Neutral Citation no. (2000) 2128

Ref: NICC3072

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

Delivered: 29/09/00

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MICHAEL COLM CARAHER AND
BERNARD MICHAEL McGINN

NICHOLSON LJ

Introduction

On 19 March 1999 the appellants were convicted at Belfast Crown Court by Carswell LCJ sitting without a jury under the Northern Ireland Emergency Legislation.

Michael Colm Caraher was convicted of possession of rifles and ammunition with intent to endanger life, of possession of property in connection with terrorism and of possession of articles useful to terrorists and of conspiracy to murder in respect of an arms find at Creggandduff Road, Crossmaglen, Co Armagh on 10 April 1997. He was also convicted of the attempted murder of Constable Ronald Galway at Forkhill, Co Armagh on 29 March 1997. Bernard Michael McGinn was convicted of the same offences as Caraher in respect of the arms find. He was also convicted of three murders and other serious terrorist offences in south Armagh. Caraher was sentenced to a total of 25 years' imprisonment. McGinn was given three life sentences and fixed terms of imprisonment

ranging from 20 years' to 7 years' imprisonment. Both of them appeal against their convictions and sentences.

The arms find at Creggandu ff (Counts 1 to 6)

A The geography of the area

The area with which this part of the case is concerned is about two and a half miles from Crossmaglen, Co Armagh (see the location map, Exhibit 20). Numbers 11 and 10 Creggandu ff Road, Crossmaglen, are two separate sets of premises adjoining the Creggandu ff Road. The former comprises a dwelling-house and outbuildings grouped around a large yard, access to which is gained through a pair of high wooden gates which are capable of closing off the entrance to the yard and an adjoining laneway. This laneway runs past the side of the dwelling-house and separates No 11 from No 10. The occupiers of No 11 are Mr Michael Kearns (senior) and his son, Michael Kearns. Immediately to the right of No 11 (as one goes towards Crossmaglen) is No 10 which consists of a modern dwelling-house with an entrance by a driveway a short distance to the south of its farm buildings. The house is occupied by Mr Lawrence Kearns, a brother of Mr Michael Kearns. The farm buildings of No 10 consist of a large corrugated iron shed or barn. The barn faces onto a concreted forecourt bordering the road. As one faces the barn from the road there are two sections with arched roofs; the third section to the left is of lean-to construction. The only access to the forecourt from the road is by a pair of substantial green metal gates.

The arrival of soldiers and police

On 10 April 1997 at approximately 2 pm two vehicles forming an unmarked

military patrol were operating on or near the Creggandduff Road. Each of these vehicles contained eight soldiers armed with rifles. The two soldiers in the front of each vehicle were in plain clothes. The other six were in uniform. Having passed No 10 the patrol turned in to the entrance to No 11. The gate of No 11 nearer number 10 was found to be open and led into the laneway dividing the two sets of premises. The gate to the left-hand side leading into the yard of Number 11 was found to be partially ajar. The green metal gates giving access to the forecourt of No 10 were found to be closed and barred on the inside; a chain was hanging on the inside of the gates with a padlock attached but open.

Police arrived at the scene shortly after the soldiers. The laneway runs past the side of the dwelling-house at No 11. (Outbuildings of No 11 are correctly numbered 3, 4, 5, 6 and 7 on Map 20B; the building numbered 8 is in fact the dwelling-house and the building numbered 9 is an outhouse.) There is a gap between outbuildings numbered 3 and 4 of No 11. At the point marked M on Map 20B were found a pair of dirty white gloves. Behind No 11 was found a blue hat amongst gorse bushes.

In the right-hand bay of the barn belonging to No 10 parked near the back and facing towards the doorway was found a stolen Mazda 626 motorcar. The registration plates were false. The car, originally maroon, was painted blue. In it was a CB radio in working order switched on to channel 26. There was also a hand-held battery powered transceiver.

Behind the rear seat of the car was found an elaborate metal device intended for use as a firing platform for a gunman firing a rifle from the rear of the car with the tailgate propped open and the hatch raised. When he had fired, the hatch and tailgate could be closed very quickly and the steel plates forming part of the firing platform would then

protect the occupants of the car from return fire. Cartridge discharge residues indicated that a weapon had been fired from the rear of the car.

In the forecourt in front of the barn was a silver Ford Sierra belonging to Michael Mines, a co-accused of the appellants. It had had false number plates at one stage. In the front of this car were a CB radio switched on to channel 26, a radio and a mobile telephone which was switched on. Traces of PETN, one of the components of explosives such as Semtex were found in the boot of the Sierra. On a bale of straw in the central compartment of the barn another mobile telephone was found switched on.

Both CB radios operated over a distance of ten miles and both mobile phones were capable of operating in the area close to the border. When a CB radio is switched on initially, it switches on to channel 9, not channel 26. Neither mobile phone was capable of making outgoing calls. They were only capable of receiving incoming calls. The CB radios were found to be capable of transmitting and receiving on their forty channels.

Parked inside the centre part of the barn was a small cattle trailer, with a layer of straw on the floor. One wheel was missing and the axle on that side showed signs of damage. There was a scoremark leading in a curve from the front of the barn out of the forecourt and along the road in a northerly direction for some 216 yards, from which the judge concluded, and we agree, that the trailer had been towed for that distance at least into the forecourt of No 10 with the wheel missing and the axle in contact with the ground. The trailer was examined in detail on 11 April 1997 and a hidden compartment was found under the floor. In that compartment there were two rifles, an AKM and a Barrett .50 inch calibre rifle fitted with a magazine containing three rounds of .50 ammunition and with a telescopic sight. A woven sack and brown bag were also

found in the compartment. In addition 50 live rounds of .50 ammunition designed for use in Barrett rifles were found. All were almost certainly capable of being successfully fired and some were successfully test fired. In addition there were twenty-six spent tarnished brass .50 calibre cartridge cases which had been discharged in the Barrett rifle. All or almost all the ammunition was found in the sack and the bag. The Barrett rifle was American made and was a model 90 bolt action rifle. It showed signs of having been fired and not cleaned. In addition a 7.62 x 39 mm calibre model AKM self-loading rifle was found which when test fired functioned correctly. There were other items found.

When the trailer was examined it was found that the wooden panel (under which the hidden compartment was found) was attached to the frame by only one bolt and nut. Two balaclavas, one black and one khaki, were found in the compartment.

Inside the barn belonging to No 10 Martin Mines, James McArdle and the appellant McGinn were found by soldiers. They were close to the Mazda car and the trailer and the Ford Sierra was just outside the barn. One of them at least seemed extremely surprised when he was challenged by one of the soldiers. We infer that the men in the barn did not see or hear the soldiers as they arrived. They resisted arrest.

The evidence of soldiers I and N was in summary that when soldier I dismounted from the front of his vehicle he saw no-one in the yard of No 11; soldier N shortly afterwards noticed the appellant Caraher moving between building 3 and building 4 (on Map 20B) at the far end of the buildings to his left and shouted "Runner". Soldier I said that he then caught a glimpse of him and they both set off in pursuit; he ran off alongside the outbuildings of No 11, passing the spot marked M at which the dirty white gloves were found and made for gorse bushes in a field behind No 11; he was wearing a blue cap

which fell off; he ignored calls to stop but was eventually arrested by the two soldiers at the gorse bushes; he also resisted arrest; the evidence was that he was asked his name and he gave his name as Kearney or Cairns (Kearns); that he was asked to account for his presence at the farm complex and was asked why he ran off; that there were some discrepancies between the evidence of soldiers I and N but both denied that he gave his name as Caraher and denied that he said he was there to see Cairns (Kearns). Soldier N said that he stated that he was a farmer.

Constable Irwin who arrived shortly afterwards said that he asked the appellant what he was doing there and why he ran off, why he was dressed the way he was on such a warm day and why he was hiding in the whinbushes; a prayer card was found on him with the name "Michael" on it and he was asked whether his name was Michael but he did not answer. He was taken to Gough Barracks and there, for the first time, he gave his name as Michael Caraher, 58 Kiltybane Road, Cullyhanna. In cross-examination the constable agreed that he asked the appellant his name on several occasions and it was implicit that the appellant did not answer except at Gough Barracks. At the barracks a spanner was taken from Caraher's property and given in to the Forensic Science Laboratory. A spanner was also taken from McArdle and given in to the Forensic Science Laboratory. Both spanners were of an appropriate size to remove nut from the bolt which secured the front panel of the trailer. In cross-examination it was stated that they were a very common size of spanner in respect of automobile work.

Dr Ruth Griffin gave evidence that she received clothing of the appellant, Caraher, which consisted of a blue/green jacket or anorak, a grey and blue patterned pullover, a pair of black denim jeans and a pair of khaki-coloured overalls. The evidence indicated

that he was wearing two sets of clothing. This explains the question put by Constable Irwin to him as to why he was dressed the way he was on such a warm day. Other co-accused were wearing two sets of clothing, according to the Crown evidence.

