

Neutral Citation No: [2018] NICC 10

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

Ref: COL10687

Delivered: 19/6/2018

IN THE CROWN COURT IN NORTHERN IRELAND

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R

-v-

DAMIEN McLAUGHLIN
—

RULING
—

COLTON J

[1] The defendant is charged on the indictment with the following offences:

- Aiding and abetting murder, contrary to Section (2)(a) and (3) of the Criminal Jurisdiction Act 1975 and he did aid, abet, counsel and procure the commission of the said offence.
- Belonging to or professing to belong to a proscribed organisation, contrary to Section 11(1) of the Terrorism Act 2000.
- Possession of articles for use in terrorism, contrary to Section 57(1) of the Terrorism Act 2000.
- Preparation of Terrorist Acts, contrary to Section 5(1) of the Terrorism Act 2006.

[2] The charges relate to the murder of Mr David Black, a prison officer, on 1 November 2012. On that morning Mr Black rose early, at about 6.20 am before leaving for work in his black Audi saloon which had been parked in the driveway beside his home. He travelled to work via the M1 motorway, which he joined at the Tamnamore junction at approximately 07.23 and travelled in the Belfast direction. On the same morning a blue southern registered Toyota Camry joined the motorway at the Loughgall junction and also travelled towards Belfast.

[3] As the two vehicles approached Junction 10 of the M1 the Toyota Camry was in the overtaking lane. A witness describes the front left corner of the overtaking

vehicle being level with the driver side mirror of the black Audi on the inside lane. Witnesses who were driving on the motorway at the time then described hearing a bang and a cloud of smoke between the two cars. One witness could see that the front and rear passenger side windows of the Camry were completely down and could see one person sitting in the front passenger seat and another in the rear seat behind the passenger. Another witness described seeing a long thin object like the barrel of a gun sticking out through the front passenger side window which was dark coloured and about 6 or 7 inches long and very thin with the end of the barrel being noticeably wider. The witnesses then describe a further 2 or 3 bangs and realised that these were shots. One witness could see muzzle flashes as the gun fired.

[4] Mr Black's Audi left the motorway and subsequent investigations revealed that he died due to multiple gunshot wounds. Forensic examination of a bullet head from the Audi car and spent cases found at the scene on the motorway were consistent with them being fired from an AKM or similar assault rifle. The incident occurred shortly after 7.30 am.

[5] At about 7.45 am residents in the Inglewood neighbourhood of Lurgan were alerted to a vehicle on fire near their homes. Inglewood is a short distance from Junction 10 of the M1. The Fire Service was called and attended the scene. They found the vehicle in a cul-de-sac and it was on fire when they arrived. A box of matches was found beside the vehicle. The burnt out vehicle was identified as a dark blue Toyota Camry model, VRM 94D50997. During the examination of the vehicle by Crime Scene Investigators a number of spent bullet casings and bullet heads were recovered. All of the cases found bore the same production marks and had been fired from the same weapon.

[6] Police investigation revealed that the Toyota Camry had been purchased in Dublin on 10 October 2012 by a person using a false name and address.

[7] A fingerprint on the vehicle registration certificate for the vehicle was identified as having been made by a man called Vincent Banks who was subsequently charged with membership of the IRA in the Republic of Ireland on 8 December 2012 and was convicted of that charge at the Special Criminal Court in Dublin on 31 July 2017.

[8] It is not in dispute that the Toyota Camry was parked in Carrigallen, County Leitrim between 10 October 2012 and 31 October 2012 in an area of parking bays which are illustrated in photographs prepared by the defence. A number of residents from the Carrigallen area have made statements identifying the presence and location of the vehicle during this period. From their descriptions it is not clear if the car was parked in the layby directly to the left of a driveway described in evidence and shown in the photographs to which I have referred, or if in fact it was in the adjacent parking bay. This evidence is subject to a hearsay application. The

court has seen a photograph of the vehicle taken by one of the witnesses which seems to identify the location of the vehicle with reasonable certainty.

[9] The vehicle was moved on 31 October 2012. A witness had observed the vehicle parked in the same place at 10.30 that morning, but noticed at 8.30 that night that it had gone.

[10] From CCTV images obtained of the Toyota Camry 94 D 50997 it is accepted that the car registration was detected by the ANPR camera at Clogher, County Tyrone on 31 October 2012 at 19.22 heading east in the direction of Augher. From the report of David Owen CCTV examiner, it is not disputed that a similar vehicle based on features such as the general body shape and the square shape of the rear registration plate is seen driving past Augher Creamery at 19:24:50. The Toyota Camry car registration is again captured on the M1 motorway ANPR at Tamnamore at 19.45 hours on the same date. A similar vehicle is identified at a number of premises in Lurgan between 19.59 and 20:01:38 hours.

[11] On 1 November 2012, the morning of the murder, a similar vehicle is seen driving east out of Lurgan at a number of premises between 06.51 hours and 07.41 hours when it is last seen driving past St Theresa's Primary School in Lurgan.

[12] It is the prosecution case that the defendant was present in Carrigallen on 31 October 2012 at around 5.45 pm onwards. It is alleged that during this time he had a key to the vehicle, that he started the vehicle and enabled it to be brought to Northern Ireland that evening. The prosecution say that he did so at least with the intention of assisting others to use the vehicle for the purpose of attacking Mr Black, and that the attack was within the range of offences that he, as a member of the organisation that carried out the attack, would have contemplated.

[13] The prosecution will also seek to rely on the fact that the defendant was convicted on his plea of guilty of offences contrary to Article 64(1) of the Firearms (Northern Ireland) Order 2004 and Section 57(1) of the Terrorism Act 2000. He served the custodial part of his sentence at HMP Maghaberry, where Mr Black worked, and was on licence after his release from prison on 23 December 2011.

[14] It is alleged that he was one of a number of prisoners detained in Maghaberry who were charged with criminal damage of their cells and furniture in connection with a protest against the conditions of their detention.

[15] On 8 March 2012, the BBC published an article on its website including an interview with the defendant during which he purported to give reasons for the protest.

[16] On 12 November following the murder of Mr Black a report appeared in the Irish News setting out a claim of responsibility for the murder on behalf of the IRA

which was purported to be *“in direct response to the torture and degradation of POWs held in Maghaberry”*.

[17] The defendant travelled to Dublin to attend the funeral of an IRA member in September 2012. He travelled to this funeral without informing his probation officer, in contravention of his licence conditions. Mr Banks, to whom I have already referred, was also in attendance at this funeral. The prosecution submit that the latter material provides the defendant with a motive to assist in the murder and is relevant to his intent.

[18] It is not in dispute that the sole or decisive evidence against Mr McLaughlin relates to various statements made by a Mr Stephen Brady in the course of a series of interviews conducted by An Garda Siochana (AGS) between 2 and 5 November 2012.

[19] Mr Stephen Brady is a resident of Carrigallen and on 31 October 2012 worked in premises known as McHugh’s Garage, which was a filling station with an attached workshop and retail shop. Mr Brady was arrested under Section 30 of the Offences Against the State Act 1939 in the Republic of Ireland in connection with the murder of Mr Black. Between 2 and 5 November 2012 he was interviewed on 12 separate occasions by AGS. The interviews were recorded on DVD and the court viewed and heard the entirety (save for an 11 minute gap) of the recorded interviews in the course of the hearing.

[20] In the interviews Brady admits that a man came to his garage at approximately 5.40 pm on 31 October. The man enquired if Brady had batteries for sale and was told that there were none. He then asked for jump leads but there were none available. Brady admitted putting an old battery on charge. The two of them went into the shop attached to the garage and the visitor asked to use Brady’s phone. Brady agreed to dial the number of the recipient; although he declined to say who this was other than he was a local. He told AGS the conversation seemed to be about fireworks. The person bought some small food and drink items and paid with sterling. They then left the garage with the battery that was on charge and they went to the vehicle which was parked in a layby at the lough. He describes assisting getting the car started. When he left the scene the person who came to the garage was in the driver’s seat. After disclosing this information Mr Brady identifies the person in question as being the defendant Damien McLaughlin. He says that he had met Damien McLaughlin before and knew who he was.

[21] The prosecution applied to adduce the statements made by Mr Brady in the course of these interviews under the Criminal Justice (Evidence) Order (Northern Ireland) 2004 (“the 2004 Order”). By this evidence the prosecution seek to prove that Damien McLaughlin was the person who spoke to Brady at McHugh’s garage and that he was involved in the moving of the vehicle involved in the murder of David Black. The application is opposed by the defendant.

[22] In considering the application I was greatly assisted by counsel in the case for the way in which they marshalled the relevant evidence and for their written and oral submissions. Mr Terence Mooney QC led Mr Robin Steer for the prosecution. Mr Orlando Pownall QC appeared with Mr Dessie Hutton for the defendant.

[23] There is no dispute in relation to the applicable law. The issue of the introduction of hearsay evidence under the equivalent provisions in England and Wales has been the subject matter of many judicial decisions. For the purposes of this application I intend to focus on the 2004 Order itself and the leading authorities of **R v YU** [2006] EWC Crim 349, **R v Horncastle** [2010] 2 All ER 359 and **R v Riat** [2013] 1 All ER 349. I have also found the publication **Hearsay Evidence in Criminal Proceedings (2nd Edition)** by JR Spencer invaluable in my deliberations.

The 2004 Order

[24] The notice of intention to adduce hearsay evidence relies on Article 20(2)(c) and Article 18(1)(d) of the 2004 Order.

[25] Articles 20 to 22 of the 2004 Order deal with “*principal categories of admissibility*” in relation to hearsay evidence. The relevant article in this application is Article 20 which provides statutory justification for the admission of hearsay evidence if certain conditions are satisfied. There are five conditions set out in 20(2) as follows:

- “(2) *The conditions are –*
- (a) *that the relevant person is dead;*
 - (b) *that the relevant person is unfit to be a witness because of his bodily or mental condition;*
 - (c) *that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;*
 - (d) *that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;*
 - (e) *that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.”*

[26] Article 18(1)(d) provides that hearsay evidence may be admitted if:

“The court is satisfied that it is in the interests of justice for it to be admissible.”

[27] In addition to these provisions of the 2004 Order the following articles are also relevant.

[28] Article 29 provides that:

“29. – (1) If on a defendant’s trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that –

- (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and*
- (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,*

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.”

[29] Article 30 of the 2004 Order preserves the court’s general discretion to exclude evidence and in particular Article 30(2) provides that:

“(2) Nothing in this Part prejudices -

- (a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI12) (exclusion of unfair evidence), or*
- (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).”*

[30] For the sake of completeness Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 provides:

“Exclusion of unfair evidence

76. – (1) *In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*

(2) *Nothing in this Article shall –*

(a) *prejudice any rule of law requiring a court of law to exclude evidence; ...”*

[31] In **R v Riat and Others** the Court of Appeal in England and Wales considered the correct approach to the admission of hearsay evidence under the equivalent provisions in that jurisdiction. The Court of Appeal dealt with five cases which involved the admission of hearsay evidence. The judgment was delivered after the decision of the Supreme Court in **R v Horncastle**.

[32] In paragraph 3 of the judgment of the court delivered by Hughes LJ the court sets out the framework to the legislation in the following way:

“[3] As everybody knows, the 2003 Act gave effect to the report of the Law Commission, itself a product of long consultations and deliberation (Evidence and Criminal Proceedings; Hearsay and Related Topics (Law Com. No. 245) (Cm 36970)). The common law prohibition on the admission of hearsay evidence remains the default rule but the categories of hearsay which may be admitted are widened. It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does not make it the same as first hand evidence. It is not. It is necessarily second hand and for that reason very often second best. Because it is second hand, it is that much more difficult to test and assess. The jury frequently never sees the person whose word is being relied upon. Even if there is a video recording of the witness’ interview, that person cannot be asked a single exploratory or challenging question about what is said. From the point of view of a defendant, the loss of the ability to confront one’s accusers is an important disadvantage. Those very real risks of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to its management. Sometimes it is necessary in the interests of justice for it to be admitted. It may not suffer

from the risks of unreliability which often attend such evidence, or its reliability can realistically be assessed. Equally, however, sometimes it is necessary in the interests of justice either that it should not be admitted at all, or that a trial depending upon it should not be allowed to proceed to the jury because any conviction would not be safe."

[33] The court then goes on to provide a template of the steps that a court should take when determining a question of admission of hearsay as follows (I have inserted the relevant provisions in this jurisdiction):

"(7) The statutory framework provided for hearsay evidence by the 2003 Act can usefully be considered in these successive steps:

- (i) Is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence (our Articles 20-22)?*
- (ii) What material is there which can help to test or assess the hearsay (our Article 28)?*
- (iii) Is there a specific 'interests of justice' test at the admissibility stage?*
- (iv) If there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (our Article 18(1)(d))?*
- (v) Even if prima facie admissible, ought the evidence to be ruled inadmissible (our Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989)?*
- (vi) If the evidence is admitted, then should the case subsequently be stopped under (our Article 29)?*
- (8) Although there is no rule to the effect that where the hearsay evidence is the 'sole or decisive' evidence in the case it can never be admitted, the importance of the evidence to the case against the accused is central to these various decisions."*

[34] Turning to the specific gateways for admission I note that the Court of Appeal reasserts in paragraph [9] of its judgment that:

“It remains the default rule that hearsay is not admissible. Its admissibility must be justified under one or other of the statutory exceptions.”

[35] In this application the prosecution relied on 20(2)(c) of the 2004 Order i.e:

“That the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance.”

