

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

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**JAMES ALEXANDER SMITH**

**-and-**

**PETER GREER**

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**Before: Girvan LJ, Coghlin LJ and Gillen LJ**

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**GIRVAN LJ (delivering the judgment of the Court)**

**Introduction**

[1] On 12 June 2012 the appellants were jointly committed for trial in the Crown Court sitting in Downpatrick on four counts, namely the murder of Duncan Morrison; the attempted murder of Stephen Ritchie; possession of a shotgun with intent to endanger life; and possession of a handgun with intent to endanger life. At their arraignment on 7 October 2012 both pleaded not guilty to the first three counts on the indictment. They each pleaded not guilty to the fourth count on 19 October 2012 and 7 February 2013, respectively. Their trial commenced on 26 February 2013 before His Honour Judge Smith QC ("the trial judge") sitting with a jury. On 22 March 2013 the jury returned unanimous verdicts of guilty on all counts in respect of each of the appellants. They were both sentenced to life imprisonment for the murder.

[2] On 10 May 2013 the trial judge fixed Smith's life sentence tariff at 21 years and he further imposed an indeterminate custodial sentence for the remaining offences also with a minimum custodial period of 21 years. On the same date he fixed Greer's life sentence tariff at 20 years and also imposed an indeterminate custodial sentence for the three other offences with a minimum custodial period of 20 years. The appellants have not appealed in respect of the sentences.

[3] Smith lodged a notice of appeal against conviction on 24 April 2013. Greer lodged a notice of appeal against conviction on 8 May 2013. Horner J, acting as the single judge, granted leave to appeal on 6 February 2014 on one ground. He concluded that Crown counsel had invited the jury to identify the appellants in the dock and having done so, the trial judge in his charge to the jury should have issued a warning to the jury about the approach it should take to such evidence and what weight, if any, it should give it. The single judge refused leave on the other grounds raised by the appellants.

[4] Mr Kelly QC appeared with Mr Barlow on behalf of Smith. Ms McDermott QC appeared with Mr McGarrity on behalf of Greer. Neither set of counsel had appeared at the trial on behalf of the appellants. Mr McCollum QC and Mr McDowell appeared for the Crown both at the trial and on the hearing of the appeal. The court is grateful to counsel for their well marshalled and succinctly presented submissions.

#### The evidential background

[5] At approximately 12:15pm on 13 May 2011 two men wearing balaclavas, one armed with a handgun and the other with a shotgun, entered a property in Hazelbrook Avenue, Bangor. Duncan Morrison and Stephen Ritchie were present in the house. The masked man with the handgun fired three shots. Two shots hit Duncan Morrison and one shot hit Stephen Ritchie. Duncan Morrison died at the scene. The two masked men made their getaway in a silver Honda Civic car, driven by a third person. This car was later found burnt out at the Somme Centre just off the carriageway between Bangor and Newtownards.

[6] The appellant Greer lived at a property in Mountcollyer Avenue (the 'Mountcollyer Property'), Belfast, and owned a silver Volkswagen Golf, Registration Mark UCZ 1615 ("Greer's Golf"). It was the prosecution case that the appellant Smith lived at a property in St Anne's Square, Belfast (the "St Anne's Square Property"). The evidence adduced at the trial showed that a search of this property revealed a tenancy agreement, driving licence and gym cards in Smith's name. The address which Smith claimed to live at when searched showed no evidence of his residence there.

[7] On 3 March 2011 a silver Honda Civic, Registration Mark SKZ 2442 ("the Honda Civic") was stolen in a 'creeper burglary' in West Belfast.

[8] On 29 April 2011 the Honda Civic and Greer's Golf were captured on an Automatic Number Plate Recognition ("ANPR") camera driving 6 seconds apart on the Knock dual carriageway in the vicinity of the Belvoir estate.

[9] On 12 May 2011, the day before the shooting, at approximately 11:05am Greer's Golf was captured on CCTV leaving Mountcollyer Avenue. By using ANPR and CCTV evidence the prosecution adduced evidence showing that the Golf

travelled to the Upper Newtownards Road, through Dundonald, the Hartford Link, Newtownards, and to the bottom of the Clandeboye Road/Church Street, Bangor, opposite the entrance to Hazelbrook Avenue. The Golf then returned to Mountcollyer Avenue at approximately 12:26pm whereupon a person wearing a grey hooded tracksuit got out and walked over to the Mountcollyer Property. At the same time a silver Honda Civic appears in Mountcollyer Avenue. At 5:21pm Greer's Golf left Mountcollyer Avenue again. A silver Golf was captured on CCTV in Academy Street near St Anne's Square at 5:28pm. At 5:35pm Greer's Golf returned to Mountcollyer Avenue. Shortly afterwards Greer's Golf and the silver Civic left Mountcollyer Avenue. At 6:00pm an ANPR camera captures both Greer's Golf and the stolen Civic driving through Dundonald towards Newtownards. Prosecution evidence showed that the two vehicles travelled passed the Moat Inn and Harry Corry's. At 6:27pm an ANPR camera captures Greer's Golf at the Dundonald Hospital heading towards Belfast. At 6:43pm Greer's Golf with two occupants left Mountcollyer again. A silver Golf was seen by CCTV on Academy Street near St Anne's Square at 7:29pm. Greer's Golf returns to Mountcollyer at 7:50pm.