Three fibres indistinguishable by comparison microscopy from the constituents of the pullover of the appellant Caraher were found on the dirty white gloves. They were also indistinguishable by microspectro-photometry and IR. This supported the proposition that the pullover had been in contact with the gloves. Six fibres which were indistinguishable by comparison microscopy from the gloves of the appellant McGinn (which he was wearing, when arrested) were found on these gloves. A fibre that could have come from the hat worn by the appellant Caraher was found on these gloves. Two fibres which could have come from the appellant McGinn's gloves were found on the appellant Caraher's overalls and a fibre which could have come from the pullover of the appellant Caraher was found on tapelifts from the Mazda car. Dr Griffin stated that these latter findings weakly supported contact between the overalls and McGinn's gloves and between the pullover and the car.

In cross-examination by Mr Harvey QC on behalf of the appellant Caraher, Dr Griffin accepted that a small number of fibres (one, two or three) gave rise to the reasonable possibility of contamination, of secondary or tertiary transfer and of an adventitious finding, of a less recent contact or fleeting contact which was recent. She agreed that they all had to be considered. Mr Harvey also raised the question of contamination where the same Scenes of Crimes Officer was involved with different items at different times. Her reply was:

> "If all the precautions had not been taken that would reduce [the confidence that a scientist could place in his finding as to

how contact occurred]."

There was no evidence that the Scenes of Crimes Officers failed to take appropriate precautions.

Dr Griffin illustrated the links between the appellant McGinn's gloves and other items. His co-accused McArdle's head hair sample, jacket and overalls had one, two and six fibres respectively which could have come from the gloves. We have already referred to the fibres from his gloves relating to his co-appellant Caraher. Fibres which could have come from his gloves were found on Mines' shirt. Six fibres which could have come from the gloves were found in tapelifts from the front panel of the trailer. More than 18 fibres which could have come from the gloves were found on a tapelift from the seat of the Mazda car. Six fibres were found in the rucksack concealed in the trailer; more than ten fibres were found on one of the balaclavas in the rucksack. Transcripts of Mr Harvey's cross-examination and of Mr McCrudden QC's cross-examination on behalf of the appellant McGinn were made available to this court and we have taken them into account.

The learned trial judge's conclusions on the arms find

These were as follows:-

> "The case against each defendant has to be looked at individually on the evidence admissible against him. It is necessary also to look at the overall factual situation as the soldiers found it in the barn and the forecourt, in order to see what inferences may properly be drawn which affect all defendants. The Crown asked the court to draw the inference that the facts showed quite clearly that an operation was in course of preparation or execution to shoot a member of the Security Forces. It was argued on behalf of the defendants that this could not be properly be inferred, but I consider that it can and should be inferred from the facts. There was a trailer in the barn with weapons concealed inside it. One of

them was a sniper rifle, designed for accurate shooting over a distance with a small number of large-calibre bullets. There was a stolen car with false number plates which had been painted blue instead of its original colour of maroon. It was equipped with a steel plate which made it into a mobile firing platform and would enable a sniper to operate from inside the vehicle. Cartridge discharge residues found tended to show that a weapon had at some time been fired inside it. There was a history in the area of sniper attacks with large-calibre rifles on members of the Security Forces. There was another car in the forecourt which had previously had false number plates fitted, and those plates were on the scene close by. In the cars were CB radios, switched to the same channel and ready for use, and there was a mobile telephone in one car and another in the barn, also switched on and ready for use. In these circumstances the inference seems to me irresistible that those persons who were associated with the vehicles and weapons had prepared and were ready to put into action an operation to shoot another member of the Security forces by means of the Barrett rifle mounted in the Mazda car. I am satisfied that this was what was afoot.

The issue then is whether any of the defendants was associated with this operation. Each of them has asserted that he was there for an innocent purpose, though none gave evidence in the trial to verify these assertions. Before I examine the case against each of them on the evidence, I would observe that there are certain facts and considerations from which an inference may arise that persons on the scene in these circumstances were likely to be associated with the unlawful activity which was or had been going on there:

1. Four men in or near the barn had arrived at the same time, from different places. McArdle and McGinn both said that they were there to give Mines a hand to get a car which he claimed to be taking in payment for a debt, though McGinn's stated reason was on his own admission false. They all happened to be there just at the time when the Army arrived.

2. The trailer would appear innocent to a person with no knowledge of the hidden cargo, but the steel plate in the Mazda car would be a readily visible and obviously unusual feature which it would be hard to overlook.

3. It is extraordinarily unlikely that if terrorists with

whom the defendants had no connection had prepared the scene for the operation, ready to receive a message and move out for a shooting, and four innocent men turned up, the terrorists would leave the scene and leave their weapons and vehicles unattended and either hide themselves or make their escape. I find it impossible to believe that in this area such a thing would happen on the arrival of such strangers.

4. The gates were barred from the inside. If those who were found on the scene had not barred them, it means that they all had made their way into the forecourt, which involved climbing over a wall or going by a roundabout route through fields to get there. It is very difficult to suppose that these four people who had casual business with the occupier would all make their way to that part of the property.

These factors tend to discredit the whole defence scenario that all four defendants found on the premises had arrived innocently on the scene of a terrorist operation. It remains possible in principle, however, that any one or more of them could have done so innocently, while the others are making a false case to that effect. It is therefore necessary to examine the case of each defendant separately and assess the evidence admissible against him and the considerations which may be advanced in his favour."

He then dealt with Mines and McArdle. He dealt with Caraher as follows:

"**Michael Colm Caraher**

The material factors in Caraher's case, in addition to the general factors 2 and 4 above, are as follows:

1. He ran away and tried to escape from the soldiers. It was suggested that he may have been afraid of an armed man in civilian clothes. That explanation is not in my opinion at all likely, for I accept that the soldiers shouted who they were and that Soldier N was plainly a uniformed soldier.

2. He gave the false name of Kearns. This has been challenged, but the challenge has not been sustained. I consider that the chances of Soldier N's having mistaken 'Caraher' for 'Kearns' are remote.

3. He was wearing overalls over other clothes, although it

was a warm day.

4. He had a spanner in his pocket which fitted the nut on the bolt securing the sliding panel on the trailer. The case was made that he was likely to carry a spanner, being a mechanic, but no explanation has been given why it should have happened to be the same size as that nut.

5. Fibres from McGinn's gloves were found on his overalls, and fibres from Caraher's own pullover were found on the white gloves found behind the barn. The first shows a connection with McGinn and the second with items with which he would not ordinarily have had contact as a casual business caller. No explanation has been offered for the finding of these fibres.

6. A call had been made on 4 April from the mobile telephone found on the straw bales in the barn to the number of Caraher's house.

7. He gave a detailed written statement, but did not explain in it why he was on the premises, other than to say that he went to see Mickey Kearns. When asked in interview about this he stated that he was contemplating starting up a business of baling, though he had no machinery and no other customers.

8. Caraher did not give evidence to support his story or explain the facts which required explanation, notwithstanding having been advised that the court could draw inferences if he failed to do so. In my judgment the inference to be drawn is clear, that he could not if he gave evidence substantiate his story, which is not only unconvincing but altogether false, or explain those facts.

The Crown case against Mines, McArdle and Caraher was made up of a multi-stranded skein of facts, if one may slightly adapt Pollock CB's metaphor. If one takes each of these facts on its own, it might be argued, as the defendants' counsel contended, that no single fact gives rise to a sufficiently strong inference of guilt to enable a court to be satisfied beyond reasonable doubt that it implicates any individual defendant in the possession of the arms and other items found in the farm complex at Creggandduff Road. When one takes all these facts together, however, after weighing and assessing them critically and making all proper allowance for any facts or

> possibilities consistent with innocence, takes into account the inferences arising from the failure of each to give evidence, and looks at the totality of the Crown case against each, I consider that they point overwhelmingly to the conclusion that each of these three defendants was involved in the terrorist operation being mounted from the farm complex at Creggandduff Road. None of the facts established in evidence was in my opinion sufficiently inconsistent with that conclusion to raise a doubt about its validity."

I am therefore satisfied of the following matters:

> " **1.** Caraher, Mines and McArdle were each in possession of the rifles and ammunition with intent to endanger life.
>
> **2.** They were each in possession of the Mazda car and the trailer, intending that they should be applied or used for the commission of or in furtherance of or in connection with acts of terrorism.
>
> **3.** They were each in possession of the articles specified in count 3 of the indictment in circumstances giving rise to a reasonable suspicion for a purpose connected with the commission, preparation or instigation of acts of terrorism.
>
> **4.** They all conspired together with McGinn to murder a person or persons unknown.
>
> I accordingly find each guilty on counts 1, 3, 4 and 5."

