Neutral Citation No: [2020] NICC 2 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **2020NICC2** ***Delivered:*** 16/01/20

IN THE CROWN COURT IN NORTHERN IRELAND

SITTING IN BELFAST

BILL NUMBER – 16/103922

REGINA

v

PAUL CAMPBELL

His Honour Judge McFarland
Recorder of Belfast

1) Paul Campbell ("the Defendant") was committed for trial on Bill 16/103922 by East Tyrone Magistrates' Court on the 29th September 2017. On the 3rd November 2017 the Director of the Public Prosecution Service certified under the **Justice and Security (NI) Act 2007** that the trial be conducted without a jury. The Defendant was arraigned on 15th December 2017 and pleaded not guilty to the two counts on the indictment.

2) The counts on the indictment are unlawfully and maliciously causing an explosion contrary to section 2 of the **Explosive Substances Act 1883** ("the 1883 Act") and possession of an explosive substance with intent to endanger life or cause damage to property contrary to section 3 (1) (b) of the 1883 Act.

3) The 1883 Act (as amended by the **Criminal Jurisdiction Act 1975** and by the **Criminal Law Act 1977**) provides as follows -

Section 2 –

"A person who in the United Kingdom or (being a citizen of the United Kingdom and Colonies) in the Republic of Ireland unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be guilty of an offence and on conviction on indictment shall be liable to imprisonment for life"

Section 3 (1) (b) –

"A person who in the United Kingdom or a dependency or (being a citizen of the United Kingdom and Colonies) elsewhere unlawfully and maliciously – … (b)makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the United Kingdom or elsewhere, or to enable any other person so to do, shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence and on conviction on indictment shall be liable to imprisonment for a term not exceeding twenty years, and the explosive substance shall be forfeited.

4) The background to the case is that a soldier was in Coalisland on the evening of the 26th March 1997. His evidence is that he observed two men each appearing to be carrying an object in their hands running at speed into an alleyway leading to the rear of the police station. He then heard what he considered to be two explosions and observed the same two men running out of the alleyway and towards him. Believing his life to be in danger he discharged rounds of ammunition from his service pistol. One of the men was struck by the gunfire and was apprehended at the scene. The soldier described the other man as getting into a white coloured vehicle which was driven off. Shots were also fired in the direction of this man and at the vehicle. The man who was detained was convicted of an offence under section 2 of the 1883 Act at Belfast Crown Court on the 14th September 1998. The prosecution case is that the other man was the defendant. The defendant's case put forward at the trial is that he is not the man. He admits to being in Coalisland on the 26th March 1997. On approaching a shop he heard a loud explosion and then gunshots. He felt a burning sensation between his legs, was fearful of sustaining further injury and got into a white vehicle which then drove away.

5) The prosecution were represented by Ciaran Murphy QC and Philip Henry instructed by the Director of Public Prosecutions, and the defendant by Orlando Pownall QC and Joseph O'Keeffe instructed by Messrs. Phoenix Law solicitors.

6) At the commencement of the trial the prosecution made several applications. The first was that the various statements, both oral and written, made by Seamus Rice be admitted under the hearsay provisions contained in the **Criminal Justice (Evidence) (NI) Order 2004** ("the 2004 Order") This application was opposed. The second was that I grant Anonymity Orders under the provisions of the **Coroners and Justice Act**

2009 permitting certain soldiers to give their evidence using a cypher letter – e.g. "Soldier A" – and from behind a screen, being only seen by the judge and the legal representatives. No issue was taken by the defence in relation to the second application. When granting the orders, I gave a brief oral ruling in respect of the hearsay application, and set out my full reasons below.

Hearsay application

7) Seamus Rice was a priest serving in the Coalisland Parish at the time of the incident which occurred at approximately 21.30 hours on the evening of Wednesday the 26th March 1997.

8) He made six statements during the police investigation, three formal written statements provided in usual form including the declaration as to truth, two oral statements in the presence of police officers, the content of one being incorporated into the second in time of the written statements and one in the presence of Aidan Conway.

9) Aidan Conway attended the Parochial House at approximately 22.30 on the 26th March 1997 and spoke to Seamus Rice. He has recorded his recollection of that conversation in a statement of the 15th May 1997. Aidan Conway described Seamus Rice as being in a shocked and distressed state and he told him that he had been asked to go down to Lineside in the town as someone was injured and on his arrival by motorcar someone jumped into the back of his motorcar and told him to take him to Clonoe, but that he refused to do this. Because of his distressed state, no further clarification was given, or sought by Aidan Conway.

10) The next day on the 27th March 1997, Seamus Rice made a formal statement to the police in which he stated that he was driving his motorcar in the area, he had heard bangs and observed flashes and he left the scene, before returning shortly later to observe a wounded man being taken away by ambulance and a number of armed men in civilian clothing.

11) On the 1st April 1997 at approximately 08.50, Seamus Rice attended a police station with another man and made an oral statement to Detective Chief Inspector Sproule and Detective Superintendent Cooke. His statement was recorded by both officers and later that day was incorporated into a written statement signed by Seamus Rice. He said that he was driving along Lineside when he heard bangs and saw flashes. He heard his name being mentioned and stopped the motorcar. The rear passenger door opened and a young man entered. He heard and felt an impact to his motorcar which felt like an explosion with the rear window glass coming in. The man shouted "drive" and Seamus Rice drove in the direction of Annagher Hill. Adjacent to a football pitch, Seamus Rice considered his duty was to go back to Lineside and turned the motorcar. The man then said "let me out" and then exited the vehicle. Seamus Rice could give no further detail about the man who he did not recognise. He

said that he was in a state of shock the next day when he made his statement to the police and that over the following days he attempted to speak to police to clarify his evidence. He said that he did not deliberately try to hide or conceal any evidence but had just been in a state of shock and confusion after the incident.

12) Finally, Seamus Rice made a written statement on the 18th August 2011. It gave some details about his purchase of the motorcar and its cleaning, and further that he had a familiarity with the name 'Gareth Doris' (the wounded person apprehended at the scene) and with the Campbell family of Killowen, but that he did not know the defendant personally, and had not given a lift to anyone called Paul Campbell.

13) The prosecution seek to introduce these statements as Seamus Rice is unavailable to give evidence because of his physical and mental health. Article 20 of the 2004 Order provides as follows –

"(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are –

… (b) that the relevant person is unfit to be a witness because of his bodily or mental condition"

14) Seamus Rice is now aged 82 years and has been suffering from dementia probably vascular in origin but now caused by a mixed Alzheimer's – vascular condition. Medical evidence has been furnished to the court and no issue is raised on behalf of the defendant about his inability to give oral evidence at the trial.

15) Article 18 of the 2004 Order provides –

"(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

(a) any provision of this Part or any other statutory provision makes it admissible,

(b) any rule of law preserved by Article 22 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

16) Much of the argument focussed on whether or not the evidence was "sole and decisive" to adopt the phrase set forth by a number of European Court of Human Rights ("ECHR") judgments. The rule would appear to have its genesis in the case of **Doorson –v- Netherlands (1966) 22 EHRR 330** when at [76] it was stated

"a conviction should not be based either solely or to a decisive extent on anonymous statements".

Later in the case of **Luca –v- Italy (2001) 36 EHRR 807** at [40] the court said that

"where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine .. the rights of the defence are restricted to an extent that it is incompatible with the guarantees provided by Article 6".