[36] On what basis do the prosecution say that Article 20(2)(c) applies? The application is supported by a statement of Detective Garda David Donnelly who is described as part of the Garda investigating into the murder of David Black. He says as follows:

“On 25/2/14 between 10.00 am and 11.00 am I spoke to the following three people regarding giving evidence in the upcoming trial in Belfast in relation to the murder of David Black on 1 November 2012.

...

On this date also I called to the home of Stephen Brady of Bredagh, Carrigallen, Leitrim. I spoke with Stephen Brady about giving evidence in the upcoming trial connected to the murder of David Black. I explained to him the options available to protect his identity and safety. He stated he does not want to give evidence or get in trouble with anyone. When I asked him would he meet with PSNI officers regarding this and he declined. He again stated he does not want to get involved with anyone. He wore an IRA tee-shirt and logo and a RSF fleece and zip when I spoke with him. This statement is correct.”

[37] In addition to this statement a further statement from Detective Garda Donnelly was served on the defence dated 20 December 2016 which states, *inter alia*:

“I am a member of An Garda Siochana attached to the Detective Branch at Carrick-on-Shannon Garda Station, County Leitrim. I am part of the Garda Investigating Team into the murder of David Black, on 1 November 2012. As part of my role in this investigation I have spoken with a number of witnesses in this case who are residing in the Carrigallen area of County Leitrim. On 3 October 2016 I spoke with witness Stephen Brady at his

home. I asked him was he willing to give evidence in the David Black murder trial in Northern Ireland or by video link from the Republic of Ireland, he stated to me that he was not willing to give evidence in any format and refused to give a reason ..."

[38] A further statement, also dated 20 December 2016, has been served on the defence in respect of Garda Donnelly which states, *inter alia*:

"I am part of the Garda Investigating Team into the murder of David Black on 1 November 2012. As part of my role in this investigation I have spoken with a number of witnesses in this case who are residing in the Carrigallen area of County Leitrim.

...

On 3 October 2016 I spoke with Stephen Brady. I would have spoken with Stephen Brady on several occasions regarding this investigation. Stephen Brady also stated in writing that he is not willing to travel to Northern Ireland to give evidence in this case ..."

[39] The defence has been provided with a typed witness statement purportedly made by Stephen Brady dated 20 December 2016 which reads as follows:

"I have been asked by Detective Garda David Donnelly about my willingness to travel to Northern Ireland to give evidence in the trial following the murder of David Black, a prison officer, on 1 November 2012 on the M1 motorway near Lurgan in County Armagh, Northern Ireland. I have been informed the trial is due to commence on Monday 20 February 2017. I am not willing to travel to Northern Ireland to give evidence. The reason I do not wish to give evidence in Northern Ireland is; it doesn't matter."

[40] Because this is a non-jury matter a separate "disclosure judge" dealt with various issues relating to disclosure. An issue arose as to whether or not this hearsay application should be heard by the disclosure judge or the trial judge, something which I return to later in this ruling. In any event in the course of various exchanges a statement from Detective Constable Julie Mullan, of the PSNI dated 18 April 2018 was served on the defence on 1 May 2018. This statement has been formally served as additional evidence. In relation to Stephen Brady her statement includes the following:

*“On Wednesday 11 April 2018 I was on duty in Carrigallen, County Leitrim in the Republic of Ireland, in relation to the murder of David Black on 1 November 2012, at the upcoming trial of Damien McLaughlin for offences relating to this murder. I was accompanied by Detective Garda David Donnelly, and in possession of a number of witness summons issued by the Crown Court in Northern Ireland for service of same on the named witnesses, all of whom are residents of the Republic of Ireland. I was aware that over the course of this investigation these witnesses had been asked numerous times by officers of An Garda Siochana to adduce their accounts in the trial of **R v McLaughlin**, and each had refused on every occasion they were asked. At 10.40 hours I called with Detective Garda Donnelly at the home address of Mr Stephen Brady. After a short time a male opened the front door about 12 inches and peeped round from behind it so only part of his head was visible. Detective Garda Donnelly introduced the male to me as Mr Stephen Brady and then introduced me to him. Stephen Brady said ‘No no no, I am not talking to you’, Mr Brady went to close the door and I asked him just to give me a few minutes of his time. He then ceased closing the door over and re-opened it back to where he was peeping out behind it. I introduced myself and explained the nature of my visit, he just kept saying ‘no’, and withdrew his head back out of sight. When I held the summons out for him to take he again said ‘no’. I held the summons out for him to take but when I let go of it, it fell to the floor just inside the front door. I thanked Mr Brady for his time and as I turned to walk away the front door closed.”*

[41] As a result of further correspondence between the defence and the PPS the defence received a copy of the summons referred to in DC Mullan’s statement and an accompanying letter that went with the summons. The text of the letter reads as follows:

“The trial of the above named, Damien McLaughlin, is due to commence at Belfast Crown Court Laganside, on 30 April 2018. As you are aware you have provided a statement to An Garda Siochana that contains evidence that the prosecution wished to lead at the Crown Court trial.

It is my understanding that you have indicated to An Garda Siochana officers that you do not wish to give evidence in the proceedings under any circumstances.

I write to inform you that there are a number of options available to the court that may assist you in giving evidence including the following:

- (i) Attendance at the court building in Belfast with arrangements put in place for you to give evidence by video link from a room within the court complex rather than being present in the courtroom;*
- (ii) Your evidence relayed by video link from a court or other convenient building such as a local Garda station to the Crown Court in Belfast;*
- (ii) Giving your evidence from behind a screen whereby you will not be able to see the accused.*

In addition to the above measures being available to the court in Northern Ireland, a request can be made from Belfast Crown Court to the High Court in Dublin to summons witnesses to attend court in Dublin to give evidence before a High Court Judge.

If you require further information about any of the measures or are happy to proceed with the assistance of these measures please contact Detective Garda David Donnelly at Carrick-on-Shannon Garda Station."

[42] Clearly Mr Brady is outside the United Kingdom. The question to be considered is whether or not it is "*not reasonably practicable to secure his attendance*".

[43] The key to the determination of this issue is to consider what efforts the prosecution have made to secure the attendance of Mr Brady at this trial and what other steps, if any, it could have taken.

[44] The steps taken have been set out in the paragraphs above. The defence is critical of the way in which the prosecution sought to serve the witness summons issued by the Crown Court in Northern Ireland by DC Julie Mullan which is in effect an invocation of the Crime (International Co-Operation) Act 2003.

[45] Section 49(1) of the Act provides for the making of rules of court to regulate proceedings under the Act which includes the service of a document by a prosecuting authority outside the United Kingdom for the purposes of criminal proceedings.

[46] The service of this type of summons under Section 3(4)(b) *“must be accompanied by a notice giving any information required to be given by rules of court”*.

[47] Section 4 provides that such a process instead of being served by post may *“be served on a person outside the United Kingdom in accordance with arrangements made by the Secretary of State”*.

[48] Section 4(2) provides that:

“(2) But where the person is in a participating country, the process may be served in accordance with those arrangements only if one of the following conditions is met.

(3)The conditions are –

- (a) that the correct address of the person is unknown,*
- (b) that it has not been possible to serve the process by post,*
- (c) that there are good reasons for thinking that service by post will not be effective or is inappropriate.”*

[49] Finally the Crown Court Rules of Northern Ireland make provision in respect of the service of NI process abroad and sets out requirements for a notice which is required to accompany any process served outside the United Kingdom.

[50] Rule 56 provides:

“(1) The notice which by virtue of Section 3(4)(b) shall accompany any process served outside the United Kingdom shall, so far as is reasonably practicable, give the information specified in paragraphs (2) and (4).

(2) The notice shall –

- (a) State that the person required by the process to appear as a party or attend as a witness may obtain information about his rights in connection with such requirement from the relevant authority; and*
 - (b) Give the particulars specified in paragraph (4) about that authority.*
- (3) The ‘relevant authority’ where the process is served-*

- (a) *At the request of the prosecuting authority, is that prosecuting authority;*
- ...
- (4) *The particulars referred to in paragraph (2) are -*
- (a) *The name and address of the prosecuting authority or, as the case may be, the Court, together with its telephone and fax numbers and e-mail address;*
- (b) *The name of a person at the prosecuting authority or, as the case may be, the Court who can provide the information referred to in paragraph (2)(a), together with his telephone and fax numbers and e-mail address.*
- ..."

[51] Rule 57 deals with proof of service outside the United Kingdom and provides:

- "(1) The service on any person under section 4(1) of any process issued or made may be proved in any proceedings by a certificate given by or on behalf of the Secretary of State.*
 - (2) A statement in any such certificate as is mentioned in paragraph (1) -*
 - (a) That a process has been served;*
 - (b) Of the manner in which service was effected;*
 - (c) Of the date on which a process was served,*
- shall be admissible as evidence of any facts so stated."*

[52] The defence argues firstly that it is not clear whether any notice in accordance with the requirements has been served. Even if the letter that accompanied the summons is to be deemed to be such notice it does not appear to comply with Rule 56 in that the letter fails to tell Mr Brady about his ability to "*obtain information about his rights in connection with his requirements in the relevant authority*" and fails to provide him with "*the name of a person that the prosecuting authority ... who can provide the information referred to in paragraph (2)(a), i.e. the aforementioned information about his rights.*"

[53] In addition it is not clear that the attempt to serve the summons on Mr Brady, which was not served by post, fell within any relevant "*arrangement made by the Secretary of State*", as envisaged by Section 4(1) of Act. Nor is there a certificate of service from the Secretary of State contemplated by Rule 57 which is required for service abroad under Section 4(1), "*otherwise than by post*".

[54] In considering these particular criticisms I bear in mind that this process does not have the effect of compelling the attendance of Mr Brady. It may well be that there is merit in the argument that the service of the summons has been technically deficient. However I am satisfied that in all the circumstances of the case it would not be reasonably practicable to ensure Mr Brady's attendance without some element of compulsion. I get no sense that any appeal to his civic duty or responsibility will be effective, irrespective of any defects in the process described.

[55] It is clear that the prosecution was belatedly conscious of its obligation to take all practical steps to ensure Mr Brady's attendance. The efforts to serve the summons were made close to the commencement of the trial and only became clear in the course of the disclosure process which briefly delayed the commencement of the trial.

[56] It is common case that there is a procedure open to the prosecution whereby a request can be made from a Crown Court in this jurisdiction to the High Court in the Republic of Ireland to summons witnesses to attend court in the Republic of Ireland to give evidence before a High Court Judge including a power to summons a witness to give evidence for use outside the jurisdiction by a television link or telephone link. These powers are to be found in the Criminal Justice (Mutual Assistance) Act 2008 in the Republic of Ireland. There is no reason to believe that Brady would not attend at a court in the Republic of Ireland or at a Garda station in the Republic of Ireland or another venue in the Republic of Ireland if compelled to do so under pain of penalty, either by way of fine or imprisonment.

[57] The circumstances of the alleged offence are such that a prosecution could have been brought in the Republic of Ireland or in this jurisdiction. Having decided to bring this prosecution in this jurisdiction in my view the prosecuting authorities as a bare minimum should avail of the mechanisms which exist within the two jurisdictions to compel the attendance of Mr Brady at a court to give evidence in this trial. This would not have caused any undue cost or delay. The evidence is of fundamental importance to the case. It is not evidence involving proof of a peripheral matter or involving, for example, a document prepared by an independent public official where there is no basis to doubt its reliability.

[58] There is little doubt that Mr Brady is a reluctant witness, but this is different from a witness who is unavailable and whose attendance cannot be secured. I consider that the procedure whereby the Republic of Ireland authorities can compel

the attendance of a witness is a reasonable and practicable step which should have been taken to secure Mr Brady's attendance at trial.

[59] I fully accept Mr Mooney's submission that "*reasonably practicable*" does not mean "*everything practicable*". The word practicable is not equivalent to physically possible.

[60] One can foresee that issues may well arise in the event that Mr Brady did attend a court or other venue under compulsion. It does not automatically follow that Mr Brady would refuse to give evidence or answer questions if brought to court. As is clear from the content of his evidence, which I will discuss further below, there are many legitimate questions that can be asked on behalf of the defendant in relation to that evidence. If he were to refuse to give evidence it may well be that an application would be made by the prosecution to treat him as a hostile witness. However all of this is speculation. The first and necessary step for the prosecution is to take what I consider to be a reasonable, practicable step to secure his attendance.

[61] For these reasons I am not satisfied that the prosecution has taken all steps that were reasonably practicable to secure the attendance of Mr Brady. I am not satisfied that the prosecution have established a statutory justification for the admission of the evidence under Article 20(2)(c) of the 2004 Order.

[62] Returning to the template in **Riat**, I should consider both Article 18 and whether there is a specific "*interests of justice*" test at the admissibility stage. If admissible under either Article 18 or 20 the court may consider Articles 29 and 30 of the 2004 Order and Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("*PACE*").

[63] I now turn to the issue of the admissibility under Article 18(1)(d) of the 2004 Order.

The Interviews

[64] I propose to provide a brief summary of the contents of the interviews. I will return to some of the matters I highlight later in the ruling.

[65] The interviews take place in a small room in Carrick-on-Shannon Garda Station. There is a table in the room with the suspect Brady sitting on one side of the table and two Garda sitting opposite him. On occasions there are 3 Garda in the room conducting the interview. There were 12 interviews in total.

First Interview

[66] The first interview took place on 2 November 2012 between 21:08 and 22:20. There are two Garda interviewers, Detective Garda Colin Barker and Detective Garda David Cullen. At the start of the interview Mr Brady is informed that "*from*

this point on everything is being recorded ... we might be asking you a few things that may have been asked already just general stuff."

[67] It is clear that there had been some conversations prior to the interview. Throughout the interviews one of the interviewers takes notes. At the end of each interview the notes are read over to Mr Brady and he is asked if he wants to make any corrections to them. In each of the 12 interviews he was asked to sign the notes but refused to do so.