The judge dealt separately with the appellant McGinn by reason of his admissions. But the circumstantial evidence against him was as strong as or stronger than the evidence against Mines and McArdle and we are sure that he would have convicted him on this evidence. No submission of any consequence was made on behalf of McGinn in respect of the circumstantial evidence against him.

Interviews by CID detectives with the appellant Caraher commenced under caution on the evening of 10 April 1997. He refused to answer any questions about the arms find. In further interviews he adopted the same tactics until 13 April 1997. A

prepared statement signed by him was then handed in. It is set out in the judgment.

He was interviewed at 8.38 pm that evening, shown the statement and was asked a number of questions which he answered. The questions and answers are set out in the judgment.

It is unnecessary to set out the grounds of Caraher's appeal in respect of the arms find as they were fully covered by Mr Harvey QC in his skeleton argument and orally to this court. It was accepted that the general factual background to the arms find and the associated police and military operation were to be found within the judgment.

It was submitted that the judge relied upon two general factors and eight specific factors, but did not indicate the relative weight of these factors or how many were needed to cross over the threshold of guilt (paras 5 and 6). We do not accept that a judge is required to do so, when giving reasons in a 'Diplock' judgment: see, for example, ***R v Thain*** (1985) 11 NIJB 31 at p 60:

> "Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning to be carried out in sealed compartments with no inter-communication or overlapping even if the need to arrange a judgment in a logical order may give that impression. It can safely be inferred that, when deliberating on a question of fact with many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognise the issues and (b) view in the entirety a case where one issue is interwoven with another."

The finding that those persons who were associated with the vehicles and weapons had prepared and were prepared to put into action an operation to shoot a member of the security forces by means of the Barrett rifle mounted in the Mazda car was not challenged. It was contended on behalf of Caraher that the only three persons who could

be so associated were McGinn, McArdle and Mines who were found in the barn belonging to No 10, whereas Caraher was first seen between outbuildings 3 and 4 of No 11.

Caraher was first seen there but in his written statement made on 13 April 1997 he said:

> "On 10th April 1997 ... I walked along the Creggandduff Road past what could be said to be the first two entrances to the Kearn's property and I entered through the third entrance and went to the house where Mickey and his father live ... I then walked across the yard between two sheds to look down the field to see if Mickey was down the field ... ."

The judge was satisfied and we are satisfied that this statement made by Caraher was untruthful as will become apparent later in this judgment. But by his own admission he was in the laneway a very short distance away from the barn shortly before the soldiers arrived. He was then near the barn which contained the Mazda car and trailer and close to the Ford Sierra and later gave a false reason for being where he was found by the soldiers. Three other persons were in the barn of whom one (the appellant, McGinn) was in our opinion forensically linked with Caraher as later discussed in this judgment. McGinn was inextricably linked with the Mazda car and the trailer.

It is a short but inescapable step to link Caraher with the barn, the Mazda car and the trailer. However the observation made at p 52 of the judgment that the steel plate in the Mazda car would be a readily visible and obviously unusual feature which it would be hard to overlook does not apply with the same force to Caraher as it does to the other three men found in the barn, as Mr Harvey properly contended. It is a strand in the rope against him but not as strong as it is against the other three men who were convicted. On the other hand the third general observation made by the judge seems to us to be a

forceful point. It applies more strongly to the men in the barn but, having regard to our observations about Caraher's statement and the forensic evidence linking him with McGinn, it is a strand in the rope against him. Again it is not as strong against Caraher as it is against the other three men who were convicted. It was not expressly relied on by the judge, but he could have relied on it.

We do not find the fourth observation about the gates as supportive to the same extent against Caraher as it is against the other three men. But the forensic evidence supports the link between Caraher and McGinn and in turn supports the link between Caraher and the vehicles. Caraher appears to have treated Nos 11 and 10 as a farm complex, to judge from his statement to the police and must have known that the gates of No 10 were closed.

In our view, however, the judge rightly stressed that it was possible in principle that any one or more of those arrested could have arrived innocently on the scene of a terrorist operation and rightly went on to examine separately the case against each of the accused.

In so far as he referred to the "general factors 2 and 4" we have indicated that these factors are not as strong against Caraher as against the other three men who were convicted. But he could have expressly strengthened this case against him by using general factor 3. Mr Harvey did not seriously challenge what the learned trial judge described as a material fact that Caraher ran away and tried to escape from the soldiers. We agree with him that the explanation for running away from the soldiers contained in Caraher's statement was false, that he falsely claimed that he gave his name to them as Caraher and that he falsely said that he was at the scene to see Michael Kearns (junior).

His story does not bear examination as his answers in the interview following the making of the statement demonstrate. We conclude that anyone who had an innocent explanation for his behaviour, when confronted with the arms find, would have given it.

Although Mr Harvey argued forcefully that the inconsistencies between soldiers I and N should lead this court to hold that Caraher may have given his correct name to them, their evidence, the evidence of the police at the scene and the absence of any evidence from Caraher lead irresistibly to the conclusion set out at paragraph 2 of the material factors referred to in the judgment at p 56.

We agree with Mr Harvey that there was no express evidence that 10 April was a warm day. But this was put to Caraher on several occasions (including at the scene) and was not disputed by him. It was, arguably, not as strong a factor as might appear from reading the judgment.

As McArdle had a spanner which fitted the nut on the bolt securing the sliding panel on the trailer, as it was agreed that such a spanner was common and as Caraher was described as an unemployed mechanic by a police officer, we do not attach as much weight to the finding of the spanner on Caraher as would otherwise be the case. But it was a strand in the rope against him because he was linked with McGinn who in turn was linked with the barn and we are satisfied that Caraher was wearing dirty white gloves shortly before his arrest.

The judge referred to fibres from McGinn's gloves which were found on Caraher's overalls and fibres from Caraher's own pullover found on the white gloves. He did not expressly refer to the fact that Caraher ran past the place where the white gloves were found. However there is no evidence that any of the other co-accused was anywhere near

that place. In our view the irresistible conclusion is that Caraher dropped the white gloves at that place. The judgment did not expressly refer to the fact that six fibres similar to the fibres on McGinn's gloves were found on the white gloves. But all this evidence was before the court. This forensic evidence supports the view that McGinn and Caraher were linked and other evidence indicates that McGinn was inextricably linked with the Mazda car and the trailer. Notwithstanding Mr Harvey's cross-examination of Dr Griffin and his submissions to this court we find the forensic evidence (in combination) so powerful a strand in the rope against Caraher that the weaknesses contended for by Mr Harvey in respect of other factors give us no concern. We accept that the judge was wrong in relying on a telephone call supposedly made to Caraher's house from the mobile phone in the barn on 4 April 1997 (material factor 6).

The material factor referred to at 7 (of the judgment) confirms the conclusion that he was justified in rejecting out of hand Caraher's written statement and answers to questions following the making of the statement.

In ***R v Gibson and Lewis*** (1986) NIJB 1 at p 29 this court stated:

> "Therefore, the question which arises may be stated in these terms: if a judge states a number of reasons for convicting an accused and if he states that one reason is, or two reasons are, the main reason or reasons, and then states other reasons, and it then transpires on appeal that a main reason or the main reason is invalid, does it follow that the conviction is unsafe and unsatisfactory?
>
> In considering this question we are of opinion that where the judgment of a trial judge in a Diplock Court contains a defective and erroneous finding the position is broadly akin to a misdirection of fact by a trial judge to a jury. Where there is such a misdirection of fact the test in determining whether the conviction is safe and satisfactory is whether the jury would inevitably have convicted if the summing-up had not contained the misdirection ... ."

Despite Mr Harvey's submission that there was no case to answer at the close of the Crown case, the judge rejected the submission and in our view there was a strong prima facie case against Caraher for the reasons which we have already discussed. Accordingly the judge was entitled to draw the inference from Caraher's failure to give evidence that he could not substantiate the story which he told the police and that it was not only unconvincing but altogether false and that he could not explain the facts which pointed towards his involvement in the arms find.

Accordingly we are satisfied that the convictions of Caraher on Counts 1, 3, 4 and 5 are safe. We have already stated that the circumstantial evidence against the appellant McGinn on Counts 1 to 5 justify his convictions on Counts 1, 3, 4 and 5. Accordingly we consider that these convictions are safe.

