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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BRENDAN McCONVILLE AND JOHN PAUL WOOTTON

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ

[1] The appellants were convicted on 30 March 2012 after a trial by Girvan LJ, sitting without a jury, of the murder of Constable Stephen Carroll on 9 March 2009. They were also convicted of possession of a firearm with intent to endanger life, namely an AK47 assault rifle together with a quantity of 7.62 x 39 mm cartridges with intent to endanger life or enable another to do so. The appellant Wootton was further convicted of attempting to collect information likely to be of use to terrorists.

The prosecution case

[2] At 8:41pm on 9 March 2009, police received a 999 call reporting that a brick had been thrown through the window of a house at 33 Lismore Manor, Lurgan. After a short period two police cars attended, one of which was being driven by Constable Carroll. Shortly after arriving, and before Constable Carroll had alighted from his vehicle, two shots were heard. One of these shots struck Constable Carroll. He was taken to hospital but pronounced dead at 10:28pm.

[3] A forensic search of Constable Carroll's vehicle uncovered a copper bullet jacket in the rear driver footwell, a piece of copper under the front passenger seat, a metal fragment in the driver's headrest, and a fragmented bullet head on the carpet of the driver's seat. Two spent brass cartridge cases bearing the head stamp "NNY1982" were found on a grass bank to the rear of Lismore Manor.

[4] On 14 March 2009, the home of Teresa Magee at 607 Pinebank, Craigavon, was searched by police. An AK47 rifle and a magazine of bullets, both of which were wrapped in black bin bags and hidden under the oil tank, latex gloves and a piece of cardboard with a mobile phone number on it were found. Subsequent forensic analysis and test firing of the gun showed it was the gun which fired the copper bullet jacket found in Constable Carroll's vehicle. It was also the gun which had ejected the two spent brass cartridge cases found on the grass bank and the bullets in the magazine also bore the head stamp "NNY1982".

[5] Forensic evidence also strongly supported the proposition that the black bin bags in which the rifle and the magazine were wrapped, came from the same roll of bin bags as bin bags found at 309 Drumbeg, Craigavon. This address is 237 metres from the point where the gunman fired the shots.

[6] John Paul Wootton was arrested by police on 10 March 2009 and his Citroen Saxo car seized. Forensic examination of the interior of the car showed large quantities of gunshot residue but it was not from the type of bullet fired from the AK47. In the boot of the car the police found a brown male Easy brand jacket. Upon forensic testing, DNA samples were taken from the inside back of the collar and right cuff of this jacket. The sample taken from the collar revealed a full profile of medium strength which matched DNA samples taken from Brendan McConville. The sample taken from the cuff was a mixed profile, the major part of which was a full profile of medium strength which matched that of Brendan McConville. The mixed profile indicated a contribution from two other sources which were not identified. Five further DNA samples taken from the coat gave weak results unsuitable for establishing sufficient DNA characteristics. The forensic scientist opined that if Brendan McConville was not the owner or regular wearer of the coat the true wearer had only deposited low levels of DNA, if any, on it and that the findings were more likely to be obtained if Brendan McConville was the regular wearer of the jacket.

[7] There was considerable debate about the forensic analysis of particles found on the brown jacket. The spent cartridges found on the grass were analysed and found to have used a Type 7 mercury-based primer. It was common case that the gunshot residue ("GSR") from such ammunition contained combinations of antimony, tin and mercury. Where the residue contained the full complement of these key elements the residue was characteristic of Type 7 GSR. Where the particles contained some but not all of the key elements, such particles were described as indicative. The term indicative indicated that the residue was consistent with Type 7 GSR. Although the expert for the defence criticised the nomenclature the learned trial judge concluded that it was appropriate.

[8] Forensic analysis of the brown jacket found in the boot of the Citroen Saxo revealed high levels of antimony/tin particles in a 1:1 ratio which the prosecution forensic scientist, Ms Shaw, said were indicative of Type 7 residue. She said that she knew of no other source for such particles other than mercuric ammunition. The morphology indicated that the particles were fusions of elements brought about at very high temperature. The forensic scientist concluded that if the particles had originated from a firearm the amount suggested the gun may have been fired whilst wrapped in the coat. The defence pointed out that the absence of any burn marks on the jacket made this unlikely. The particles were consistent with the gunshot residue produced by the last ammunition fired by the AK47 but not exclusive to it. The defence expert disputed the methodology used by the prosecution experts and we will return to this when dealing with the defence case. The prosecution also relied upon the detection of PETN on the coat. That is a substance to be found in Semtex explosive.

[9] Brendan McConville was arrested on 20 October 2009. During the search of his home at 5 Glenholmes Avenue police seized a black male Easy brand jacket. The jacket was of the same make and size as the coat in the car. Forensic examination of this coat located 57 antimony/tin particles and 2 lead/antimony particles on the inner pockets, inside lining and the outer surface. Mr McMillen, a forensic scientist retained by the prosecution, concluded that the high number of particles strongly supported a contact between the coat and the source of the particles. The particles were of a type produced, but not exclusively, by the cartridges found on the grass bank behind Lismore Manor.

[10] Some eleven months after the arrest and remand in custody of the first appellant Witness M contacted the police. There had been a public police request for information and assistance shortly before this. He said that he had taken his child out for a walk at approximately 7pm on 9 March 2009. In the vicinity of Lismore Manor, near the grass bank on which the cartridges were found, he saw three men standing at a small electricity box. One of the men, who was wearing a green army jacket, looked at Witness M and addressed him by name. Witness M identified this man as Brendan McConville whom he said he knew from when he was very young and whose nickname was Yande. Witness M proceeded on his walk and stayed at his destination, his close relation's house, with his partner and children for a period which he said was 1¾ hours although he had given an account that his visit was as short as 40 minutes. On his return walk home he again recognised Brendan McConville standing at the electricity post. He also observed another man standing at the top of the hill near a burnt out lamp post. Sometime after the murder which the witness variously described as several weeks or

possibly 2 months, and before Witness M had spoken to police, two men called at Witness M's home and told him to keep his mouth shut.

[11] The army, for intelligence purposes, had fixed a GPS tracking device to Wootton's Citroen Saxo motor vehicle prior to the murder. The data taken from the tracking device gave the longitude and latitude position of the vehicle up to 1:15am on 10 March 2009. The data stored on the device after 1:15am was deleted before being handed over to the police and no explanation was forthcoming as to how or why that happened. The tracking device showed that at 7:11pm on 9 March 2009 the car was just under 240 metres from the scene of the shooting and remained there until 9:55pm, 10 minutes after the shooting. The location of the vehicle was outside 309 Drumbeg where the roll of black bin bags connected to the bags covering the AK47 and ammunition was found. When the vehicle left that location its journey brought it in close proximity to McConville's address.

[12] CCTV taken from a benefits office showed that McConville and Wootton knew each other. The CCTV also showed that McConville was wearing an army camouflage type coat on that occasion. That coat has never been located. CCTV taken on 10 March 2009 in Lurgan, showed the Citroen Saxo pull up at an ATM and a passenger use the machine. Bank records showed that money was withdrawn from McConville's bank account by the passenger.

[13] Bad character evidence in relation to Wootton was admitted at the trial. This included propaganda and training documentation downloaded from a seized computer relating to republican paramilitaries. There were also photographs of Wootton dressed in republican paramilitary uniform and acting as a member of the colour party at a republican event. Approximately two weeks prior to the murder, Wootton approached a man, E, whom he knew was dating the daughter of a police officer. Wootton asked E for the police officer's address. E told him to "f" off and that the man did not deserve to be shot because he was a police officer. E said that Wootton replied, "a cop's a cop".

Defence evidence

[14] The learned trial judge recognised, of course, that the onus of proving that each appellant had committed the offences alleged against him lay at all times on the prosecution and that the standard was proof beyond a reasonable doubt. McConville was interviewed by police between 11 March 2009 and 21 October 2009 on 43 occasions. During the course of an interview on 23 March 2009 he introduced the following statement:

> "I Brendan McConville am not and never have been a member of a proscribed organisation. John Paul Wootton is a friend of mine and I have been in his golden Saxo car on many occasions. I have been in the front passenger seat, the back seat and I have taken items such as groceries and newspapers from the boot of his car on several occasions. I do not own brown coat police exhibit HGS3 I did not put AK47 rifle police exhibit JB1 to my shoulder and shoot Constable Carroll on 9 March 2009."

Wootton was interviewed on 37 occasions between 11 March 2009 and 23 March 2009 and exercised his right to make no reply in relation to any questions concerning his movements and the evidence in the case.

[15] There were four principal areas in which the appellants challenged the prosecution case. The first concerned the prosecution's reliance on the identification of McConville by Witness M. M had been inconsistent as to how long he knew the appellant. At one point he suggested that he knew him for 10 years and on another occasion that he had known him since he was a small child. It was also contended that since Witness M had been away from the area for a prolonged and indeterminate period there was no explanation as to how the appellant would have known his name. It was agreed that Witness M and McConville had never spoken before.

[16] Witness M said that the green army camouflage jacket worn by McConville was knee length with a German logo. That description did not match the coat seen in the CCTV at the benefits office. M was unclear about the distance at which he saw McConville ranging from 12 feet to 30 feet or more. He had repeatedly lied about the condition of his sight and the wearing of glasses. Mr Page, the ophthalmic surgeon, said that a person with his eyesight would have difficulty with facial features when more than 8 yards away. Measurement suggested that the distance between the path along which M walked and the energy box near where McConville was allegedly standing was just over 16 yards.

[17] M initially said that he was sure that one of the men who came to his home to tell him to keep his mouth shut was a named man, A. He subsequently suggested that he was 90% certain before concluding that he was 50% certain about the identity of this person. The appellant submitted that this impinged upon his reliability and reinforced the need to hold an identification procedure in accordance with paragraph 2.12 of the Terrorism Act 2000 Code of Practice ("the Code"). The argument that an identification procedure would have served no useful purpose was unsustainable. In any event in light of the importance of the identification the police should have established the position in relation to the witness's eyesight.

[18] When Witness M first contacted the police he did so by telephone late at night. The officer taking the call noted that the caller sounded as though he had taken a drink. Witness M accepted that he had consumed some beer but rejected the suggestion that he was a heavy drinker. It was suggested that he had a gambling problem and was given to making things up in order to attract attention to himself. He denied those suggestions. There was some exploration of his financial position in the witness protection scheme but he contended that he was better off before he entered the scheme.

[19] The second major area of contention concerned the treatment of the GSR evidence. Mr Doyle was a forensic scientist retained by the defence. He accepted that the size, morphology, composition and shape of the particles were consistent with gunshot residue. He also accepted that the explosive reaction of mercury fulminate results in the formation of mercury. Its relatively low boiling point and ability to form alloys with elements in the cartridge case accounted for its limited detection in GSR from mercury fulminate based primers. He noted, however, that studies by Zeichner and Wallace in laboratory conditions showed some presence of mercury and he considered it significant that there was no evidence of mercury among the almost 400 antimony/tin particles recovered from the coat.

[20] Mr McMillen had carried out experiments by way of test firing. It was accepted that those experiments were significantly flawed. Nevertheless there was some recorded detection of mercury which should have been reported in his statement. Mr Doyle considered that the opinion as to whether the GSR was the product of the firearms discharge that resulted in the death of the deceased should be determined by a likelihood ratio. If that had been applied it should have led to the conclusion that the GSR evidence was more supportive of the defence case.