17) This was re-stated in **Al-Khawaja and Tamery –v- UK [2011] ECHR 2127** by the Grand Chamber. At [147] it stated that

"The Court therefore concludes that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6.1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales … and one which would require sufficient counterbalancing factors, including the existence of strong

procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."

18) Much has been written concerning the apparent conflict between the ECHR and what ultimately were the unanimous decisions of a five judge Court of Appeal and on appeal by a nine judge Supreme Court in **R –v- Horncastle [2008] EWCA Crim 964** and **[2009] UKSC 14**. Lord Philips in the Supreme Court stated that the safeguards introduced by the 2004 Order when taken with the discretion to exclude evidence under the **Police and Criminal Evidence (NI) Order 1989** ("PACE 1989") and the common law are sufficient in all the circumstances. An analysis of the ECHR decision in an application by Horncastle – **Horncastle –v- UK [2014] ECHR 1394 –** largely agreed with the Supreme Court analysis.

19) At [134] the European Court defined "decisive" as follows –

"[it] means more than "probative" or that, without the evidence, the chances of a conviction would recede and the chances of an acquittal advance. It should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be "decisive"".

In the following paragraph it echoed the comments of the Supreme Court in relation to the safeguards enshrined in United Kingdom law –

"In respect of the need for counterbalancing factors where evidence is deemed to be sole or decisive, the Court has found that the safeguards contained in the 2003 Act, supported by section 78 PACE and the common law, are in principle strong safeguards designed to ensure the fairness of criminal proceedings."

20) The defence attempted to raise the "sole and decisive" rule to bolster its argument. Using their own phraseology, the admission of the evidence was "potentially decisive", but that is an overstatement of the position. The Crown sought to adduce the evidence to prove that the defendant got into Seamus Rice's motor vehicle and was driven from the scene to a location on Annagher Hill. The defendant, by his amended defence statement dated March 2019, now accepts that he did make that journey in that vehicle. His case is that he was in the vehicle which was driven by Seamus Rice, but another male, who he will not name, got into the vehicle, and that it was that male who requested Seamus Rice to stop.

21) The absence of Seamus Rice means that the defence cannot question him about this case now put forward on behalf of the defendant. The case against the defendant relies primarily on the evidence of Soldier A who observed the movements of the man the Crown assert is the defendant,

with him running towards the back of the police station, the explosion happening and then retracing his steps to where he was confronted by Soldier A with a weapon discharged in his direction, and then getting into a white motor vehicle. The movement of the defendant away from the scene and the circumstances surrounding the movement may assist the Crown in proving its case against the defendant but the evidence is not sole and decisive. Whether there was one passenger or two passengers in the motor vehicle is of little relevance to the prosecution case.

22) The inability of the defendant to cross-examine Seamus Rice may mean that a potential piece of evidence that may corroborate his version could be lost to him, but it is a speculative approach to the matter. In approaching this particular issue, the test is perhaps more akin to the rules surrounding the inability of the prosecution to call a witness due to circumstances outside its control. In such a case the principles set out in **R –v- Cavanagh 56 Cr App R 407** would apply with the court permitting the case to proceed provided that no injustice would be done. In exercising that discretion the court would consider the extent to which the absent witness would have been able to assist the defendant and whether other witnesses are available who could assist.

23) The extra passenger is a man known to the defendant and he can be called to give evidence. The defendant has not been denied an opportunity to provide corroboration from that source.

24) In assessing the complete position, Seamus Rice's evidence is of limited value in proving the Crown case that the defendant either by himself or as a joint enterprise with another caused an explosion and possessed an explosive device and, in any event, Seamus Rice's assertion that a man had got into his vehicle and left the vehicle adjacent to the GAA club, is accepted by the defendant and that he was that man. The only potential loss to the defendant is that Seamus Rice cannot be cross-examined as to the defendant's case that an additional man was in the vehicle. As to what Seamus Rice would have said to those questions is a matter of speculation, although he had the opportunity on six occasions to report to the police and to Aidan Conway that there was a second passenger and did not. The defendant could call the second passenger as a witness as he is known to him, and, in any event, the presence of a third man adds little to the case either in undermining the Crown case or supporting the defendant's case. If he was present, on the defendant's case, he was instrumental in getting the vehicle to stop at the location where the defendant exited the vehicle, but at no time does the defendant assert through direct evidence or by inference, that this man was, or may have been, the second bomber observed by Soldier A, and therefore the defendant could not have been the second bomber.

25) In the circumstances I admitted the hearsay evidence.

The background evidence

26) Soldier A described himself as being on duty in civilian clothing undertaking an operation with seven colleagues in five unmarked vehicles. The operation involved surveillance of a person of interest to the security services. Soldier A was on his own and in a parked vehicle which was in a car park adjacent to the Heritage Centre on Line Quay in Coalisland. The car-park was situated just off Line Quay, and was separated from Line Quay by a raised flower bed with shrubs growing from it. Two retaining walls held the bed and railings were also in place on top of the wall adjacent to Line Quay. This would have formed an obstruction although would not have fully obstructed Soldier A's view of Line Quay. It would not have given him a clear unobstructed view.

27) Soldier A had taken up this position as he had anticipated that the subject of their surveillance would pass along Line Quay.

28) Completely independent of the surveillance operation, Soldier A described how he observed two men running in front of him from left to right. They were on the opposite footpath immediately in front of a row of shops and offices. He described the two men as each appearing to be carrying something in their right hands. He was not sure what they were carrying but said that it was about the size of a large coffee cup (using that comparison as a cup was sitting on the bench in front of him in the courtroom). He said that both men appeared to be exercising care when running. The men then turned left into an alleyway and moved out of his sight.

29) His suspicions having been raised by their conduct, he got out of his vehicle and walked towards Line Quay. When he reached a point at the vehicular entrance to the Heritage Centre (which is opposite, but not directly opposite the entrance to the alleyway so that they form a crossroads) he heard what he thought were two explosions and a flash. He did not see the seat of the explosion. He then saw the two men, who he had observed earlier, run out of the alleyway. At that stage both were running towards him. He described how both appeared to be rummaging in their waist area, and he then formed the view that his life was in danger, either through both men being armed and threatening him with a weapon, or weapons, or with the two men overpowering him and seizing his weapon.

30) He said that he immediately shouted "Army, Army, Army" and drew his weapon aiming it above the men. One of the men continued towards him and the other broke off to the right (Soldier A's left). Still fearing for his life, Soldier A then discharged what he thought were 2 shots in the air as a warning. The man still continued to run towards him, and believing his life to be in immediate danger, Soldier A fired two aimed shots into what he described as the man's "upper left quadrant". These shots halted the progress of the man who fell to the ground, face down.

31) Soldier A then turned his attention to the other man who was then approaching a parked white motorcar. This vehicle was located adjacent to a bus shelter on Line Quay and was pointing away from Soldier A. Soldier A said that he had not been aware of its presence until that point. As the man approached it he moved towards the near-side rear door and at that stage was turning to face Soldier A. The distance between the two was estimated to be about 30 metres. Soldier A remained concerned that the man would produce a weapon and fired two shots in his direction. At the same time the man opened the door and got into the vehicle, which then left the scene. Soldier A was not in a position to describe the direction taken. Further shots were fired at the vehicle in an attempt to disable it, the shots being described as being aimed at the tyres.

32) Soldier A then remained at the scene. At this point other soldiers from the team had moved to Line Quay to deal with a situation that had developed with a large hostile crowd. Police and ambulance personnel also attended to remove the injured man. During this disturbance shots were fired into the air, and stun grenades were discharged.