[10] On 13 May 2011 evidence established that Greer's Golf left Mountcollyer at 10:45am. A silver Golf was captured by CCTV on Academy Street near St Anne's Square at 10:59am. Further CCTV evidence showed a silver Golf on Milltown Road at 11:24am. Greer's Golf was captured by ANPR at the Belvoir Road at 11:33am and again at 11:40am on the Knock dual carriageway near PSNI Headquarters travelling towards Newtownards. It was captured for a third time by ANPR at 11:46am near the Ulster Hospital. A Golf was then seen by CCTV at 11:48am at the Ulster Bank and at the Moat Inn; then at Harry Corry's at 11:49am; and at the Spar shop at the Hartford Link at 11:56. Then, ten minutes later, at 12:06, the stolen Civic was captured by ANPR on the Newtownards to Bangor carriageway.

[11] At approximately 12:15pm on the same day Miss Anne Montgomery at Hazelbrook Avenue saw two masked men getting out of a silver five door hatchback car, one from the front passenger seat and one from the rear. She described the person who got out of the front passenger seat as wearing a balaclava, a long sleeved black jumper and a white top with a red stripe underneath. He was about 5 feet 8 inches tall, heavy with a large stomach. The person getting out of the rear of the car was taller, about 5 feet 9 inches, of lighter build compared to the other person but not skinny. He was wearing a black long sleeved knitted jumper.

[12] At 12:20pm ANPR picked up the stolen silver Honda Civic on the carriageway again, this time travelling from Bangor towards Newtownards shortly before the Somme Centre. Constable Barnes was radioed this information and waited for the car on the carriageway, but it did not pass him.

[13] Mr Mason, a mechanic, saw a silver Volkswagen Golf car, either a Mark 4 or Mark 5 model, parked in the Somme Centre. His own car was recorded by ANPR as being in the vicinity of the Somme Centre at 12:13am.

[14] Detective Sergeant Montgomery, an off duty police officer, was driving along the Ards to Bangor carriageway at about 12:20pm. He saw smoke coming from the direction of the Somme Centre so went to investigate. He found a Honda Civic on fire in the car park. Mr McAnerney, who lives near the Somme Centre also saw the smoke and went to investigate. He too found the burning car and took a photograph of it on his mobile phone. He estimated the time to be 12:22pm.

[15] A silver Golf was then seen at Corry's and the Moat Inn. At 12:36 Greer's Golf was captured by ANPR near the Ulster Hospital travelling towards Belfast; near police headquarters at 12:44pm; the Belvoir Road dual carriageway at 12:50pm. Then, some five minutes later, a silver Golf was seen by CCTV passing Russell Cellar's in the Belvoir estate. At 12:56pm ANPR captured Greer's Golf at Shaw's Bridge and another at Queen's University at 1:03pm. It was stopped by police at 1:08pm on Ormeau Avenue. When stopped by police, Smith was driving the vehicle and there were no passengers. Smith told police he had borrowed the car 30 minutes earlier from his friend "Pete".

[16] Upon searching Greer's Golf the police found three tops; a BMW key (which Smith identified as his and claimed the BMW belonged to a friend); grey/blue gloves; a white plastic bag with the legend 'Monkstown Dental Surgery'; a blue hat and a purple baseball cap; in the boot a Puma sports bag and a fuel funnel; and latex gloves were found in several places. They also found a set of car keys which, it was conceded at trial, belonged to the stolen Civic.

[17] A forensic examination of the gloves found in the footwell of Greer's Golf for cartridge discharge residue ("CDR") found a single fused particle of lead, barium and antimony on one of the gloves. Ms Irwin, Forensic Scientist, opined that this was very weak support for contact between the glove and a cartridge retrieved from the murder scene. Other sources could include a Hilti gun or a starting pistol. DNA was also taken from inside both gloves and each gave a mixed sample. Ms Beck, a forensic scientist, gave evidence that the major provider to both these mixed samples matched the profile attributed to Jamie Smith and that he could not be excluded as a significant contributor. The inside of the purple baseball cap also found in the car was examined for DNA. This uncovered a mixed profile of at least three people. It was not possible to resolve this mixed profile into individual components; but Jamie Smith could not be excluded as being a significant contributor to this mixed profile; Peter Greer, and a third person, Stephen Greer, could not be excluded as being minor contributors to this mixed profile.

