jury trial. These were serious accusations for which one would have expected specific evidence. It is a matter of concern to us that none was proffered. I am afraid that we feel constrained to say that that these claims should not have been made.

The principal ground of appeal

[44] As we have said at paragraph [30] above, the principal ground of appeal was that the judge had found the appellants guilty on a basis which

the Crown had not relied on in its presentation of its case and that, in consequence, they were not given the opportunity to meet the "alternative case".

[45] Much of the material necessary to consider this ground has already been set out in paragraphs [13] to [23] of this judgment. The formulation of the sentence quoted at paragraph [15] above that the Crown case was that Mr McCartan and Mr Skinner "acted in concert as a joint enterprise to cause McKinley to be present in Euston Street so that he might be shot, and that McKinley was thereby caused to be at Euston Street" is important in considering the claim that the appellants were convicted on a basis other than that which had been presented by the prosecution and that they did not have the opportunity to meet that case. It is quite clear, in our judgement, that the case made for the prosecution on the opening was that the part played in the joint enterprise that was common to both appellants was that they "caused" Mr McKinley to be present in Euston Street for the purpose of his being shot. The specific role attributed to Mr Skinner of having shot Mr McKinley was additional to his participant as a procurer. On either basis he could be convicted of murder. Likewise the specific case made against Mr McCartan in the course of the trial (that he was the driver of the vehicle) was supplementary to the case that he had caused Mr McKinley to be present for the purposes of being murdered.

[46] There can be no question, therefore, that both appellants faced a case that they had caused the victim to be present at the point where the attack took place. It is significant that the role played by each of them in securing his presence was not specified during the opening of the Crown case. Not only did they ultimately face a precise allegation as to their involvement in the actual killing (Mr Skinner as shooter and Mr McCartan as driver), when the case was opened, they both faced the charge of having been guilty of murder by procuring the presence of the victim to the place where he was to be murdered.

[47] The question then arises whether that anterior basis of the charge was ever abandoned by the Crown or did circumstances arise in which the appellants were no longer required to meet it? We are entirely satisfied that both questions can be firmly answered in the negative.

[48] As we have observed at paragraphs [17] and [18], when the application for a direction of no case to answer was made, the appellants knew that they were facing a murder charge *inter alia* on the ground that they had caused Mr McKinley to be present in Euston Street. As we have already observed, Mr Fee said, in describing the case against the defendants, "The Crown case is that Mr Skinner was the gunman *and there was some agreement or arrangement between McCartan and Skinner to, as they put it, cause Mr McKinley to be in Euston Street*". And, as we also have already noted, Mr McDonald was present at

this time because when he came to make his submissions he adopted what Mr Fee had said. The burden of Mr Hunter's submissions on behalf of the Crown and Mr Fee's response to these was concentrated on the case that the appellants had caused Mr McKinley to be present at the Euston Street in order that he could be shot there.

[49] As we have stated at paragraph [20], Mr Fee and Mr McDonald also spent a considerable amount of time, in their reply to Mr Hunter's submission, dealing with the evidence of Ms Knox and of what the deceased was reported to have said to her about meeting Mr McCartan and Mr Skinner. This was primarily relevant to the anterior case. If at that stage, counsel considered that the only case they had to meet was that they were respectively the gunman and the driver, surely one would have expected them to say that this evidence could not possibly be prayed in aid as supporting that specific case.

[50] We consider it likely that what became the principal ground of appeal was prompted by the exchange between the trial judge and Mr Murphy. We have set this out in paragraph [23] above. Mr Murphy's first reply to the question put by the judge was perhaps somewhat incomplete. In suggesting that Mr Hunter's submissions had "starkly set out the scenario which the prosecution suggest … bears most accurately upon the evidence that's been presented", he perhaps created the impression – no doubt, unwittingly - that the prosecution was uniquely and exclusively committed to the case that Mr Skinner had discharged the shots that killed Mr McKinley and that Mr McCartan had driven the car that had taken Mr Skinner to the scene. That was plainly not the case for the reasons that we have given earlier. Mr Hunter had outlined a case that the appellants had lured Mr McKinley to his death and, indeed, Mr Murphy had also done so in the submissions that he had just completed before this exchange with the judge began.