33) Several witnesses indicated that they had witnessed the aftermath of the incident, but there was no other evidence relating to the two men and Soldier A, save for a sighting by Debra Donnelly and a possible sighting by Martin Armstrong (see below).

34) As part of the police investigation an examination was undertaken of the area within the alleyway. The alleyway leads into an area of rough ground with garages and is adjacent to the back wall of Coalisland police station. This wall is of some height and its outside edge consisted of steel cladding. The evidence of an army technical officer (ATO) was that there had been one explosion (discounting the remote possibility that two devices could have been adjacent to each other when they both detonated simultaneously). It was caused by about 500 – 750 grams of military or commercial explosives and it damaged the cladding to the perimeter wall but did not penetrate through the inner brick skin of the structure. He was unable to recover any debris or shrapnel from the device. He considered that it was likely that the explosives would have been detonated by some sort of impact mechanism, discounting a fuse or timing device. He said the discovery of a starting pistol in a poor condition in the area was not relevant to this incident.

35) A forensic expert also visited the scene and later examined items recovered at the scene. His opinion was similar to the ATO, estimating the device contained about a pound in weight (one pound equalling 450 grams), although he considered that a fuse could have been inserted and lit to cause the detonation.

Abuse of Process

36) The defendant has argued that because of the delay in the case it is an abuse of process that he be prosecuted.

37) It is well established that a court should be very slow to stay proceedings as an abuse of process and only in the most exceptional circumstances (see **DPP –v- Humphrys [1977] AC 1**).

38) There are two main categories of abuse of process – when an accused person cannot receive a fair trial or when it would be unfair for the accused person to be tried. (see **Re DPP for NI's Application [1999] NI 106**).

39) The defence have referred to the delay as being the abuse of process. There is no time limit within which cases must be brought before this court. Where delay has been deliberate on the part of the prosecution or delay has been used by the prosecution to manipulate the process then that could well be evidence that there is an abuse of process. If it has not, then it could still be an abuse of process, provided the defendant can show, on the balance of probabilities, that there has been an inordinate or unconscionable delay or when the defendant has been prejudiced by the delay. The delay must produce genuine prejudice or unfairness (see **Bow St Stipendary Magistrate, ex parte DPP (1989) 91 Cr App R 283**). Hughes LJ in **Brants –v- DPP [2011] EWHC 754** stated at [47] that

"There is a public interest in prosecuting offences which transcends any consideration of punishing the prosecution for delay. If delay by the prosecution does not cause prejudice to the defence then normally it would not be appropriate to stay proceedings as an abuse of process."

40) Lord Lane in **Att-Gen's Ref (No 1 of 1990) [1992] QB 630** stated that stays on the ground of delay should only be employed in exceptional circumstances and that delay due merely to the complexity of a case or contributed to by the actions of the defendant should never be the foundation of a stay.

41) The chronology put forward by the defendant in this case is partly based on facts that the prosecution take no issue with, and other evidence given by him but not corroborated by anything or anyone. For the purpose of the abuse of process application, I am prepared to accept the accuracy of the defendant's evidence as to his movements and whereabouts.

42) The basic details are as follows –

Explosion 26th March 1997

Defendant leaves the jurisdiction 26th / 27th March 1997

Defendant presents himself to Louth Hospital 27th March 1997

Defendant arrested in Louth 1st April 1997

Defendant released 2nd April 1997

Defendant remained living in the Republic of Ireland using his own name, working and claiming benefits

Defendant states he was arrested for a motoring matter in the Republic of Ireland

Defendant states that he returned to the jurisdiction in 2001 to reside in his family home

Defendant purchased the family home obtaining a mortgage for that purpose

Defendant stopped by police in Northern Ireland for motoring matters in 2003

Defendant stopped by police in Northern Ireland on 10th May 2007 and given a fixed penalty notice for a driving matter. On that occasion it was noted that he was wanted in connection with this matter, but no steps taken due to absence of a case file.

In October 2008 a police arrest alert for the defendant was removed

Defendant left the jurisdiction to work in Monaghan in 2011

Defendant arrested at Portadown railway station in 2015.

43) There is no evidence of any deliberate decisions being made to cause delay in this case. The court's analysis of this issue commences with the evidence that the defendant deliberately left the jurisdiction and failed to maintain any contact with the authorities in Northern Ireland. The trial of Gareth Doris, who had remained in the jurisdiction, proceeded with reasonable haste. There has been delay, and it would appear that the police did not deal with this case as expeditiously as may have been possible. Of importance is the fact that there is absolutely no evidence of any misconduct on the part of the police or the prosecuting authorities.

44) The questions the court must answer are as suggested by Lord Dyson in **R –v- Maxwell [2010] UKSC 48** - Will the continuation of this trial offend the court's sense of justice and propriety? and Will it undermine public confidence in the criminal justice system and bring it into disrepute?

45) There is no evidence placed before the court that in any way suggests that either question could be answered in the affirmative.

46) The defence seek to suggest that the delay has in some way caused prejudice to it in presenting its case. I do not propose to deal with this in much detail. In its argument, the defence suggest the following areas of prejudice –

Inability of prosecution witnesses to recall the incident and related matters;

Inability of Seamus Rice, Gary Montgomery and Andrew Ballentine to give evidence;

Death of the defendant's grandmother and uncle and Denis Faul;

General non-availability of Coalisland CCTV images of scene;

Failure to provide forensic examination of Seamus Rice's vehicle, the defendant's clothing, and the defendant's hair sample;

General non-availability of witnesses such as the sanger occupants, radio operator, the helicopter crew, and civilian witnesses of the Line Quay scene;

Absence of documents such as a radio log and inventory of weapons and ammunition seized from the soldiers.

47) The prejudice must be shown, on the balance of probabilities, to an extent that the defendant cannot receive a fair trial. The trial process often has to deal with situations were witnesses cannot be traced, or if traced are either unable to give evidence at all or if they can give evidence, have difficulty recollecting matters. Suitable warnings will be given to jurors about this so that they take it into account when considering if the prosecution have proved the case beyond reasonable doubt.

48) The defence have highlighted a number of individual witnesses, or groups of witnesses, which present some difficulties. Contemporaneous statements had been made by some of these witnesses about what they say happened, or setting out their professional opinion about matters. Professional witnesses also made working notes of their examinations and the notes are available. Some witnesses are clearly not available and could no longer be traced. The court would be speculating about what those witnesses could say or add to the case.

49) Whilst it is accepted that the defendant does not have to prove anything, there are a number of witnesses who would be available to be called to give evidence on his behalf – Gareth Doris, the unnamed third man in Seamus Rice's vehicle, the several relatives who were present in the grandmother's home and the relatives who transported him to Louth Hospital. The defendant has not suggested that these witnesses are not available or are unable or unwilling to give evidence. He has just chosen, as is his right, not to call them.

50) Except in the most general terms, the defendant has failed to show that he has been prejudiced in undermining the prosecution case and/or in the presentation of his case. The trial process and the warnings that I give myself concerning the impact of delay on the defendant are well able to deal with any such prejudice.

51) I reject the application that I should stay the prosecution as an abuse of process.

The prosecution case

52) The prosecution case is that the defendant was the second man observed by Soldier A and who escaped the scene in the white vehicle driven by Seamus Rice.