[21] Mr Doyle was also critical of Mr McMillen's conclusion in relation to the presence of PETN. He considered that the detection was based on very small poorly shaped peaks with poor resolution. The findings were in his opinion insufficient to say with a high degree of certainty that PETN was present. He accepted, however, that weight should be given to the fact that two methods were used which came to the same result. Mr McMillen pointed out that the technique used was widely accepted and had been used by other agencies.

[22] The third area of significant contention related to the DNA evidence upon which the prosecution relied to link the brown jacket found in the boot of the Saxo to McConville. Ms Southam was a forensic scientist based at Forensic Science Service Ltd in London with over 25 years' experience in the analysis of biological evidence such as body fluids and textile fibres. She gave her opinion that the full DNA profiles of medium level in the inside of the collar and the right cuff were

what might be expected if McConville was the regular user of the court. She was advised of McConville's statement that he did not own the jacket and made an assumption that he had never worn it. She had a low expectation of obtaining a medium level full profile from that jacket by secondary transfer. That would not explain the DNA being found on the inside of the jacket. If McConville was not the owner or regular wearer of the jacket the true wearer had only deposited low levels of DNA, if any, on it. The DNA profile in the collar sample was such that the chance of a person unrelated to McConville matching the profile was one in 1 billion. The DNA profile of the major contributor in the cuff sample was of the same evidential quality. She considered that the DNA findings were more likely to be obtained if McConville was the regular wearer of the jacket. She could not determine when the DNA would have been deposited on the coat.

[23] She agreed that if there was information that McConville may have worn the court once or twice without being the owner she would have had to re-evaluate her findings. No suggestion was ever made to police at any stage that he had worn the coat nor was any evidence to that effect introduced. It was suggested to Ms Southam that the absence of DNA from the regular owner or wearer of the coat could be explained by him having poor shedding qualities in relation to his skin. She accepted that the ability of someone to shed their DNA was material but the more times somebody wore items such as the coat in the car the greater the chance that there will be depositions of detectable DNA even if the wearer is a poor shedder.

[24] Fourthly, the tracker device attached to the Citroen Saxo motor vehicle was programmed to record the location of the vehicle every 2 minutes when it was moving and every 2 hours when it was static. The device recorded the vehicle as moving as long as it had not been stopped for more than 20 seconds. The device recorded the vehicle as moving at the junction of Downshire Avenue and Glenholm Park shortly after 10 pm on 9 March 2009. That was approximately 200 metres from the first appellant's home. There was no evidence that the vehicle stopped or that it entered Glenholm Park where the first appellant lived. The route taken by the car was not materially different from that which the vehicle would have taken to get to its eventual destination.

The rulings of the learned trial judge

[25] On behalf of the first appellant an application was made pursuant to Article 76 of PACE (NI) Order 1976 to exclude the identification evidence of M. This was based on the failure of the police to comply with the provisions of paragraph 2.12 of the Code which provided as follows at the relevant time:

"Whenever –

(i) a witness has identified a suspect or reported to have identified them prior to any identification procedure set out in paragraphs 2.5 to 2.10 having been held or

(ii) there is a witness available, who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and they had not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 2.5 to 2.10 and the suspect disputes being the person the witness claims to have been, an identification procedure shall be held unless it is not practicable or it will serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence. For example, when it is not disputed that the suspect is already well known to the witness who claims to have seen them commit the crime.

Such a procedure may also be held if the officer in charge of the investigations considers it would be useful."

[26] The learned trial judge rejected the prosecution submission that an identification procedure would have been of no possible utility since renewed recognition of the person by the witness would not have been of any real probative value. The court held that a failure to recognise the first appellant again would be significant and of great assistance to the defence case. He also rejected the argument that the first appellant would inevitably have declined to co-operate in an identification procedure on the basis that he may well have been advised that he had very little to lose by doing so. The learned trial judge concluded that the breach of the Code in the circumstances of this case, while significant, could be counterbalanced to an extent by the court carefully directing itself on the shortcomings in the evidence and the need for real caution and the requirement to carefully analyse the evidence and its shortcomings. He noted that recognition cases carry their own particular danger because a person may honestly think he has recognised another but be honestly wrong. He said that defendants in non-jury cases had the protection of an automatic right of appeal and balancing all those factors indicated that the admission of the evidence of M would not have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

[27] At the end of the Crown case each appellant applied for a direction that there was no case to answer. In respect of the first appellant it was contended that

M's identification evidence was of such poor quality that there was no case against him and there was no evidence on which the tribunal of fact (we hereinafter refer to the jury) could rely as supporting independent evidence. The learned trial judge considered that there were two separate questions for the jury to decide. The first was whether the identifying witness was honest and secondly, if satisfied of his honesty, was the jury satisfied that he had not made a mistaken identification. The judge concluded that it could not be said that the witness's credibility had been so discredited that the case should be taken away from the jury.

[28] The learned trial judge recognised that there were a number of features in the evidence as set out at paragraphs 15 to 17 above that substantially weakened its reliability. On the other hand the prosecution relied on the fact that this was a recognition case in which the first appellant was known to M for years, was a person well known in the area, had a distinctive physical appearance in terms of hair colouring and build, was observed face-to-face on two occasions and had spoken to the person he was identifying who was wearing a green Parka camouflage coat with some similarity to a coat that the first appellant was wearing at the benefits office a few days prior to the shooting.

[29] The prosecution also sought to rely on the DNA found on the coat to establish a connection between the first appellant and the car which was in the area at the time. In addition the jury could have accepted that Witness M was intimidated and told to keep his mouth shut and that this was capable of supporting the accuracy of his identification. The prosecution also relied on the fact that M had consistently indicated that he was insufficiently sure to be able to identify person A.

[30] In respect of the second appellant the learned trial judge concluded that the particles found on the coat in the car could not be seen in a vacuum. The car was parked in close proximity to the scene of the shooting close to a house in which a roll of bags was found from which the bags used to wrap the firearm when it was being prepared for hiding were taken. The coat bore the DNA of the first appellant in circumstances indicating a very close physical connection between the first appellant and the car. The jury could have accepted that the first appellant was at the scene of the shooting and that in the circumstances he was connected to the car at the time. The car contained evidence of firearm residue indicating its close proximity to other gun related crimes. It was owned by the second appellant who was the driver. The second appellant was an active participant in a branch of Republican paramilitaries actively involved in terrorism. The coat and the car also bore evidence which could satisfy a jury that the wearer had been in contact with Semtex explosives, an explosive substance widely used in terrorism. All those circumstances had to be taken with the fact that the second appellant had two

weeks before the shooting actively sought to gather information about the whereabouts of a police man. In those circumstances the judge considered that the jury could conclude that the second appellant was an active participant in the events on the night in question. He accordingly rejected the direction application in respect of both appellants.

[31] Neither appellant gave evidence having been warned that the court may be entitled to draw an adverse inference from their failure to do so. In addition to the expert evidence in relation to GSR the first appellant called as a witness Mr Sheridan who in 2009 worked as a security guard at the Brownlow Leisure Centre. M had told police that he was in the company of his partner, two children and a dog and that he had said hello to the security guard on duty that night as they passed. When interviewed by police in 2010 and February 2012 Mr Sheridan indicated that he did not know M and he could not say after that length of time to whom he said hello that night. In his evidence Mr Sheridan said that he would rarely see families going along the path and that he never saw any family or spoke to anyone on the evening of the shooting. He accepted in cross-examination that he told police that he would say hello to a lot of people and that he would find it hard to remember everybody he said hello to.

The conclusions of the learned trial judge

[32] The judge was satisfied that Constable Carroll was murdered by a shot fired from the AK47 from a location at the rear of Lismore Manor. The murder was the result of a planned Republican terrorist plot which involved luring the police into the area. For the plot to work successfully it was necessary for a number of individuals to be involved in arranging for the bringing of the appropriate weapon and ammunition into the area, to ensure that it was working properly, to arrange for a competent person to be there to fire the shot and to arrange for the removal of the weapon and its secretion. Those involved in the plot had to be actively committed to a cause supposedly served by the murder of a policeman. The second appellant's car was parked close to the house from which the bags covering the weapon were taken at a point less than 300 yards from where the gun was fired. That car left the scene 10 minutes after the shooting. The car was contaminated with GSR not associated with the shooting that night. The judge concluded that the car must have been involved in connection with other firearms incidents and those using the car had been involved in the use of firearms.

[33] At paragraph 143 the learned trial judge concluded that he should draw an inference against the first appellant by reason of his failure to go into the witness box to challenge the identification by M. He drew the inference that the first appellant did not have an answer to the identification evidence or did not have an

answer that would stand up to cross-examination. At paragraph 144 he stated that he was satisfied that M was telling the truth about having seen the first appellant on the night in question. He noted that M was belligerent and offensive and less than open when dealing with the issue of his eyesight and glasses. He was satisfied that M was the victim of genuine intimidation and that his life had been seriously affected in consequence of coming forward with his identification evidence. The judge was satisfied that he did see a group of men on the evening in question and that those men must have been involved in the murder plot. He concluded that M was intimidated because it was felt that he had valuable or damaging information which supported the view that he came sufficiently close to be able to recognise one or more of the group. He concluded that the first appellant was present on the evening at the scene.

[34] He was fortified in that conclusion by the coat with the DNA of the first appellant in the nearby car and the evidence that the first appellant regularly wore a green bulky Parka jacket. He concluded that the first appellant was the habitual wearer of the coat with his DNA found in the car. He found that the first appellant lied when he stated that he was not the owner of the coat and the lie supported M's identification of the first appellant.

[35] The judge considered the evidence in relation to the antimony/tin particles on the coat in the car. Having reviewed the scientific evidence he said that the type of particles found on the coat in the car represented a type which could on occasion be produced as a result of the use of mercury fulminate ammunition. The scientific evidence on its own in the surrounding circumstances satisfied him that the particles were very probably firearms related. No other source could be identified by any of the experts. The conclusion had to be examined in the light of all the surrounding circumstances including the finding of the particles in a car very close to the scene of the shooting, the presence of other firearm residues, the connection of the first appellant to the car which left the scene shortly after the shooting and was at all material times driven by the second appellant who was an active and committed adherent to violent republican terrorism and was seeking to obtain targeting information in respect of a policeman shortly before the shooting.

[36] The learned trial judge concluded that the particles had a connection to the events of the night but that the connection was unclear. The appellant gave no evidence to explain the presence of the particles on the coat. He concluded that there was a sufficiently strong prima facie circumstantial case from the circumstances of the finding of the particles in the coat to indicate a connection with the events of the night leading the court to draw inferences against the appellants from the absence of any evidence by them. In any trial the tribunal of fact will not be able to resolve exactly what happened in respect of every aspect of the case but

must be satisfied from the totality of the evidence that the guilt of the accused is established. The learned trial judge concluded that the combination of circumstances produced compelling evidence of the guilt of the appellants demonstrating that they were both intimately involved in the plan to murder the deceased. He accordingly found them guilty on each count.