[68] At the start of the interview Brady is in a hunched position, he is shaking and appears nervous, he is fidgeting. He is able to answer some general questions about his name, his date of birth, his address and how long he has been living in Carrigallen and general matters about his family background. He admits that he works in McHugh's service station as a general operative. There is reference to his drinking and to his possession of a mobile phone.

[69] He speaks comfortably and easily about the type of contract he has for his phone and appears at ease at this stage of the interview. The first sign of any resistance is when he is asked whether or not he was working on Wednesday 31 October:

He says:

"I, I think I'm just going to put down no comment from here on in now."

He is asked:

"Why is that?"

He says:

"Because I have the right to do it."

The response is *"No need to be like that."* He continues to answer *"no comment"* and he again is noticeably fidgeting with his hands. As this continues one of the interviewers says to him *"Ah come on you are not doing yourself any eh favours by not answering the questions Stephen - are you alright there, do you want a drink of water or anything?"*

There is some evidence that he is slightly upset at this stage but he continues to reply *"no comment"* when he is asked questions about whether he noticed any unusual activity or people in the garage over the last couple of weeks. Later he continues to answer *"no comment"* when one of the Garda says to him: *"This is going to be a long sort of session if you, you are not going to be answering the questions."* He is asked if he is alright.

[70] There is some interaction and laughter between the interviewer and the interviewee when he is asked about his drinking and there is some discussion about Bulmers Cider. However, when he reverts to “*No comment*” there is evidence of clear frustration on behalf of the interviewers. The interviewer says:

“What – aagh listen nobody is trying to catch you out we are only asking you a fucken question Stephen – have you not have you.”

Brady: *“No comment”*

“Jesus Christ he’s not that bad is he – he’s like, he’s like a fella whose fucken been (inaudible) or something. I’ll not fucken ask you (inaudible) – no seriously though it is not fucken – (inaudible) – am – what ah do you support any political party or anything like that no?”

There is a noticeable increase in the volume of the voices of the interviewers at this point.

He is asked has he ever been a member of the IRA or did he condemn the IRA to which he replied “*No comment*”.

[71] At this stage one of the officers reads over his notes of the interview. In the course of doing so the ‘member-in-charge’ enters the interview and introduces herself and asks if the prisoner has any issues. None are raised and she leaves the room. At the end of the summary Brady is asked “*Do you want to add anything or change anything?*” to which he replies “*I’m sure if I change anything, aagh, what, what, it’s definitely now that would be used against me too I suppose*”, to which the response is “*hold on, what’s all this used against you business?*”

[72] At this stage there clearly is a level of friction between the interviewers and Brady.

Second Interview

[73] The second interview takes place on 3 November 2012 between 9:27 and 11:18. The interviewing officers are Detective Garda David Gantley and Detective Garda Colin Barker. At the start of the interview Mr Brady complains about being cold to which the interviewers respond “*Jesus it’s roasting in here you couldn’t be cold*”. After the caution Brady is asked for his name to which he replies “*No comment*”. This provokes a loud and profane response from one of the interviewers who says in a loud and aggressive manner:

“Ah for fuck’s sake you know your own name that’s bullshit – yeah we are not going down this here ok – no we’re not we’re not (inaudible) – you can, you can have all the fucken advice you want in the world right. If you are a smart enough fella and you want eh and that’s, that’s the road you want to go down right there’s fucken questions you can answer and there’s questions you are not going to answer right. If that’s what you’ve been told, that’s what you want to, that’s the road you want to go down right. You’re fucken name is your name right, your date of birth, you’re fucken address, simple things like that, I’m going to ask why, why you were, the next thing I’m going to be asking you about is the reason that you got arrested and all that right, you either understand that or you don’t. Now, so what’s your name?”

[74] The reference to advice I presume relates to the fact that Mr Brady had a consultation with his solicitor for 20 minutes on the evening of 2 November 2012.

[75] The outburst has the desired effect and at this stage Mr Brady answers routine questions about his name, date of birth and address. He is then informed that he had been arrested for the offence of membership of an unlawful organisation and withholding information. When asked whether he had anything to say about being arrested he said *“No comment”*. This provokes further offensive and aggressive language in a loud voice from the interviewer who responds *“you, you answered this fucken question before why can’t you answer it again. It’s fucken bollix and that’s what it is.”* As Brady continues in this vein the interviewer responds *“I’ll write it down, I have written it down right, no comment right – but you have to understand why you are here – but the thing is right, the thing is right just because you say no comment to a question isn’t going to stop me asking it.”* Brady does however go on to answer very mundane questions about where he lives and some personal background.

[76] It is clear that Mr Brady has responded to the initial aggression and raised his voice and engages in friendly conversation at this stage in the interview. The member in charge enters the room at this stage and Mr Brady requests a cup of water. Mr Brady comments that his boss will not be a bit impressed about him being arrested by the Garda. He talks about his work. He is asked questions about his mobile phone which he answers easily and readily. At this stage he appears relaxed. He is asked about his social media usage. When he is asked whether or not he is involved in any forums and in particular forums relating to *“Eirigi”* or *“The Republican Socialist Policy”* he reverts to *“no comment”*. There is reference to the fact that they were *“chatting in the back of the car”* yesterday when there was a discussion about whether or not Mr Brady was still in Sinn Féin. When he does say that he is not a member of any political organisation or group this is treated with derision by the interviewers:

"Oh that's a good line – that's a rehearsed line, isn't it – I fucken heard that line before and I don't know what Garda Station it was but, I definitely heard that line before.

At this stage unfortunately people do be telling us lies David – well that does happen every now and again – the unfortunate thing – you've an interest in Republican Sinn Fein Stephen, you might as well tell the fucken truth. And you have an interest in Eirigi as well that's the fucken truth – well I ah – you can sit there and say no comment all you fucken like but that's the truth – yeah but wait for it. Are you in Eirigi, are you? Are you a member of Eirigi – Eirigi is not an illegal organisation – it's not an illegal organisation, we're not, we've not now we only ask, I only ask and I am writing this now, now, now but."

When Brady repeats that he is not a member of any political organisation the response is:

"Ah for fuck sake Stephen."

[77] As was the case in earlier parts of the interview these comments are delivered in a loud and aggressive tone. He is asked why he is answering some questions and not others. In the context of the discussion about his previous involvement with Sinn Fein it is put to him:

"Was there anyone putting pressure on you to do stuff or not to do stuff or was it – they weren't militant enough for you Stephen that's the fucken truth – isn't that the truth Stephen, they weren't fucken militant enough for you."

[78] The discussion then returns to his work and payment during which Brady answers the questions that are put to him. There then is a discussion about his drinking from which, on Brady's account, it appears he may well be an alcoholic and certainly drinks to excess. This drinking has been going on for 8 or 9 years according to him. He is then asked about his working habits and where he was on Thursday night. He refers to drinking 9 cans of Bulmers in the fridge at home before going off to the local pub, Pat Masterson's. At this stage Brady is talking freely. There is a lengthy discussion about his work and what is involved. He gives his PIN number of his phone and is asked about any social hobbies he has. He is then asked about whether or not there is a "booster pack" or "boxes for jumping cars and that". He is asked whether or not people come into the garage looking for stuff like that. He is asked about whether or not they sell batteries. He says that there would be some uncharged tractor batteries and stuff and some car batteries lying about the garage somewhere. He says: "You'll find all sorts of junk in that place". Brady asks about

damage that may have been caused to his door when his house was searched by the Garda.

[79] The interviewers return to the subject matter of Brady's arrest. It is put to him that he is a member of the IRA to which he responds "*I am not a member of the IRA and never have been*".

[80] This provokes the by now familiar pattern of a raised voice from the interviewer coupled with aggressive and profane language as follows:

"Jesus that means you are because that's fucken hell how many (inaudible) to be told that same fucken line eh - (inaudible) - I am not a member and I never have been - I remember (inaudible) - fucken hell - (inaudible) - when you go back to the house (inaudible) tell him to get a new line cause we are sick of hearing that one - (inaudible) driving around the country arresting fellas."

[81] Brady continues to deny he is a member of the IRA. His answers are met with derision and expletives. When Brady again reverts to no comment, the response is "*Ah you're fucken guilty as sin*" ... "*you fucken are and you have to be, you have to be*" ... "*I fucken said, the minute he came in, the first question we asked him and he said no comment when we asked him his fucken name, that's it - eh that's it.*" When Brady said "*Well that doesn't mean anything*" the response is "*Eh, fuck, ah Jesus it does.*" At the end of the interview Mr Brady is read a summary prepared by one of the Garda. Towards the end of the summary Brady says: "*I wonder how long more do I have to be in now before I get released?*" Whilst the transcript has described the response as "*(inaudible)*" on listening to the tape one of the interviewers says "*Do you think you are going to be released?*" When Brady says "*I would hope so*" he is told "*We've got started*".

Third Interview

[82] The third interview is on 3 November 2012 between 12:19 and 14:37. It is conducted by Detective Garda David Gantley and Detective Garda David Cullen. The interview commences as the previous one ended with the interviewers expressing derision at Brady's denial of membership of the IRA. A reply of "*no comment*" to one of the questions provokes the following response:

"Look at yeah, you have your opinion. Like no comment is the worst fucken answer in the world you can give me because I'll be asking you the questions till you give me, till you answer me you know. Like do you support the IRA, the cause that they believe, that you believe that, whatever, like you know?"

In the face of persisting responses of “no comment” the interviewers make comments such as

“Oh Devine Jesus Stephen, you are breaking me here now. And it’s supposed to be me that’s breaking you, you know. ... Everything’s fucken ass about face at the moment. ... Bollix still no comment.”

[83] This section of the interview focuses on whether or not Brady was a member of Sinn Fein and whether he supports the IRA. He eventually admits that he had been a member of Sinn Fein, that he was there for the purposes of “*assisting the community*” – helping with potholes etc and helping the local councillor. He admits attending some ceremonies. He denies having anything to do with the IRA or with any weapons or explosives. During this period Brady does not demonstrate any distress or discomfort. They then return to a discussion about Brady’s drinking and about whether or not he is an alcoholic. Eventually, in the course of this interview Brady is asked about a car that was parked on the Mohill Road. When asked about his knowledge of the vehicle he says “*I don’t know anything, no comment*”. This provokes an angry response from the interviewer who says:

“Stephen stop acting the fucken maggot now, you are fucken lying to me, everyone fucken knows about this. Are you telling me you are the only one in the whole town or village that knows nothing about this fucken car?”

Brady – *Well I heard stories about it yesterday.*

AGS – *You are fucken, tell you, just tell us what you fucken know about it. Yeah.*

Brady – *I know nothing about it, that’s it I just heard it was parked up here and that’s all.*

AGS – *Listen you heard, you just heard.”*

[84] He says he doesn’t recall seeing the vehicle and when asked whether or not he was “*ever around it*” he says “*I don’t recall, no comment*”. He is questioned persistently and aggressively about this. It is put to him: “*Stephen this is your, you’re best interests here now*”. This is followed by more aggressive comments such as:

“You know what, what they’re fucken, what way the world fucken works. We don’t ask fuck all questions that we don’t know the answers to. Alright. So you sitting there fucken telling a ball of lies or not fucken answering us isn’t

going to do you any good. Do you understand where I coming from?"

[85] The member in charge enters the interview room at this stage and when asked if everything was ok Brady replies: "Yeah". After the member in charge leaves the interviewer says the following to Brady:

"You know how the special criminal court works or do you? You've got 3 fucken judges up there looking down at you and you've got no jury, just 3 judges and they know all this shit. They see the fucken lies that you are fucken spinning us. Do you think they are going to have any sympathy for you. It is not your fucken average court. Just tell us Stephen, just tell us what the story is with the car now.

Brady – I don't know anything about it.

Stephen you're acting the fucken bollix now, just tell us what the story is with the car, come on just tell us, that's all we want to know, just tell us the fucken, what you did what you didn't do.

The car was parked up.

What type of car was it? Stephen it's on the fucken tip of your tongue just tell us now.

Look, come on here you work in a fuck you work in a garage. You are a handy man around fucken cars you've changed a fucken puncture and you've changed punctures, mended punctures, a fucken loading fucken fuel there, every day of the week into the back of vans, cars and fucken everything. You know, you know what a car is and what a car isn't, so what type of car was it that was parked up to the best of knowledge em.

Stephen come on. Stephen are you thinking or are you just not going to answer me. Look at me.

Brady – No comment.

Look one way or the other you're going to fucken tell us at some stage will you tell us this time tomorrow?"

[86] Brady finally admits that *"I heard about it alright"*. They then go on to engage in some small talk about whether Brady could drive. They then return to the subject matter of the car.

"You're doing well, look you're doing, just fucken getting a few things sorted out here but one thing we need to box off is this car. We need to know what you know about it."

Brady - *"Don't know anything about it."*

[87] He is asked about when he was last in Ballyconnell, when he last left Carrigallen. When he continues to deny any involvement with the car it is put to him:

"I don't want to see a fucken young fella like you getting locked up."

Brady says: *I've done nothing to get locked up for.*

The Garda say: *You're not helping yourself. Just fucken want to know the story with the car.*

Brady - *I don't know anything about it. By the way that this is going I take it I am going to court so.*

I didn't say that, I said I don't want to see a young fella like you getting fucken locked up, it doesn't do anybody any good you know, you know that I mean.

Brady - *There's no point in my getting locked up for something I didn't do and that's just basic facts (inaudible).*

The way it's going now it's looking like you you have done something you're not telling us, you're not fucken giving us your version."