[18] A search of Greer's home at the Mountcollyer Property retrieved, inter alia, a pair of gloves from the bedroom. Forensic examination of these gloves for CDR uncovered five particles of lead, barium and antimony on one glove, and a single particle on the other glove. Ms Irwin opined that this provided support that the first glove had been in contact with the cartridge found at the murder scene and weak support that the second glove had been in contact with it. The inside of these gloves

were also examined for DNA. The major profile matched that of Peter Greer, and Jamie Smith could not be excluded as being a minor contributor.

[19] Smith attended for numerous police interviews over a period of several months. In his initial interviews he said he lived on his own at a property in Shaftesbury Court; that he had borrowed the Golf from a friend, whom he had known for just eight weeks, and that he was stopped 30 minutes later on his way to Newtownabbey. In relation to where he collected the car he gave 'no comment' answers. He denied any involvement in the murder; he denied being in Bangor except on occasions a long time ago; he denied knowing of Hazelbrook Avenue; and he did not offer an account of his movements at the time of the murder or at any other times the police put to him. He claimed the Civic key was already in the car when he collected it and denied any contact with the latex gloves or the items in the boot. However, at a subsequent interview he said he had got his times wrong and was only in the car 20 minutes; he confirmed some of the clothing found in the car was his; when told that the search of the St Anne's Square Property had uncovered items linking him to it, he gave 'no comment' responses. In his last interview he stated that he had taken possession of the car in the Belvoir estate and confirmed that he would have been the driver when it was captured by ANPR at Shaw's Bridge at 12:56pm, but did not say where in the estate he got the car.

[20] During his police interviews Greer also denied any involvement in the murder and denied being in Hazelbrook Avenue on 13 May. He confirmed his ownership of the Volkswagen Golf in question but did not answer questions about his movements or whereabouts, or that of his car, on either 12 May or 13 May; and he did not volunteer an alibi. He refused to answer whether he knew James Smith or if he had ever visited the St Anne's Square Property. He further denied knowing anything about the Honda Civic key found in his car; he said he did not recognise the Puma sports bag found in the boot; he refused to answer questions about the fuel funnel in the boot; but he did say the latex gloves may have been his as he used latex gloves to clean the car, check the oil, etc. Eventually, on being shown his car leaving Mountcollyer at 10:45am on 13 May, he claimed that he lent someone his car and then went drinking.

### The Crown Case

#### *In respect of Greer*

[21] It was the Crown case that Greer was identifiable as the driver of the Golf from a number of pieces of evidence. The Crown relied on his physical similarity to the balding, overweight man person seen getting into and out of the Golf, who wore a purple t-shirt on 12<sup>th</sup> May and a longer sleeved purple top on 13<sup>th</sup> May. It further relied on the fact that he was the registered owner of the VW Golf UCZ 1614 and he lived at the Mountcollyer Property. He behaved as the owner of the car and the house. Whenever one of the two men had to drive the Honda Civic, he drove his own car. When entering the Mountcollyer Property, the other man stood by so that he could open the door with the key. He is seen to visit his brother, Stephen Greer's

house, another property in Mountcollyer Avenue. In interview, when referred to the footage and asked: "Is that you going into the house?", he replied: "It probably is." In his final interview, he was shown the footage at 10:45hrs on 13 May of the man coming out of his house when asked where he was going he replied: "I lent somebody the car and went out on the drink". The case was never made at trial that the person in the footage was not him.

[22] Peter Greer declined to answer questions in his first five interviews. He answered some questions thereafter. In his 12<sup>th</sup> and final interview, he claimed that on 13<sup>th</sup> May 2011, he had lent his car to someone and had gone "on the drink". When asked who he lent it to, where he lent it and where he went drinking, he made no reply. While the inference could be drawn that on Friday 13 May, the Golf visited the area of the Belvoir Estate, his account did not explain his apparent involvement in the preparation for the shootings on the previous day in performing the 'dry run' and in depositing the Civic. Greer never made the case that he had allowed another to use his car on 12 May as well. That he did not lend it to anyone on that day is supported by the evidence.

[23] The time taken to travel from Mountcollyer Avenue to Newtownards and back again on Thursday 12 May was consistent with a continuous journey, rather than, on each occasion, providing the car to another and receiving it back. In the morning, the journey took 26 minutes (11.05 to 11.31hrs to Newtownards and 30 minutes 11.56 to 12.26, (via Belmont Road back.) In the evening, it took 33 minutes (17.38 to 18.11hrs on the outward journey in evening traffic and driving in convoy); and 26 minutes on the return journey (18.16 to 18.42hrs.)

[24] If he had allowed another to use the car on 12 May as well, it was an odd coincidence that when he left that morning he had a passenger whom he had picked up. It was of note that on the Golf's return to Mountcollyer at 12.26hrs on 12 May, his passenger remained in the vehicle.