<u>The attempted murder of Constable Galwey at Forkhill, Co Armagh (Counts 7 to 11)</u>

B The facts of the case

We gratefully adopt the summary of the facts set out in the judgment at pp7, 8:-

> "Constable Ronald Galwey left Forkhill RUC Station on 29 March 1997 at 11.40pm approximately, as a member of a joint RUC/military foot patrol made up of a number of soldiers, another constable and himself. He was just short of the junction of School Road and Main Street when he was struck in the right hip area by a bullet fired from a high velocity weapon. Major Bathurst though from the flash which he saw that the shot came from the direction of Carrickasticken Road. Constable Galwey was taken to hospital, where he was treated for an intertrochanteric fracture of his right femur. The torch which he had been carrying was examined by Mr Leo Rossi of the Northern Ireland Forensic Science Agency, who found that a .50 inch bullet fitted the groove scored in the torch in the incident, which gave some support for the conclusion that a bullet of that calibre caused his injury.
>
> Earlier that evening three masked men had invaded the home

> of Gerard and Paula Sheridan at 13 Carrickasticken Road and held them for some time against their will. They said that they were from the IRA and one had a rifle. The man with the rifle and one of the other men went out through the back door, leaving one to watch the Sheridan family. Bout 11.45pm the Sheridans heard a loud bang outside, following which the men departed in their car.
>
> It was later found that a dog kennel in the back garden had been moved along to a position near the corner and a crate placed on top. A coping stone had been removed from the garden wall. Footprints were found on the roof of the kennel and examined by George Johnston of the Northern Ireland Forensic Science Agency. He compared them with the prints made by the soles of the boots which Caraher was wearing at the time of his arrest. He expressed the opinion as the result of his examination that it was conclusively established by the pattern and pattern dimension and by specific features attributable to areas of damage on the soles of the boots that the footprints on the roof of the dog kennel were made by Caraher's boots. He prepared comparison photographs from which I was able to examined for myself the footprints and the pattern of the soles of Caraher's boots. From that examination and Mr Johnston's evidence I am satisfied that the footprints on the dog kennel roof which were the subject of comparison were made by the right and left boot taken from Caraher after his arrest."

This summary was based on the evidence of Constable Galwey, Constable Cochrane, Army Sergeant Price, Major Bathurst, Lieutenant Corporal Furlong, Martin Luscas, Dr Brown, Detective Constable Gowring, Constable Johnston and George Johnston (a forensic scientist) and the statements of Seamus, Gerard and Paula Sheridan (made for the purposes of the Preliminary Inquiry and set out at pp 144, 113-116 and 117-119 respectively of the Preliminary Inquiry Papers). In addition a map of the area prepared by Constable Simpson and a set of photographs taken by Constable McAteer enabled the judge and this Court to follow the factual situation.

The conclusion of the learned trial judge

There were set out at pp 59,60 of his judgment. They are short and to the point:

> "I am satisfied that the shot which struck Constable Galwey was fired by a gunman standing on the roof of the dog kennel at the back of the Sheridan's house 13 Carrickasticken Road, Forkhill. I am satisfied that the footprints found on the roof of that dog kennel wee made by the boots which were being worn by Caraher at the time of his arrest on 10 April 1997. The written statement made by Caraher on 15 April 1997 was entirely false. While unable to dispute that Caraher had stood on the roof of the kennel at some time, his counsel argued that the Crown had been unable to establish that he had done so at the time of the shooting of Constable Galwey on 29 March 1997. he further submitted that since the case against Caraher was so slender it would be wrong to draw an inference from his failure to give evidence.
>
> I do not accept this submission. There was nothing from which one might suppose that other people might have stood on the roof of the kennel for other purposes at other times. Nor was there anything which might explain how Caraher's footprints could have got on to the roof at some other time. He did not put forward any suggestion to this effect in his written statement handed in on 15 April 1997 and he did not give evidence at trial. I consider it justifiable in these circumstances to draw the inference, which in my view is obvious, that he did not give evidence because he could not produce any explanation consistent with innocence for the finding of his footprints on the roof of the dog kennel.
>
> I am satisfied that Caraher was the gunman who fired the shot at Constable Galwey on 29 Arch 1997 and wounded him. It was probably fired from a .50 inch calibre rifle, and I am satisfied that it was fired at Galwey with the intention of killing him. I find Caraher guilty on count 7. Count 8 involves a lesser intent and should be regarded as an alternative, accordingly I do not make any finding on it. I find him guilty on count 9, possession of a rifle and ammunition with intent, and counts 10 and 11, false imprisonment and Gerard and Paula Sheridan."

Submissions before this court

Mr Harvey QC challenged the conclusion that the shot which struck Constable

Galwey was fired by a gunman standing on the roof of the dog kennel at the back of the Sheridans' house. He pointed out that there was no forensic evidence to indicate that the firing point was at the back of the Sheridans' house.

In our view the absence of forensic evidence is not significant. One would not have expected firearms residues to be detected as the firing was in the open air. Cartridge cases are frequently collected by terrorists in order to conceal the firing-point and to prevent the police from establishing that a particular gun has been used to commit a crime.

An illustration is afforded by the finding a fortnight later of a Barrett 90 bolt action rifle at Creggandуff, Co Armagh, not far from Forkhill; it fired .50 ammunition and had a telescopic sight. With it, apart from live ammunition suitable for use with it, 26 spent .50 cartridge cases were found which had been discharged from it. In addition three spent .50 cartridge cases were found which had been discharged from another Barrett 90 rifle.

Mr Harvey argued that the firing-point could have been at some place other than at the back of the Sheridans' house. We consider that there would have been no need to take over the Sheridans' house and hold them captive for about three and a half hours until Constable Galwey became a target for the gunman, if the firing-point was elsewhere. The irresistible inference is that the shooting was to take place from within their garden.

The photographs and the map reveal that the only firing point in the garden was from the top of the dog kennel. If one did not stand on it one could not fire downwards to the position at which Constable Galwey was shot. Photograph 4 of the album of photographs (Exhibit No 14) shows where Constable Galwey was shot and one can see the Sheridans' house behind the large tree in the middle ground and to the left of two

other houses: see also photograph 24. These photographs demonstrate that the gun had to be in a position so as to fire down from the top of the wall of the garden.

Photographs 28 to 35 show that the only place in the garden from which the shooting could be successful, without exposing the firer, was from the top of the kennel. Photograph 34 shows the view which the gunman would have had from the top of the kennel and photographs 35 to 38 show a dislodged coping-stone. One can see that the gunman having dislodged it would have had a flat surface on which to rest his weapon.

Mr Sheridan told the Court that the kennel had been moved from a position about midway along the wall to the corner. It is an unavoidable inference that this was done whilst the Sheridans were kept inside their house; otherwise some member of the household would have detected that it had been moved from its original position and that, therefore, there had been an intruder. At the time when Constable Galwey was in a position to be shot from the top of the wall the Sheridans heard a noise. We are satisfied that this was the sound of the shot which nearly killed Constable Galwey.

The evidence of the forensic expert, Mr G Johnston, conclusively endorses the finding that the bootprints found on the roof of the dog kennel were made by the right and left boot worn by the appellant on 10 April 1997 as the judge held.

Mr Harvey took issue with the finding of the judge that counsel was unable to dispute that Caraher stood on the roof of the kennel at some time and referred us to his submissions at the trial in the course of which he contended otherwise. He argued before this Court that the sole print of the boots might have been placed on the wooden board forming the top of the kennel before it was used as part of the kennel. We consider this argument to be based on speculation and as the outside of the kennel was painted white

before the prints were placed on it, it seems to us fanciful to suppose that the top of the kennel was painted white before the kennel was made.

He also contended that someone else may have used the appellant's boots to stand on the kennel and argued that the judge wrongly used Interview No 27 against him. Even if the judge placed some weight on the answers contained in Interview No. 27 to the question "Does anyone else were them"? Answer: "I don't think so, no", and we do not know whether he did, in our view the judge's approach would not have differed if he had been told that the interview had been agreed by counsel to be omitted from the evidence. (It is apparent from the transcript that this was agreed but the judge was not told expressly that this was so.) There would then have been no statement from the appellant about the boots other than the statement given in by his solicitor on 15 April.

The appellant was told that a bootprint from his left boot had been found on top of the dog kennel at an interview beginning at 4.07pm on 15 April. He was also told of the details of the incident and shown photographs of it at that interview. At 10.20pm on that date Detective Inspector Mairs spoke to him in the presence of his solicitor, read to him an Article 5 caution in respect of the pair of boots which the appellant was wearing when arrested on Thursday, 10 April and informed him that he believed these boots and their sole prints might be due to his involvement in the offence of attempted murder of Constable Galwey.

A statement in the handwriting of his solicitor and signed by the appellant was given to the police by his solicitor later on the same day. In it he stated:

> "The boots which I was wearing at the time of my arrest are mine and I bought them some months ago from Benny Cregan, a merchant of Glasdrummond. Mr Cregan has supplied me and many others whom I now with this and

> exactly similar boots over the years. There is nothing peculiar about my boots which are in mass circulation and worn by many people in the area where I live and beyond. I have never been in, at or around 13 Carrickasticken Road, Forkhill nor have I ever been involved in an offence of attempted murder from the location or elsewhere. … I was asked by police where I was between 8.15pm and 11.40pm on 29 March 1987. I have no immediate recollection of my whereabouts that evening although I undoubtedly will be able to advise police of precisely where I was and with whom if anyone asks when given the opportunity".