[51] The exchanges that followed compounded the difficulty. When the judge asked whether 'that' was the only interpretation of the evidence which might involve participation in the murder, it was assumed by counsel that this was a reference to the specific roles that had been assigned to the appellants for he replied, "I don't necessarily say that it's the only interpretation". What, of course, should have been said was that there were two bases on which the murder charge depended, *viz* the luring and the shooting/driving.

[52] The judge's next question as to what were the alternatives, "since the defence [was] entitled to know" was unfortunate. Both the defence and the judge should have known that the two different cases (not the 'alternatives') were (i) the luring and (ii) the shooting/driving. Mr Murphy's reply was even more unfortunate in suggesting that it would not be appropriate, "having in a sense pinned our colours to the mast that Skinner was the

gunman, to attempt to create a role for him outside that …". Counsel here was clearly concentrating on an alternative role *at the time of the actual shooting*. He neglected to make clear that the Crown was also making a case on the basis of luring Mr McKinley to his death. Everyone associated with the case should have realised that and, it appears to us, plainly did so at all times before this exchange took place.

[53] The critical issue is whether this exchange is sufficient to remove from the case against the appellants an element or basis of the charge that had hitherto been present, *viz* that they had lured Mr McKinley to his death. Although the first part of Mr Murphy's final reply was somewhat unsatisfactory, we are firmly of the view that the allegation that the appellants had lured the victim to his death remained as part of the case against them.

[54] The trial judge summarised his decision in the following passage (which we have already quoted at paragraph [26] above) from paragraph 76 of his judgment: -

> "It is clear that there was a joint enterprise over a period of time to kill Alexander McKinley which involved luring him to Euston Street by mobile phone for the exchange of the vehicle registration documents, where he was shot. The planning and execution of it involved a number of persons in excess of two. The prosecution suggestion that McCartan drove the dark car in Euston Street and that Skinner was the gunman is not established with sufficient certainty. The combination of the factors I have mentioned in this judgment and the failure of the defendant McCartan to provide an explanation for them satisfy me that McCartan was a party to that joint enterprise and was aware of the details of it and by his phone calls and his presence in the area at least, lent assistance to and encouraged it and is therefore guilty of the murder of Alexander McKinley."

[55] Although the judge did not articulate it in quite this way, what in effect he was saying was that he accepted the broader, anterior case that had been made by the Crown that the appellants had lured Mr McKinley to the place where, to their knowledge, he was to be murdered. It is not apparent why the judge concluded that more than two people were involved. This is the only reference to that view in the judgment and we have been unable to deduce why he should have reached that conclusion. In any event, it adds nothing to the Crown case and does not detract in any way from the integrity of his

finding that the evidence established that both appellants were instrumental in enticing Mr McKinley to Euston Street.

[56] We are satisfied that the basis on which the judge found the appellants guilty was one on which the Crown had relied throughout the trial and that there is no question of them having been deprived of the opportunity to meet an "alternative case"

Circumstantial case

[57] A desultory argument was presented on behalf of the appellants that the learned trial judge "did not act upon the established legal guidance and warnings concerning the approach to evidence in circumstantial cases", although it was accepted that he had correctly referred to the legal principles involved in such cases, as indeed he did at paragraph [58] of his judgment. We find no merit in that argument. Although this prosecution depended on circumstantial evidence, the abundance of factors pointing to the appellants' guilt made for a formidable case against them, especially when those factors remained unanswered by testimony from the appellants themselves.

Conclusion

[58] None of the arguments advanced on behalf of the appellants has succeeded. We are entirely satisfied of the safety of their convictions. The appeal is dismissed.