53) For reasons which I set out below I am satisfied that there was one explosive device. The prosecution case against him is that he was one of the two men seen by Soldier A running into, and then out of, the alleyway. The other man was Gareth Doris. The defendant either, possessed and threw an explosive device and was assisted in doing so by Gareth Doris, or it was held and thrown by Gareth Doris, with the defendant jointly involved by the assistance rendered by him to the bomber, not merely by his presence, but also by providing support, before, during and after the explosion. The prosecution suggest a further alternative that the device was carried in two or more parts into the alley by both the defendant and Gareth Doris and that it was assembled there and thrown. The prosecution case is that in any of these scenarios the defendant is guilty of the offence of causing an explosion likely to endanger life or cause serious damage to property.

54) When considering whether an offence has been committed as part of a joint enterprise, it has to be borne in mind that each participant in a plan to commit a crime may play a different role but if they are acting together as part of a joint plan they are each guilty of committing the offence. If looking at the case of any defendant the tribunal of fact is sure that he committed the offence on his own or that he intentionally encouraged others to commit the offence he is guilty.

55) Although much of the focus of the case has been whether the defendant was one of the two men as described by Soldier A, the defence have raised two further issues for consideration. The defence submit that firstly, there is no evidence before the court to suggest that the explosion that occurred was likely to endanger life or cause serious damage to property and secondly that there is no evidence before the court to suggest that what Soldier A described was a joint enterprise between the two individuals.

Causing an explosion likely to endanger life or cause serious injury to property

56) The defence referred me to a Scottish decision – **McIntosh –v- HM Advocate (1993) SCCR 165.** McIntosh had thrown a petrol bomb at the rear wall of an occupied dwelling and it exploded causing scorch damage to the exterior wall. The appeal against a section 2 conviction was allowed because of a misdirection by the sheriff who told the jury that they were entitled to take into account what might have happened had the bomb gone off inside a bedroom. The Lord Justice Clerk at p170E stated that

"The essence of the charge is that the appellant has caused an explosion, and, to be guilty, the explosion which he has caused must be of a nature likely to endanger life. This meant that the jury had to consider the nature of the explosion which the appellant had caused and that it was wrong for the sheriff to direct the jury to consider what might have happened if the bomb had gone off inside the house rather than outside, as that was not what happened."

57) I was not referred to two Northern Ireland authorities on this issue – **R –v- Jones [2007] NICA 28** and **R –v- Marcus [2013] NICA 60. Jones** was a case of a home-made mortar device in a vehicle parked adjacent to a police station. There was an initial explosion which propelled the mortar bomb (which contained 79 kgs of explosive) out of the vehicle in which it was placed but it fell a short distance away and failed to explode. Jones was convicted of a section 2 offence, the trial judge determining that the explosion of the propellant charge was likely to endanger life because of the likelihood of the devastating consequences on impact of the mortar in the urban setting. The Court of Appeal allowed the appeal holding that the essential ingredient is that the explosion caused is of a nature likely to endanger life and that *"the fact that the mortar device would have had the consequences stated, if it had exploded, does not render the explosion by which it was propelled, one likely to endanger life"*

58) The final case is **Marcus**. A nail bomb was thrown through the window of an occupied house and landed in the hallway. The occupant was in another room when it exploded. The bomb had a modest amount of low grade explosives but contained nails which were projected in the hallway with evidence of them striking the walls of the hallway up to a height of several feet. The trial judge refused a direction and the jury convicted the defendant.

59) Girvan LJ at [17] gave some guidance as to the meaning of the word "likely" in the following terms –

"As pointed out by the House of Lords in Boyle v SCA Packaging Limited [2009] NI 317 the word "likely" has several different shades of meaning. As Lady Hale at page 337 points out predictions are different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. Assessing whether something is a risk against which sensible precaution should be taken is an exercise which is carried out all the time. The context of the relevant legislation may compel the conclusion that when the word "likely" is used it is in the sense "could well happen" rather than that it was probable or more likely than not. Section 2 of the 1883 Act criminalises the causing of explosions which have the real capacity to endanger life or cause serious injury to property, that is to say could well cause danger to life or cause serious physical damage to property. In this case there was clear evidence at the close of the Crown case more than sufficient to raise a prima facie case."

60) This Court of Appeal decision confirms that notwithstanding the fact that the explosion occurred in an unoccupied area of the house and no one could have been injured by the explosion, it did not prevent a safe conviction for the section 2 offence. The offence is not causing an explosion that endangers life or causes serious injury to property, although evidence that it did would be clearly sufficient. The offence is causing an explosion *of a nature likely* to endanger life or cause serious injury to property (my emphasis).

61) Therefore it does not require an analysis of what actually happened. It requires an analysis of the nature of the explosion which will include the capacity of the explosion and whether, it could well have caused endangerment to life or serious injury to property.

62) Taking into account each of these decisions, the correct approach in relation to the consideration of a section 2 charge would appear to be as follows –

a) When considering the nature of the explosion the court is considering the criminal act (the *actus reus*), therefore the intention of the bomber is irrelevant to this issue;

b) The defendant must have caused the explosion;

c) The actual nature of the explosion must be considered;

d) The location of the explosion must be considered and there should be no speculation about what could have happened had the explosion taken place at a different location (as in **McIntosh**) or if it had triggered, or resulted in, a secondary, or further, explosion (as in **Jones**);

e) When looking at the nature of the explosion, the capacity of the explosion must be considered and this can involve the capacity to endanger life or cause serious injury to property, even though people or property may not be immediately adjacent to the explosion at the time (as in **Marcus**);

f) In section 2, likely means that an eventuality could well happen (as in **Marcus**);

63) Returning to the facts of the case, I am satisfied beyond reasonable doubt that the nature of this explosion was such that it could well have caused endangerment to life. The estimate of the two experts was a device containing somewhere between 450 – 750 kg of military or commercial explosives. The blast wave from the explosion could well endanger life as could airborne projectiles released, or created, by the explosion.

64) For the sake of completeness, in case I am wrong about my assessment of the evidence reaching the requisite standard placed on the prosecution, it could also be possible for the prosecution to rely on the conviction of Gareth Doris. Article 72 of PACE 1989 provides as follows –

"(1) In any criminal proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom … shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

(2) In any criminal proceedings in which by virtue of this Article a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom … he shall be taken to have committed that offence unless the contrary is proved."

65) The commission by Gareth Doris of the section 2 offence is admissible in this case. It includes a finding that he caused an explosion likely to endanger life or cause serious injury to property. Article 72 (2) of PACE 1989 means that there is evidence that such an explosion has occurred, unless the defendant proves the contrary. This would take the form of an evidential burden placed on the defendant to prove, on the balance of probabilities, that such an explosion had not taken place. For the reasons I have set out above, I consider that the defendant has not satisfied that burden.

Joint enterprise

66) The Supreme Court's judgment in **R –v- Jogee [2016] UKSC 8** is a recent ruling on the meaning of joint enterprise. It has clarified the legal position in relation to joint enterprise, but this does not in any way assist the defendant. The Supreme Court held that for a secondary party to be guilty under a joint enterprise it was necessary for the prosecution to prove that the secondary party intended the primary party to commit the crime, rather than merely foresaw the possibility that he might do so. In the factual scenario described by Soldier A, a clear and valid inference could be drawn that an explosive device was carried into the alleyway by either Gareth Doris or the other man and that device was thrown by one of them. The man throwing the device (be it Gareth Doris or the other man) is guilty as the primary party, but the actions of the second man (be it Gareth Doris or the other man) in accompanying the primary party into the alley, remaining with him, and then exiting the alley with him is clear evidence of him providing moral and/or practical assistance to the primary party, and further, by inference, an intention that the primary party would unlawfully and maliciously cause an explosion.