[25] On the evening of 12 May, there was evidence that Greer went to pick up his passenger, a silver Golf being seen on Academy Street, before returning to Mountcollyer Avenue and the two driving off in convoy in the Golf and the Civic. The passenger is again present in the Golf on its return to Mountcollyer at 18.42hrs and the silver Golf is seen again on Academy Street later that evening. The footage showed his passenger, on the evening of 12 May, taking a yellow bag out of the back seat of the Golf and into the Mountcollyer Property before bringing a holdall out of the house and putting it into the boot of the Honda Civic which was later deposited near Newtownards. He returned that same night with a parcel which he took into his house before visiting his brother's address, returning with a holdall, then driving off, returning 45 minutes later and briefly visiting his brother's address again.

[26] Greer was otherwise linked with the Honda Civic. His Golf had passed the ANPR on Belvoir Road 6 seconds before the Civic at 10.06hrs on 20<sup>th</sup> April 2011. The

Civic was parked on his street before it was deposited near Newtownards on Thursday 12 May 2011.

[27] As already noted at para [18] a pair of gloves (LML/3) were found in Greer's bedroom with his DNA on them. On them was cartridge discharge residue in the form of five type 1 particles (containing lead, barium and antimony) which could not have been from a non-firearms source. The spent round (TC/2) recovered from the scene of the shooting contained type 1 and type 2 particles so that there was 'support' for contact between the gloves and a source of the particles found on them. They could have come from the spent round recovered from the scene. This was consistent with either preparation for the shooting, with firing the gun, or with the gloves being used in the shooting and Greer returning to his house through the back door (for the CCTV showed that he did not do so through the front door). Like Smith, Greer did not hold any legal firearms. Greer did not return home (through the front door at any rate) before the police search at 19.10hrs on 14<sup>th</sup> May. It was unclear whether he returned home at all before he handed himself in at Castlereagh Police Station on 6<sup>th</sup> June 2011.

[28] The Crown also relied on an inference that could properly be drawn against the accused from his failure to give evidence in the circumstances.

*In respect of Smith*

[29] Smith was in Greer's Golf when it was stopped in Ormeau Avenue at 13.10hrs on 13 May 2011. He was wearing a light blue "Florida State" t-shirt, light coloured Adidas tracksuit bottoms with stripes down the sides (PT/14), and dark trainers with a white edge to the sole (PT/8&9). The latter two pieces of clothing bore similarity to that worn by the man seen with Peter Greer at Mountcollyer Avenue on 12 May. The striped tracksuit bottoms are most easily seen in the still taken from the footage CJB/100.

[30] When Greer's Golf was searched Greer's house keys were attached to the key in the ignition. Police found various clothing including a black hooded top (MC/2), dark grey and blue gloves (MC/6) and a dark grey jacket (MC/4). Smith matched the major profile obtained from the hooded top, the gloves and the jacket. The combination of characteristics observed would be expected to arise in fewer than one in a billion males unrelated to Jamie Smith. Smith could not be excluded as a significant contributor to a complex mixed profile obtained from a purple baseball cap (PEM/8) found in the Golf. This cap was similar to that worn by Greer's passenger on the evening of 12 May. Smith accepted in interview that he had worn it, but claimed that he did so only while messing about in Greer's car. Smith had with him a plastic bag with writing on it indicating it was from "Monkstown Dental Practice". He later said that he had carried the black hooded top in it. It was the Crown's case that it was an odd coincidence that he had a bag containing additional clothing on a day he described in interview as hot so that he took his grey Adidas jacket off and was driving in a t-shirt.

[31] The particle of type 1 (lead, barium and antimony) cartridge discharge residue was recovered from a pair of gloves (MC/6) found in the passenger seat footwell with Smith's DNA on them. The practice of the laboratory was to take DNA swabs from the inside of the cuff where the wearer was most likely to leave their sweat. The finding of the particle offered 'very weak support' for the proposition that there had been contact between the gloves and a source of such particles, including the spent round recovered from the scene (TC/2). Given the time of year and that Smith had to take his jacket off, the prosecution argued that it was unlikely that he had gloves with him for an innocent purpose.

[32] Smith lived at the St Anne's Square Property. On the evening of 12 May, Peter Greer left Mountcollyer Avenue on his own at 17.21hrs. A silver Golf was seen by CCTV on Academy Street, near to St Anne's Square, at 17.28hrs and Greer returned to Mountcollyer at 17.35hrs, having acquired a passenger. Later that night (after the Civic has been deposited) at 18.44hrs Greer left Mountcollyer with a passenger. A silver Golf was seen on Academy Street at 19.29hrs, Greer returning to Mountcollyer at 19.50hrs. On 13 May, Greer again left on his own at 10.46hrs, going through York Street ANPR at 10.54hrs. A light coloured car like the Golf was sighted by CCTV on Academy Street at 10.59hrs before Greer's Golf went through the Belvoir Road ANPR at 11.33hrs. Smith was later present in the Golf. The prosecution pointed to the fact that Academy Street was not on the natural route which Greer would have used to drive to Bangor or Newtownards.