The submissions on appeal on behalf of the first appellant

[37] This appeal was initially listed for hearing on 29 April 2013. The detailed argument on behalf of the first appellant was lodged on 2 April 2013. The principal basis upon which the appeal was pursued concerned the approach to the evidence of Witness M. On 26 October 2011 Hart J made an order that nothing must be published which would have the effect of identifying Witness M nor could Witness M be asked any questions which would or may have the effect of revealing his identity or of enabling that identity to be ascertained. He was satisfied that there had been an attempt to intimidate Witness M as a result of his willingness to give evidence in the case and that in order to protect the safety of the witness he had to be relocated. He considered that the application had to be viewed against the background of a grave terrorist attack which could result in intimidation and reprisals against the witness or members of his extended family.

[38] The appellant was aware of the identity of Witness M for at least a year prior to the trial. It was contended on behalf of the appellant that although he was aware of the witness the Order would have the effect of reducing or eliminating the potential for a witness to come forward and give evidence on his behalf which might undermine or contradict the evidence of the witness. Witness M's close relation, Z, had provided information to the first appellant's solicitor indicating that the witness was unreliable and tended to make things up. He also suggested that the witness's partner with whom he said he was visiting Z that night would not have been welcome at Z's house thereby calling into question the account of Witness M on the night of the shooting. Those matters had been put to the witness in cross-examination but Z was not prepared to give evidence. It was submitted that in the interests of a fair trial the judge was wrong to allow anonymity to a witness whose testimony was crucial to a successful prosecution.

[39] The first appellant relied on various inconsistencies and weaknesses in Witness M's evidence. He said that he formed the view that something was going on that night in a statement he made on 21 February 2010. Despite that it was only a few months later that he thought to himself that the first appellant might have had something to do with it. The contact with the police occurred two days after a police letter-drop to the community requesting assistance. He made the call at 1:15 AM on a Saturday night/Sunday morning after consuming alcohol. He claimed

that he had known the first appellant since he was a "nipper" but on another occasion said he had known him for 10 years.

[40] He was cross-examined about the quality of his eyesight. He denied having prescription glasses and said that they were just for fashion. There was an issue between the parties as to whether the witness properly understood the question. Mr Page, a consultant ophthalmic surgeon, indicated that Witness M had visual acuity of around 6/9 with both eyes and could engage in most everyday tasks. He would see normally in twilight with adequate street lighting but would have difficulty identifying facial features beyond a distance of about 8 yards.

[41] There were differences between the description Witness M gave of the green knee length army style coat with a German logo and hood which the witness said the first appellant was wearing and the coat the first appellant was seen to be wearing in the benefits office. The weather conditions were poor and it was raining heavily particularly when the witness was returning home. There was some disparity in the number of men he claimed to see and in the period of time that he said he had spent at Z's house. He was unclear as to whether it was weeks or months after the shooting that he was intimidated and his confidence about his identification of Person A also varied.

[42] It was submitted that in those circumstances the failure to carry out an identification procedure in accordance with the Code of Practice under the Terrorism Act 2000 should have led to the exclusion of the identification evidence. The learned trial judge concluded that the identification in this case was by way of recognition and the breach of the Code could be counterbalanced to an extent by careful direction and the requirement to analyse the evidence and its shortcomings. He also referred to the fact that there was an automatic right of appeal in a non-jury case. The appellant contended that this was an irrelevant consideration.

[43] The brown jacket with the first appellant's DNA was found in the Citroen Saxo car on the day after the murder. Even if the evidence was sufficient to establish that the first appellant may have worn the brown jacket or even that he had been the habitual wearer of it and that the jacket was in the car on the night in question the evidential value, it was submitted, was negligible where the appellant was not said to have been wearing it on the night of the shooting. The first appellant's son had travelled in the Citroen motor vehicle on the morning of 10 March 2009 and lived with his father. It was contended that this prevented any inference being drawn that the coat was in the car at the time of the shooting. The DNA evidence also indicated that at least two others from time to time could have worn the coat.

[44] The basis for the conclusions reached by Ms Southam, the forensic scientist dealing with DNA, was the information that the first appellant denied being in contact with the jacket itself. It was contended that if the first appellant had worn the jacket once or even twice that could have accounted for his DNA. In any event the witness accepted that the presence of the DNA did not assist in establishing when the jacket was worn.

[45] In relation to the particles found on the jacket the residue did not establish on its own that the particles came from mercuric fulminate based ammunition because of the absence of any trace of mercury. Even if it were the case that the particles were produced by such ammunition because there was no other known source, it did not follow that the residue was caused by the shooting of the deceased. The prosecution had been unable to put forward any explanation as to how so many particles could have been deposited on the jacket as a result of the firing of the murder weapon on that night. The detection of PETN, Semtex, had no more than prejudicial value and ought never to have been admitted as bad character evidence by the disclosure judge.

[46] The learned trial judge relied on bad character evidence consisting of particles found in the first appellant's house. Mr McMillen, the prosecution expert, concluded that the presence of a high number of lead/antimony particles on a pair of black knitted gloves strongly supported a contact with the source of those particles which were indicative of GSR but did not provide support for contact with mercuric fulminate ammunition. A total of 57 antimony/tin particles and two lead/antimony particles were located on the inner pockets, inside lining and outer surface of the black male Easy brand coat seized at the first appellant's home. He concluded that the high number of particles strongly supported a contact between that coat and the source of the particles and that the particles were of a type produced but not exclusively by the ammunition used in the shooting. The learned trial judge included the particles found in the house among the points of relevance in the context of the particles found in the car and on the brown jacket but these formed no part of the combination of circumstances he specified in paragraph 157 that led him to conclude that the first appellant was involved in the murder plan. It is not clear, therefore, whether he used this material at all in considering whether the first appellant was guilty and if it was not used it had no more than prejudicial value.

[47] The particles found inside the Citroen Saxo vehicle could not have been related to the murder weapon. The learned trial judge included that evidence as part of the combination of circumstances which he specified in paragraph 157 that led him to conclude that the first appellant was involved in the murder plan. It was submitted that this evidence was of no value in reaching that conclusion.

[48] A device had been fitted to the Citroen Saxo car for intelligence purposes. The purpose of the device was to track the movements of the vehicle. Data was recovered from the vehicle up to 1:15 AM on 10 March 2009. The data subsequent to that time had been deleted and there was no explanation as to how that occurred. The prosecution sought to establish that the second appellant dropped the first appellant near his home shortly after the shooting. The indications from the device placed the vehicle approximately 200 m from the appellant's home at its nearest point. Throughout that period the vehicle was recorded as being in motion.

[49] The prosecution also maintained that the vehicle was relevant to the shooting by virtue of the fact that it was parked approximately 240 m away from the firing point. It was pointed out that the vehicle did not make a hasty getaway after the shooting but that it was approximately 10 to 15 minutes later before it moved. In any event the first appellant contended that the vehicle evidence should be excluded by virtue of the possibility that there had been some contamination of the vehicle subsequent to 1:15 AM on 10 March 2009.

[50] The first appellant also made complaint about the extent of disclosure. The PPS indicated in correspondence that information was received by police suggesting that Person A was responsible for firing the shots which killed the deceased. Person A was identified in the correspondence. The informant was considered reliable. Further details were given of other findings in connection with the murder and Person A or members of his family. The prosecution confirmed that all available information in relation to others being investigated in connection with the murder was provided on disclosure. Although the first appellant contended that the identity of the person who provided the information should have been disclosed it is difficult to see how that disclosure would have been of any material benefit to the first appellant. The second disclosure issue arose in relation to a report prepared by Ms Shaw, a forensic scientist, who commented upon the report from Mr Doyle who gave evidence on behalf of the appellants. The prosecution initially objected to disclosure of the report on the basis that it was confidential but later accepted that confidentiality would not provide a proper basis upon which to resist disclosure. The report was considered from the point of view of relevance and did not pass the disclosure test. There is no reason to consider that disclosure was required. The document was merely commentary upon Mr Doyle's report on which Ms Shaw was effectively cross examined. We do not need to consider the disclosure issue further.

[51] On the basis of the submissions it was contended that the learned trial judge ought to have concluded that there was no case for this appellant to answer. The identification evidence was poor. The witness would have seen a person face-to-face for seconds. The distance would have rendered facial identification difficult.

The witness had eyesight problems. There was a discrepancy in the description of the green coat and there had been a failure to comply with the relevant Code. The learned trial judge did not expressly find that the evidence was poor but at paragraph 134 he noted the shortcomings "properly identified in respect of M's identification evidence".

[52] The appellant contended that the evidence identified by the prosecution as providing support for the identification was misconceived or wholly unconvincing. The prosecution submitted that the coat bearing the appellant's DNA established a sufficiently close personal connection so as to give rise to the inference that he was the owner of the coat and thereby establish a connection between him and the car which was in the area at the time. That was supported by the presence of a coat of the same size and same make with similar particles found in the appellant's own home. The fact that the witness had been intimidated supported the view that he was in a position to identify some of those present and that those present had been engaged in the relevant incident.

[53] Even if there was support for the identification it was submitted on behalf of the appellant that there was no indication that he was doing anything wrong. There was no evidence of association between the appellants on the day of the shooting. There was nothing to indicate that he was behaving in any sinister or clandestine way. There was nothing to link the GSR on the coat to the firing of the weapon at the time that the deceased was killed. The evidence from the tracking device did not establish that the vehicle travelled to the appellant's home.

[54] The judge having rejected the application for a direction the appellant also criticised the judge's conclusion that the prosecution case was sufficiently strong to clearly call for an answer and it was submitted that the judge misdirected himself by attaching disproportionate weight to the appellant's decision not to give evidence. In particular it was submitted that the learned trial judge dealt with the adverse inference issue at paragraph 143 of his judgment before his evaluation of the strength of the prosecution case at paragraph 144. It was submitted, therefore, that the judge wrongly relied on the failure to give evidence as the basis for the Crown case rather than taking it into account as additional support for the Crown case. We do not accept the latter submission. The evaluation at paragraph 144 did not rely on the adverse inference. The sequence of the paragraphs did not give rise to error.

[55] The learned trial judge also drew specific adverse inferences from the appellant's failure to give evidence. He considered that the failure to give evidence about the DNA on the jacket supported the inference that the first appellant was the habitual wearer of the jacket. He concluded that the failure to give evidence about

the particles on the jacket resulted from the connection to the events surrounding the murder. It was submitted that this inference was startling since given the multiplicity of particles and the evidence of all the firearms experts the particles could not be definitively linked to the murder weapon.

[56] Finally it was contended that the judge failed to apply the principles governing circumstantial evidence. The prosecution never ascribed a particular role to the appellant and contended that he must have been involved in some unspecified way. It was submitted that this was particularly dangerous when the allegation was one of joint enterprise and the evidence was circumstantial. The danger was that the appellant was convicted because of his perceived association with others. The conclusion of the judge that the men must have been involved in the murder plot was challenged on the basis that although there may be a reasonable suspicion of involvement it was not possible to conclude that this was the only inference to be drawn from the evidence.

The submissions of the second appellant

[57] Mr Harvey for the second appellant adopted the submissions of Mr Macdonald. He submitted that the hypothesis that the particles on the brown coat in the Citroen Saxo car came from the discharge event of 9 March 2009 was essential to the circumstantial case advanced by the prosecution against the second appellant and yet there was no direct or inferential evidence to sustain the proposition. He focused his submissions on an analysis of the forensic evidence.