Basic legal principles

Burden of proof

67) The burden of proof lies on the Crown to establish the defendant's guilt. He does not have to prove that he is innocent. He has put forward a scenario which would exonerate him from these crimes. He does not have to prove that scenario. When considering the case that he advances, the correct approach of the court is to always focus on what the prosecution can actually prove, and when assessing the defence case, to consider whether that, or part of it, raises a reasonable doubt in the court's mind.

Standard of proof

68) Before the court can convict the defendant of either count on the Bill of Indictment the prosecution must prove the defendant's guilt beyond reasonable doubt. I remind myself that proof beyond reasonable doubt is proof that leaves the court sure, or firmly convinced, of the defendant's guilt.

Inferences

69) All the decisions I am making are based on the evidence established before the court. In some cases I have drawn inferences from facts I regard as reliable and proven to the appropriate standard.

Alternative counts

70) Although there are two counts on the Bill of Indictment, the second count is an alternative count, and I will only consider it should I find the defendant not guilty of the first count.

Circumstantial evidence

71) The prosecution case depends on circumstantial evidence rather than direct evidence. In the present case the prosecution rely upon evidence of various circumstances relating to events leading up to, at the time of, and subsequent to the explosion. The prosecution has submitted that when all these circumstances are taken together, they establish the case against the defendant to the requisite standard. The prosecution say that this is the only conclusion that can be drawn from the evidence.

72) Circumstantial evidence must be treated with care. Juries will often be told that it is not necessary for the evidence to provide an answer to all of the questions raised in a case. It is also not necessary that each fact upon which the prosecution relies taken individually proves the defendant is guilty. The court must decide whether all of the evidence has proved the case against him.

73) It is essential that circumstantial evidence is examined with great care for several reasons. Firstly, it can be fabricated. Secondly, to see whether or

not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant.

74) Higgins LJ in **Jones** at [33] provided a summary of the approach that should be taken when there is to be a consideration of circumstantial evidence –

> *"In a case that depends on circumstantial evidence a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together."*

Good character

75) I am treating the defendant as a man of good character. He had no previous criminal convictions and his subsequent convictions have been for driving matters. In the circumstances he is to be treated as a man of good character. As such having given evidence, his good character is a factor that I should take into account when assessing his credibility, and further, as a man of good character it may mean that he is less likely to have committed these offences.

Delay

76) Although I do not consider that the 22 year delay gave rise to an abuse of process, it is a factor that I must take into account when considering whether the prosecution have proved the guilt of the defendant. I have taken into account the fact that notwithstanding many of the statements were made at the time when, no doubt, events were fresher in the minds of witnesses, it will have been difficult for all the witnesses, and the defendant, remembering precise details and sequences. I also take into account that some witnesses are not available to give evidence now, and that several witnesses that the defendant may have called are now deceased. I have focussed on the particular impact that the delay has had on the defendant, and his ability to remember details to assist him in instructing his legal representatives and in giving evidence.

Defendant's failure to mention evidence when questioned by police

77) The defendant was given evidence during the trial putting forward a case that he failed to mention when he was interviewed by police.

78) When arrested, and at the beginning of each of his interviews, the defendant was cautioned. He was told that he need not say anything, and it was therefore his right to remain silent. However, he was also told that it may harm his defence if he did not mention something when questioned which he later relied on in court; and that anything he did say may be given in evidence.

Defendant's questioning of DNA evidence in his defence statement

79) The defendant was also obliged by law to furnish the prosecution and the court with a defence statement which sets out in general terms the nature of his defence, indicating any matters on which he takes issue with the prosecution, and why he does so. During the preparation for the trial, the defendant served three statements. The first in January 2018 was a brief statement simply denying his guilt. The second in December 2018 included at [3] the following – "The accused will challenge the … reliability of the expert and forensic evidence sought to be adduced by the prosecution in respect of DNA". This statement also included a more general denial and other details which are not relevant to the issues in the trial. A third statement of March 2019 set out in detail at [4] (a) – (n) the defendant's case that was presented by him at the hearing.

80) Similar issues arise from the conduct of the defendant in both his not mentioning some matters when questioned by police and by asserting some matters in his defence statement.

81) Part of the prosecution case is that I should not believe the defendant's evidence because he has given evidence which is different from the case set out in his defence statement and which he could have mentioned to police when he was questioned.

82) Making an inconsistent statement in his Defence Statement cannot, on its own, prove the defendant's guilt. Neither can a failure to mention something when questioned. Depending upon the circumstances, such failures may be held against a defendant when deciding whether or not the prosecution have proved his guilt. However, he should not be found guilty only, or mainly, because of either or both of these failures. They are matters I can take into account when considering whether the prosecution has proved his guilt.

83) I will deal with his evidence in court in more detail later, but in essence he said that he was in Line Quay for an innocent purpose, he was caught up in the aftermath of the explosion, again as an innocent person, in the process of this he was shot, he then was taken in a motorcar to his grandmother's house, and from there he was taken by un-named relatives to a hospital in Co Louth where he received medical treatment.

84) He admitted that he did not mention these facts when he was questioned under caution about his involvement in the offences.

85) Care needs to be taken not in inflate this issue. It is not a case of him telling admitted lies, although it is the prosecution case that this explanation is a series of lies. He did not say anything to the police when interviewed and in the Defence Statement he challenged the reliability of the DNA expert evidence. He never asserted that he had not been in the motorcar. It will have some relevance when the court comes to consider his version of events, as the prosecution argue that that version has been invented in recent times to explain his presence at the scene, how he came to be shot, and why he left the scene and the jurisdiction. It does not support the prosecution case directly but is a factor that can be taken into account during the consideration of the defendant's explanation. I remind myself that even if I reject the defendant's case, the burden still remains with the prosecution to prove the underlying facts upon which its case is based.

Hearsay evidence

86) I have admitted the statements of Seamus Rice and the defence and prosecution have agreed that other hearsay statements from other witnesses can be admitted. The defence have helpfully outlined in documents and submissions questions that they have been unable to put to the various witnesses. I take into account the fact that the defence have not been able to question these absent witnesses, and in particular I bear in mind the specific questions that cannot be posed to the witnesses. I take this into account when considered whether the prosecution have made me sure of the defendant's guilt.

87) The other hearsay statements admitted by agreement included –

The statement dated 27th March 1997 of Andrew Ballentine, a police officer undertaking duties at Coalisland Police station;

The statements dated 30th June 1997 and 21st October 1997 of Gary Montgomery, a forensic scientist who examined Seamus Rice's vehicle, the soldiers' firearms and the ammunition;

Consideration of the evidence

88) The prosecution case is primarily based on the evidence of Soldier A and in particular his observations and actions.

89) I had the opportunity to observe him giving his evidence and when he was cross-examined. I consider that he gave his evidence in a very straightforward manner, when able to remember directly what he saw or did, he gave his evidence clearly. He answered the questions put to him by defence counsel again in a straightforward manner, and did not in any way attempt to be evasive or to prevaricate.

90) The core of the defence case is that Soldier A has invented the presence of the second man to justify his actions that evening with the alleged unlawful discharge of his weapon generally, and specifically at Gareth Doris, at the defendant and towards two occupied vehicles.