[33] In interview Smith said that he had got into the car only a short time before he was stopped by police on Ormeau Avenue. He said that he had been given the car by Greer. He initially said that this was on the Malone Road, confirming to police that he would not have been in the Golf when it went through the ANPR at Shaw's Bridge. He variously estimated the time he had been in the car as 30 minutes (in the first interview), 35 minutes (by the fourth interview) before saying it could have been 20 minutes.

[34] The CCTV and ANPR evidence indicated that the Golf had visited the Belvoir Estate on its way back from Bangor. It passed through the ANPR on Belvoir Road at 12.50hrs and was seen, at 12.55hrs on CCTV coming out of Belvoir Drive onto Old Milltown Road and back onto the Outer Ring and Milltown Road, this sighting being confirmed by the Shaw's Bridge ANPR at 12.56hrs. On being shown that CCTV, Smith then said that he had picked the car up in the Belvoir Estate, although he declined to give details about the circumstances in which he had done so, save to say that Greer and another male had been present.

[35] The Crown pointed to the fact that the account Smith advanced at interview contained a number of matters undermining his defence. On Smith's account Greer was willing to lend him his car straight after he had used it as transport in an assassination, with the attendant risk that Smith, if innocent, might make unwelcome enquiries of Greer. The hand-over of the car would have had to have



been almost immediate, given the timings. He had no mobile phone with which to contact Greer. Smith had said he did not know where the Belvoir Estate was. His reason for borrowing the car was to go to Newtownabbey but he had chosen to go some distance in the opposite direction, to South Belfast, in order to do so. The Agricultural Show was on at Balmoral that day so that his journey would have been even more inconvenienced. He often went to Newtownabbey so there was no discernible reason for him to have borrowed a car on this occasion. He had known Greer only 8 weeks and met him only 10 times. He did not know when the car was to be given back. Once in the Golf, he was in possession of Greer's house keys. He would not say whether Greer had been in the car when he picked it up. He would not say whether the engine had been running.

[36] Additionally, the ANPR on Belvoir Road captured a photograph of the Golf (at 12.50hrs on 13 May) which showed the upper body of the passenger. He was wearing what appears to be a light blue t-shirt. Dark coloured patches on the front appear consistent with the design on Smith's Florida State t-shirt. The importance of this is that the Belvoir Road ANPR camera is situated at a point before the Golf could have turned into the Belvoir Estate on its way from Newtownards, so that it was evidence that Smith was in the car before it entered the Belvoir Estate where he said he had first got into it.

[37] The prosecution argued that it was clear that in interview he chose not to answer some questions where it would expose his story as a lie. He said that he had had to move the key of the Honda Civic that was found in the Golf and gave his story about messing around with the purple cap. The prosecution contended that it should be inferred that this was an attempt to account for any forensic findings on either, knowing that he had previously touched them.

[38] He claimed in interview that he lived in Shaftesbury Court, Dublin Road, Belfast and denied living at the St Anne's Square Property. When the flat in Shaftesbury Court was searched the police saw that there were no bed sheets, the bathroom was completely clean and there was mouldy bread dated 2½ weeks before. In contrast, in the St Anne's Square Property, Smith's birth certificate, driving licence, gym membership card and tenancy agreement were found. It was the Crown case that Smith lied about his place of residence because he released that he needed to distance himself from the flat in St Anne's square.

[39] Neither appellant gave evidence. The Crown argued that adverse inferences could and should be drawn by the jury against each appellant. The inferences to be drawn made the case against the appellants overwhelming.

### **Smith's grounds of appeal**

[40] Mr Kelly in his submissions sought to rely on four grounds of appeal. The first ground of appeal was that the trial judge failed to properly direct the jury in the light of what Crown counsel said in his closing speech in relation to the

identification of the appellants as being the potential gunmen involved directly in the shooting. The second ground of appeal related to the question of the finding of a single CDR particle on a glove connected to Smith. Thirdly counsel further relied on what was alleged to have been an error by the judge in giving the Lucas direction in the case. Fourthly it was alleged that the trial judge erred in his directions in relation to adverse inferences to be drawn from the appellant's failure to give evidence. While the original notice of appeal put forward further grounds Mr Kelly did not seek to advance those additional grounds.

[41] Counsel's submissions in relation to the identification point arise out of what Crown counsel said in the course of his closing speech:

"You will notice, members of the jury, that we do not attribute a specific role to each of the defendants. We do not say one is one of the gunmen and the other the getaway driver or, for instance, that both were the gunmen. That is because, on the evidence we are unable to. There is, of course some evidence that they were the two assassins, the two who went into Hazelbrook - one is described as fat or heavy build with a large tummy consistent with Greer, the other was taller and similar height to Jamie Smith. They may have been the two who entered [the property in] Hazelbrook but there is not enough there by any stretch of the imagination that you could say for sure. But more importantly members of the jury we, the prosecution do not have to say that for sure for they are charged as part of what we in the law call a joint enterprise ..."