[58] The shooting of the deceased produced particles characteristic of Type 7 GSR, antimony/tin/mercury, in the AK47 and the two cartridge cases found behind Lismore Manor. He submitted that the prosecution experts with access to the murder weapon and the supply of appropriate ammunition and spent cartridges failed to properly test the evidence and disregarded contradictory evidence. The tests which were carried out by Mr McMillen and Ms Shaw were agreed to be flawed because of the failure to clean weapons prior to the experiments in order to eliminate contamination from lead. Mr Doyle was highly critical of this failure. He considered that the ejecta from such tests properly carried out were the best reference sample of particles discharged after the shooting of the deceased. The failure to carry out proper tests in relation to this meant that no satisfactory reference sample was available.

[59] It was common case that the various hypotheses offered by the prosecution were highly unlikely to account for the very high number of particles detected on the brown coat. It was submitted that objective consideration of the scientific evidence was frustrated by the failures of the forensic procedures. The tests which

had been carried out showed the presence in a small number of cases of detectable amounts of mercury and it was surprising that no mercury was found in the large number of particles on the brown coat. The tests also showed some evidence of lead and there was no satisfactory conclusion as to why there should have been a build-up of lead alone because of repeated firing.

[60] Ms Shaw and Mr McMillen both agreed that antimony/tin particles are indicative rather than characteristic of firearms discharge. Ms Shaw concluded, however, to a 95% measure of confidence that the particles originated from a firearm source. She based this on the lack of experience of antimony/tin in day-to-day work in the laboratory other than from such a source. It was submitted that the lack of adequate research imposed restrictions on the confidence which could be reposed in the reliability of that interpretation of the findings.

[61] Ms Shaw stated that the possibility of the detection of mercury was not to be expected because of its volatility but it was submitted that the correct interpretation was that if mercury was not detected this was within the range of potential outcomes and the particles were to be regarded as indicative only. Some emphasis was placed by the prosecution on the proportional composition of the antimony/tin particles but it was submitted that there was no scientific publication which supported the use of the energy dispersive spectroscope as an appropriate technique for such analysis. The reliance on quantitative analysis and morphology did not advance the proposition that the particles were indicative only.

[62] Even if one accepted the proposition that the particles were consistent with discharge residue there was no evidence which supported the proposition that the particles recovered from the brown coat were the result of the discharge event on 9 March 2009. The evidence of the particles from the second appellant's clothing, the interior of the car, the boot and its contents pointed to them being linked to some other source unconnected with the shooting.

[63] The assertion that the second appellant was active in a branch of republicanism and had two weeks before the shootings sought to gather information about the whereabouts of a policeman together with the other circumstantial evidence did not justify the conclusion that the second appellant was an active participant in the events of 9 March 2009. All that could be said was that the type of particles found on the coat in the car represented a type which could on occasion be produced as a result of the use of mercury fulminate ammunition. The research of Wallace and Zeichner could be interpreted as showing that mercury can be detected in the GSR.

The prosecution submissions

[64] The prosecution submissions in reply were lodged on 21 April 2013. Although there were relevant events prior to that date it is convenient to set them out here. The principal issues raised were the evidence of Witness M and the application to exclude it, the DNA and GSR on the brown jacket, the tracking device on the car and the adverse inferences drawn by the judge.

[65] The application to exclude the identification evidence of Witness M was based on the failure of the police to comply with Code D of the Terrorism Act 2000 (Section 99) Code of Practice.

[66] The prosecution submitted at the trial that an identification parade did not need to be held because the witness knew the first appellant and had done so for many years. The identification parade would be taking place over a year after the offence was committed and during that time it was public knowledge that the first appellant had been arrested and charged with the murder. Those factors would have undermined an identification as the physical appearance of the appellant would have been within the public domain during that time. In any event the first appellant would undoubtedly have contended that any identification procedure was not achieving its purpose but simply supporting the fact that the witness was going to identify the appellant as the person that he knew was the person in the identification parade and who had been charged with the murder. The senior detective in charge of the case did not consider that it was appropriate to hold an identification procedure because the appellant was already in custody and an identification in the circumstances described would have been of little or no weight.

[67] We agree with the learned trial judge that there was no reason why the duty under the Code to hold an identification procedure should not have applied. A failure by the witness to recognise the first appellant would have been of significance and assistance to the defence case. An identification procedure was practicable and it could have provided the appellant with a safeguard. That is now accepted by the Crown in this appeal. Having found a breach of Code D the learned trial judge concluded that he should not exclude the identification evidence for the reasons given at paragraph 54 of his judgment and set out at paragraph 25 above. The prosecution submitted that those reasons explained why it was appropriate not to exclude the evidence.

[68] It was submitted that the learned trial judge properly identified the matters which he should take into account in evaluating the identification evidence at paragraph 142 of his judgment and then applied the law properly at paragraph 144. Having done so he was satisfied that Witness M did see a group of men on the

evening in question, that he honestly thought that he recognised the first appellant who was a figure known in the area and who had distinctive features and colouring and that, with the supporting evidence, was sufficient to conclude that the first appellant was present on the evening at the scene.

[69] The respondent relied on the DNA evidence from Ms Southam as support for the conclusion that the first appellant was the regular wearer of the brown jacket. The prosecution also relied on the evidence of Ms Shaw who had more than 20 years' experience of casework involving firearms. She indicated that the one-to-one ratio of antimony and tin in the particles on the brown coat was extremely unusual and apart from mercuric ammunition she had not identified another source. The absence of any other source was the reason for her conclusion that she could be more than 95% sure that the particles came from mercuric ammunition. She stated that the amount of residue emitted from a gun will vary enormously and she could not estimate how the particles came to be on the jacket. It could have been from wiping the gun or direct exposure to discharge. Mr Doyle did not have the same type of experience as Mr McMillen or Ms Shaw. He did not encounter day-to-day the analysis and interpretation of GSR. He accepted that the particles found on the coat were consistent in terms of size and morphology and the fact that they were made up of antimony and tin was sufficient to make them indicative of gunshot residue. He accepted that the expert evidence indicated that it was not surprising that very few particles containing mercury were detected in casework. He could not suggest any alternative non-firearms source for the particles. The prosecution also relied on the fact that particles of the same type were found on a coat of the same make and size as the brown jacket in the first appellant's home. Particular emphasis was placed on the fact that in relation to both jackets the GSR is indicative of Type 7 GSR which is itself an uncommon form of ammunition. The prosecution contended that this strongly supported the inference that the first appellant was the regular wearer of both jackets. The prosecution also relied upon the presence of PETN Semtex on the brown jacket as an indicator that the wearer of the jacket was connected to an explosive substance frequently used by terrorists. Although the judge had not relied upon this in reaching his conclusions on guilt the prosecution submitted that he would have been entitled to do so. The prosecution submitted that the fact that the brown coat in the boot of the second appellant's car was covered in Type 7 GSR and that such ammunition was used to effect the shooting is significant in establishing the first appellant's connection to the shooting and also connecting the second appellant to the events of the evening.

[70] The appellants did not dispute the lawfulness of the authorisation of the deployment of the tracker device on the Citroen Saxo motor vehicle and there was no legal challenge to the admissibility in evidence of the downloaded data although

the appellants had sought to exclude the evidence on the basis of the deletion of the material after 1:15 AM on 10 March 2009. The Crown's response indicated that there was no discloseable material concerning the vehicle in the period thereafter. A protocol in relation to information obtained from the device was drawn up between the parties and agreed.

[71] The respondent submitted that there were a number of adverse inferences that could properly be drawn as a result of the failure of the appellants to give evidence. In relation to the first appellant he had not challenged the evidence that he was at Lismore Manor on the evening in question. He asserted at interview that he was not the owner of the brown jacket but had failed to sustain that by evidence. There was no explanation for the presence of particles indicative of Type 7 GSR ammunition on both jackets. The judge was entitled to conclude that his assertion at interview that he did not own the jacket was a lie. It can be inferred that he was associated with the second appellant and that there was no innocent explanation for the presence of PETN on the brown jacket.

[72] In respect of the second appellant an adverse inference could be drawn that the brown jacket was present in the boot of his car from the time of the murder and there was no innocent explanation for the presence of the jacket, the residues on that jacket or other residues within the boot of the car and other parts of the vehicle. The prosecution submitted that the jacket was directly associated with the murder weapon and the murder. It may be inferred that the presence of the vehicle near the scene of the shooting was part of a joint plan connected to the first appellant's presence at the firing point. In the absence of any explanation it can be inferred that he had knowledge of the plan to kill a police officer and intent to murder in what was a carefully planned operation.

[73] It was submitted on behalf of the first appellant that when the learned trial judge dismissed the application for the direction he was under a duty to give reasons for that decision so that the appellant could make a judgement as to whether it was appropriate for him to give evidence. No authority was referred to in support of that proposition. Although it was submitted that the appellant would have benefited from knowing whether in the view of the court the identification evidence was poor but supported or good independent evidence it was not entirely clear as to how this would have been of assistance in relation to whether the first appellant should give evidence. In any event the submission on behalf of the first appellant was that the identification evidence was poor and the prosecution were relying on the proposition that there was supporting independent evidence. That was the case the appellant had to meet. The prosecution submitted that there was no obligation on the learned trial judge to give reasons for rejecting the direction application at that stage and we agree.

[74] The prosecution submitted that this was a compelling circumstantial case. The second appellant's car was in Drumbeg before the window was broken at 33 Lismore in order to bring the victim to the scene. The vehicle remained there until about 10 minutes after the shooting. The first appellant was seen by Witness M in the area at the rear of Lismore Manor within the same time period. The second appellant's car was located close to the house in which a roll of black bags was found from which the bags used to wrap the murder weapon after the murder were taken. His route away from the area of the shooting took the second appellant close to the first appellant's home before travelling to his own home. That route was more circuitous than the direct route. The boot of the car contained a brown jacket of which the first appellant was the regular wearer as established by the DNA evidence and on which there were a large number of particles indicative of Type 7 GSR. GSR was found in the car which was consistent with another firearms source. The coat from the car was of the same make and size as one found in the first appellant's home and with large numbers of the same GSR on it. Mr Murphy accepted that the learned trial judge did not specifically say that the GSR residue on the coat was from the events of the night of 9 March 2009 but he submitted that one could infer beyond reasonable doubt that some of the particles found on the coat were consequent upon the events of that night.

The fresh evidence

[75] On 9 April 2013 the first appellant lodged an application pursuant to section 25 of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act") that the court should receive fresh evidence consisting of an affidavit prepared by Z and sworn on 5 April 2013. The affidavit disclosed that Z consulted with the first appellant's solicitors on 23 January 2012 and again on 4 April 2013. He said that M was a compulsive liar. He had been addicted to slot machines as a teenager but had got over his gambling addiction with help. He described him as a "Walter Mitty". He had received counseling for gambling and personal issues and at one stage was suicidal.

[76] The affidavit stated that Witness M's Lithuanian partner had prior to March 2009 physically attacked him causing injury. As a result of this Z said that the Lithuanian partner was not welcome in his house and it was not possible, therefore, that the couple visited on the night that Constable Carroll was killed. Z suggested that M had poor eyesight and he provided information to the first appellant's solicitors about that in January 2012. It appears that this was the source of the allegation put to Witness M in cross examination that he was "as blind as a bat". The affidavit suggested that he did not give evidence against M because he was concerned that this could have resulted in deterioration in M's mental health.