91) This incident would have taken place over a very short period of time, with the bomber or bombers running towards and into the alley and then running out, and the white vehicle driven by Seamus Rice leaving shortly afterwards. Coupled with this short interval of time, there was an explosion and discharge of rounds from a firearm. This was then followed by the gathering of a hostile crowd and the discharge of further rounds and flash grenades. It is perfectly understandable that any witness to the incident, including those directly involved in it, could have difficulty remember the precise details of what happened and in which sequence.

92) The short period of time also means that any observations made by Soldier A would be fleeting in nature and care is needed in assessing exactly what he is saying that he saw.

93) Soldier A made his first observation when seated in his vehicle in the Heritage Centre. I accept that his view would have been partially obstructed by the raised flower and shrub beds and the railings. There are photographs taken at the time which show the type of bed and railings involved although there is no direct photograph of the view Soldier A would have had. Soldier A was carrying out a surveillance operation. His task at that time was to observe Line Quay and in particular the movements of a vehicle associated with the man under surveillance. I am satisfied that he would have taken up a position that would have given him a sufficient view of Line Quay and the vehicular and pedestrian traffic moving along it. I reject the suggestion that as the up to date intelligence was that the surveillance target was behind him in the vicinity of Main Street, his attention would be in that direction. Soldier A was part of a team and he had a task to monitor Lineside Quay. That would have been the focus of his attention, relying on colleagues to undertake other tasks in connection with the surveillance.

94) Having made his initial observations, Soldier A then got out of his vehicle and moved towards Lineside Quay. When he moved into the entrance of the Heritage Centre carpark he would have had a clear and unobstructed view of Lineside Quay and anything that was happening along it. As he then moved out into Lineside Quay his view would have improved with every step taken.

95) The incident took place at night. There was no street lighting on the south side (police station side) of Lineside Quay, however there is street lighting on the north side and the street lamps had an overhanging design.

96) I am therefore sure that Soldier A had an adequate view of Lineside Quay and it was sufficiently illuminated to enable him to make adequate observations.

97) His observation was of two men running from his left to his right. His evidence was that he saw both carrying what appeared to be objects in their right hands and appearing to exercising care in doing so. The men

then disappeared from his view when they ran into the alley and he said that he then heard what appeared to be two explosions.

98) I am sure that there was only one explosion. The evidence clearly shows one site for an explosion. I discount the possibility that there were two devices which coincidentally exploded in close proximity to each other thus creating the appearance of one site. I accept the evidence of both the Army ATO and the forensic scientist on this point.

99) I have considered if this discredits the evidence of Soldier A as to his observation that both men appeared to be carrying something and what he actually heard. I accept that even trained professionals can make mistakes as to what they hear, particularly if they are describing the noise of an explosion in a built up area, with the possibility of echoes. I consider that it is unlikely that both men were carrying explosive devices, and the observation that both appeared to be doing that was a mistake made by Soldier A. However the main issue is not what the two men were carrying but whether there were two men at all.

100) The defence suggest that what happened next casts serious doubts as to the accuracy of Soldier A's evidence. This involved the discharge of his weapon on numerous occasions. An analysis of the evidence of Mr Montgomery from the weapon seized from Soldier A and accompanying magazines and ammunition suggests that 12 rounds may have been fired. 10 casings were recovered from the scene which can be attributed to Soldier A's weapon.

101) Soldier A's evidence is that he initially fired two rounds above the approaching men as a warning when the two men ran towards him. He then discharged two rounds at Gareth Doris. As the second man approached and was adjacent to the white vehicle, two further rounds were discharged at the man, although Soldier A did not believe that he hit the man. He also described two further rounds being discharged at the white vehicle.

102) As the hostile crowd gathered in the aftermath of the incident further rounds were discharged by other soldiers.

103) The forensic survey of the scene indicated that 17 bullet casings were located mainly in the entrance to the Heritage Centre carpark and on Lineside Quay. The location of a casing may not give a precise indicator as to the location from where a round was discharged as a casing will be ejected from the weapon on discharge, and can then also be moved about on the ground depending on vehicular and pedestrian movement.

104) The evidence of Mr Montgomery is that in addition to Soldier A, Soldier B fired 2 rounds, Soldier C fired 4 rounds, Soldier F fired 1 round, and Soldier G fired 5 rounds. Of these 12 additional discharged rounds, 7 casings were located.

105) In summary the army personnel would appear to have discharged 24 rounds, with 17 casings recovered.

106) The defence case is that given the number of rounds discharged, the army personnel could be tempted to either invent, or exaggerate, the situation they faced in order to justify their conduct.

107) It is not the court's primary function to determine if the conduct of Soldier A, or any of his colleagues, was unlawful. It is however a matter that can be considered as it may be a motive for him, and/or his colleagues to invent a threat that they say they faced.

108) The conduct of Soldier A and his colleagues will have already been the subject of an investigation and no adverse allegations have flowed from that. There was also a contested trial involving Gareth Doris when the conduct of Soldier A that evening would have been subject to judicial scrutiny.

109) In the immediate aftermath of an explosion Soldier A said that he was confronted by two men running towards him, with hand movements towards their waist area suggesting an imminent removal of a weapon. Should that be his reasonable perception, that would justify the production of his own weapon and the issue of a warning, followed by the discharge of the weapon into the air.

110) The height of the bullet strikes to the premises of PA Duffy & Co Solicitors (6 Lineside Quay) would indicate that the discharge of those shots, if they were warning shots, were poorly aimed and bordering on negligent discharges.

111) When the second man reached the white vehicle, Soldier A described him as turning towards him and making movements to suggest a further threat to Soldier A, and further rounds were then discharged.

112) Soldier A then described the man getting into the vehicle and as it departed two rounds were fired towards the tyres in an effort to stop the vehicle. It would appear that one round, either directly or by ricochet, entered the vehicle in the area of the bottom of the rear window on the near side of the vehicle.

113) The discharge of the rounds that struck No 6 Lineside Quay may indicate a poor aim at the time. However, there is nothing to suggest that the conduct of Soldier A was so bad or out of order as to require a concocted story to justify his actions. Soldier A did not believe that he had struck the escaping man. This does not mean, as the defence have suggested, that he did not hit him. I am satisfied that the two rounds aimed at and fired in the direction of the man as he stood by the door of the vehicle would have struck him, as evidenced by the fact that two bullet wounds were recorded by medical staff in Louth Hospital.

114) The notion that this man, the defendant, had been struck by two rounds fired by another soldier is not supported by any evidence. The white

vehicle, bearing the defendant, had departed the scene very quickly after the explosion and the shooting of Gareth Doris. There is no evidence to suggest that another soldier was that quickly on the scene, and had his attention directed towards the white vehicle. The possibility of two unaimed rounds entering his lower abdomen in close proximity to each other, having been fired randomly by another soldier is so remote that it can be discounted. I accept that there may be some rounds discharged that cannot be accounted for in the sense that targets had not been identified and justified. The aftermath did present a very difficult public order incident that the soldiers had to deal with and that could easily explain unaccounted rounds, particularly when warning rounds were being fired into the air.

115) The evidence of what happened to the soldiers after the incident, their removal from the scene, and the de-briefing, would suggest that there is no evidence of collusion and little opportunity for them to concoct versions of events to justify their own actions, and particularly the action of their colleague Soldier A who had discharged the rounds that struck Gareth Doris.

116) Some time at the trial was taken in dealing with the question of the presence of a helicopter and in particular the failure by Soldier A to alert his colleagues and the helicopter that a white vehicle was on the move and should be followed.