Earlier counsel had said:

"In this case we know that two men entered [the property in] Hazelbrook Avenue in Bangor on Friday 13 May 2011; Duncan Morrison was shot dead and Stephen Ritchie was also shot and seriously injured. There is little doubt that this was an assassination, it was intended to kill, but Ritchie or for that matter even Dominic Davidson don't identify the perpetrators as Peter Greer or Jamie Smith; nor do any of the witnesses at Hazelbrook. Neither did they identify the driver of the car which brought them there. That is for the simple reason that they were disguised, the assassins were disguised with balaclavas and no one can identify them. There is no direct evidence ..."

[42] Mr Kelly submitted that the Crown was effectively inviting or suggesting to the jury that they should make an identification of the appellants as the actual gunmen. Original counsel at the trial had made an application to the trial judge to discharge the jury in light of the alleged invitation. The trial judge did not consider that this was an invitation to make a dock identification. Although acknowledging that a direction to the jury was required it was argued that the trial judge failed to deal with the issue adequately. Counsel argued that if, as Crown counsel's remarks seem to indicate, the Crown was intending to rely on the relevant physical stature and appearance to the appellants to implicate them in the actual shooting that ought to have been made clear and the conduct of the case would have been completely different. The absence of profuse CDR would have been even more significant. Counsel contended that there was a real danger that the jury would speculate about the question whether the appellants were the actual gunmen in a case in which the Crown had argued on the basis that no particular role could be attributed to the appellant. Mr Kelly, however, accepted that this was not a dock identification case and he also accepted that he could not challenge the judge's decision not to discharge the jury. However, he contended that a special warning and direction to the jury was required from the judge. Ms McDermott on behalf of Greer also relied on similar arguments on this issue.

[43] The Crown's case was presented on the basis that the prosecution could not and did not propose to prove that the appellants played any particular role in the murderous attack. It was the Crown's case that the evidence clearly established their active and willing participation in the joint enterprise involving the murder and attempted murder. On a fair reading of Crown counsel's closing speech the Crown did not resile from that approach to the case. The Crown was making clear that it did not say that either appellant was one or other of the gunmen who fired the shots. It was making clear that it was unable to prove that either defendant was one of the gunmen. The inability of the prosecution to identify the defendant's role was emphasised. There was, as Mr Kelly accepted, no invitation to the jury to make a dock identification. The single judge was accordingly in error in concluding that Crown counsel had invited the jury to identify the defendants in the dock. Had he done so it is of course correct that it would have been incumbent on the judge to warn the jury of the perils of deciding whether the defendants committed the crime on the basis of their identification (see R v Dobson and Williams (1984) 79 Crim App Rep 220).

[44] The trial judge in his charge to the jury made clear to the jury that this was not an identification case and that no case had been made that the appellants played specific roles in the joint enterprise. Thus at page 7 of his charge he said:

"No one is suggesting that any evidence indicates, there is no evidence, real evidence of identification in relation to who pulled the trigger."

He made clear that the case made out by the Crown was of the involvement of the appellants in the joint enterprise which required proof of the accused's knowledge of what was going to happen at the relevant premises at the relevant time and that the accused did an act to facilitate, assist or encourage the plan. Later at page 14 of his charge the judge re-emphasised the point "there is no identification evidence in this case ... no one is saying you can identify features or make an identification".

[45] While it could be argued that it might have been better *ex abundanti cautela* for the judge to have advised the jury not to speculate about whether the appellants were the actual gunmen in the light of the way Crown counsel had put the point, the judge may very well have concluded that rather than remind the jury of Crown counsel's words it was preferable to state the matter in the clear and blunt terms which he used. It must be remembered that the trial judge heard submissions about what should be in his charge and the defence did not requisition the judge in relation to his charge on this issue. Furthermore it must be borne in mind that after Crown counsel's speech defence counsel had a full opportunity to address the issue in the closing speeches. No transcript was sought or provided of the defence speeches or of the appellants' counsels' submissions to the judge in respect of his charge.

[46] We are satisfied that the appellants have failed to make good this ground of appeal.

[47] In seeking to pursue the second ground of appeal Mr Kelly sought leave to adduce fresh evidence. On one of the gloves found in the passenger footwell in Greer's Golf a major DNA profile matching Smith was found. The left glove contained one type 1 particle the source of which could have been the cartridge TC2 found at the scene. It could also have come from a starting pistol or Hilti gun. The transfer could have been secondary. The appellant argued that the Crown elevated this very weak forensic evidence to a higher importance than it had. Since the appellant's conviction Phillip Boyce, a firearms expert in a written report expressed the view that the CDR finding provided no support that Smith had been involved in a firearms related incident. In isolation a single particle of CDR was "insignificant" in his opinion. Counsel sought to persuade the court that the expert's opinion should be admitted under Section 25(1) of the Criminal Appeal (Northern Ireland) Act 1980 since it was necessary and in the interests of justice to do so. He contended the evidence was capable of belief; it afforded a ground for allowing the appeal; it would have been admissible at the trial; and there was a reasonable explanation of the failure to adduce the evidence at the trial. The significance of the evidence became more pertinent according to Mr Kelly in that the Crown in its closing had sought to place the defendants at the scene of the shooting.