[77] Z was arrested on the evening of 25 April 2013 for the offence of withholding information in respect of arrestable offences. He was brought to Dungannon police station where he was interviewed on 10 occasions before being released in the early hours of 27 April 2013. By the date of the proposed hearing of the appeal, 29 April 2013, it also transpired that there had been a police audio surveillance operation in respect of the house at which Z was living on 21 April 2013 as a result of which audio recordings and transcripts were available of conversations between Z and other persons living there on that day. The appeal was adjourned on 29 April 2013 pending the provision by the PPS of disclosure, the conduct of any further investigation and decisions on whether any charges were to be laid. Z was never charged with any criminal offence.

[78] At the resumed hearing the first appellant pursued his application for the admission of Z's affidavit pursuant to section 25 of the 1980 Act which provides as follows: –

> "25. - (1) For the purposes an appeal, or an application for leave to appeal, under of this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice-
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;
>
> (b) order any witness to attend and be examined before the Court (whether or not he was called at the trial); and
>
> (c) receive any evidence which was not adduced at the trial."

[79] We noted that the application was for the admission of hearsay evidence in respect of a witness who was reluctant but otherwise available. We considered the interests of justice test both under section 25 of the 1980 Act and Article 18 (1) (d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. We noted that no application had been made for the issue of a witness summons to require Z to attend the original trial. The circumstances in which he made his affidavit were disputed as was the accuracy of its contents. We recognised that Z's affidavit touched on an important matter in issue in the trial namely whether M visited Z's house on the night of the shooting and therefore whether he passed by the area from which the shots were fired that night. We refused the application to introduce the affidavit in evidence because Z was available and there were issues concerning his reliability but indicated that we would issue a witness summons to require the attendance of Z if it was sought. The first appellant duly applied for a witness summons and Z appeared to give oral evidence.

[80] Prior to the resumption of the hearing on 30 September 2013 the Prisoner Ombudsman for Northern Ireland provided a booklet of information to the first appellant's solicitors concerning the background to a complaint made by the first appellant on 11 November 2009 and the manner in which the complaint was investigated. On 17 September 2009, while the appellant was in Maghaberry prison on remand, his cell was searched and a piece of toilet paper with the registration number of the governor's motor vehicle was found in a Steradent tube. He was interviewed about this on 22 October 2009 and accepted that the Steradent tube was his but denied putting the piece of toilet paper in the tube. He asked police to secure a video of all persons who entered his cell as someone else had placed the item in the tube without his knowledge or permission. The first appellant sought permission to call Ms McCabe who was the Prisoner Ombudsman for the five-year period ending May 2013 and Mr Rodford who was the relevant prison governor. The first appellant sought to advance an argument in relation to abuse of process. We agreed to hear the evidence. We also agreed to hear evidence from Detective Chief Inspector Harkness in rebuttal together with various supporting documents.

[81] In his direct evidence Z said that M had not come to his house with his partner on the night of the shooting as Z was aware that M's partner had beaten him up as a result of which she was not welcome in the house. M had come to his door covered in blood on that occasion. He could not say when that incident occurred but it was well before the murder. He said that M was known by the nickname Walter Mitty because of his stories and lies. At one stage it was arranged for him to attend a psychiatrist because he was thought to be suicidal although Z later agreed that the psychologist who treated him over ten sessions concluded that he was not suicidal. He said he had not been coerced or threatened in any way to sign the affidavit. He had to leave his home in June 2012 when a bus was burnt outside his door. He believed his phone and house were bugged by police. He said that in the audio recordings of 21 April 2013 he referred to the police wanting him to retract and the solicitors wanting him to go to court. He said that when he was arrested he was held for 24 hours and then told that he could be held for a further 12 hours and subsequently placed in Maghaberry prison. He was not prepared to retract what he said in his affidavit because it was the truth. At the original trial M was cross examined on the basis that he had made a complaint that he was being harassed by two police officers whereas there was no substance to that complaint. Z said that he was initially sceptical about M's complaint but later experienced an incident with M which left him convinced that the harassment did occur.

[82] He agreed in cross-examination that M probably had known the first appellant since they went to school together. M was now in his forties. When asked if M regularly visited people he said "not really". He was referred to a typed note of

his meeting in April 2013 with the solicitors on behalf of the first appellant when he said that M was an awful man for going visiting people. He could not recall saying that. He said that M was not one for going visiting people. He was then referred to a draft affidavit which referred to M being an awful man for going visiting people. That sentence had been deleted from the final draft. He offered no explanation as to why it was there or why it was deleted.

[83] It was put to Z that in the notes of his interview with the solicitor in January 2012 he said that it was possible that M made the journey described on the night Constable Carroll was murdered but he was 90% sure that he was not there. He said the only reason he could be sure was because he would not have let the partner into the house. He agreed that he could not remember the date when the partner allegedly beat M. He agreed that he had no independent memory of the night of the shooting.

[84] He said that he met the first appellant's solicitors on 23 January 2012 at a local restaurant. He gave them some background information in relation to M. He met them again in April 2013. He described how on this occasion he was contacted by phone two or three times but because he thought the phone was being bugged he put it in the bin. He then went on to explain that he had thrown other phones in the lake to prevent further calls. He also said that his landline was bugged and he found a bug in his car. He said he did not want to talk to the solicitors but agreed at his last meeting to allow them to put his account into writing although he was not going to court.

[85] He said that he met the solicitors in a house in a housing estate at Taghnevan. He agreed that this meeting had been arranged by a man called Terry McCaugherty. He said that police had been able to show a video of him meeting McCaugherty outside his local pub. He denied that he told police that someone else had arranged the meeting. He said that McCaugherty was a go-between on two or three occasions arranging the meeting between Z and the solicitors. He initially said that this was the account that he had given police when he was first discussing it at interview but then agreed that he had initially told police that he had been contacted by the solicitors in the middle of March 2013. He said that he did this to keep McCaugherty out of it and had made up an account that he had been contacted by the solicitors. In his third interview he agreed that McCaugherty suggested that he should tell the truth and give the solicitors all the help that he could.

[86] He described the meeting with the solicitors. He said that it lasted for two hours or two and a half hours. It got hot and heavy at times and the meeting ended when he walked out. He did not want to sign anything and felt that he was put

under a bit of pressure but was persuaded to visit another solicitor to swear his affidavit. He described how he had previously been intimidated by people who had burnt a bus outside his home in Drumbeg as a result of which he had to move. He had also been subject to threats to bomb him in the street and there had been an incident in a bar when a man put his hand up and pointed at him as if he had a gun.

[87] Z was asked about certain passages in the audio recordings. Between 11 am and noon on 21 April he was recorded having a discussion about the fact that the police wanted him to admit that he made the affidavit under duress. In the recording Z is described as UKM2 and there are two females and a male also involved.

> "UKF1 That's it they want to say it was under duress.
>
> UKM2 That's yes
>
> UKM1 Aye well, well you were forced
>
> UKF1 Aye
>
> UKF2 Yeah
>
> UKM2 Ah ha and what happens then
>
> UKF2 So they go into they, they say
>
> UKM2 Yeah the cops is after me and the RA's after me"

[88] Z was asked what he meant about the reference to the RA. He said that was a reference to a man in the bar who pointed his finger as if it were a gun. He was then referred to a further passage in which UKM1 said to him "So, so they don't know you met the hoods." Z said that this was a reference to a story that he had made up to tell his family that he had arranged to see some people to stop the harassment he was getting. When pressed on this he said that he made the story up around 1 June 2012 at the time that the bus was burnt. He could not explain how that could be relevant to the discussion about the statement which was occurring on 21 April 2013.

[89] Z was referred to a further portion of that conversation concerning his affidavit.

> "UKF2 Yeah but they can't force you if you say you're not speaking because it's too dangerous then they can't force you
>
> UKM2 I know but all they want me to do is to retract

UKF1 I know yeah but you

UKM2 And the other ones want me to go to court, Jesus Christ

UKF1 Yeah

UKM2 How can you keep everybody happy

UKM1 Well then what you're saying is if you go and tell the cops you're not, if you tell them, if you tell them everything the IRA will kill you"

Z said that he must have told some story to his family which led them to say this but he could not remember what it was. In a further portion of the conversation discussing what he would say to police about the affidavit UKM1 asked should he wait until the IRA contacted him again to try to school him. He denied that he had any dealings with the IRA.

[90] At a later stage in the same transcript he described his meeting with the solicitors in April 2013. "I had three hours with them…and I just cracked up… I says I'm actually going to fucking hit you I says if you don't get out of my face. He was all the same thing, nice guy and then he turned nasty." When asked about this he initially said that it was a story that he made up and then agreed that it was a description of the meeting with the solicitors, that he had banged the table and thrown it over and then agreed to sign the affidavit to finish the interview. In a later interview with police he said that he would have signed anything just not to see the solicitor again.

[91] During his police interviews Z was shown various pieces of CCTV from the Stables Bar. On 4 April 2013, he was seen in the company of Terry McCaugherty. It was after viewing that piece of CCTV that he admitted that McCaugherty had been involved in setting up the meeting with the solicitors. He was also shown a further piece of CCTV on the same premises on 24 April 2013, which showed Z and McCaugherty going out to see a black Toyota Yaris in the car park of the Bar. The vehicle was registered to and used by the first appellant's brother. Z said that McCaugherty had invited him to come out to look at the car because it was going cheap. Z was not interested in a car but came out anyway. He said that he had no idea that the owner of the car was the first appellant's brother.

[92] Pauline McCabe was the Prisoner Ombudsman for the five-year period ending in May 2013. The discovery of the governor's vehicle registration number in the Steradent tube of the first appellant had been referred to police. On 4 February 2010, she was advised that police had not investigated the possibility that the paper had been put there by prison officers. She was surprised because in his complaint

made on 19 October 2009, the first appellant said that if any illegal material was found in the cell it must have been planted there by staff in the prison's employment. Secondly, she was aware that an article had appeared in the press in December 2009 in which the allegation that the note had been planted was made. The police had not forwarded their file to the PPS until January 2010. She subsequently discovered that when interviewed by the police liaison officer, Constable Close, on 22 October 2009 the first appellant made the case that the note had been planted by someone else.

[93] She noted that CCTV should have been preserved in respect of the period prior to 17 September 2009 in order to establish who, if anyone, entered the cell. The CCTV was retained for a period of 30 days but thereafter was unavailable. It was, therefore, already unavailable by the time the first appellant was interviewed by police. Ms McCabe interviewed the relevant governor, Mr Rodford, on 25 February 2010. He explained that the find had occurred the day before he was due to hold a meeting to discuss the disbandment of the Standby Search Team (SST) within the prison. The disbandment of this team was very unpopular with a group of prison officers. He found it quite a coincidence that this note should have been found just before the proposed announcement. Ms McCabe recorded that Mr Rodford told her that the police said the information they had in respect of the shooting of the police officer with which the first appellant was charged was delicate and that this would help them to build up a picture.

[94] Ms McCabe had a meeting with ACC Harris on 25 March 2010 at which she provided him with a preliminary report indicating the possibility that the note had been planted. She was told on 16 April 2010 that a decision had been made to prosecute the first appellant in relation to the notes but it appears that this information was inaccurate. Her report was not provided to the PPS for almost 4 weeks. Mr Rodford made a further statement to police on 1 July 2010 and said that the Prisoner Ombudsman's report was a snapshot of an overall conversation where a wide range of topics were discussed during a detailed interview. On 7 September 2010 the PPS decided not to prosecute the first appellant in respect of the find and in a note dated 7 October 2010 a member of the prison officers investigating staff recorded that Mr Harkness indicated that the information provided by that office clouded the waters in respect of any chance of success. In March 2011 the Prisoner Ombudsman concluded in her report that the item found in the cell had probably been planted there by a member of prison staff.