117) There is always a danger in looking at an incident such as this with the benefit of clinical hindsight. Soldier A had just shot Gareth Doris, he had fired four rounds at a man and the white vehicle, and the vehicle had disappeared from sight. He had to deal with Gareth Doris who may still have posed a danger to him, and on closer examination, required immediate medical attention. Soon after that a hostile crowd gathered, and further rounds were discharged and flash grenades discharged. The white vehicle was no longer a threat, and Soldier A was quite rightly focusing on the scene before him. His failure to alert colleagues about a vehicle that might be carrying a suspect is perfectly understandable. In addition there is no evidence that the helicopter was in the immediate location. It was airborne but was unlikely to have been overhead at the time given the nature of its role and the surveillance operation it was supporting at the time.

Defendant's case

118) The defendant's case is that he had walked into Coalisland that night to get a video and had been walking across Lineside Quay from the direction of the Heritage Centre. He would have been crossing in an area very close to where Soldier A had moved to from his vehicle. He did not witness any person running along Lineside Quay and into the alley. He did not see Gareth Doris getting shot but was aware of an explosion and

shooting. His location at this point was midway across Lineside, adjacent to where Soldier A said that he was standing when he shot Gareth Doris.

119) The defendant described two men firing shots. These men would have been behind him at the entrance to the Heritage Centre Carpark. He described moving towards the white vehicle to get away from the scene and to protect himself. He described feeling a burning sensation in his groin area.

120) On reaching the vehicle he instinctively got into the vehicle through the off-side rear door, and at the same time a man who is known to him, but he has refused to name, got in through the nearside rear door. That man told the driver to drive and he did so. There then followed a short journey to Meenagh Park when the driver stopped and the defendant got out, walking to his grandmother's house in Meenagh Park. (During the evidence various words were used to describe this area – Annagher Hill, Meenagh Park and the GAA pitch. I am satisfied that the various witnesses were describing the same general area.)

121) He then described how there followed a family meeting. He identified some now deceased members of the family who were present, but has declined to name other living members who were present. He described how he was bleeding from the gunshots and a decision was made that he had to go to hospital. He stated that he received advice from the family that he should not go to a hospital in Northern Ireland. He also spoke in vague terms about advice given by Denis Faul, a local priest and his headmaster, and Seamus Rice, his parish priest. It was unclear if this advice was given in a church setting or in a school setting, and what the exact advice was, but the thrust seems to have been that if you were innocent of any wrongdoing and were ever shot by police or soldiers you should not cooperate with government agencies (north and south of the border) and you should seek medical assistance in the Republic of Ireland. The defendant said that he followed that advice.

122) Based on this advice, plans were made to move the defendant across the border, and unnamed family members were involved in driving him across the border.

123) When arriving at Louth Hospital, the defendant gave a false name – John Murphy – and his correct date of birth and an address in Dundalk. He gave a history of falling off a motorbike. The medical evidence suggests that he was struck by two bullets with one remaining at the front of his pelvis, and the other entering in the perineum and exiting through the scrotum. He was bleeding heavily and had lost about three pints of blood.

124) The thought process behind his post-incident conduct was a fear that despite his innocent presence at the scene and the fact that he had been shot, he, and his family who were advising him, feared that he would be falsely accused of involvement in this or other terrorist activity.

125) I accept that in the heat of the moment people can make irrational decisions. This was not however a spontaneous decision as several hours were taken to reach it, and it involved advice being taken from family members and consideration of previous advice given by Denis Faul and/or Seamus Rice. It was therefore a considered decision made after several hours of deliberation.

126) I reject this explanation insofar as it explains why the defendant left Lineside Quay and several hours later, why he left the jurisdiction.

127) It is an uncorroborated story (save for his presence in Seamus Rice's vehicle). It is a story that stands on his testimony alone as he has declined to call witnesses who could give evidence about it – Gareth Doris, the man in the vehicle, his relatives, parishioners or school friends who could speak to the advice purportedly given by Denis Faul or Seamus Rice.

128) He was in a distressed state having been shot twice, with one bullet still in his body. He was bleeding and was no doubt in significant pain and discomfort. His journey to Louth Hospital in Dundalk involved him driving in close proximity to Craigavon Area Hospital where he could have received medical attention.

129) Once he reached the perceived safety of the Republic of Ireland there was no reason for him to give either a false name and a false history of the method by which he sustained his injuries.

130) Again once he had recovered from his injuries there would be no reason why he if an innocent man could not return to Northern Ireland.

131) There was clear evidence that two other people who had been caught up innocently in the incident (Seamus Rice and the driver of a Renault Megane), both having driven vehicles that were struck by bullets, had not been charged or somehow been falsely accused of involvement. This would have been particularly the case in relation to Seamus Rice who had innocently been instrumental in removing the defendant from the scene.

132) The story has all the appearance of one concocted to fit the prosecution case against him. He has only come forward with it in March 2019 despite having an opportunity to give it in May 2015 when interviewed by police. His defence statement challenged the accuracy of the forensic evidence that had confirmed the presence of his blood in the rear seat of Seamus Rice's vehicle, a position he maintained knowing that he had been in the rear seat of the vehicle. It was only when that element of his case could not stand, that he came forward with the version which he eventually gave in evidence.

133) A finding which rejects the defence's explanation as to his presence on Lineside Quay is not sufficient by itself to find him guilty, but the elimination of his explanation as to what happened and what he did, does support the prosecution case against him.

134) Although the prosecution depends to a large extent on the evidence, and credibility, of Soldier A, there is also support of a modest nature for his version of events. The location of the debris from the incident, including spent casings and spent flash grenades even taking into account the possibility of these small items being kicked and moved about tends to confirm the location where Soldier A says he was standing at the time.

135) The CCTV images captured the aftermath of the scene and confirm the location of Gareth Doris as he lay on the ground, where Soldier A says he fell.

136) The agreed evidence of Martin Armstrong (statement 1st May 1997) is that he had parked his vehicle close to the car park entrance of the Heritage Centre. He was reversing out of his space when he heard an explosion and stopped his vehicle. He then heard five or six shots and then saw, in his words "a male person in his late teens, twenties run down Lineside from the direction of the town and towards the direction of the Canal. The first time I saw this person he was in the centre of the road and running at an angle across it. The shots were still being fired. I thought this person was trying to get to safety."

Identification

137) In its closing submission the defence raised the issue of identification, essentially arguing that there was a breach of PACE Code C in that Soldier A did not participate in an identification procedure (in 1997 and 2015) depriving the defendant the opportunity for Soldier A to exculpate him, and further that this is a case which requires the court to direct itself in accordance with the guidelines relating to identification evidence in **R –v- Turnbull [1977] QB 224**.

138) I do not consider that this is a case that falls to be considered taking into account the **Turnbull** guidance. At no stage does Soldier A ever identify the defendant as the man who he saw on the 26th March 1997. His evidence is that he saw two men running across in front of him, then turning away from him into the alley, returning towards him, with one man turning to Soldier's A left, and whilst maintaining him to an extent in his peripheral vision Soldier A saw the man approach a white vehicle about 30 metres away, and then enter the vehicle.

139) The extent of Soldier A's description is that this man was of medium height and build, wearing a dark green army parka type jacket with his face partially covered with either a scarf or balaclava. There was no identification by Soldier A that the defendant was that man, and Soldier A never indicated that he would be able to identify that man.