[48] For the reasons which we have already given we reject the latter point. It was not the Crown case that the appellants were shown to be at the scene of the actual shooting. The additional evidence if it was to be admitted could only be admitted in

relation to the case made out at the trial namely that the appellants were knowingly involved in a joint enterprise.

[49] We rejected the application to adduce additional evidence. Mr Kelly accepted that there was a high threshold for the introduction of fresh evidence. The appellant could not in fact proffer any reasonable explanation for the failure to adduce the evidence at trial. The appellant was represented by very experienced counsel and solicitors at the trial. They effectively cross-examined Anne Irwin who accepted that the CDR was very weak support for the Crown case. The appellants' representatives may well have considered that nothing was to be gained by adducing any further expert evidence on the topic such as that proffered by Mr Boyce. His categorisation of the evidence as "insignificant" is in any event a value judgment on the extent of the relevance of the evidence which was a matter for the jury. The evidence would not in itself have offered a ground for allowing the appeal nor even if accepted, would it call into question the safety of the conviction in the light of the rest of the strong circumstantial case. The judge in his charge reminded the jury of Ms Irwin's evidence that the particle provided very weak support for contact with a cartridge source such as found at [the property in] Hazelbrook Avenue, and he reminded the jury that she also referred to the means of secondary transfer. Both the Crown and the judge in his charge made clear the limitations of the evidence.

[50] This piece of evidence in its overall evidential context was not so valueless as to be rendered inadmissible. It was found on one of a pair of gloves in the passenger footwell of a car that had been used in the assassination, a car which Smith said he borrowed that day. The glove bore his DNA. It was quite unlikely that he would have needed gloves for an innocent purpose that day. No evidence emerged to realistically suggest that the glove would have been in contact with an innocent source. Circumstantial evidence is a multi-stranded skein of facts (per Carswell J in R v Meehan (unreported)). A piece of evidence can constitute a strand in the Crown case even if as an individual strand it may lack strength (per Hutton LCJ in R v Meehan). In a circumstantial case the quality of individual pieces of evidence may be poor but other pieces of evidence may suggest it has potential relevance. The jury must consider the accumulation of evidence (per Gibbs CJ and Mason J in Chamberlain v R (No. 2) (1984) 153 CLR 521). Accordingly we reject the second ground of appeal.

[51] In relation to the Lucas direction Mr Kelly argued, albeit faintly, that the judge may have misled the jury when he said that if the jury was satisfied beyond reasonable doubt that Smith did not lie about his correct address for some innocent reason then the lie "goes to support the prosecution case". Counsel argued that he should have said that the jury might consider that it went to support the prosecution case. While the judge should more correctly have followed the suggested terminology we do not consider that the jury was misled as to its function. In any event it was undoubtedly the case that the lie did support the prosecution case. Even if we were to conclude that there was a misdirection on this aspect of the case

we do not consider there was a material misdirection and the safety of the conviction is not called into question.

[52] Counsel's final point was that while the trial judge correctly directed the jury on the failure of the appellant to give evidence and having told the jury to apply the tests separately in relation to each appellant he wrongly went on to say "I imagine that your decision on this will be the same whatever way it is". It is clear that he did go on to say that the decision was for the jury to make. At the outset of his charge the judge stated that any view on the evidence he expressed would be put as his views on the facts but on the facts the jury should make their own decision and only give the judge's view the attention they felt it deserved. The judge's comment in no way restricted the jury in the decision-making. It did not dictate a particular viewpoint. It merely stated the judge's personal (and common sense) view on the likelihood of the jury arriving at a similar decision as to what inferences should be drawn in respect of each defendant. We see no substance in this ground of appeal.

### **Greer's grounds of appeal**

[53] Although Greer's original notice of appeal raised a number of grounds Ms McDermott sought to rely on three grounds. Firstly, she relied essentially on the same ground as that put forward by Smith. We have already disposed of that ground of appeal. Secondly, she sought to rely on the ground that the trial judge erred in his directions to the jury and misdirected them on how they should consider the legal issues of circumstantial evidence, the liability of a secondary party to murder, the failure to give evidence and the burden of proof. The third ground of appeal was that the verdicts of the jury were unsafe and against the weight of the evidence.

[54] Counsel submitted that while the trial judge recited the correct legal tests he failed to apply them to the evidence adduced by the Crown. The Crown case was that the appellant was involved in the murder and that no role could be ascribed to him. In those circumstances it was submitted that the trial judge should have directed the jury's collective mind to the following question:

"Has the Crown satisfied you beyond a reasonable doubt that the accused must have lent its car to the principal-s or must have given them encouragement and at the time he did so he must have contemplated that they might murder or cause grievous bodily harm with intent to do so?"