[95] Mr Rodford was the prison governor whose vehicle registration number was found on the toilet paper. He made a statement to police on 10 December 2009 in which he did not refer to his feeling that the note was planted. He explained that although he had a gut feeling that this was so there was nothing substantial to

prove that. He could not remember whether he had mentioned it to police at that stage or later. He subsequently made a statement on 22 March 2010 when he dealt with the access prison officers would have to prison cells and recorded that his decision to disband the SST was not very well received. He said that a few days after the find a member of the SST approached him and said that he hoped that the find had not unnerved him or his wife. He regarded this as an attempt to intimidate him.

[96] In rebuttal Mr Murphy read by agreement a statement from Roberta Lennox, the counselling psychologist who treated M in November 2007. She indicated that their sessions related to a relationship that had recently ended and the loss of M's job as a chef. She found M to be open and honest. He was not suicidal and was not suffering from any mental disorders. He did not display any signs of addiction and as an addictions counsellor she had been trained to identify symptoms and signs of addiction concerning alcohol, gambling or drugs.

[97] The PPS called Detective Constable McClelland in rebuttal. On 22 April 2013 he attended with Detective Constable McKee at the premises at which Z was living. Z was reluctant to speak to them but agreed to let them in. He told them that he had been contacted by the solicitor acting for the first appellant in the middle of March 2013 and arranged to meet him in early April 2013 at another solicitor's office in Lurgan. He said that he made the statement because of the persistence of the solicitor but that he had not been threatened. Z did not mention Terry McCaugherty.

[98] Detective Constable McClelland again spoke to Z with Detective Inspector Caldwell on the evening of 25 April 2013, at a car park in Moira where they met by agreement. The police officers indicated that they had concerns for his safety and also that they believed that he was withholding information. He was arrested at 18:35 hours by Detective Inspector Caldwell. He was subsequently interviewed on 10 occasions before being released in the early hours of 27 April 2013.

[99] In cross examination, Detective Constable McClelland agreed that Z let them into the house because the police indicated that he was required to speak to them. He confirmed that the affidavit was true. He was arrested on suspicion of withholding information about events between 3 and 5 April 2013. He denied that the object of the arrest was to put pressure on Z to retract his affidavit or to cross-examine him. Detective Constable McClelland indicated that his instructions prior to commencing the interview were not to talk about any of the detail contained within the affidavit. He agreed that there were questions about intimidation during the two-year period prior to April 2013 but said that this was part of the interview strategy. Z was advised that it may be necessary to search his daughter's house but

Detective Constable McClelland rejected the suggestion that this was intended to unnerve him.

[100] At one point it was put to Z that there was information that the first appellant's brother arrived in a car at the Stables bar and that Z and another gentleman spoke to him. The witness agreed that this had been put and that it was inaccurate. He stated that he had been given this account by Detective Chief Inspector Harkness but subsequently discovered that it did not accord with the CCTV.

[101] He agreed that in the final interview Z was asked questions about whether M came to his house on the night of the shooting. Z said that he could not recall if he did but that he was 90% sure that he was not there because of the previous incident in which M had been assaulted by his partner. It was put to Z at interview that this account was at odds with his affidavit which appeared to say that he was completely sure that M was not there.

[102] Detective Constable McClelland agreed that he had not put to Z in interview that his statement that he was not sure if M came to the house on the evening of the shooting had been made in the vehicle. He said that the disclosure occurred when the other officers accompanying Z were outside the car. He had not invited Z to confirm the accuracy of his notebook entry and signify his agreement. He agreed that in the course of the interviews he had not put specifics about the intimidation to which Z had allegedly been exposed because of the sensitivity of the source although Z was told that police believed that a firearm was present and the statement was made under duress.

[103] The last witness called for the PPS was Detective Chief Inspector Harkness, the Senior Investigating Officer. He said that he became aware of Z's affidavit on 12 April 2013 and at the same time became aware of a threat to Z. He directed the recovery of CCTV in Taughnevin and the Stables Bar for 4 and 5 April 2013. He sought and obtained approval for a surveillance operation in Z's house. He requested surveillance of the Stables Bar on 24 April 2013 in order to identify people meeting Z. He read the transcripts of the covert recordings on 25 April 2013 and as a result briefed Detective Inspector Caldwell to speak to Z. He rejected as untrue the suggestion that the steps taken by him were designed to sabotage the appeal.

[104] In cross-examination he said that he had no recollection as to how he came to be appointed the senior investigating officer in relation to the finding of the note in the first appellant's cell on 17 September 2009. He became aware of the note on 18 September 2009. He was not aware of the circumstances of the find in the cell or

whether it was related in any way to the murder and appointed Detective Sergeant McGrory to take forward any enquiries. As a result of that investigation there was no evidence or intelligence to link the find to the murder of Constable Carroll. Mr Harkness was leading several murder enquiries at the time as a result of which he was unable to participate in any aspect of the investigation at the prison.

[105] He rejected the suggestion that the find had not been properly investigated and, in particular, that the investigation only concerned the culpability of the first appellant. Mr Harkness said that there was no evidence to connect anyone to the note recovered in the first appellant's cell and he was not aware of the allegation that the note had been planted. He was not aware of the complaint dated 19 October 2009 made by the first appellant and had not seen the complaint before these proceedings.

[106] He was referred to the statement taken on 22 October 2009 by Detective Constable Brannigan who was one of the officers investigating this issue as part of his team. He said that he had not been sighted on the allegation that the note had been planted. He had recently become aware that a second investigation was conducted by officers at Lisburn CID and that two prison officers' homes had been searched and interviews conducted with those officers. None of those produced any evidence implicating the officers in any wrongdoing.

[107] He said that he would have reviewed the investigation when complete but was not sighted on the day-to-day conduct of it. He was aware that it was too late to obtain relevant CCTV and indeed it was already too late when the first appellant was interviewed on 22 October 2009. He rejected any suggestion that he had sought to delay the Prisoner Ombudsman's investigation. He was referred to a number of e-mails between 23 December 2009 and 15 January 2010 from the Prisoner Ombudsman's office but explained that e-mails were not coming to him because of some problems with the police e-mail system at that time. He had not directed that the Prisoner Ombudsman's investigation should not commence until a final direction was given by the PPS but understood that the decision was made by Detective Sergeant McGrory. He agreed that it would have been beneficial if there had been a meeting between the Prisoner Ombudsman and the police to establish progress and agree lines of communication. He said that he was unaware of the Prisoner Ombudsman's report which had been provided to Mr Harris on 25 March 2010 until much later.

[108] Although he said that there had been no recommendation for prosecution by police when the file was submitted to the PPS on 20 January 2010 he was referred to a copy of the file signed by Detective Sergeant McGrory which showed that a recommendation for prosecution of the first appellant had in fact been made. He

said that he was not disappointed when the PPS decided not to prosecute because he knew that there was insufficient evidence.

[109] He became aware of Z's affidavit and the threats to his life at about 4:30 pm on 12 April 2013. Shortly thereafter he asked Detective Constable Brannigan to carry out discreet enquiries based on the information which had been received. He was concerned that Z and his family and the community were in danger. He received the information by telephone and the person who made the call was guarded. It was put to him that the information suggested that Z "had been held" which suggested a threat in the past. Mr Harkness said that he launched an investigation because he was concerned about a current threat. He agreed that no PM1 had issued but said that this decision was made elsewhere and related to the threat to others from disclosure of knowledge of the information.

[110] He agreed that he had not interviewed Z before 12 April 2013 but said that the reason he had not done so initially was to conceal the identity of M. It was put to him that the identity of M became apparent in January 2011. He said that he did not wish to heighten the risk to Z or his family. He said that he had not spoken to M's partner at the time of the disclosure in April 2010 because the information was so sensitive that he could not afford to have a leak because of the risk that would follow. She was subsequently spoken to by a female police officer but was not able to assist.

[111] He was questioned about the information given to Detective Constable McClelland that Z had spoken to the first appellant's brother at the Stables Bar on 24 April 2013. He referred to an entry in the Policy Book which indicated that Z and McCaugherty had spoken into the car but agreed that the CCTV did not support that account. He said that he had reliable information that Z had been intimidated and rejected the suggestion that he had directed the arrest of Z as a last resort. He said that he had directed that the interview should not deal with the content of the affidavit but he gave specific authority to Detective Constable McClelland to ask about the matter raised in the back of the car.

Abuse of process

[112] The general principles governing the abuse of process jurisdiction were set out by Carswell LCJ in Re DPP's Application [1999] NI 106.

> "Our conclusion from our examination of these authorities is that there are only two main strands or categories of cases of abuse of process:

(a) those where the court concludes that because of delay or some factor such as manipulation of the prosecution process the fairness of the trial will or may be adversely affected…;

(b) those, like *Ex parte Bennett*, where by reason of some antecedent matters the court concludes that although the defendant could receive a fair trial it would be an abuse of process to put him on trial at all."

In determining whether to exercise the jurisdiction, Carswell LC J indicated that the following factors be considered.

"**1.** The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: *Ex parte Bennett* [1994] 1 AC 42 at page 74, per Lord Lowry.

2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: *ibid***.**

3. The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and *a fortiori* if he has admitted the offences, there may be little or no prejudice: see *Ex parte Brooks* (1984) 80 Cr App R 164 at page 169, per Sir Roger Ormrod."

[113] In respect of the note found in the cell, it was contended first that this was material that ought to have been disclosed to the appellant, as it may have assisted in undermining the prosecution case by demonstrating a mindset on the part of the police not to investigate those matters helpful to the appellant. Secondly, in any event, it represented an abuse of process of the second type in that, although it did not affect directly the fairness of the trial, it demonstrated a failure on the part of the police to conduct a fair investigation process.

[114] In order to assess that submission it is necessary to examine carefully the evidence. Although Mr Harkness appears to have become aware of the find on 18 September 2009 and allocated responsibility to Detective Sergeant McGrory it appears that Constable Close, the police liaison officer at the prison, was the person delegated to take a statement from the first appellant. In that statement the first appellant contended that the note had been planted. Detective Constable Brannigan then followed that up by interviewing Mr Rodford on 10 December 2009. In that statement Mr Rodford gave no indication that he had any reason to believe that prison staff were involved in planting the note within the cell. There is no doubt

that he held a view to that effect but he was unable to indicate whether he had communicated that to Detective Constable Brannigan. In his evidence Mr Rodford indicated that although he had a gut feeling that this was planted by the SST team he had nothing substantial to prove it other than its coincidence with some of the changes he was making to the prison.

[115] Mr Rodford was interviewed by Ms McCabe on 25 February 2010 and her note records his suspicion that the SST team were involved and the reasons for that suspicion. She clearly saw this as an important aspect of her investigation. It appears, however, that the material before her was not the same as the material available to the police when they made their recommendation in relation to the investigation in January 2010. All one can say at this stage is that the police were aware of the allegation by the appellant that the note had been planted both from the first appellant's statement and the media report, that there was no independent forensic evidence to assist, that the CCTV was no longer available and although Mr Rodford indicated in conversational terms his concerns about staff issues he was not suggesting to police at that stage that the find was not bona fide. In those circumstances it is not entirely clear what line of enquiry in relation to prison staff was appropriate.