But the boots were "peculiar" for the reasons given by the learned trial judge.

Mr Harvey argued that his submission of `no case to answer' should have been granted but we consider that there was a clear prima facie case against the appellant; accordingly we agree with the judge that Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 applied. The appellant was duly informed that inferences could be drawn from his refusal to give evidence but he chose not to give evidence.

We take the view that the judge was entitled to find that Mr Harvey, at the close of the Crown case and on closing the case for the appellant, was unable to dispute in any meaningful way that the appellant stood on the roof of the kennel at some time. Mr Harvey could only put forward speculation, conjecture and the suggestion that the boots might have been worn by someone else. The appellant, unaware that Mr Johnston, the forensic scientist, was able to conclude with certainty that these were his bootprints, had pinned his hopes of explaining the findings away on the fact that the merchant who sold him the boots had sold similar boots to many other people.

Mr Harvey submitted that even if the appellant had stood on the top of the dog kennel at some time, it did not follow that he did so on the occasion of the shooting. He suggested that he might have done so on another occasion in order to see whether one

could fire from it at a police officer or soldier coming from Forkhill Police Station on foot patrol, as Constable Galwey did. The judge rejected this submission and this Court is satisfied that he was fully justified in doing so for the reasons that he gave.

Our conclusions

We consider that it was relatively easy for the terrorists to determine that the place at which the dog kennel was placed was a suitable firing point without going into the garden of the Sheridans, as can be deduced from the photographs of the view from the garden and the ground just outside it. We reject the contention that the dog kennel might have been moved to the firing point on a day previous to the shooting and that the bootprints might have been made then. If Gerard Sheridan had not noticed this, in our view some member of his family would have been bound to notice it and the intrusion into the garden might well have been reported to the police, thus jeopardising the plan of attack and possibly leading to the capture of the terrorists.

The Sheridans were detained by three masked men, one of them carrying a rifle, from 8.15pm until after the shooting at 11.40pm. If Mr Sheridan is right that the rifle was an AK47, then there was a second gunman who used the weapon which discharged a .50 bullet at Constable Galwey. He may well have stayed outside. It is obvious that the terrorists waited for about three and a half hours until the target appeared, giving ample time to move the dog kennel into the position in which it was found the next morning. The removal of the coping stone, as seen from the photographs, provided a flat surface on top of the wall for a weapon which fired .50 calibre ammunition such as the Barrett 90 found at No 11 Creggandduff Road and produced to the learned trial judge.

We conclude, therefore, that the conviction of the appellant, Michael Caraher, for

the attempted murder of Constable Galwey is safe and that the convictions of Caraher on Counts 9, 10 and 11 are also safe.

The confessions of McGinn

The appellant McGinn was convicted of three murders and other grave offences on the basis of confessions made to the police. It is necessary to consider whether these confessions should have been admitted in evidence in the exercise of the judge's discretion.

The interviews between CID detectives and the appellant McGinn

McGinn was interviewed by detectives at Gough Barracks, Armagh over six days. There were twenty-eight interviews.

At the start of all the interviews McGinn was informed that the reason for his arrest was his suspected membership of the Provisional Irish Republican Army and his alleged participation in a planned terrorist operation during which he was arrested at a farm shed at Kearns' farmyard, 10 Creggandduff Road, South Armagh at 3 pm on 10 April 1997 (or vice versa). He was cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 as follows:

> "You do not have to say anything but I must caution you that if you do not mention when questioned, something which you later rely on in court, it may harm your defence. If you do say anything it may be given in evidence."

He was interviewed by two sets of interviewers, both of which started their interviews in this way. One set contained D/S Burns, D/C Dickson and D/C/I McFarland. The other consisted of D/C Honeyford and D/C Curtis.

At the end of Interview 8 with D/S Burns and D/C Dickson he said "Make me an

offer I can't refuse". He was asked what he meant and said "You know what I mean". The detectives told him they were not in a position to offer anything and would tell their authorities what he had said. When Dickson came back to the interview room after escorting McGinn to his cell Burns made an accurate record of all verbal statements made by McGinn during the interview in his notebook. He informed D/C/I Bogle and D/I Monteith about what had happened and Bogle directed him to find out what McGinn had meant in the next interview.

At Interview 9 he was reminded of what he had previously stated "Make me an offer I can't refuse" after which he aid no interview notes were to be taken which was agreed. McGinn told Burns and Dickson that he wanted freedom for the sake of his 7 year old son, Kieran. He said he wanted out. They told him that they were not in a position to offer him that. He said he could tell them what was going on in South Armagh but did not specify what that was. He was told that they were not in a position to offer him anything but would pass on the information to their authorities. He was told that because they could not comment on his request they were going to conduct the interview as previously done. McGinn told them that if they started to take notes again he would "go back to his old ways and start sleeping". They said they had to write something in the booklet to show an interview had taken place. He agreed with this. When the questions were put to him he made no reply. He was told that other interviewers would be coming in after them. He said he would not talk to them and did not want them to know he was talking to Burns and Dickson. He said he had picked them. They told him they would tell their authorities what he had said to which he nodded his head in agreement. Questions were put to him which were recorded in the

interview booklet during the latter part of his interview to which he made no reply. He was invited to read the interview notes but refused. They were read aloud to him.

After McGinn had left the interview room Burns made a written account of all verbal statements made by McGinn in his notebook in the presence of Dickson. They spoke to D/C/I Bogle after the interview and he told them to re-access the prisoner and develop what he was saying during future interviews.

At Interview 11 McGinn refused to let interview notes be taken by Burns and Dickson but talked openly during interview about his son. He said that if he got out he could tell them what was going on and could work for them. He was told they were not in a position to make that decision but that he could talk to themselves (our underlining). He said "Do you want to stop another Canary Wharf?". He told them he could tell them how it was planned and how it happened but did not go into detail. They asked where on the mainland the next bomb was going to be. He said Birmingham had been the target but had since been cancelled. He did not go into detail. He was asked if he was responsible for the sniper attacks in South Armagh. He said "I'm not the sniper if that's what you mean". He smiled and said "The sniper wasn't there". He did not elaborate further. They told him they would pass the details of the conversation to their authorities and that they would have to take notes. He said that if they did he would stop talking. He left the interview room and, in the presence of Dickson, Burns made a written account of all verbal statements made by McGinn in his notebook. Burns and Dickson then met senior police officers.

In our view this interview had put the detectives on notice that he might well be involved in serious crimes other than the arms find and membership of PIRA.

At Interview 13 Burns and Dickson interviewed McGinn. He was asked if he wanted to make a reply after caution under Article 3. He replied "Yes I want to talk to you but I do not want you to write it down". He was asked "Are you sure?" and replied "Yes, don't take any notes". Note taking stopped. He again stated he would not talk if interview notes were taken. This was again agreed to by the detectives. He talked of the Canary Wharf incident stating he had mixed the explosives which were put on a lorry and taken by a Dublin based freight company to the mainland. They asked about South Armagh PIRA arms and he said that they had unlimited access to arms and explosives, that there was at least one more .50 rifle in the South Armagh area. He said he had never fired the Barrett but rode shotgun on the attacks in the car with an AK47. He asked what sort of deal they could get him for the stuff he had told them. They again told him they were not in a position to offer any deal. It was up to their authorities. He said he wanted to talk to their authorities. They then said they would have to write interview notes which recommenced at 4.40 pm. He was asked if he wished to read the interview notes, and he said 'no'. The interview notes were read over to him. He agreed that they were a true and accurate account of the interview. They did not contain any admissions made during the interview. After McGinn left the interview room Burns made a written account of all verbal statements made by McGinn during the interview in his notebook. He then discussed what had happened with his authorities. He and Dickson told them that they felt McGinn was "drying up" and expressed concern that he refused to allow any notes to be taken. D/Ch/Supt McBurney directed D/C/I McFarland to interview McGinn with Burns and Dickson to assess the situation and if necessary make notes after the interview. Burns and Dickson again interviewed McGinn. He was made aware

of their enquiries, namely his suspected membership of the IRA and his arrest on 10 April 1997 at 10 Creggandduff Road. He was cautioned under Article 3.