Counsel submitted that to require the jury to focus on the issues in this way would have highlighted the fact that the Crown had adduced no evidence from which the jury could infer that the appellant, if he did lend the car, did so with the necessary guilty mind. Counsel went on to argue that the failure of the trial judge to direct the jury's mind to the essential issues on which they had to be satisfied was

compounded by the fact that he misdirected the jury as to how they should take into account the accused's failure to give evidence. Counsel referred to the charge where the trial judge said:

"Again you should not find Mr Greer guilty only or mainly because he did not give evidence but you may take it into account as providing some additional support for the prosecution's case when deciding whether the case made by the defence about these matters is true."

The jury should have been told that they may take account of the accused's failure to give evidence and that if they did so it was a circumstance that they might consider in deciding whether the Crown had proved its case to the necessary standard.

[55] We must reject Ms McDermott's criticism of the trial judge's charge. The trial judge correctly stated the legal principles and rehearsed in considerable detail the evidence adduced at the trial. He did not omit any relevant evidence nor, as Ms McDermott accepts, did he misstate the law in relation to circumstantial evidence. Counsel's formulation of the proposed question which the judge should have put to the jury in fact adds nothing to the way in which the judge actually set the issues out for the jury. Having correctly directed the jury on the question of the burden and quantum of proof the judge said to the jury that:

"Counsel accept that if either of the accused knew what was going to happen at [the property in] Hazelbrook Avenue on Friday 13 May 2011 and if you are satisfied that either of the accused did an act intended to facilitate, assist or encourage the common plan, discharge of a weapon to kill, the accused would have been guilty of the murder of Duncan Morrison and the attempted murder of Stephen Ritchie."

He directed the jury in clear terms that the jury had to consider the case against and for each defendant separately. He directed the jury carefully on the movements of the cars and asked the jury if they were sure that the cars caught on the ANPR were Greer's car and the Honda Civic. At pages 78 and 79 of his charge he said:

"(Counsel) accepts you have heard no evidence from Mr Greer but he says that there is ... or you should find at least the possibility, he says there is a likelihood, and he says that you should find at least the possibility that the planners of this did not tell Mr Greer its purpose and that Mr Greer was ignorant of what was going to happen; they would not need to

tell him. Is that a reasonable possibility not just that he lent his car but that he lent his car and did not know the purpose for which he was lending it? If you believe there is a reasonable possibility of that you will acquit him. But look at all the evidence. There is nothing for Mr Greer to exclude movements on the Friday. There is no alibi. Did he lend his car twice on the Thursday? Was what happened on the Thursday a dry run and then the parking of the stolen Civic at the Somme Centre, was that Civic in Mountcollier Avenue? In other words, was it the one that was stolen. The one that had been snapped the ANPR in close timing with the Golf belonging to Mr Greer in April? And those are the areas to concentrate upon. As I said take the case as separate because you are required to do that and the evidence is also different. ... Examine all the evidence carefully in relation to Mr Greer, they are his replies to police questions. He is not giving evidence in support of these and I think the final thing I am going to do is to say how you should approach a case in which evidence has not been given by the accused. The prosecution say if you look at all the evidence you will be satisfied that no such reasonable possibility exists that Greer lent his car on the Saturday without knowing exactly what was going to happen in [the property in] Hazelbrook Avenue in Bangor..."

Properly read the charge did what Ms McDermott said it should have done.

[56] Counsel criticised the judge for adopting a somewhat different approach in presenting Greer's case as compared to the approach he adopted in Smith's case. In the case of Smith at pages 70-73 he went through the points made by the Crown against Smith and then set out what Smith's defence was. In the case of Greer the judge set out Greer's defence without summarising or repeating the Crown case against Greer although earlier in the charge he had set out fully and correctly the state of the Crown evidence against Greer. While it may well have been tidier for the judge to have adopted exactly the same format in respect of the cases of both Greer and Smith, in the case of Greer there was no misdirection. Read as a whole the charge fairly and accurately set out the prosecution and defence case.

[57] We see no substance in counsel's criticism of the judge's direction at page 81 lines 19 to 24. The trial judge made clear to the jury that it was open to the jury to draw adverse inferences against the defendants arising from their failure to give evidence. It was clear that those were inferences which would be adverse to the defendants and would strengthen the Crown case.



## **Disposal of the appeals**

[58] We have set out above at some length the evidential basis of the Crown case against the appellants. The circumstantial evidence against each appellant was very strong. The strength of the Crown case was such that the only rational inference open to the jury arising from the failure of each of the appellants to give evidence was because they did not consider that their respective defence cases would stand up to cross-examination. We entertain no doubt as to the safety of the convictions. Accordingly the appeals are dismissed.