[88] Brady continues to deny any involvement with the car and the tone of the conversation is clear from the following:

"I can't tell you.

You fucken (inaudible)

You can tell us.

Brady - *I can't tell you because I don't know.*

That's bollix, that's horseshit faeces ok.

Brady – Well that's it question over.

Yeah.

For the moment we'll keep asking you. You'll be here for a long while yet."

At this point Brady then says:

"I know it's a blue car, what the Detective, one of the Detectives that called at my place on Thursday said it was either a Toyota Corolla or a Toyota Camera but I was ..."

[89] There then follows a friendly discussion about drinking and playing darts and what time he was down at the pub at on Wednesday night. He is asked whether or not he or others would talk about the IRA in the pub or drinking. He is asked whether or not he was ever asked to hold anything or keep anything in the house for the IRA which he denies. He says in the course of this exchange that he had a very poor education and *"I don't know a whole pile"*. There is some discussion about speaking Irish.

[90] The member in charge comes in at 13:25 and asks Brady if he has any requests to which he replies *"Ah no, I'm grand"*. After the member in charge leaves the following conversation ensues:

"Brady – Well there's one request I should have had.

What.

Brady – To end this interview and go home. Don't think I'll get it though.

No somehow I don't (inaudible)

You fucken tell us because we need to know you'll be gone out the door out the back door."

[91] He was then asked if he was out the door of the garage and walking in the direction of the Mohill Road on Wednesday night. Brady says he doesn't know and says *"I, I don't want to, I don't want to incriminate myself in anything and"*.

[92] Shortly after he returns to this theme:

Brady - *"I don't want to incriminate myself and that's why I am (inaudible).*

But what, what makes you think you'll incriminate yourself?

Jesus you're incriminating yourself by not fucken saying anything.

Yeah, that's the fucken thing that's what you don't understand."

[93] He is asked whether or not he left the garage to help someone on Wednesday night. As has become the pattern when the interviewers are focussing on issues relating to Brady's involvement with a person who started the car on the evening in question the interviewers begin shouting at the suspect in an aggressive manner. There are 11 minutes of the tape missing between 1:15 and 1:26. When the tape resumes the following is heard:

AGS - "You get fucken charged then, in to court, in to custody, bang, sentenced. I asked you earlier on there how long you were a member of Sinn Fein, you couldn't tell me the number of years like. But I guarantee you, when you get a sentence out of this, it will be more than a fucken year. Do you understand that? Did you do, did you ever serve any time.

OK (inaudible)

It ain't going to be fucken open (inaudible)

Explain a couple of things to you right. Couple of things we have been asking you here for the last hour, hour and half. The reason we have been asking you that is because one of the reasons you were arrested, withholding information in a fucken murder, right, serious fucken business. We want to know about the car. You're dealing with the car. We want to know what you did after work, on Wednesday. Tell us this, otherwise you are withholding information about a fucken murder. And that's a murder charge Stephen whether you like it or not. The same as if you fucken pulled the trigger and shot somebody in the head. It's a murder charge. It's serious shit."

Brady - *"But I think I should talk to my solicitor or have him present here now.*

He can't be present.

(Inaudible) I can get your solicitor in but eh we need (inaudible)."

Shortly afterwards the following is said:

AGS – "You tell us will you just get it off your chest

Just come on, just fucken tell us.

Stephen why say nothing right cause like Jesus Christ

It's a fucken murder charge, I don't want to see you come to fucken (inaudible)

Yeah come on, tell us, come here, what, what did you have to do."

Eventually, Brady says:

"I didn't do anything physically at all."

Having made this concession the interviewers press on.

"Look it's no crime in itself to fucken see something happening. What did you see being done?"

Do you want me to put down my pen, do you?"

Brady – "No, it's not even that it's just

Now come on Stephen, Stephen come on.

(Inaudible)

Look you're a big boy, you know the fucken, you know the score, right, come on what did you see being done? You didn't, you done nothing physically yourself.

Right we accept that, thank you. Now just fucken (inaudible) now what did you see being done. Come on."

Brady – "See I'll fucken end up being the next man shot.

You won't be the next man shot."

Brady – *“I fucken will, this will be read out in court and everything.*

It will not be read out in court won’t.

Special Criminal Court no, no, no direct interviews are read out in court. Unless because you’ll be the man to be charged, if you’re the man that’s charged and you are in front of the Special Criminal Court, no interviews are read out unless you plead not guilty and you want them read out in court.”

Brady – *“But I’m not guilty of any offence.*

Look at now, that’s what you have to tell us, that’s what we are trying to establish.

Come on

That’s what we are trying to find up – clear up here and now. You just tell us and tell us why you are not guilty of it right, you didn’t, you didn’t do nothing.”

Brady – *“Yeah.*

Right but what did you see?”

Brady – *“Just the car being started.”*

[94] It is at this point that Brady admits to the interviewers that he saw the car being started, and that he was beside it when it was started.

[95] Whilst admitting this he said *“I know I’ll be fucken shot for this”* when the Garda say he won’t be shot he says *“I will surely”*. Brady goes on to admit that there was something wrong with the battery and that it would not start and he describes how he jump started the vehicle. He suggested he did this by simply tapping the poles or connections to the battery. He said he knew nothing about the car other than that he was involved in getting it started.

[96] He was then asked about the man who asked him to help start the car and Brady commented *“I would, I wouldn’t know him now if I seen him again, and I wouldn’t know his face, so I wouldn’t have a clue who he is.”* He describes how he came into the garage and asked him to give him a hand to get the car started. He says that it was dark when he got to the vehicle and he didn’t even see what colour it was. He was

asked if the man was “a Northern fella” and he says “I honestly don’t remember now whether, what his accent was like”.

[97] He is asked for a description of the man in terms of height or any distinctive clothing. Brady says that he was wearing a hat and a hoodie top.

[98] When pressed further he says that he actually did bring a battery down and put it in the engine of the car. When the car started up he swapped the batteries back as he realised there was actually nothing wrong with the battery in the first place. It needed the poles or the wires “banged down”. When he was asked what he did with the battery he says “It’s in the garage somewhere”. He is asked further about his movements after the car was started. The interview continues in similar vein until the summary is read out in the normal way. At the end of the interview Brady says “Well now, are you happy enough that I am not an IRA member?” to which the reply was “Oh I don’t, I still think you are an IRA man, I am still convinced you are an IRA man.”

Again, he refuses to sign the interview notes.

Fourth Interview

[99] The fourth interview was on 3 November 2012 between 16:41 and 18:33.

[100] He is asked about the chances of getting out tonight but he is told that it is likely that there will be an extension of his detention for a further 24 hours. The interview resumes with questions about the man who came to the garage. Brady remains elusive about the exact nature of the contact between them but confirms that he went to assist the man by bringing the battery from the garage to a car so that it could be started. The member in charge comes into the interview room and no issue is raised by Brady. The atmosphere in the interview is calm with an absence of any swearing or raised voices. Brady answers the questions that are put to him. He is pressed for a description of the man he assisted. He is asked if the man had a Northern accent. Brady is evasive and says he does not know. He admits that he did not have a local accent. He asserts that he did not know the man in question.

[101] The entire atmosphere in the interview then changes suddenly when one of the interviewers says:

“Is this going to be another of these fucken, it’s going to take us two hours to eventually get you to tell us some,

Yeah

Semblance of the truth.

That's it right now look at (inaudible) right here, you're not telling me the truth here.

Brady – I am well.

No hold on my friend across the desk from me now, here listen to me and how many times did I tell you in the last interview. I said I'll not ask you something that I don't know the answer to right, I'm not saying I always know the answer but it is very very seldom.

Yeah

That I don't know most if not all of what the truth is alright, so right listen now we are going to get, we are not going to start beating around the bush I can't remember this and I can't remember that. When we spoke about it earlier on for half an hour right at the end of the last interview it took two hours to get to it but when you told us the start of the truth because that's what this is it's only the start of the truth alright. When you told us that that was at what, half 3 today, its now, we're here now at this, for just over what, just over half an hour already alright and it's 20 past 5. That's 3, that's 3 hours like you want to you knew that this is what we're interested in right. You knew (inaudible) but even if you claim you didn't know that's what we are interested in. We spoke about it in the last interview right and ____ dragging it out of you right, so you have been thinking about it. You know exactly what happened that evening."

As this conversation continues Brady says:

"I wonder what time the solicitor will be here at."

[102] The response is *"Don't know. When you locked up after getting a battery you were on the phone, who were on the phone to"*. The matter of the solicitor is left at that. He is pressed again about exactly what happened between him and the man he helped start the car. He continues to refuse to give any detail about the identity of the man which clearly frustrates the interviewers and results in more raised voices and profanities:

"Stephen look you know fucking well, well all right.

I'm getting fucking pissed off with you now.

Yeah you know well what sort of accent he had.

(Inaudible)

And listen, listen to me, listen to me now, listen very very clearly right, I'm asking you a lot of questions now we are asking you an awful lot of questions and all we are trying to do is try and help you get your side of this story out as much as fucking possible all right. Right this is a fucking murder case all right. So what kind of an accent had he, no more messing, no more nothing you start thinking about your fucking self now, don't mind your pal here all right. I don't know why you're trying to mind him or protect him or why you are keeping information from us."

[103] Brady goes on to say that he is afraid that he does not want to get into "any shit" from this. The interviewer says:

"Sure how the fuck is he going to know any of this shit ehm.

Listen you have nothing to worry about, just tell us the fucking truth now. Look right who was this fella."

Brady continues to say that he does not know who he was and he does not have a clue. It is put to him that he is "surely slowly but surely tightening the noose around your neck". Voices are raised again:

"Look will you just tell us the fucking story we know the story, you tell us, we need you to tell us, Dave says we're trying our fucking best to help you out here.

And you're not giving us anything back do we have to spell it out for you.

Brady: Aye, I haven't committed any offence nor have I committed any crime.

That's not fucking true you are withholding information from us in relation to a fucking murder case right so basically you are getting involved in this up to your fucking eyes all right. Now you can either start fucking tell us what the fuck is going on or else you're going to be boxed, end of fucking story all right. Now I ask you did you use your fucking phone or not. You claim you don't

know who the fuck he is, I know fucking well you know who he is."

[104] There is then an intervention at which the defendant is told that there has been an extension for a further period of 24 hours of his custody. After having been informed of that Brady says:

"Look I don't want to answer any more questions unless I have a solicitor here with me.

A solicitor won't be able to be here with you, a solicitor can't be in a room with you.

Can't be in here. Do you want us to get them to call your solicitor?

Brady: *Ehm how can he not be in with you to advise you.*

They can't be in here in the room with you. I can get them to call your solicitor and when a solicitor gets here you can go out and talk to him.

Yeah.

But we're not we're going staying going till he gets here. All right. Will I get them to ring him?

Brady: *Ehm I well. He told me to get him today anyway.*

Well I'll go out and I'll get that girl, that girl there to ring him and tell him to come down to you will I.

Brady: *Aye.*

And when he lands down here you can go and talk to him all right. Do you want that?

Brady: *Aye.*

Or do you want to continue on with this?

Brady: *I'd appreciate it if I got talking to him first.*

Well I'll go out and tell him to ring now.

17:42

(Door opens)

We are doing our best for you really I know you can't see it trying to fucking help you out here."

Notwithstanding Brady's request the interview continues. The interviewer says:

"This is a fucking murder case all right so listen to me. It's a fucking murder case that's why it's so fucking important right.

Brady – *Yeah.*

Now you're going to end up in fucking court charged with membership and withholding information right, it's the same as getting a fucking murder charge. Do you understand that right so Stephen you can do two fucking things here. You can sit there and lying to us like you have been doing all, all day, you give us a couple of little tiny bits of truth there all right.

Brady – *Look as I have explained I don't want to be the next fucking victim."*

[105] Brady is then asked whether or not the man who visited the garage used his phone. The interviewer says:

"Come on Stephen bullshit time is over now right, all the little fucking holding hand session is finished here. Did he use your phone or not. It's a yes or no fucking answer come on did he?"

Brady answers:

"Yes"

This matter is then pursued and Brady confirms that the man asked him could he use his phone and that he gave it to him. He accepts that he entered the PIN for him and initially says he cannot remember whether he dialled the number for him but when pressed robustly on the matter he says *"I think I might have"* although he was not *"100% sure"*. This provokes a familiar response:

"Ah for Jesus sake"

Fuck sake Stephen do we have to stay asking the same fucking question 3 or 4 times in a row.

Fucking hell.

Brady – I don't whether I fucking (.....)

You fucking did know you know well what you fucking did, I'm not saying (inaudible) now you dialled the fucking number of the phone for some fella."

In the course of these exchanges Brady said:

"This is doing my fucking head in fuck."

There follows another profane series of exchanges with raised voices from the interviews.

"AGS – You're not the fucking town fucking patsy that everyone goes along to you ah Jesus.

Go down there I'll getting fucking I'll get Stephen Brady ... Are you the patsy the town patsy is what you fucking.

Brady – What is a patsy

Brady – Christ I have to a whole fucking day of all of this shit of this shit again tomorrow yeah and the fucking ...

Why Jesus we'll be doing a lot more than a fucking day now if you don't start telling us the stuff the truth here like you know. You're telling us fucking lies you've told us lies all fucking morning right so straight away you've implicated yourself in a fucking murder right. You didn't pull the fucking trigger but you're involved in it.

Brady – I had no (not audible).

Which makes you as guilty as.

Same as.

It makes you as guilty.

Same as.

As the man that pulled the fucking trigger all right.

Brady – *Yeah well maybe in the eyes of the court.*

Well that's it that's where it's going to fucking count, you've said earlier on you don't give a shite about going to jail did you not."