McFarland entered the room and introduced himself to McGinn saying "I have been told you wish to talk to me". McGinn replied "Yes, but I don't want anything written down". Nothing was written down. McFarland explained that McGinn should realise he was in custody for a very serious offence and that public opinion would demand the court to treat the matter seriously. McGinn asked McFarland what was in it for him if he co-operated. He replied that only after McGinn had told the truth about the matters he was involved in could he assess the situation. McGinn made it clear the he wanted his freedom in order to watch his 7 year old son grow up. McFarland said he was in custody for a very serious offence and that it was in his interests to tell the truth about the intentions of him and his fellow accused on Thursday past if he expected any mercy from the court. McFarland explained that the court would show mercy to any individual who had taken steps that might lead to the saving of lives. McGinn said that the plan on Thursday was to shoot a soldier anywhere in the South Armagh area, he was to ride shotgun and Michael was to be the sniper. McFarland asked "Michael who" and McGinn replied "Caraher".

He went on to explain that he had joined the IRA at 15 years of age. He said that he was accepted about 4½ to 5 years ago by the South Armagh Unit. He was asked if he was involved in the murder of Bombardier Restorick in Bessbrook. He said he had rode shotgun with the AK seated in the rear seat. Michael Caraher was the man who shot the soldier with the big rifle. He was asked if he took part in the sniper attack on Constable Galwey in Forkhill. He said 'no'. He said he had been involved in the sniper

attack in Keady when the soldier was killed. He said that Michael Caraher was the sniper on the job and Seamus McArdle rode shotgun. He was asked what else he was involved in and referred to Canary Wharf. He was asked if he had taken part in any other sniping attacks and said he had mostly around Crossmaglen. A soldier had been killed about 11 am one morning. He was asked if he could identify any other sniping attacks that he took part in and he said he would have to think about it.

McFarland said he would see him later in the evening. Notes were made after McGinn was taken to his cell about matters discussed after McGinn said he did not want anything written down. A written account was recorded by Burns in the interview booklet in the presence of McFarland and Dickson of the verbal conversation. The interview booklet was then date stamped and countersigned. McGinn was unaware of either set of notes, it appears.

At Interview 15 Burns, Dickson and McFarland interviewed McGinn again. He was cautioned under Article 3. He was asked if he was prepared to talk again to McFarland. He said he would but he did not want him taking notes. McFarland said he could not possibly remember accurately everything he was telling him, and asked him "do you mind if I take rough notes for my use later". McGinn said "That's OK". McFarland then questioned McGinn and recorded rough notes which were later signed by him and Burns and Dickson. In the course of the questioning McFarland asked McGinn "Did you ever pull the trigger?". He replied "when 18 years of age I shot a wee lad in Keady". The details which he gave identified it as the shooting of Thomas Gilbert Johnston in 1978. At the end of the interview each page of the notes was signed by McFarland, Burns and Dickson. It would appear that McGinn was unaware of

these notes.

At Interview 17 McFarland, Burns and Dickson interviewed him and he was cautioned under Article 3. At the request of McGinn questions and answers were recorded in the official interview booklet as he stated that he wanted all interviews to look the same. As a result the official interview booklet contained a record of a negative interview which did not in fact take place. During the interview that did take place McFarland recorded one page of notes on plain paper regarding matters "not connected with the present enquiry". He, Burns and Dickson signed each page of all notes recorded. It would appear that McGinn did not know of this.

The three policemen interviewed him again at Interview 18. He was cautioned under Article 3.

McGinn stated that he wanted the same notes to be taken as the previous set of notes and questions recorded. The official interview booklet contained a record of a negative interview which did not in fact take place. McFarland recorded five page of notes on plain paper. At the end of the interview each page of the notes was signed by him, Burns and Dickson. McGinn does not appear to have been aware of these notes.

At Interview 19 the three detectives again interviewed McGinn. He was cautioned under Article 3. He requested at the start of the interview that it be recorded as was the previous interview. The official interview booklet contained a record of a negative interview which did not in fact take place. Two pages of rough notes were taken on plain paper by McFarland of the content of the conversation that did take place. Each page of all notes was signed by McFarland, Burns and Dickson. It would appear that McGinn

was not aware of this.

At Interview 22 the three detectives interviewed McGinn. The interview took the same form as previous interviews with them had taken. The official interview booklet contained a record of a negative interview which did not in fact take place. One page of notes was taken by McFarland. All interview notes were signed by the detectives. McGinn does not appear to have been aware of these notes.

They saw McGinn again that afternoon. He was cautioned under Article 3. As in previous interviews McGinn refused to read the notes but requested that notes be recorded in the official interview booklet. These record a negative interview which did not take place. He agreed that McFarland could record rough notes on blank paper of the interview that did take place. The pages of the notes were signed by McFarland, Burns and Dickson. McGinn does not appear to have been aware of these notes.

On that date he made a written statement on the advice of his solicitor in which he completely denied any knowledge of the weapons and other materials found at Creggandduff Road (Exhibit 21).

Later the three detectives saw McGinn. He was cautioned under Article 3 and asked how he came to make the statement (Exhibit 21). He said he made the statement on the advice of his solicitor.

McFarland left the interview room at 9.31 pm. The official interview booklet contained a record of a negative interview which did not in fact take place. Burns took rough interview notes on blank paper with the consent of McGinn. We infer that this permission was given on the same basis as had been given to McFarland.

On 16 April 1997 D/C Honeyford and D/C Curtis interviewed McGinn. The

statement which he had made to his solicitor was read to him and he was questioned about it. The interview was negative. He agreed that the notes which were read over were correct.

He was seen by the other three detectives later and was informed that the reason for his detention was the conspiracy to murder on 10 April 1997. He was cautioned under Article 3. He requested Burns to record notes in the official interview booklet which contains a record of a negative interview which did not take place. During the interview McFarland completed three pages of notes. All these notes were signed by him, Burns and Dickson. Again McGinn does not appear to have been aware of these notes.

He was seen again by Burns and Dickson. McFarland joined them. McGinn was cautioned under Article 3. McGinn requested the interview not to be recorded but the interview notes to be completed. The official interview booklet contained a record of a negative interview which did not in fact take place. Burns recorded what did take place on five pages of rough notes. McFarland, Burns and Dickson signed the relevant pages of notes. McGinn does not appear to have been aware of these notes.

When the evidence of the interviewing officers was about to begin before the judge, McGinn's counsel indicated that the admissibility of verbal statements made by him in interview was challenged and should be excluded under Section 12(3) of the Northern Ireland (Emergency Provisions) Act 1996. The judge conducted a voir dire and held that the statements should be admitted in evidence. No oral evidence was given on the voir dire. By agreement between the parties the statement of Chief Inspector Patterson was read, as was the written statement made by McGinn on 15 April. It was agreed that the statements contained in the committal papers of a number of officers be

received as evidence without being read, their contents being admitted under section 2 of the Criminal Justice (Miscellaneous Proceedings) Act (NI) 1968. These officers were D/C/I Bogle, D/C Curtis, D/C Honeyford, McFarland, Burns and Dickson. McGinn did not himself give evidence, nor were any witnesses called on his behalf. Submissions from the defence and prosecution were put before the judge, based on the evidence contained in these statements.

Two principal arguments were advanced in support of the proposition that the statements should have been excluded. 1. It was submitted that there had been repeated, substantial breaches of the Codes of Practice made under the Northern Ireland (Emergency Provisions) Act (Northern Ireland) 1996. 2. It was claimed that interviewing detectives and their superiors had deliberately manipulated the interviews and had permitted breaches of the Codes in order to deceive McGinn into believing that admissions made by him in relation to matters other than those for which he had been arrested would not be used except for intelligence purposes.

Breaches of the Codes

The relevant sections of the Codes for the purpose of this appeal are paragraphs 10 and 11 of Code 1. Paragraph 10 deals with cautions. These are the relevant portions of that paragraph:-

> "**10. Cautions When a caution must be given:**
>
> *(a) When there are grounds to suspect an offence*
>
> 10.1 When there are grounds to suspect a person of an offence, and he is to be questioned regarding his involvement or suspected involvement in that offence and if his answers or his silence, (i.e. failure or refusal to answer a question, or to answer satisfactorily) may be given in evidence to a court, he must be cautioned:

(i) before any questions are put to him about the offence; or

(ii) before any further questions are put to him if it is his answers to previous questions that provide the grounds for suspicion.

This applies whether or not a person is under arrest.

Cautions and the law on evidence

10.7 A person need not be cautioned unless questions are put to him to obtain evidence that may be given in court. It is not necessary for other purposes, such as establishing identity or ownership of, or responsibility for, any vehicle.

...

General guidance on cautions

10.15 Where a suspect is in police detention he should be given a written notice setting out the main terms of Articles 3, 5, and 6 of the Criminal Evidence (Northern Ireland) Order 1988. [See Note 10C].

Documentation

10.16 A record shall be made when a caution is given under this section, either in the officer's note book or in the interview record as appropriate."