[116] There is no doubt that Ms McCabe was concerned when she discovered at the beginning of February 2010 that police had not followed up the possibility of the involvement of prison staff. It is also clear from Ms McCabe's note of the interview with Mr Rodford on 25 February 2010 that she had a clear line of enquiry concerning the SST. She was clearly concerned the police were avoiding this line of enquiry which was why she forwarded her interim report to Mr Harris on 25 March 2010. She appears to have been unaware of the fact that Detective Constable Brannigan had interviewed Mr Rodford three days earlier on 22 March 2010 and taken a statement which recorded Mr Rodford's difficulties with staff. It appears, therefore, that although a recommendation for prosecution of the first appellant had issued from police in January 2010 they were in fact following up this line of enquiry in March 2010 prior to the receipt of the interim report from Ms McCabe.

[117] Subsequent to the receipt of the report Mr Rodford was again interviewed this time by Detective Constable McClelland on 1 July 2010. He was asked to comment on the portion of the report prepared by Mrs McCabe dealing with the SST. He said that the comments were accurate but had to be considered in the context of the meeting. The report was a snapshot of a conversation where a wide range of topics were discussed during a detailed interview.

[118] We now turn to the decision to arrest and interview Z. It was contended on behalf of the first appellant that the decision was taken in order to encourage him to

retract the affidavit which he had signed on 5 April 2013 and to prevent him giving evidence if requested to do so. Z did in fact give oral evidence when he attended in answer to the witness summons directed from this court and did not retract his affidavit. There is nothing to indicate that his evidence was adversely affected so far as the first appellant was concerned by virtue of the arrest and interview. This was not, therefore, an abuse of process arising from the adverse effect upon a fair trial and the case was not argued in that way. The argument advanced by Mr Macdonald was that the arrest and interview of a prospective defence witness so undermined the adversarial system of justice that the appeal ought to be allowed to protect the integrity of the criminal justice system.

[119] We are satisfied that police had reasonable grounds for suspecting that Z was withholding information in relation to the circumstances in which he made his affidavit on 5 April 2013. We base that not only on the direct evidence of Mr Harkness but on the audio transcripts of 21 April 2013 which referred to contact by Z with the IRA, fear that he would be shot if he did not comply with what was sought from him and multiple references to the fact that his statement was made under some form of duress. It was after reviewing the audiotapes that Mr Harkness authorised the arrest operation. There was no evidence of bad faith.

[120] The initial instruction that there should be no questioning of Z about the content of the affidavit was entirely appropriate. Detective Constable McClelland told Mr Harkness that Z had informed him while in the car alone that he was not entirely sure that M was not at his house that night. Detective Constable McClelland made a note to that effect in his notebook but did not invite Z to sign it. The Codes of Practice under PACE are designed to provide adequate safeguards for interviewees. In the circumstances we consider that, at most, Z ought to have been asked whether he admitted making the statement while in the back of the car. If he denied it no further questions on the topic should have been put. That was not done. Constable McClelland questioned Z in interview 10 about whether M was there that night without ever putting the basis for the question. We accept, however, that the question was put in circumstances where Z had the safeguard of his solicitor present and the entirety of the proceedings recorded.

[121] The rationale behind the safeguarding of witnesses is outlined by Borrie and Lowe, The Law of Contempt, where they say (at paragraph 10.2):

> "Direct attempts to deter or influence witnesses personally should be regarded as serious contempts of court. In *Littler v Thomson* [(1839) 2 Beav 129, 131], Lord Langdale MR explained that 'if witnesses are...deterred from coming forward in the aid of legal proceedings it will be impossible that justice can be administered...it

> would be better that the doors of the courts of justice were at once closed'. The aim of the law of contempt in this regard is dual in character. On one hand, it operates to defend the integrity of the legal proceedings in which the witness is participating, so as to ensure that justice is done in that individual case. On the other hand, the law serves the symbolic function of vouchsafing to the wider public that the courts offer a fair and effective means of determining disputes. Ultimately, it is a guarantor of the rule of law. It is not important whether the legal proceedings involved are criminal or civil in character. The law of contempt is concerned to uphold the due course of justice in all proceedings."

[122] In R v Kellett [1976] QB 372 the appellant was a party in an acrimonious divorce. Neighbours gave statements of evidence to his wife's inquiry agent. Upon receiving these statements, the appellant arranged for a friend to pose as a prospective tenant, speak to the neighbours and asked for their opinion of the appellant as a prospective landlord. Given what was said by the neighbours to the friend, the appellant wrote to the neighbours stating, inter alia, that he intended to commence defamation proceedings against them in relation to what they said to his friend and that they might like to send him written notification of the withdrawal of the statements of evidence. The appellant was convicted of attempting to pervert the course of justice in the divorce. In giving the decision of the Court of Appeal dismissing the appeal, Stephenson LJ considered the limits of the offence and the conduct necessary to amount to the offence. His Lordship rejected the suggestion in some textbooks that any interference with a witness is an attempt to pervert the course of justice and concluded:

> "With this authority in mind we would not consider that the offence of attempting to pervert the course of justice would necessarily be committed by a person who tried to persuade a false witness, or even a witness he believed to be false, to speak the truth or to refrain from giving false evidence.
>
> Secondly, with this among other authorities in mind, we think that however proper the end the means must not be improper. Even if the intention of the meddler with a witness is to prevent perjury and injustice, he commits the offence if he meddles by unlawful means."

[123] Stephenson LJ then went on to consider what the position might be where the offender threatens the witness with doing something which would otherwise be within his legal rights.

> "So, in our judgment, the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice by deterring a witness from giving the evidence which he wishes to give before he has given it… There may be cases of interference with a witness in which it would be for the jury to decide whether what was done or said to the witness amounted to improper pressure, and so wrongfully interfered with the witness and attempted to pervert the course of justice, and it would be not only unnecessary and unhelpful but wrong for this court or the trial judge to usurp their function. The decision will depend on all the circumstances of the case, including not merely the method of interfering, but the time when it is done, the relationship between the person interfering and the witness and the nature of the proceedings in which the evidence is being given. Pressure which may be permissible at one stage of the particular proceedings may be improper at another. What may be proper for a friend or relation or a legal adviser may be oppressive and improper coming from a person in a position of influence or authority…"

[124] In R v Evans [2001] EWCA Crim 730, however, the Court of Appeal looked at the issue of police approaching defence witnesses in the context of abuse of process rather than contempt or attempting to pervert the course of justice. In that case the appellant and others were charged with murder. The prosecution case was primarily the evidence of an accomplice who said the killing had occurred on a particular date. Neighbours of the deceased, however, gave statements that they had seen the deceased on a later date. The police revisited these neighbours, some of whom then withdrew their statements. The trial judge refused to stay the proceedings as an abuse of process. The defence called the neighbours to give evidence and the prosecution did not cross-examine them. On appeal following conviction, the Court of Appeal held:

> "[51] We have no doubt that the ruling of the judge on this aspect was right. There was nothing improper in the police revisiting the witnesses. It would be quite improper for the police to put inaccurately the evidence in order to obtain a statement or a change in a statement from a witness. However, in this case it must be remembered it is not the statement which is important, it is the evidence which is ultimately given at the trial. In the circumstances of this case original statements had been obtained, the police had revisited and possibly obtained changes in those statements, but, the defence solicitors were in a position to visit those witnesses

themselves and put to those witnesses any aspect on which they had been misled by the police…"

[125] In R v Heston-Francois [1984] 1 All ER 795, 78 Cr App Rep 209 there was an allegation that the police had interfered with the defence by approaching a potential witness for the defence. Counsel had to concede in that case that the evidence of the witness was unaffected by the approach and that the witness gave the evidence that he was prepared to give. What the court ruled was:

> "However reprehensible conduct of this kind may be, it is not, at least in circumstances such as the present, an abuse or, in another word, a misuse of the court's process. It is conduct which, in these circumstances, falls to be dealt with in the trial itself by judicial control upon admissibility of evidence, the judicial power to direct a verdict of not guilty, usually at the close of the prosecution's case, or by the jury taking account of it in evaluating the evidence before them; thus, the trial judge in the instant case had not erred in any way in refusing to hold a pre-trial inquiry and as there was no reason to suppose that the verdict was either unsafe or unsatisfactory, the appeal would be dismissed."

[126] In R v T [2008] EWCA Crim 183 the appellant's girlfriend made a complaint of rape. Whilst the appellant was remanded in custody his girlfriend visited him on a number of occasions and he also frequently contacted her. The girlfriend subsequently withdrew the rape complaint. The appellant claimed he had spoken to the girlfriend about the complaint and urged her to tell the truth. The appellant was convicted of perverting the course of justice. In quashing the conviction on the grounds the judge had misdirected the jury, the Court of Appeal quoted R v Kellett with approval stating that there needs to be meddling by unlawful means.

[127] These cases demonstrate that the courts will intervene to protect witnesses where there is any interference by unlawful means to prevent a witness giving evidence or where improper pressure is applied to a potential witness even though the threatened act is itself lawful. It is also clear from the authorities that the abuse of process jurisdiction is available to a defendant. The cases suggest, however, that the issue in abuse of process of this kind is the effect upon the fairness of the trial.

[128] These decisions must now be read in light of the decisions of the Supreme Court in R v Maxwell [2010] UKSC 48 and Warren v Attorney General for Jersey [2011] UKSC 10. In Warren the court adopted the summary of the approach to the second category of abuse of process set out by Lord Brown in Maxwell.

> "The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of the proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged."

[129] We do not consider that there is any basis for determining that there was an abuse of process of any kind in this case. For the reasons given we are satisfied that the police had reasonable grounds to suspect that Z was withholding information in respect of the making of his affidavit. We also accept the evidence that he and his family were believed to be at risk. It was necessary to effect an arrest in order to explore the circumstances of the making of the affidavit with him. There was nothing improper in effecting an arrest in those highly exceptional circumstances.

[130] We accept that Z should not have been asked questions about whether M had visited his house on the night of the shooting without in the first place establishing whether M accepted or denied making the statement attributed to him by Detective Constable McClelland. We also accept that Z was perturbed at the suggestion made in interview that a search may need to be conducted of his daughter's home in order to recover a phone. We do not consider that this amounted to improper pressure but in any event these matters fell far short of the type of misconduct which could justify a finding that this conviction was unsafe on the basis that there had been an abuse of process.

[131] We have previously considered the evidence in relation to the pursuit of lines of enquiry arising from the find in the cell of the first appellant on 17 September 2009. It is common case that the police did not pursue any line of enquiry suggesting that the piece of paper was planted in the cell prior to early February 2010. It is also clear that as a result of her interview with Mr Rodford on 25 February 2010, Ms McCabe considered that there were circumstances pointing towards the SST staff within the prison and she eventually concluded on the balance of probabilities that they were responsible. The evidence of Mr Rodford suggests, however, that his discussions with the police were informal and he was not suggesting that the find was not bona fide. We accept that more active steps

could have been taken by police to establish the identity of those SST staff who were present on the day of the search. It would also have been possible to explore with Mr Rodford any information he could have provided about such staff. It is clear, however, that such enquiries faced the difficulty that the CCTV which would have been available for up to 30 days after the incident was no longer available and that was likely to significantly hamper any progress. We do not consider that the evidence indicates a determination not to pursue this avenue. Mr Macdonald relied on the indication to Mr Rodford recorded in the record of his interview with Ms McCabe in February 2010 that police were building up a picture but the taking of the statement on 22 March 2010 before the submission by Mrs McCabe of her report on 25 March 2010 suggests otherwise. At most this amounts to an error of judgement. We do not consider that such an error of judgement gives rise to an abuse of process. Accordingly we reject the arguments on abuse of process.