Brady continues to deny knowing the man who came to the garage. Eventually he says *"I don't know him personally no."* Understandably this is picked up by the interviewers who say:

"You don't know him personally right but you know who he is. Would that be fair to say, would that be fair to say you don't know him personally, you know who he is,

Brady – *I don't want to say anything more.*

Look you are after saying it you don't know him personally do you know him, do you know him Stephen.

Yes no answer.

Brady – *Aye, Aye.*

Look.

Brady – *If I, if I say yes I am going to have to be a witness or something or*

You fucking won't.

You're already a fucking witness. You're after being arrested in relation to a fucking murder now do you want to be a fucking witness or a suspect which the fuck would you rather."

[106] At this stage there is a knock on the door and someone enters to inform Stephen that he had spoken with his solicitor and that he would not be able to attend the station until about half six. When pressed Brady finally admits that he knows "of" the man and that "he probably is" in the IRA. The next section of the interview focuses on whether or not Brady knew this man was in the IRA. He was asked about when he first met this man and he says that he would have "heard about him from the times of Sinn Fein". He admits to having met the man on 2 or 3 occasions. He admits that he was from somewhere "over the border". He confirms that he met the man a couple of times in Pat Masterton's bar in the past. He again goes over

what took place when the man arrived at the garage. He is asked who this man rang and it was put to him that the Garda know who this person is but Brady says he does not want to say his name. This appears to be accepted by the Garda. At one point the interviewer raises his voice and bangs the table and says:

"I'm again, I'm again fucking telling you right there's questions I am asking here because I know the fucking answers."

[107] The raised voices continue. He is asked did he hear the content of the conversation between the man who came to the garage and the person whom he had rung on Brady's phone. He says that they were talking something about fireworks. When Brady raises the seriousness of the matter the response is:

"You tell us you had nothing to do with it and everything fucking adds up you walk free and fucking nothing is going to happen to you, no one will know a fecking thing we need, you're here so we can fucking clear this up. You need to clear your name, you need to prove to us that you have nothing to do with it."

When Brady repeats his fears about what might happen to him the interviewer says:

"You haven't named anyone and the other thing is they are not going to know what you said in, in here."

At this point the interview ends. A summary of the notes is read to him and he does not add anything to it nor does he sign them.

[108] Towards the end of this interview particularly when the summary is read out Mr Brady appears to be visibly under pressure and is holding his head in his hands.

Fifth interview

[109] The fifth interview took place on 3 November 2012 between 20:51 and 23:21.

[110] It appears that Mr Brady had access to a solicitor for 17 minutes on the evening of 3 November 2012 with the consultation ending at 19:38. The fifth interview was conducted by Detective Garda Barker and Detective Garda David Cullen. The interviewers return to the subject matter of the car and Mr Brady's knowledge. He readily admits that he knew the person who came to start the car was a member of the IRA. He says:

"I would have known that yes. Sounds like final nail in the coffin, it's like going to get me in trouble now."

Shortly thereafter he asks:

"Just out of curiosity am I going to actually to have to stand in court."

To which the reply is:

"That decision goes (inaudible) Stephen (inaudible). The Director of Public Prosecutions eh evidence to pres....., presented before him will make that decision".

The defendant says that he is tired but answers the questions.

[111] Brady looks visibly tired during the course of this interview which in comparison with the previous interviews is low key and more subdued. The questioning is calm. The interviewer says *"You really don't why okay - Stephen. I'm trying to flipping do my best to help you out here."* Brady says that he cannot remember some of the detail about what happened. He said *"I'm tired now, I wouldn't think straight but I wouldn't, I probably wouldn't remember anyway. Just too long not the type thing you care too much about."* This relates to when he may have previously met the man in the shop of the garage. The interview tends to go over old ground in terms of what took place in the shop/garage and the extent of his knowledge of the person who visited him. He is asked again about the conversation between the man in the shop and the person he rang.

[112] There is an increase in volume when Brady is pressed about his knowledge of what was involved in assisting this man in terms of it being an IRA operation involving a murder. In the course of an exchange it is said to him that:

"A murder occurred here and you're implicated in the matter.

Brady says - I've just cleared myself of it.

You're not - you're not doing too well."

He is asked about what his views are on the murder of Mr Black. He admits that when he heard about the murder on the news *"I kind of knew that might have something to do with it"* - he is referring to the car.

[113] He is invited to apologise for assisting the IRA.

[114] Brady says *"The IRA could be fucking after me so I can't do that"*. To which the interviewer replied *"But sure there not going to see these notes"*. Again the member-in-charge appears at this interview and Brady makes no request for anything. He does not identify the person in the shop in the course of the interview. He is asked where

the car was parked. He says it was parked just across from the lake and was pointing in towards the wall. At one stage a third Garda enters the room and walks about but does not appear to get involved in the interview.

[115] Overall this was a fairly calm interview with the suspect clearly tired. A summary of notes was read in the usual way and the suspect refused to sign at the end of the interview.

Sixth interview

[116] The sixth interview occurred on the following morning 4 November 2012 between 9.17 and 11.06. It was conducted by Detective Garda Colin Barker and Detective Garda David Cullen. The interview begins by asking Brady to recount his movements on 31 October 2012 which was the Wednesday. It is put to him that the man who came to the shop was part of a pre-arranged meeting to enable the vehicle to be started as part of an IRA operation. It was put to him that he is a member of the IRA. He is reminded that *"we don't ask questions we don't know the fucking answer to"*. Brady gives no further information and the following exchange ensues:

AGS - "So we have to keep putting you or, we are going to keep putting to you until we are satisfied."

Brady - "Then I, then I refuse to say anything more because I have said enough, I'm just sick of saying it over and over again and I'm saying no more. That's the interview over."

Now you are really digging a hole for yourself."

Brady nonetheless continues to answer questions about what occurred on 31 October and in particular he is asked about the dialling of the phone on behalf of the man who visited the garage. He is asked about the number which he provides. When asked about this the interviewer says:

"I'm not writing anything now right. I will hold my hands in the air right, there we go, hands in the air."

As in the previous interviews there are examples of raised voices littered with expletives. Brady is pressed to admit that he is a member of the IRA. At one stage the interviewer says:

"Ah Jesus I tell you plenty of them have fucking spilt a lot more than that. You've got to remember you'll be fucking; three judges looking down on you. ... In the middle wrapped up in all this shit. ... You are caught by the bollocks."

He is asked for a description of the man, what he was wearing and his name. He was asked where he came from. Brady says he does not want to name him and that "he's a friend of mine". The Garda make it clear to Brady that they claim to know who he is. In the course of the interview the Garda say:

"Do you understand why we have to question you about it like. What happened was, was very serious where Jesus, your man was fucking killed, so I don't know. So we have a duty, we have a responsibility to investigate everything you know as thoroughly as we can and bring it, bring things as far as we possibly can, you know. That's why you're here and that's why you're being questioned, all right. Don't be taking anything that we are saying to you as personally now you know. – And to be honest with you, believe it or not (inaudible) but I don't see you going to prison and I am sure (inaudible) – we just want to fucking get as much information as I possibly can."

Brady – *"I'm fairly sure."*

"I know you probably you probably don't give a shit you'd probably love to go to prison for a while."

Brady – *"Not that I would love to do that I'm, I'm fairly sure that I am going to go now."*

"Ah yeah listen come here and it's not the road we want to be going down. We have to find out as much information about the fellows who killed this man and what they were about, what they were about and because you because you helped start the car do you what I mean?"

Brady – *"But I mean you can't put somebody in because bang they were hit with a job to do because they didn't even know they were doing it."*

Brady denies that he is a member of the IRA and the interview closes with the customary reading of the notes and Brady's refusal to sign them.

Seventh interview

[117] The seventh interview was on 4 November 2012 between 12:05 and 13:58. There were three officers present throughout this interview, Detective Garda Gantley, Detective Garda Colin Barker and Detect Garda David Donnelly.

[118] At the start of the interview the suspect is shown CCTV footage of an external camera which shows the suspect chatting to an unidentified male. Brady says that they were chatting looking for a battery and jump leads and stuff like that. It appears that the person is on the phone, presumably Brady's. The camera subsequently shows someone walking away heading out the direction of the Molehill Road. Because the person cannot be identified Brady says that that was the same man that first approached him. He is shown other footage from the external camera which appears to show him in the possession of the battery and returning the battery and leaving it at a wall outside the premises. He is then shown footage from cameras which are located inside the shop attached to the garage and he is played approximately 4 minutes, between 18:42:18 and 18:46. He is also shown further footage from another camera within the shop from a different direction. This footage has been played in the course of the trial and has been seen by me. The footage clearly shows Brady who is still wearing the same clothing that he was throughout the course of the interview. It shows a man coming in to the shop and interacting with Brady. He is seen picking up bars of chocolate and conversing with Brady. He appears to have taken a can of mineral from a fridge. He is shown at the counter talking and paying for the items. He is wearing a hat. Brady accepts that he is the man who he believes is in the IRA and whom he knows by name but does not know personally. He refuses to say his name.

[119] There then follows the key passage in the interviews in which Brady identifies the defendant. This evidence is central to the hearsay application and to the case against the accused. The exchange is as follows:

"Right come here that male there right he's on CCTV footage from McHugh's garage time 3,20; 10; 31; 18;43;20. I asked you do you know him and you said you do and you won't tell me his name, that's Damien McLaughlin. Is that correct. I'm not telling you, you're not telling me his name, I'm telling you who he is and asking you is that correct it's a yes or no answer."

Brady - *"I know."*

"Now it's a yes or no answer, there's no ifs, nos or buts or I'd not say or want to say or anything, it's a yes or no answer, simple as that Stephen, that's Damien McLaughlin from Tyrone."

It's as clear as day it is.

Again going back to the first interview me and you sat in here."

Brady - *"I know."*

And I told you.

Brady – “I, but I, said before I didn’t want to say their names.”

“You’re not saying it, I’m saying it.”

Brady – “Yes but.”

“I’m asking you is that correct, that is Damien McLaughlin, I am telling you that’s Damien McLaughlin.”

Brady – “If I say whether it is correct or not then I’m saying who it is.”

“Well you have already told me you know him

Yeah.

So it’s the same difference right is that Damien McLaughlin that is that correct.”

Brady – “I can’t say like.”

You can’t say it you’re okay you can you can say.

Brady (inaudible).

“Now Stephen hold on a second now, I’m not going to do like we done yesterday and me sitting here banging the table and roaring at you all right and having to ask you the same question ten times over until you eventually see sense and tell me the fucking truth. Right, now I told you it’s all about your level of co-operation when it comes to this right, I’m telling now that’s Damien McLaughlin from Tyrone right. I know that’s Damien McLaughlin from Tyrone. Isn’t that correct yes or no now.”

Brady (inaudible).

“Hold on it’s not like I’m going to fucking be sitting out tomorrow .. with what’s the leader or the Independent or fucking Herald or whatever you have down here, putting these fucking notes up in it right. Nobody fucking sees these only your solicitor and us right. You told me you know who the man is, you know him by name, you don’t

know him personally, you met him a couple of times right, going back over the couple of interviews you done yesterday. You met him a couple of times right, all right, you know him from, you, you, got to know him by name."

Brady - *"Right."*

"From being in Sinn Fein a few years ago."

Brady - *"Can you let me say something right."*

"I can."

Brady - *"It's just if I, if you're telling me is that such and such and I say yes it is I'm just actually telling you who it is."*

"I know who it is, you're not telling me who it is, I know who it is, I'm telling you who it is, it's as simple as that, Stephen you can sit there now, I'm not going in, I'm not going to say fucking harping on at this, well I will for a few minutes but listen we can round in circles right and then eventually like with every other fucking question I ask you ten fucking times yesterday will eventually come out and we'll, we'll agree what the fucking truth is, you're telling me the truth all right. Now I'm telling you, that Damien McLaughlin that's Damien McLaughlin, is that correct, now go on. Listen sense is a fucking it's going to be your biggest fucking, biggest, biggest assets you can have is fucking telling the truth and using your fucking common sense because there is only one way to dig a fucking hole right, you can't dig up."

Brady - *"Well there."*

"The only way you can help yourself now is."

Brady - *"There is two ways, two ways in this case cause one I go to jail or two I get killed."*

"Well listen that hasn't been fucking you're not going.

It's as clear as day you're not going right.

Ah well that's then here like yeah go ahead yeah yeah."

[120] At this stage the member-in-charge enters the room and asks if everything is all right. Brady does not say anything and she leaves.

[121] The interview continues:

"Yeah. Now we're doing this for fucking plenty for a long time right, we don't get people fucking killed right. There's only one fucking shower of bastards in this country that's killing people, well there is plenty of shower of bastards and one shower we are interested in the moment and that's the fucking IRA right."

Brady - *"That, that, that man was looking, looking for the battery goes to jail I get fucking done, now that's as simple as that."*

"That's, look at that's that's his fucking business."

It's not, you're not going to fucking you're not going to get well do you think you're going to get fucking Stephen Brady (inaudible) yes."

"No."

Brady - *"Oh I know."*

"Well look at right if that was the case every man I have ever interviewed would be getting shot right and that doesn't fucking happen right these are a cowardly shower and are bastards anyway right that their fucking (inaudible) shower of bastards."

And he's (inaudible) fucking stupid cunt sure he's standing there on CCTV clear as fucking day and you can see his face it's Damien McLaughlin (inaudible). I can see its Damien McLaughlin. Is it fucking Damien McLaughlin end of fucking story. Is that correct, is that correct I'm telling you its Damien McLaughlin Stephen is that correct."

Brady - *"For me to say it is."*

"No".

"Is it fucking Damien McLaughlin."