At the beginning of each interview McGinn was informed of the reasons for his arrest, namely, that he was suspected of being a member of the Provisional IRA and of being involved in a planned terrorist operation on 10 April 1997. He was cautioned under Article 3 of the 1988 Order. The caution was administered immediately after the appellant had been informed or reminded of the reasons for his arrest and the nature of the inquiries being conducted by the police. It was clearly designed to be understood by McGinn to relate to the offences into which the police were conducting inquiries. It

did not relate to other matters about which he was volunteering information to the police. He was not cautioned at any time in relation to those matters although he was giving the police information about his involvement in serious crimes. Under the terms of the Code he should have been cautioned. We consider that the failure to caution McGinn in relation to those matters about which he was volunteering information constitutes a serious breach of the Code.

Paragraph 11 of the Code deals with interviews. These are the relevant portions:-

> "**11. Interviews: general**
>
> *(a) Definition*
>
> 11.1 An interview is the questioning of a person regarding:
>
> (a) his involvement, or suspected involvement in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland, and/or
>
> (b) possible offences under sections 2, 8, 9, 10 or 11 PTA, and/or
>
> (c) his being subject to an exclusion order.
>
> Any such interview is required to be carried out under caution by virtue of paragraph 10.1(a) of this code of practice.
>
> ...
>
> *(b) Action*
>
> 11.3 A written record should be made of any comments made by a suspected person, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the maker. Where practicable a person shall be given the opportunity to read that record and to sign it as correct or to indicate the respects in which he considers it

inaccurate. Any refusal to sign should be recorded. [See note 11C]

11.4 Immediately prior to the commencement or recommencement of any interview at a police station or office, the interviewing officer should remind the suspect of his entitlement to legal advice and that the interview can be delayed for this purpose unless the exemptions in paragraph 6.6 or Annex B apply. It is the responsibility of the interviewing officer to ensure that all such reminders are noted in the record of interview.

11.5 At the beginning of an interview carried out in a police station or office the interviewing officer, after cautioning a suspect, shall put to him any significant statement or silence which occurred before the start of the interview, and ask him whether he confirms or denies that earlier statement or silence and whether he wishes to add anything.

...

(c) Interview Records

11.11 An accurate record must be made of each interview with a person suspected of an offence, whether or not the interview takes place at a police station or office. The record must:

(a) state the place of the interview, the time it begins and ends, the time the record is made (if different), any breaks in the interview and the names of all those present; and must be made on the appropriate interview booklet provided for this purpose; and

(b) be made during the course of the interview, unless in the interviewing officer's view this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it.

11.12 If an interview record is not made during the course of the interview it must be made as soon as possible after its completion.

11.13 If an interview record is not completed in the course of the interview the reason must be included in the interview booklet.

11.14 When an interview booklet is issued, the issuing officer shall ensure that it is electronically date and time stamped. Interview booklets completed as a result of an interview must be signed by the interviewing officers.

11.15 As soon as practicable following the completion of an interview booklet, the interviewing officer(s) shall take the interview booklet to the issuing officer, who shall ensure that it is again electronically date and time stamped. The interviewing officer(s) shall then take the interview booklet to the certifying officer, who shall complete the certificate and ensure that it is again electronically date and time stamped.

11.16 In all cases where the detained person has been interviewed he shall be asked to read the interview booklet and to sign it as correct or to indicate the respects in which he considers it inaccurate, but no person shall be kept in custody for this sole purpose. If the person concerned cannot read or refuses to read the record or to sign it, the senior police officer present shall read it over to him and ask him whether he would like to sign it as correct or to indicate the respects in which he considers it inaccurate. The police officer shall then certify on the interview record itself what has occurred.

...

11.18 Any refusal by a person to sign an interview record when asked to do so in accordance with the provisions of this code must itself be recorded.

11.19 A written record shall also be made of any comments made by a suspected person, including unsolicited comments, which are made outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the police officer making it. Where practicable the person shall be given the opportunity to read that record and to sign it as correct or to indicate the respects in which he considers it inaccurate. Any refusal to sign shall be recorded.

11.20 Following the completion of an interview booklet, the interviewing officer(s) will hand the interview booklet to the

> certifying officer who shall complete the certificate and ensure that it is again electronically date and time stamped."

The failure to record what the appellant said in a conventional interview booklet; the fact that admissions made by him were not timed; the failure to offer the appellant the opportunity to sign such notes as were made or to read them over to him all constitute breaches of paragraph 11 of the Code. We consider these also to be substantial breaches.

The learned trial judge's reasoning

The judge dealt with the breaches of the Codes of Practice in the following passage of his judgment:-

> "It has regularly been held that breaches of the Codes made under PACE may cause the court in the exercise of its discretion to exclude evidence of confessions. In *R v Walsh* (1990) 91 Cr App R 161 at 163 Saville J set out the basis for this approach:
>
> > 'The main object of section 58 of the Act and indeed of the Codes of Practice is to achieve fairness - to an accused or suspected person so as, among other things, to preserve and protect his legal rights; but also fairness for the Crown and its officers so that again, among other things, there might be reduced the incidence or effectiveness of unfounded allegations of malpractice.
> >
> > To our minds it follows that if there are significant and substantial breaches of section 58 or the provisions of the Code, then prima facie at least the standards of fairness set by Parliament have not been met. So far as a defendant is concerned, it seems to us also to follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met, cannot but have an adverse effect on the fairness of the proceedings. This does not mean, of course,

> that in every case of a significant or substantial breach of section 58 or the Code of Practice the evidence concerned will automatically be excluded. Section 78 does not so provide. The task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded.'

In decisions given in this jurisdiction under the Emergency Provisions Acts it has been assumed, I think correctly, that breaches of the Codes could form a ground for the court to exercise its discretion under section 12(3) of the 1996 Act to exclude confessions: see, eg, *R v McKeown* (1998, unreported), per Girvan J and *R v Crooks and others* (1998, unreported), per Kerr J. It is necessary to bear in mind in considering resort to the discretion the need to avoid defeating the will of Parliament as expressed in the Emergency Provisions Acts: see *R v Howell* [1987] 5 NIJB 10 at 12-14 and particularly principle 2 there set out by Hutton J. Given this context, the emphasis is firmly on the effect on the fairness of the trial, as may be seen from the decisions which I have quoted and from *R v Keenan* [1990] 2 QB 54.

The adoption of the expedient of an 'official' version of the interview record alongside an informal note kept separately by the interviewing officers was described by Mr McCrudden QC on behalf of McGinn as a 'twin-track' approach. He attacked it vigorously as involving numerous breaches of the Codes and as designed and operated in such a way as to be unfair and deceptive towards the defendant. It is incontestable that this method of operation involved breaches of the Codes. But it was adopted in response to requests from the defendant McGinn himself, who obviously wished to conceal the fact that he was making statements to the interviewers. It is clear that in order to conceal this effectively from the other suspects who had been arrested and were being questioned in the same station, McGinn wished that it be kept from all the other interviewers and apparently even from his own solicitor. In order to do so, he 'wanted all interviews to look the same', as he stated in Interview 17. This of necessity involved a deliberate *suppressio veri* and *suggestio falsi* in the content of that note, which contained an altogether imperfect record and in places a fictitious account of what really took place.

Certainly this involved repeated breaches of the Codes of Practice. Since, however, these were brought about by McGinn's own urgent request for his own purposes, it is difficult to see how those breaches could give rise to unfairness or injustice. They are designed to protect persons in detention against falsification of records and being induced to make confessions. If he deliberately asked the interviewers not to follow the usual practice, their compliance with that request is not unfair or unjust. But Mr McCrudden went further. He claimed that the wording of the Article 3 cautions, the omission to remind McGinn or his right to legal advice and the failure to refer to significant statements which had been made by him before the start of the several interviews (Code I, paras 1.5 and 11.6) were deliberately designed to deceive him. Mr McGinn was, however, well aware of his right to see a solicitor, as the notes show, and he did in fact see him in due course. The other matters, if they constitute breaches of the Code, are the inevitable consequence of the request to keep his admissions off the face of the record, which had then to be framed in such a way as to conceal that he made them.

I do not consider that the breaches of the Code were in themselves the product of any attempt to deceive McGinn or operate matters to his disadvantage. They do not seem to me to have caused any unfairness or injustice. It is necessary, however, to give careful consideration to the more general allegation made by Mr McCrudden, that the interviewers deceived McGinn into believing that his admissions would not be used to make a case against him on criminal charges and that they were at most material to be placed on an intelligence file and not used in evidence. This thesis involved the proposition that DCI McFarland in particular manipulated the separate note-taking as a trap for McGinn, to lull him into making admissions which he would not otherwise have made. If this were so, it would certainly be capable of being regarded as unfair and unjust.

My assessment of the possibility that this proposition might be correct had to be based on the committal statements of the interviewers whose contents were by agreement to be treated as correct. McGinn did not give any evidence himself about what he thought the arrangement to be, nor were the interviewers cross-examined about it. I have therefore read and considered the statements in minute detail in order to

form an assessment.