140) The PACE Code C exists primarily to test a witness's ability to identify, under controlled conditions, any suspect. As Soldier A could not have identified the man, any identification procedure would have been a waste of time. The defence suggest a failure to use An Garda Siochana photographs of the suspect taken after his arrest in 1997. The VIPER

photographic procedure was not introduced until the early 2000s and the use of photographs would have been a flawed procedure. When he was eventually arrested in 2015, 18 years after the incident, a VIPER or other procedure would again be a waste of time.

141) The court is required to consider all the evidence carefully. This is not a case which is covered by the **Turnbull** type direction to a jury. It is not a case which depends wholly or substantially on the correctness of an identification of the defendant. The court acknowledges the concept that an honest witness can however be a mistaken. The case depends on what Soldier A has described as a continuity of observation of a male of medium height and build wearing a dark green jacket, first entering the alley, then leaving it, then turning right and moving across his vision from Soldier A's right to left. At or about this location, the defendant admits to being in the position that Soldier A says he was, and the defendant admits moving towards the white vehicle and getting into it, as Soldier A says the man did. Some of the **Turnbull** factors are in play – darkness, lighting, period of time, potential obstructions, distances and distractions, but these are factors that I have considered in my analysis of the evidence. It is not a case that requires a specific **Turnbull** direction.

Discharge of rounds.

142) The defence have also asked the court to consider the number of live rounds discharged by all the soldiers on duty that evening. The defence have suggested that it is an issue that the discharge by various soldiers was not in controlled or precise manner, with evidence of bullet strikes to the solicitor's office, Seamus Rice's vehicle and the front headlamp of a Renault Megane. The defence also suggest that the defendant may not have been shot by Soldier A but by one of his colleagues.

143) I have considered this evidence and I do not consider it to be a reason why I should doubt Soldier A's evidence about the man he saw and he shot at. Soldier's A belief that he did not know if he had hit the man with his shots is of little significance. That was his belief at the time. I do not consider that Soldier A has invented his evidence, or has exaggerated parts of it, in an attempt to cover up for any wrongdoing on his part, or on the part of his colleagues.

Number of persons in Seamus Rice's vehicle

144) It is the defence case that there were three men in the vehicle, Seamus Rice, the defendant and another male who he refuses to name. The witness Debra Donnelly in her statement of 8th April 1997 said that she observed a youngish man wearing what looked like a black jacket and a cap. He was lying on his back in the vehicle and shouting something. She said "I think there were others in the car at the time but I'm not sure what they looked like or how many there was."

145) This evidence does not take the case much further. She believed that there were at least two in the vehicle (which we know is correct) but is not sure how many.

146) Even if the third man did enter the vehicle, this does not alter the main thrust of the case against the defendant – that he was the man seen by Soldier A entering and leaving the alley and then getting into the vehicle. Whether his departure from the scene was facilitated by Seamus Rice and/or another man is not of major significance.

147) I am not sure if the defence are suggesting that this third man was in fact the man who was, or could have been, the man with Gareth Doris. Having considered Soldier A's evidence I am sure that he did not lose sight of the man he had under observation and that man came out of the alley moved from Soldier A's right to left and then entered the vehicle. There is no evidence to suggest that a third man was on the street at the time, and his movements were sufficiently adjacent to the defendant so that Soldier A lost his continuity of vision and somehow mixed up the two men.

Forensic examination of Seamus Rice's vehicle.

148) Swabs were taken from the vehicle and they were examined for the presence of materials of an explosive nature. None were found.

149) An item of clothing that Gareth Doris was wearing confirmed the presence of pentaerythritol tetranitrate (PETN) and the organic compound RDX. Both are explosive compounds (not present in the flash grenades discharged that evening). PETN was detected in the hole caused by the explosion. The presence of PETN and RDX on Gareth Doris's clothing indicated contact between the clothing and PETN/RDX based explosive or surfaces contaminated with such material.

150) The defence assert that it is also evidence that Gareth Doris was in close proximity to the explosion, although that was not the evidence of the expert Gerard Murray who referred to direct contact with either explosives or surfaces contaminated with explosive material and not from airborne particles.

151) I do not consider that it is a reasonable inference to draw that the absence of a forensic finding is indicative that the defendant was not in close proximity of the explosion. Four items of Gareth Doris's clothing were examined – exhibits AR5, AR6, AR7 and AR10, respectively black trousers, green windcheater jacket, green pullover and green (bloodstained) jacket. The PETN and RDX were only found on the windcheater jacket (AR6 – FSNI reference 66) and not on any of the other items.

152) I would regard the lack of any presence of PETN or RDX in the vehicle where the defendant had been present to be a neutral finding. Similarly the failure on the part of An Garda Shiochana to retain the defendant's clothing in Louth Hospital is of no assistance to the defendant's case. Any

failure to find PETN or RDX on his clothing would also have been a neutral finding.

153) The defence also ask the court to consider the presence of the defendant's blood staining on the off-side rear seat (behind the driver's seat). This, the defence say, supports the defendant's version that he entered that door, as opposed to Soldier A's evidence that the rear near-side door was used.

154) The whereabouts of blood staining is not of great significance. It does confirm that at some stage the defendant was adjacent to the rear off-side seat, in all likelihood sitting on it. He could have entered through that door, or could have entered through the other door and slid across. Debra Donnelly described the man as "lying out the back window" and then later saying that he was on his knees. Seamus Rice in his second statement (confirming an earlier oral statement to the police) said that the man entered the rear passenger door (which I infer is the rear near-side passenger door).

155) It may also be of relevance that the vehicle was struck by a bullet which grazed along the top of the near-side boot before ricocheting upwards before breaking the rear window and entering the vehicle. Seamus Rice said that this happened after the man got into his vehicle describing the noise as an "unmerciful loud bang" and shaking the vehicle. A bullet having struck the nearside rear and then entering the vehicle could easily have motivated the defendant to move across the rear seat away from the bullet strike.

Lack of CCTV evidence

156) The defence have suggested that there is a lack of evidence from CCTV cameras, coupled with the non-availability of police officers and soldiers who may have been observing CCTV images. The defence say that CCTV images of the scene on Lineside Quay would have exonerated him. Such evidence has not been placed before the court. I am satisfied that if any such recorded images did exist they would have been retained by police as relevant evidence and if a witness had observed something of relevance either directly on Lineside Quay or on a screen, that witness is likely to have made themselves known and made a statement. There is little point in speculating what could have been recorded or seen, in the absence of any evidence.

The explosion

157) Although it is not strictly necessary to make findings as to what happened in the alley, I consider that it is appropriate that I should do so. I have already indicated that there was one explosion, caused by one device. The presence of PETN and RDX on Gareth Doris's jacket is evidence that the jacket was in direct or indirect contact with explosive material. The absence of a similar finding on the rear seat of Seamus Rice's vehicle may suggest that the defendant did not have similar contact. I therefore could not be satisfied so that I am sure that the defendant carried the explosive

device into the alley or was involved in carrying a component part of the device and was involved in its construction in the alley. Soldiers A's evidence about the time frame would suggest that not a lot of time was spent in the alley which may suggest that any final construction of the device in the alley was unlikely. In rejecting these two scenarios, I am however sure that the defendant was assisting Gareth Doris as a secondary party, for the reasons I have set out above.

Verdict

158) For all of these reasons, I am satisfied that the prosecution have proved to the extent that I am firmly convinced that the defendant unlawfully and maliciously caused an explosion of a nature likely to endanger life. I find him guilty of Count 1.

159) In the circumstances I am not required to deliver a verdict in respect of count 2.