Consideration

[132] We will first consider the fresh evidence given by Z. The allegations made about M's reliability where largely unparticularised. The two points that were made in relation to him were that he was a gambler and at risk of suicide. In fact the statement admitted from the psychologist, Roberta Lennox, indicates that he was not suicidal and did not display any indications of addiction. She specifically looked at addictions to alcohol, gambling or drugs and pointed out that as an addictions counsellor she had been trained to identify symptoms and signs of such addiction.

[133] The evidence given by Z about whether M visited on the night of the shooting was similarly unparticularised in various aspects. He had no independent recollection of the night of the shooting. He was prepared to accept that there was a possibility that M had visited that night although he was 90% sure that he had not. He based his recollection on the fact that he had prohibited M's partner from visiting his house after the alleged assault upon M. He was not, however, in a position to indicate when that incident occurred other than suggesting that it might have been a year before the shooting incident.

[134] In his evidence he rejected any suggestion that he had been coerced or forced into giving evidence or making his affidavit. He was cross examined about references within the audio material to contacts with the IRA. His answer was that he had made up a story which he told to his family that he had spoken to someone to stop the harassment that his family had been getting. He said that he told them this around June 2012 when a bus had been burnt outside his house. That did not, however, explain why in April 2013 he was discussing contact with the hoods/IRA and why in those discussions he and his family were discussing the possibility that

he would be killed if he did not do what was required of him. He gave no satisfactory explanation.

[135] He admitted that he made up a story when first interviewed by the police about the circumstances in which he came into contact with the first appellant's solicitors. He suggested that they had contacted him by phone in March 2013 and he gave detailed accounts of persistent phone calls. In fact it appears that contact was made through Terry McCaugherty and the meeting with the solicitors took place not in a solicitor's office but at Mr McCaugherty's house. There was no explanation as to why he would wish to prevent the police knowing about the involvement of this individual.

[136] The circumstances in which he eventually came to make and sign his affidavit were an indication of the pressure under which he felt placed. Although he said at various stages that the only pressure he had was verbal pressure from the solicitors his account included the suggestion that he had banged the table, thrown it over and indicated that the interview was finished. He said that he would have signed anything just not to see the solicitor again.

[137] The test to be applied in fresh evidence cases was set out by Lord Bingham in R v Pendleton [2002] 1 WLR 72.

> "… the House in Stafford v Director of Public Prosecutions [1974] AC 878 were right to reject the submission of counsel that the Court of Appeal had asked the wrong question by taking as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury. It would, as the House pointed out, be anomalous for the court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury. I am not persuaded that the House laid down any incorrect principle in Stafford, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty. But the test advocated by counsel in Stafford and by Mr Mansfield in this appeal does have a dual virtue to which the speeches I have quoted perhaps gave somewhat inadequate recognition. First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a

> disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

[138] For the reasons given we consider that Z's evidence is unparticularised and contradictory. The audiotapes suggest that he believed himself to be under threat from terrorists and his purported explanations for those passages were entirely unconvincing. We consider Z an unreliable witness and his evidence did not render the conviction unsafe in any way.

[139] We now turn to the grounds originally raised. The witness anonymity order in relation to M was made because of the obvious threat to him and his family. It is, of course, necessary to ensure that a defendant's fair trial rights are not violated by such an order but in this case the appellants and their legal advisers were provided with the identity of the witness and through Z were able to access extensive information in relation to him. This is an entirely different case from the anonymous witness cases considered in R v Davis [2008] UKHL 36. The evidence of this witness could be and was adequately tested and assessed. We do not consider that there was any error in the making of the order nor did it render the conviction unsafe.

[140] The appellant applied pursuant to Article 76 of PACE to exclude M's evidence on the basis that the admission of the evidence in breach of Code D would have such an adverse effect on the fairness of the proceedings that the court ought to exclude it. The decision as to whether to exclude evidence is a discretionary decision taken by the trial judge in the context of the trial as a whole and it is generally only where the decision is perverse that the Court of Appeal will interfere (see R v McKeown [2006] NICA 42). A failure to conduct an identification procedure in accordance with Code D does not of itself lead to the exclusion of the identification evidence (see R v Forbes [2001] 1 AC 473). This was a case of recognition where the prosecution maintained that the first appellant, who had a distinctive appearance, had been known to the witness for many years. The witness claimed to have seen the person identified as the first appellant on two occasions face-to-face. He claimed that he had spoken to the first appellant. The witness was cross-examined on all of that. This was not a case where the breach of the Code gave rise to the risk of a flawed identification that might arise in a stranger identification. Those reasons informed the decision not to carry out an identification procedure. This was not a case of flagrant disregard of the procedures. The prosecution also relied on supporting evidence.

[141] There was not, in our view, any proper basis upon which we could interfere with the exercise of the learned trial judge's discretion. The learned trial judge carefully set out all the frailties of the identification evidence at paragraph 44 of his judgment and the arguments advanced on behalf of the appellants at paragraph 45. He noted that this was a recognition case and the need to carefully analyse the evidence. He referred at paragraph 54 in this context to the protection in a non-jury case of an automatic right of appeal. We accept that such a protection could have carried little or no weight in a decision of this kind but the thrust of the reasoning is not undermined by this comment.

[142] When he came to assess the identification evidence at the direction stage, the learned trial judge recognised the criticisms of the quality of the identification evidence which he had already set out at paragraph 44 of his judgement. He did not express any view as to whether the identification evidence fell to be treated as poor when considering the test under R v Turnbull [1977] QB 224 but the manner in which he then looked at the independent evidence suggested, at the very least, that he considered what the position would be if the evidence was considered poor. Turnbull makes it clear that what is required as independent evidence is not corroboration in the strict sense. The learned trial judge was entitled to take into account the brown jacket with the first appellant's DNA, similar to another jacket in the appellant's home, found the following day in the boot of a car which had been a relatively short distance from the shooting. The fact that the witness was intimidated was an indication that he had been in a position to see something. The learned trial judge was also entitled to form a view of his reliability by virtue of the manner in which he differentiated between those he could identify. We detect no error in his approach.

[143] We do not accept that the learned trial judge was wrong to admit the evidence of the tracking device on the Citroen Saxo motor vehicle. A procedure was agreed between the prosecution and defence in relation to the examination of the device by a defence expert. There was no material issue about the findings in relation to those fixes determining the location of the vehicle. There was no issue as to the lawfulness of the use of the tracking device. The prosecution confirmed that no duty of disclosure arose in relation to any matter arising from the deletion of the information from the device from 1:15 AM on 10 March 2009.

[144] Mr Harvey lodged a concerted attack on the learned trial judge's acceptance of the prosecution evidence concerning the particles found on the brown jacket in the Citroen motor vehicle. It is common case that the scientific evidence indicated that the particles found on the coat were indicative of Type 7 GSR but not characteristic of such ammunition. There was also a dispute between the experts about the significance of the absence of mercury. The learned trial judge had to

weigh in the balance the scientific evidence but as he indicated at paragraph 135 of his decision on the direction application the scientific evidence has to be assessed by the jury on the basis of all of the surrounding circumstances. Those circumstances were identified by the learned trial judge when dealing with his reasons for refusing the direction application.

[145] There is nothing controversial about such an approach. The primary scientific evidence and the opinions and evaluation of the experts, are only part of the material that the jury can take into consideration in determining the significance of those findings. The jury need to place the findings within a context as the learned trial judge did. There are many examples of such an approach, of which the most recent is R v Lundrim Gjikokaj [2014] EWCA Crim 386 where evidence of gunshot residues was admitted and treated as the primary scientific evidence upon which the jury then addressed the inferences that they should draw.

[146] Precisely the same reasoning applies to the evidence of Ms Southam in respect of the DNA findings. She gave primary scientific evidence about the nature and location of the DNA and the means by which it was likely to have been deposited. It was for the jury to then apply that to the evidence as a whole in order to draw appropriate conclusions and inferences. It was not appropriate to examine the scientific evidence on its own as the only basis for the drawing of any inferences.

[147] The prosecution case was a circumstantial case. The nature of such a case was considered by Carswell J in R v Meehan, McGuigan and Thomas [1988] NICC (21 March 1988).

> "The Crown case in this trial depended very heavily upon circumstantial evidence, which has to be evaluated with the correct amount of circumspection. Where it points in one direction only, it can be a highly convincing method of proof. It is necessary, however, to beware of the possibility that it may be laying a false trail. It is incumbent upon the Crown to establish that the evidence points beyond reasonable doubt to one conclusion only, and in the process to rule out other reasonably tenable possibilities which may be consistent with the evidence. That does not mean that every fact making up the Crown case has to be proved beyond reasonable doubt."

[148] There is a helpful analysis of the approach to circumstantial evidence in R v Hillier (2007) 233 ALR 63, High Court of Australia. The case is cited as authority

at paragraph 10 – 3 of the latest edition of Archbold. The general approach set out at paragraph 46.

> "It has often been said that a jury cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances. It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence."

[149] Paragraph 48 of Hilllier then deals with the importance of ensuring that the circumstantial evidence is examined as a whole rather than piecemeal.

> "Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs CJ and Mason J said in *Chamberlain [No 2]*:
>
> > 'At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness "separately in, so to speak, a hermetically sealed compartment"; they should consider the accumulation of the evidence: cf *Weeder v The Queen*.
> >
> > Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the

> circumstances put together': per Lord Cairns, in *Belhaven and Stenton Peerage*, cited in *Reg v Van Beelen*; and see *Thomas v The Queen*.'"

And as Dixon CJ said in *Plomp*:

> "*All* the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. *I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done.*" (emphasis added) "

[150] In submissions to this court Mr Harvey on behalf of the second appellant contended that the issue was whether there was a reasonable possibility on the evidence adduced that the particles on the brown jacket found in that appellant's Citroen Saxo motor vehicle did not come from the discharge event on 9 March 2009. He based that argument on his review of the scientific evidence alone. We do not accept that submission. The learned trial judge made no finding on that issue. The issue which he had to address was whether taking all of the evidence as a whole he was satisfied that there was a case to answer on the direction application and subsequently that he was satisfied beyond reasonable doubt on all the evidence that the appellants were guilty of the offences charged against them. That necessarily required him to conclude that their guilt was the only explanation compatible with all the evidence. That is what he did at paragraphs 134 and 135 in relation to the direction applications and at paragraph 157 on the case as a whole. At that stage he was entitled to take into account the adverse inferences that could properly be drawn from the failure of the appellants to give evidence. It is clear that those inferences were specific and supported by the evidence and the judge was entitled to draw them.

[151] It was not necessary for him to determine the role that each of the appellants played. This attack was clearly an operation which required considerable logistical support as recorded by the learned trial judge paragraph 141 of his conclusions. There were a number of others involved apart from those who were directly involved in firing the weapons. The surrounding circumstances set out at

paragraphs 31 to 35 above in our view formed a compelling case that each of these appellants was guilty of the offences with which they were charged.

Conclusion

[152] For the reasons given the appeals are dismissed.