DS Burns and DC Dickson quite correctly told McGinn, when he asked them to make him an offer at the end of Interview 8 and said in Interview 9 that he wanted out, that they were not in a position to offer him anything but would pass on the information to their authorities. When DCI McFarland came into Interview 14 he told McGinn that only after he had told the truth about the matters he was involved in could he assess the situation. McGinn responded by admitting the purpose of the gathering at Creggandduff Road. He was then asked about shootings and admitted his part readily. No representation or suggestion was at any stage made to him that this was for intelligence briefing only or that it would not be used. I do not accept that the separate recording of the notes of the admissions was designed to or did mislead McGinn into thinking that those admissions would not be used. On the contrary, it seems clear from perusal of the statements that he was responding to the DCI's admonition that only if he told the truth about his activities would it be possible for him to assess the situation.

Mr McCrudden asked rhetorically why McGinn would admit to participation in a series of crimes committed on other occasions, rather than confining himself to the Creggandduff Road incident, unless he thought that the admissions would not be used against him. There is no evidence that he did so think, and I do not consider that it is by any means a convincing inference. He knew from what Mr McFarland said that he had to make the admissions before it could be considered whether he might obtain the benefit of some mitigation or even escape prosecution altogether. If he was deluding himself into thinking that there was a realistic prospect of release, it was not as a result of anything that the police said or did. It is a commonplace of criminal trials that accused persons confess to crimes for manifold reasons, not infrequently because they think that they may have something to gain by it. Lord Lane CJ said in *R v Rennie* (1982) 74 Cr App R 207 at 212:

> 'Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by

> something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.'
>
> *Mutatis mutandis*, these remarks appear to me apposite in the present case."

Since giving judgment in this case, the Lord Chief Justice has had occasion to consider, while presiding in this court in *R -v- McKeown* (unreported 25 October 1999), the effect of breach of paragraphs 10 and 11 of the Code. In that case the accused had been arrested on suspicion of involvement in the murder of Michael McGoldrick and other terrorist crime. He was interviewed on several occasions. At the end of a number of interviews, he volunteered information about his involvement in several armed robberies. The trial judge found that these admissions had been made after the formal interviews had come to an end. He decided to admit the interviews, however, because the appellant was familiar with police procedure and the situation in which he made the admissions was self induced. The Lord Chief Justice, delivering the judgment of the Court of Appeal, said:-

> "In considering this appeal we bear in mind that we are dealing with the exercise of a trial judge's discretion, which should not be upset unless there are proper grounds for doing

so. As MacDermott J pointed out in *R v Cowan* [1987] NI 338 at 351, the proper approach is to examine the exercise of the judge's discretion and to consider whether he has exercised it within its proper limits. Those limits were articulated by Lowry LCJ in *R v O'Halloran* [1979] NI 45 at 47:

> 'An appellate court's approach to the exercise of a judicial discretion must always be to look for indications that the judge misconceived the facts, misstated the law or took into or left out of account something which he ought to have disregarded or regarded, as the case may be.'

We think that these principles should be read subject to the qualification that even though none of the criteria may be strictly satisfied, if the appellate court comes to the conclusion that the judge's decision will result in injustice being done, it has both the power and the duty to remedy it. This was so stated by Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 481 in the context of the review of a judge's discretion to set aside a default judgment in a civil action. It has regularly been stated in criminal appeals that an exercise of discretion will not be upset unless the judge has gone wrong in one of the ways to which we have referred (see the cases referred to in Archbold, 1999 ed, paras 7-99 to 7-100). In respect of such a fundamental matter as the exclusion of statements, however, we consider that this residual ground for reversing the exercise of a judge's discretion exists in appeals from decisions in criminal trials, although it should be exercised with circumspection where none of the conditions specified in *R v O'Halloran* has been established. In this respect we agree with the approach of the Court of Appeal in *R v McCann* (1991) 92 Cr App R 239 at 251 in the context of a decision not to discharge a jury.

In approaching the issue we bear in mind the remarks of Saville J in *R v Walsh* (1990) 91 Cr App R 161 at 153 which seem to us to be apposite, even though the analogue in Northern Ireland of PACE Section 78 does not apply to terrorist trials:

...

It is quite apparent that the appellant thought that he could speak 'off the record' once the formal parts of the interviews were completed. It is notable that he did not on any occasion make admissions about any crime for which he had been cautioned at the commencement of the formal interview. In so

> thinking he was deluding himself, for any admission made in any circumstances is capable of being proved in evidence. The criminal law has, however, fashioned a shield for the prevention of unfairness to suspects being held in custody, by restricting the admission in evidence of statements made in certain circumstances. One of the principles upon which the restrictive rules are based is that the suspect must be made aware that he is not obliged to say anything but can if he chooses remain silent about the matters in relation to which he is being interviewed. This is to be achieved by the formalised procedure of the administration of cautions phrased in a prescribed manner.
>
> The significant factor which weighs heavily with us is that if the appellant had been cautioned before he commenced to make admissions in the supplementary conversations it is unlikely that he would have made any. The judge so recognised at page 46 of his judgment, but nevertheless decided to admit the statements because the appellant was very familiar with police procedure and the situation in which he made the admissions was self-induced. We do not consider that this is a sufficient reason for declining to exclude the statements. When the court considers that there is a reasonable doubt whether a suspect would have made the statements in question if the provisions of the Code relating to caution had been observed, they should not in our opinion be admitted except perhaps in rare and unusual circumstances. The circumstances of the present case do not in our judgment suffice to justify admission of the statements.
>
> It may be said that the judge misdirected himself in failing to direct himself in this manner. Equally it may be said that to allow his discretionary ruling to admit the statements to stand would result in injustice being done, and on either ground we should be prepared to reverse his ruling. We accordingly conclude that the learned judge should not have admitted the appellant's statements made in the supplementary conversations following Interviews 1, 2, 4, 7, 11 and 15. In respect of counts 3 to 6 his statements formed the only evidence linking him with the commission of the offences and the conviction on those counts must accordingly be quashed."

We consider that the most important sentence from this passage and the one which best encapsulates the *ratio* of the decision is, "when the court considers that there is a reasonable doubt whether a suspect would have made the statements in question if the

provisions of the Code relating to the caution had been observed, they should not … be admitted except perhaps in rare and unusual circumstances".

The judicial discretion

It would be unwise and unhelpful to seek to define the judicial discretion provided by section 12(3) beyond the phraseology adopted by Parliament. It was argued that the judge applied the wrong test. We are sure that the judge recognised the difference in wording between PACE section 78 and section 12(3). We are sure that he adhered to the wording of section 12(3).

We are also conscious of the principles that govern an appellate court's approach to the exercise of a judicial discretion as set out by the Lord Chief Justice in *McKeown*. We have sought to apply them in the present case. Our view of the effect of the police conduct on McGinn differs from the judge's view and explains the difference of approach.

In the present case there have been breaches of the provisions of the Code which deal with cautions and the conduct of interviews. We must ask ourselves the question, "Is there a reasonable doubt that, if those breaches had not occurred, McGinn would not have made the admissions in question?" It was urged upon us by the Crown that a clear distinction required to be drawn between the *McKeown* case and this because in that case McKeown was speaking in a situation where he believed that the interviews were over. We do not consider that this is a difference of any significance. We are of the view that it is at least possible that McGinn believed that the admissions that he volunteered to his interviewers would not be used against him. We also consider that there is a reasonable doubt as to whether he would have made those admissions if, as

soon as he embarked upon them, he was cautioned in respect of them and the provisions in relation to the conduct of interviews were observed. Had these things occurred, McGinn could have been in no doubt that prosecution for the offences which he was admitting was in prospect, at least. In those circumstances, it is, in our view, reasonably possible that he would have refrained from further admissions.

Manipulation of the interviews

On the submission that there had been manipulation of the interviews and that breaches of the Codes were tolerated in order to induce McGinn to believe that he would not be prosecuted, we make no finding. It may be that the detective officers were concerned that if they were to caution McGinn when he began to or continued to make admissions to crimes unrelated to those for which he had been arrested, that they would lose valuable information, but this is speculation. We do not consider that it has been shown that the failure to comply with the Codes of Practice and the manner in which the interviews were conducted were part of a deliberate strategy to deceive McGinn.

For the reasons that we have given we consider that McGinn's convictions on the Counts other than Counts 1, 3, 4 and 5 cannot be allowed to stand and must be quashed. We affirm his convictions on Counts 1, 3, 4 and 5.

The sentences of Caraher to a total of 25 years' imprisonment and the sentences of McGinn to a total of 20 years' imprisonment are upheld.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MICHAEL COLM CARAHER AND
BERNARD MICHAEL McGINN

JUDGMENT

OF

NICHOLSON LJ