Now Stephen, now (inaudible) or you're not right as far as I am concerned. Now at the minute you're not right these fucking simple questions, I am showing you something, I am telling you what you're looking at, you were standing in the fucking shop, you went up to the fucking car with him right, you fixed the car with him okay, we can answer that but I'm telling you that is Damien McLaughlin right, I did not, I asked you his name and you said you didn't want to say, that's fine, I'm not asking you to say his name, I am saying that it is Damien McLaughlin, I'm telling you that is Damien McLaughlin, right, from Tyrone, that is correct isn't it. Is that correct, isn't it you can fucking deny it you can't fucking deny it, I'm telling you who it is."

Brady - *"I know but it's."*

"You're a crying fucking."

Brady - *"It's because it's because of me that's putting it down as me acknowledging if you know who it is then why should I have to say it."*

"Because aye, and aye, and aye look if you're tell me you're not going to say that's fine are you gonna are gonna I'm telling you that's Damien McLaughlin are you going to tell, is that correct or not yes or no."

Brady: *"Aye, aye."*

"It's a yes or no answer you either tell me the truth you tell me a fucking lie, now its yes or no what is it."

Brady - *"Aye, I'm not lying if I don't say (inaudible)."*

"You are fucking lying if you don't answer it."

Brady (inaudible).

"No. no I'm telling you, it's him is that correct, if that a yes or not, pick you answer and give it to me now."

Brady - *"I am trying to think what to do (inaudible)."*

"No, no, no no."

There's there's (inaudible) simple enough for you, is that McHugh's shop McHugh's garage is it."

Brady – *Yeah.*

"Is that you behind the counter."

Brady – *"Yeah."*

"It is.

Is that Damien McLaughlin it's a simple question it's the same (inaudible)."

Brady – *"I know it's a simple question."*

"It's a simple question."

Brady – *"But it's (inaudible) are the tiles red, is that a blue hat.*

Brady – *I know it's simple question for me to answer (inaudible)."*

"If you were to ask me who is that behind the counter I can tell you behind the counter it's Stephen Brady."

Brady – *"It's the, it's the aftermath of."*

"No aftermath all you're doing is telling it as it is, simple as that did he get a battery, he got a battery, is that Stephen McLaughlin, that Stephen McLaughlin. It's not a trick question you're not giving us something that we don't already know."

Brady – *"Ehm."*

"I told you here the first day simple as that.

Stephen I don't ask an awful lot of questions that I don't know the fucking answer to all right. I assume, but I am telling you a fact here right now, look at it, look at it, I'm not."

Brady – *"But once if I say I agreed that it's him then that's going to be on paper and that's yeah and where the paper going.*

Brady – *I don't know.*"

"Into your fucking file the only ones that could see that is your solicitor and whoever you decide to show it to all right."

Brady – *"I don't to show it to anybody."*

"This man decided to walk into a filling station with three cameras on the inside and one camera on the outside and he doesn't have his face covered whatsoever how does he fucking think that we are not going to see it like, like it's his fucking problem it's his fucking problem."

Brady – *(Inaudible).*

"I'm telling you look at it, is it Damien McLaughlin, yes or no, what."

Brady – *"Yeah."*

"See simple now you're not fucking doing anything else. Go on there."

Now here we are."

[122] Thus does Brady identify McLaughlin.

[123] For the true sense of what took place at this stage of interviews it is necessary to see and hear the DVD. There are three Garda gathered round the small table facing Brady. Throughout the questioning the interviewer literally roars and shouts at the suspect using questions replete with expletives.

[124] Having confirmed the identification of McLaughlin it is suggested that McLaughlin can be identified from the CCTV evidence and that he probably left fingerprints and DNA all over the place. Brady confirms that he handed over the phone to the person he has now identified. The mood changes briefly and there is an interchange between Brady and the interviewers about him drinking with Garda. He is asked about what they were chatting about in the course of the conversation showing the CCTV evidence. Nothing of any real significance emerges. He is asked further questions about what happened and his knowledge of the defendant and whether the meeting had been pre-arranged. The Garda emphasised that they are simply trying to get the truth from him.

[125] There is some discussion about the damage to the door of his house and also he is questioned about the man whom it is alleged McLaughlin rang in the shop. He is asked about his activities on Facebook and whether or not he is a Republican sympathiser.

[126] He is asked to confirm that the CCTV footage that he was shown from McHugh's garage showed himself and Damien McLaughlin to which he replied "yes".

The eighth interview

[127] The eighth interview took place on 4 November 2012 between 15:16 and 16:19.

[128] The interviewers were Detective Garda Dave Cullen and Detective Garda David Gantley. The interview initially focuses on his phone and the phone calls that were made by the person the prosecution say is Damien McLaughlin. He was asked about drink and drugs and about contacts he might have in Republican circles. They seemed interested as to whether or not the person who was rung is involved in the IRA.

[129] The interview is calm and there is nothing that directly relates to the defendant.

The ninth interview

[130] The ninth interview took place on 4 November 2012 between 17:59 and 19:20.

[131] The interviewers were Detective Garda David Gantley and Detective Garda David Cullen. From here until the end of the interviews there is a complete change of tone. Everyone is relaxed and for my part I was left with the impression that the interviewers were going through the motions. He was asked about whether or not he was a member of the IRA and about his views on Republicanism generally. He denies however being a member of the IRA. He is asked about the defendant who is referred to as "De De". He says they had never been in any telephone contact. Again the focus is on the man whom it is alleged the defendant rang but the interviewers appear to accept that he is not going to name him. There is no shouting or pressure applied to provide the name. Again he is questioned about his social media activity.

[132] Nonetheless it is clear that Brady still remains concerned about who will have access to the statements he has made and in the course of the interview Brady asks "will these be read out in court or" to which the response is "no, I've like, the only people that will ever get to view these is us your solicitor and you".

The tenth interview

[133] The tenth interview took place on 4 November 2012 between 21:00 hours and 22:18. The interviewers were Detective Garda Colin Barker and Detective Garda David Cullen.

[134] This is similar in tone to the ninth interview and a very lengthy caution is read to him about membership of the Irish Republican Army and Brady continues to deny that he ever was or is a member. He is asked in the course of the interview *"who did you help start the car on 31/10/12"* and he replies *"Damien McLaughlin"*. When asked if he believes McLaughlin was a member of the IRA he says *"possibly still is, I don't know, there's a good chance of it but I say I can't say for certain"*. He confirms going to the car and that he helped McLaughlin start it.

The eleventh interview

[135] The eleventh interview took place on 5 November 2012 between 12:08 and 13:06. It was conducted by Detective Garda David Gantley and Detective Garda Colin Barker. The interview is relaxed. Brady answers the questions after a very extensive caution explaining Section 2 of the Offences Against the State Act 1998 in relation to membership of the IRA. He admits to being a *"supporter of the IRA"* but not a member. His answers are accepted in marked contrast to the interviews leading up to the identification of McLaughlin. There are no raised voices or any signs of aggression between the interviewers and the interviewee. He repeats the assistance he gave to the person described as McLaughlin in relation to the starting of the car and handing him the phone in the shop. He confirms that he did not see the vehicle driving at any time and simply saw the car starting. He confirms that the man identified as McLaughlin paid for the can of Coke and a bar of chocolate with sterling coins. It was a £1 coin and 50p coin and some others that were simply thrown in to the till.

The twelfth interview

[136] The twelfth and final interview commenced at 15:16 on 5 November 2012 and concluded at 16:34. It was conducted by Detective Garda David Cullen and Detective Garda Colin Barker. Again this was a very relaxed interview in which the officers go over familiar ground and Brady is asked to confirm that a man by the name of Damien McLaughlin called at the garage where he worked at 20 to 6 and that he had met this man previously for *"pints"* in Carrigallen. He confirms charging up the battery in accordance with his previous interviews. Again he is asked about his mate who was rung from the shop. The Garda acknowledged *"I know you don't want to name him and that, that's okay but can you tell us if he is involved in the IRA"*. Although Brady does not name him there is no attempt to press him or pursue him on this point.

[137] When pressed on the car he said that he did not know it was a Toyota Camry. He could not see the make or colour and he refers to where the car was parked by reference to a photograph that had been shown to him in the course of the interviews. He denies being a member of the IRA or any suggestion that the IRA have meetings in a local bar in Carrigallen. He admitted to having met McLaughlin before.

[138] The impression I formed was that these latter interviews were simply routine and were seeking to confirm the details that had been obtained in the previous interviews.

Article 18(1)(d) of the 2004 Order

[139] Mr Mooney made it clear in his able submissions that he relied primarily on Article 18(1)(d) of the 2004 Order as the basis for admitting the hearsay evidence.

[140] In analysing the framework of the legislation and the relevant case law he stressed that the provision amounted to an "*inclusionary discretion*".

[141] There are a number of general comments I wish to make about the effect of the 2004 Order.

[142] Firstly, there is no doubt that the intent and effect of the 2004 Order is to change the law to permit the admission of evidence which would previously be inadmissible. Secondly, the order gives the court a very broad discretion to admit hearsay evidence. This principle must be tempered by the observations of Lord Phillips in **Horncastle** at paragraph [31] of his judgment when he described the discretion provided by the equivalent of Article 18 as a "*limited residual power*".

[143] In addition to these comments I make further general comments which are of particular relevance to this case.

[144] Firstly, in the case of **Y** [2008] EWCA Crim. 10 the Court of Appeal in England and Wales concluded that, in principle, the effect of the equivalent of Article 18(1)(d) potentially displaced the longstanding rule that X's extra judicial confession was admissible against X only - so that if in the course of the confession X also implicated Y, X's confession could not be used at trial as evidence against Y.

[145] Secondly, there is no overarching rule, either in the ECtHR or in English law, that hearsay evidence which is "*sole or decisive*" is for that reason automatically inadmissible - following the domestic decisions in **Horncastle** and **Riat**. These cases involved a careful analysis of the impact on English law of the Strasbourg jurisprudence relating to Article 6(3)(d) of the ECHR (the right of an accused to have examined witnesses against him) and in particular the ECtHRs' Chamber decision

and Grand Chamber decision in **Al-Khawaja v UK** [2009] 26 BHRC 249 and [2011] 32 BHRC 1.

[146] In this context, the court therefore has to consider whether “*it is in the interests of justice*” to admit the statements made by Mr Brady in the course of his interviews.

[147] In considering this issue Mr Mooney reminds me of the public interest in ensuring that serious crime is properly investigated and prosecuted.

[148] As per Lord Steyn’s observations in **AG’s Reference (No. 3 of 1999)** [2001] 1 CAR 34:

“There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”

[149] In considering Article 18(1)(d), Article 18(2) requires the court to have regard to a series of non-exhaustive factors set out in (a) to (i) in addition to “*any other matters it considers relevant*”.

[150] In the present case the prosecution acknowledge that the evidence of Brady is of vital importance to the prosecution case. In the language of **Horncastle** it is the “*sole or decisive*” evidence in the case. It is the only evidence which makes a connection between the defendant and the car used in the murder of Mr Black.

[151] The fact that the evidence supplied by Brady was elicited during questioning whilst he was under arrest is no bar to admissibility.

[152] The prosecution accept that the interviews of Mr Brady involve robust challenges to his initial stance of denying any knowledge of the vehicle or the defendant. They argue his subsequent admissions of his involvement with the vehicle and his identification of the defendant do not suffer from any dangers of unreliability sufficient to deny their admission in evidence.

[153] Mr Mooney invites the court to come to its own conclusions having had the opportunity to view the audio visual recordings and consider the transcript of what was said. It is submitted that the atmosphere in the interview room is far from menacing. It is suggested that Brady does not appear to be cowed or timorous in any way.

[154] In the course of each interview he was visited by a “*member in charge*” at Carrick-on-Shannon Garda Station who entered the interview room unannounced and asked if he had any complaints. He was given access to independent legal

advice whilst he was in custody. No complaints were made by him or on his behalf in respect of his detention.

[155] It is suggested that his eventual responses to questions may be properly ascribed to persistent questioning.

[156] There is other evidence to support the statements of Mr Brady. Thus his description of his interaction with the person in the garage is accurate as is confirmed by the footage recorded by CCTV in Mr McHugh's shop which shows him speaking to the person, handing his phone to him and the purchasing of confectionary which was according to Brady paid with sterling. Sterling coins were discovered in the till and handed to the AGS subsequently.

[157] After he had identified the defendant as the person shown in the CCTV evidence he confirmed that he had met him before and knew him.

[158] Furthermore the person shown in the CCTV evidence interacting with Brady has been positively identified by members of the PSNI and An Garda Siochana as being the defendant.

[159] In considering the matters set out in Article 18(2)(a) to (i) of the 2004 Order the prosecution say that the probative value of the statement of Brady is of considerable value to a matter in issue in the case. Without this evidence the Crown will be deprived of proof of the only evidence of a link between the defendant and the vehicle involved in Mr Black's murder. It is submitted that there is other evidence to support Mr Brady's statements. They say that having had an opportunity to view the circumstances in which the statement was made the court should come to the conclusion that the evidence is reliable. It has had the opportunity to see for itself the circumstances in which the evidence was obtained. In terms of challenging the statement it is argued that the best person who can do so is the defendant himself who can give evidence and who is best placed to refute or explain his presence in Carrigallen at the relevant time. Since he can give evidence on his own behalf, if he so wishes, it is argued that he is not prejudiced by the admission of the evidence.

[160] In terms of why oral evidence cannot be given by Mr Brady the prosecution rely on the evidence of the attempts to secure Mr Brady's attendance in court at this trial which have been set out earlier in this ruling. It is argued that it has not been reasonably practicable to secure his attendance. Further it is contended that the attitude demonstrated by Brady when approached by AGS and the PSNI is such that it is clear he will not attend court, give evidence or co-operate with the prosecution.

[161] Article 18 must be construed in its statutory context and within the structure of the 2004 Order. The prosecution's failure to satisfy the gateway under Article 20(2)(c) does have implications for the interests of justice consideration.

[162] In **R v Z** [2009] 3 All ER 1015 the court was dealing with hearsay evidence of the defendant's bad character contained in a statement that the defendant had sexually abused and raped the witness when she was young. The witness refused to give evidence and was not compelled to attend court. In the judgment of the court Burton LJ said at paragraph [20]:

*"In our judgment, Section 114(1)(d) (**our Article 18(1)(d)**) of the 2003 Act is to be cautiously applied since otherwise the conditions laid down by Parliament in Section 116 (**our Article 20**) would be circumvented. As Scott Baker LJ said in **R v O'Hare** [2006] EWCA Crim 2512 at [30]:*

'We think it is important to point out that, as a matter of generality, Section 114 cannot and should not be applied so as to render Section 116 nugatory.'"

[163] The court was influenced by the fact that the admission of the evidence was potentially very damaging to the defendant and it was very difficult for him to deal with it other than by a simple denial. The court took the view that the trial judge clearly erred in admitting the hearsay evidence. It said at paragraph [25]:

*"In the present case, the reluctant or apparent but untested unwillingness of D to testify did not justify its admission. This was a case in which the restrictions on hearsay in Section 116 (**our Article 20**) were being circumvented. ... We need not consider what the position would have been if D had been served with a witness summons and refused to attend or to testify; that did not happen."*

[164] In **R v Freeman** [2010] EWCA Crim 1997, Lord Justice Moses, giving the judgment of the court, said at paragraph [26]:

*"There is now ample authority on the correct approach to Section 114 (**our Article 18**). As Lord Phillips made clear in describing the scheme of this part of the 2003 Act in **R v Horncastle** [2010] 2 WLR 47, the jurisdiction to admit such a statement under section 114 is a residual jurisdiction if the interests of justice require it. Not only is it residual, it is limited: see paragraph [31]. In a number of cases this court has stressed that Section 114 should not be used by the prosecution or the court as a way of circumventing the requirements of Section 116 (**our Article 20**). Indeed, it would be wholly contrary to the*

scheme of the Act if the prosecution, having failed to identify a condition under Section 116(2) (our Article 20(2)), could as a matter of routine rely upon Section 114(1)(d) (our Article 18(1)(d)) in particular in circumstances where to do so would circumvent the requirements of Section 116. If authority is required for that proposition, which is evident from the structure of the Act, it can be found in the decision of this court in R v Y [2008] EWCA Crim 10."

[165] This is of course reinforced by the statute itself because one of the matters to be taken into consideration in applying the interests of justice test is at subparagraph (g) "*whether oral evidence of the matter stated can be given and if not why it cannot.*" This point is emphasised in the judgment of Lord Phillips in **Horncastle** to which Moses LJ referred. In particular paragraph [38] of the judgment refers to the "*principal safeguards designed to protect a defendant against unfair prejudice as a result of the admission of hearsay evidence*". Lord Phillips goes on to say that at [38] (ii) "*hearsay evidence is only admissible in strictly defined circumstances. In essence the judge has to be satisfied beyond reasonable doubt that the prosecution is not able to adduce the evidence by calling the witness.*" Lord Phillips goes on to distinguish the position between a witness who cannot be called to give evidence because he is dead or untraceable and someone who is unwilling to give evidence in the context of special measures and anonymity when he says:

"[49] There is a difference of principle between a witness who cannot be called to give evidence because, for instance, he is dead or untraceable, and a witness who is able and available to give evidence but not willing to do so. It might be argued that, where a witness is in a position to give evidence, fairness demands that his evidence should not be used if he is not prepared to face the defendant in court without anonymity. But, as I shall show, both the Strasbourg Court and the United Kingdom Parliament and, indeed, the ministers of the Council of Europe have recognised that in some circumstances it is permissible to allow witnesses to give their evidence anonymously."

[166] The issue of the non-availability of Brady to give evidence at this trial also has to be considered in the context of the importance of his evidence and the fact that it is the sole or decisive evidence in the case.

[167] Lord Phillips considers the interplay between a lack of justification for the non-attendance of a witness and the importance of that evidence in the **Horncastle** decision.

[168] At paragraph [81] he says:

*“It is clear from these cases that a failure to comply with Article 6(3)(d), even if there is no justification for this, does not automatically result in a violation of Article 6(1). It is necessary to consider whether the failure has affected the result. If it has not, no question of a violation of Article 6(1) arises (see **X v UK** (1992) 15 EHRR CD 113; **Craxi v Italy** App No 34896/97 (5 December 2002, unreported). Where there has been a failure to comply with Article 6(3)(d) for which there is no justification, the court has found a violation of Article 6(1) where the evidence may have contributed to the applicant's conviction (**Lüdi v Switzerland** (1992) 15 EHRR 173; **Taxquet v Belgium** App No 926/05 (13 January 2009, unreported).*

[82] *In the majority of cases there has been a failure to comply with Article 6(3)(d) which has not been justified and the evidence in question has been the sole or decisive basis of the applicant's conviction. A violation of Article 6(1) has naturally been found in such cases.”*

[169] Notwithstanding the obvious force of the requirement to apply Article 18(1)(d) cautiously in circumstances where the evidence is the sole or decisive evidence and where the court is not satisfied that the prosecution have established a gateway under Article 20 I do not consider that these factors exclude the possibility of admitting such evidence under Article 18. As the Court of Appeal expressly said in **R v Z** at paragraph [20]:

“But Section 114(1)(d) should not be so narrowly applied that it has no effect. It follows that there will be cases in which hearsay evidence may be admitted under it in circumstances in which it could not be admitted under Section 116.”

[170] Equally in **Horncastle** the Supreme Court was anxious to point out that there was no absolute rule prohibiting the inclusion of hearsay evidence when it was the sole or decisive evidence.

[171] Nonetheless what I take from these authorities is that the fact that the evidence in this case is the sole and decisive evidence together with the failure of the prosecution to establish a gateway under Article 20 of the 2004 Order are strong and compelling factors pointing against the admission of the hearsay evidence in this case.

[172] In considering the interests of justice test and the factors referred to in Article 18(2)(a) to (e) of the 2004 Order in this case it seems to me that the remaining crucial

issue relates to reliability. It is clear from the authorities that there is no general rule that hearsay evidence has to be shown to be reliable before it can be admitted, or before it can be left to the jury.

[173] As the Court of Appeal said in the **Riat** judgment at paragraph [6]:

“The true position is that in working through the statutory framework in a hearsay case (below), the court is concerned at several stages with both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed.”

[174] In considering these two matters I propose to analyse the contents of the interviews with a particular focus on the circumstances in which Mr Brady made the statements which are sought to be introduced and how reliable the statements appear to be. This consideration is plainly relevant to the interests of justice consideration but is also relevant to considerations of Articles 29 and 30 of the 2004 Order and Article 76 of PACE. Therefore the analysis which follows informs the court’s consideration of each of these statutory provisions.

[175] In relation to the interviews it would be an understatement to say that the court was not impressed by the way in which they were conducted. The written transcript does not give the full picture of the extent of the aggressive and abusive manner in which the suspect was interrogated, particularly in relation to the important matters upon which the prosecution rely, namely Mr Brady’s actions in relation to the car and his identification of the defendant. The profanities used by the interviewers were excessive and oppressive.

[176] The conduct of the interviews give rise to a number of specific concerns which have a bearing on the potential reliability of Brady’s statements upon which the prosecution rely. The interviews were conducted in such a way as to undermine or dilute the suspect’s right to silence which exists in the Republic of Ireland. In the course of the interviews the suspect was the subject of threats and inducements. There is an issue about the extent to which his entitlement to legal advice was denied.

[177] The examples which support these concerns are plentiful and to an extent they overlap.

[178] I set out the following as a summary but these should be read in the context of the entire interviews:

- (a) Shouting, cursing and intimidating behaviour on occasions when Brady attempted to offer “no comment”.

- (b) Allied assertions that if he offered no comment this would not stop them asking questions.
- (c) Allied assertions that if he told the officers what they classified as "*lies*" they would continue asking him questions until he told them "*the truth*".
- (d) He was told he was under an obligation to answer questions "*you need to prove to us that you had nothing to do with it*".
- (e) He was told that his silence implicated him "*Jesus, you're incriminating yourself by not fucken saying anything*".
- (f) He was told that his refusal to answer questions/his exercise of his right of silence was in fact the further commission of an offence of withholding information.
- (g) He was told that he was under an obligation to answer questions "*you need to prove to us that you had nothing to do with it*".
- (h) He was told that his silence implicated him "*Jesus, you're incriminating yourself by not fucking saying anything*".

[179] In addition he was actively misled and threatened. The following are obvious examples:

- (a) The fact that he was told his refusal to answer questions/his exercise of his right to silence was in fact the further commission of an offence of withholding information.
- (b) He was told that he was facing a "*fucken murder*" charge, that it was "*the same as if you fucken pulled the trigger and shot somebody in the head. It's a murder charge a serious shit*" and that "*you've implicated yourself in a fucking murder*" and "*it makes you as guilty as the man that pulled the fucking trigger*".
- (c) He was told that he would end up in court charged with membership and withholding information and that "*it's the same as getting a fucking murder charge*".
- (d) He was told he would appear before the Special Criminal Court and that the court would give him no sympathy.
- (e) He was threatened with imprisonment "*I guarantee you when you get a sentence out of this, it will be more than a fucking year*".

- (f) He was told in a particularly aggressive exchange that *“now you can either starting fucking telling us what the fuck is going on or else you’re going to be boxed, end of fucking story”*. When asked about this particular exchange Detective Sergeant Gantley denied that this was a threat of violence but rather he was conveying that the suspect would be *“cornered”* or *“not putting himself on his best footing”*. He was attempting to explain the gravity of the situation to Brady.

[180] The defendant submits that the threat of charging Brady with *“withholding information”* because of his refusal to answer questions and exercise his right to silence is indicative of the oppressive nature of the interviewing tactics adopted and is illustrative of the difficulties caused to the resulting product of interview which is sought to be introduced as evidence against a third party. In their written submissions Mr Pownall and Mr Hutton argue that it is not clear that the advice given to Brady that by not answering questions asked he was committing an offence was lawful advice. The essence of the offence under Section 9(1) of the Offences Against the State (Amendment) Act 1998 is that the offence is committed if a person has relevant information and *“fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Siochana”*. The offence would appear to have been complete by the time of Brady’s arrest and that section does not appear to disclose a continuing offence so that there could be ad hoc commission of the offence as and when Brady refused to answer particular questions during interview.

[181] They go on to submit that even if that submission is misplaced, it should be noted that Section 9(1) has been recently declared to be *“unconstitutional”* by the Irish High Court in **Sweeny v Ireland and Others** [2017] 1 EHC 702 on the basis (inter alia) that the prospect of an accused committing the offence as a suspect who is silent during police interview is considered an unconstitutional inroad into the suspect’s right to silence.

[182] As a counterpoint to threats such as this he was induced and advised that there would be no consequences to his telling the officers what they wanted to know in that:

- (a) He was offered the option of being a witness or suspect when he was told *“you’re already a fucking witness, you’re after being arrested in relation to a murder; now do you want to be a fucking witness or a suspect, what the fuck would you rather?”*
- (b) He was told that the officers would protect him and that they were skilled in doing so.

- (c) He was told that the Chief Superintendent could assist him i.e. – *“Whatever he says has a lot of clout so think about it again, is there anything at all?”*
- (d) He was told that what he said in the room would not be read out in court or any other forum without his consent and that no one would know what he said.
- (e) He was told that only his legal team would see the statements.
- (f) The interviewers made express and implied threats that he would remain in detention until he gave them an account that they were happy with; for example *“for the moment we will keep asking you. You’ll be here a long while”* further *“Ah Christ, is there any more fucking interviews? Yes, if you keep filling us full of shit. Tell us the fucking truth and there will be a lot less of them.”*

[183] It is clear that Brady was without the assistance of a solicitor or legal advisor throughout the questioning in this series of interviews. At that time in the Republic of Ireland it was the practice that suspects could see solicitors between interviews but that solicitors would not be present during the course of interviews. This practice was changed when the DPP introduced new codes of practice in July 2014.

[184] However, even on the basis of the policy which existed at the time of the interviews it is clear that Brady’s request for a solicitor for the purposes of legal consultation outside of the interview were ignored and glossed over on two occasions during interviews on 3 November 2012 with the result that he did not obtain any further consultation until 19:18 on the evening of 3 November 2017.

[185] There can be no doubt that had his solicitor been present during the interviews they would have been conducted in an entirely different fashion.

[186] In relation to the failure to have a solicitor present during the course of the interviews the defendant argues that the interviews were conducted in defiance of generally accepted international norms that prevented him from having practical and effective legal representation during his interviews, protection which is closely linked to the internationally recognised protection of the right to silence. In **Cadder v HM Advocate** [2010] 1 WLR 2601 the UK Supreme Court reviewed the lawfulness of Scotland’s legislation which prevented access to a solicitor prior to or during questioning in a police station and noted it to be deficient having regard to the decision of the ECtHR in **Salduz v Turkey** [2008] 49 EHRR 421. It appears that in the Republic of Ireland in 2012 the right of access to a lawyer was constitutionally recognised. The right recognised was a right of *“reasonable”* access which had not been interpreted as providing a *“right”* to have a solicitor present during interview, although this could be provided at the discretion of the interviewers.

[187] In any event the policy has changed and since 2014 a suspect is entitled to have a solicitor in attendance at interviews if this is requested.

[188] From the court's point of view it seems to me that the obligation is to provide a fair trial according to standards which exist today and which apply in this jurisdiction. From the point of view of the law in this jurisdiction contemporary standards of fairness and Convention compliance are reflected in Article 59(1) of PACE and PACE Code C, paragraph 6.7 which respectively provide:

"59(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.

6.7 A detainee who has been permitted to consult a solicitor, shall be entitled on request to have the solicitor present when he/she is interviewed unless one of the exceptions in paragraph 6.5 applies."

[189] In my view the fact that Brady did not have the benefit of a solicitor present in the course of his interviews, despite his request, is a relevant factor in considering the fairness and reliability of the evidence. It may not have been unlawful in the Republic of Ireland at the relevant time but applying contemporary standards and the law in this jurisdiction I consider that it is a factor to be taken into account.

[190] A particular feature of the interviews was that the interviewers adopted a clear policy of resorting to aggressive and profane questioning when Brady refused to answer questions in relation to any involvement with the car and the identification of the defendant.

[191] This approach was allied with the repeated assertion that the officers rarely asked questions they did not already know "*the answers to*".

[192] This approach culminated in the crucial part of the interviews when three officers sat across from Brady and demanded that he name Damien McLaughlin as the person to whom he was speaking. It is very difficult to see how this could be described as a voluntary identification of the defendant, rather than a response to repeated and threatening demands that he name the defendant. He was not asked who the person was but was told who he was in the context of all the concerns I have referred to above.

[193] In the course of the hearing I heard evidence from the three Garda who were involved in the interviews with Brady. In summary all the officers took the view that the questioning of Brady was "*robust*" but did not cross the line. They said that the effect of the robust and persistent questioning was that Brady ultimately told the

truth which is a vindication of the approach they adopted. In the words of Detective Garda Cullen – “*The end justified the means*”.

[194] The court has already expressed its view that it was not impressed by the conduct of these interviews. The court is not naïve. An interview of this type is not meant to be a friendly conversation over a cup of tea. The police were carrying out an investigation into a horrific murder. They are under an obligation to conduct a rigorous investigation into that murder including interviewing both suspects and potential witnesses. In the course of interviews they are entitled to persist with questions and to put pressure on reluctant or resistant interviewees. They are entitled to confront the suspect with the evidence available to them in an attempt to elicit the truth. Profane and offensive language however unnecessary or unjustified does not of itself preclude the admission of answers given in response.

[195] The concern the court has does not arise because of its strong disapproval of the manner of the questioning but because the conduct of the interviews raises real issues about the reliability of the answers given.

[196] The statements from Brady are far from the type of “*demonstrably reliable*” evidence referred to in **Horncastle**. Returning to the **Riat** judgment in my view the extent of the risk of unreliability of Brady’s evidence is extremely high because of the manner in which his statements were made. He was subjected to hectoring and bullying treatment. Nowhere is this more apparent than in the exchanges which lead to the identification of McLaughlin which is at the heart of the prosecution case. His legal rights were undermined. He was subjected to both threats and inducements. In short he was given a “*way out*” of his predicament if he would agree to provide the answers which the interviewers clearly sought, the answers which they “*already knew*”.

[197] In assessing the issue of admissibility and reliability of this evidence it is useful to look at this through the prism of Article 74 of PACE.

[198] If Brady had been prosecuted for an offence, would the admissions he made in these interviews be admitted as “*confession*” evidence if he were to challenge them?

[199] Article 74 of PACE states:

“(2) If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) By oppression of the person who made it; or

(b) *In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid ...

(8) *In this Article "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."*

[200] In my assessment the interviews would not be admitted in such a scenario by reason of Article 74 of PACE. The nature of the questioning could clearly be considered oppressive as to overbear the will of the interviewee. By reason of what was said or done during the course of the interview it is likely that the statements made by Brady were unreliable. There is a real risk that his freewill was overborne. His evidence could be said to have been obtained by fear or prejudice or hope of advantage. His admissions could hardly be described as 'voluntary' - all of which are likely to render his "*confessions*" unreliable.

[201] If the evidence would not be admissible against Brady as a confession it seems to me that those statements could not be admitted against a third party under Article 76 of PACE and in particular when that third party will not have the opportunity to confront or question his accuser.

[202] In the words of Article 76 "*having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*"

[203] This consideration "feeds in" to the "*interests of justice*" test under Article 18(1)(d) of the 2004 Order, quite apart from any separate basis for excluding the evidence.

[204] The authorities demonstrate an inherent scepticism in respect of the admission of this type of evidence "*in the interests of justice*" even if admission of such evidence is considered to be theoretically possible. In **The Prosecution Appeal (No. 2 of 2008)**; **R v Y** [2008] 2 All ER 484 at paragraph [57] et seq Hughes LJ (as he then was) in the Court of Appeal says:

"[57] For present purposes it is enough to say that the existence of Section 114(1)(d) (our Article 18(1)(d)) does not make police interviews routinely admissible in the case

of persons other than the interviewee, and that the reasons why they are ordinarily not admissible except in the case of the interviewee are likely to continue to mean that in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person. (My underlining)

[58] The interests of justice test will require, in a case such as the present, attention to the difference between an admission against interest and an accusation against someone else. That consideration no doubt also comes into play under Section 114(2)(e), the reliability of the maker of the statement, and (d), the circumstances in which the statement was made. Absent inducement, mental instability or perhaps an incentive to protect someone else, it can no doubt normally be said that a person is unlikely to confess to a serious crime unless he did it. Precisely the reverse may well be true of an accusation against someone else, whether it is combined with a reliable confession or not. It may be evident that the maker of the accusation has a possible motive to blame someone else when no one else was in fact involved, or (where plainly someone else was involved) to cast the blame on the wrong person. Self-interest, to which Judge Graham sagely referred in his ruling in the present case, is one obvious such motive; it is of course not the only one, for diversion of the accusation to protect another or out of animus against the person accused, may also, on the facts of different cases, fall for consideration. Sometimes it may be impossible to know whether such a motive exists or not. Sometimes it will be significant that the possibility of mistake cannot adequately be explored. In a few cases, it is possible that the accusation can be regarded as sufficiently reliable for it to be in the interests of justice to admit it, even though it cannot be tested by questioning the maker. It seems to us that it is likely that that will be the unusual case. (My underling)

[59] Although Section 114(1)(d) is available to the Crown as it is to a defendant, the identity of the applicant is plainly relevant to the interests of justice test. It does not necessarily follow that the interests of justice will point in the same direction upon an application by the Crown as they might upon an application made by a defendant. Section 114(2)(i) moreover requires consideration of the injurious consequences of admission ('prejudice') to the party facing the evidence which will arise from the difficulty of challenging it. Since the burden of proving the

case is upon the Crown and to the high criminal standard, very considerable care will need to be taken in any case in which the Crown seeks to rely upon an out-of-court statement as supplying it with a case against the defendant when otherwise it would have none. In such a case if there is genuine difficulty in the defendant challenging, and the jury evaluating, the evidence, the potential damage to the defendant from that difficulty is very large. (My underlining)

[60] Both the interests of justice test and Section 114(2)(g) command attention to the question whether oral evidence can be given, rather than reliance be placed on the hearsay statement. We would expect that before reaching the conclusion that it is in the interests of justice to admit a hearsay statement, the judge must very carefully consider the alternatives. The alternatives may well include the bringing of an available, but reluctant, witness to court. ..."

[205] Thus even if Brady's confessions or admissions were admitted by Brady the court would be slow to admit them against a third party. However in circumstances where the contents of the interviews would not be admitted against Brady in any criminal prosecution it seems to me inconceivable that they could be admitted against the defendant McLaughlin.

[206] To what extent can the reliability of the evidence be safely tested and assessed?

[207] In this case the defendant will not have the opportunity to confront Brady in respect of the sole and decisive evidence against him. It is well recognised in both domestic and European jurisprudence that the right of confrontation is of fundamental importance. The normal rule is that an accused should be given an adequate and proper opportunity to challenge and question a witness against him. There are obvious matters that the defendant would wish to test. For example was Brady vulnerable in any way? We know from the interviews he claims to be an alcoholic and someone of limited education. The defendant is denied the opportunity to test Brady as to whether his statements were truly voluntary or were made because of the various threats and inducements that were made to him in the course of the interviews. He cannot test his motive for identifying the defendant. He cannot challenge him on many of the inconsistencies and different accounts he gives about what took place on the evening in question leading up to the statements upon which the prosecution rely.

[208] It is apparent from the interviews that Brady had other conversations with the Garda which have not been recorded in any form. The defendant cannot ask Brady about the contents of any such conversations.

[209] In the course of his detention the AGS accompanied Brady to the locus at which the car was allegedly parked. There is no record of what was said during this excursion. Given the nature of behaviour recorded "*on camera*" the defence cannot test whether or not similar behaviour occurred "*off camera*" during the period of his detention.

[210] In my view it is not an answer to the inability of the defendant to challenge the reliability of the evidence in the trial context that he can give evidence himself. He is clearly disadvantaged in his inability to confront Brady as is the court in ultimately determining the reliability of Brady's statements. In the words of Hughes LJ the potential damage to the defendant is very large.

[211] In determining the Article 18(1)(d) issue the court should also look at all the other evidence in the case. At the commencement of the hearing there was a disagreement about whether or not the disclosure judge should consider the issue of the admissibility of Brady's statements as a separate and discrete issue. Having considered submissions I took the view that in order to apply the 2004 Order properly it was necessary for the court to consider all of the evidence in the case. I therefore dealt with this issue as the trial judge. The court has heard virtually all the evidence in this case and, for the purposes of this application, I consider that those matters which have not yet been proven should be accepted at the height of the prosecution case.

[212] In terms of other evidence Mr Mooney in particular relies upon the identification evidence which he says supports the reliability of the identification by Brady of the defendant as being the person to whom he spoke in McHugh's premises on the evening in question.

[213] The court heard all of the relevant identification evidence.

[214] I heard evidence from Detective Constable Beggs and Detective Constable McClelland who conducted interviews with the defendant. In the course of the interviews they played the CCTV evidence which shows Brady interacting with whom the prosecution say is McLaughlin in McHugh's garage/shop. In the course of the interviews the detective constables played the relevant sections of the CCTV evidence and put it to McLaughlin that he was the person shown. Both detective constables gave evidence to the effect that they believed the person shown was the defendant. They do so on a simple comparison between the material in the CCTV and the person they were interviewing. McLaughlin was not previously known to them.

[215] I have to say that I have considerable reservations about this evidence and whether it is even admissible. The witnesses stated that they believed the CCTV evidence did show McLaughlin. This is in the context where they were interviewing the suspect whom they were aware had been identified by Brady. When they were questioned about their identification they could point to no particular distinguishing features of the person shown upon which they were basing their identification. When pressed the only distinguishing feature that Detective Constable Beggs could identify on the CCTV evidence was that the person had *"a bit of a bulbous nose"*. He accepted that this was the first time in his 30 years as a police officer that he had been asked to identify from CCTV or other material the person he had interviewed as a suspect.

[216] A Detective Sergeant Boyce from AGS gave evidence that he knew the defendant and had identified him as being present at a paramilitary funeral on 8 September 2012.

[217] The court has seen stills of photographs of McLaughlin at that funeral. In the photographs his face is clearly shown and easily identifiable. His features are clear and there is no doubt or indeed dispute that he is shown in the photographs as being present at that funeral. The detective sergeant confirmed that he had stopped and spoken to McLaughlin on the day of the funeral.

[218] He gave evidence about the circumstances in which he was asked to identify McLaughlin from the CCTV evidence.

[219] He was shown approximately 4 minutes of footage on a laptop. This was the footage described earlier. There is no note or record of the identification in question. He was clear that it was his opinion when he saw the footage that the person shown was McLaughlin. He viewed the footage on 27 February 2014 and made a statement about the identification on 31 March 2014. He admitted that when he made the identification he was aware that McLaughlin had been charged with the murder of Mr Black and that he had been identified by Mr Brady in the course of Garda interviews. When cross-examined he could not point to any distinguishing features in the CCTV footage which would have led him to identify McLaughlin. He simply said that he knew him and that that was who was shown in the footage.

[220] I also heard evidence from four PSNI officers who were asked to view the CCTV footage and were also shown stills of photographs of the defendant at the funeral to which I have referred earlier. Two of the officers who had previous involvement with McLaughlin namely Constable Murray and Constable McKay were unable to make any identification from the CCTV evidence. Constable McKay was able to identify McLaughlin from the funeral stills. Specifically in the relevant documentation McKay in relation to the CCTV footage entered *"cannot be sure"*. Murray entered in response to *"persons identified"*, *"no one"*.

[221] Two other PSNI officers, Constable Bradley and Constable McKinley gave evidence that they both attended at Omagh PSNI Station at the request of Detective Constable Paul Leonard (who was unable to give evidence due to illness). Both officers were shown stills of the photographs of McLaughlin at the funeral and also of the CCTV footage and were asked if they could identify any person in either of the exhibits. In relation to Constable Bradley, on 25 February 2014, he identified McLaughlin in both the funeral stills and the CCTV footage. Although he also recognised a person called Dillon in the stills he did not record this in the identification procedure.

[222] Constable David McKinley attended a controlled viewing at Omagh PSNI Station on 4 April 2014. He too was shown the stills from the funeral and the CCTV footage. He identified McLaughlin as the person shown in the stills of the photographs and in the CCTV evidence. He had known McLaughlin through working in the Dungannon area and through confidential briefings for about three years. He had stopped him on a previous occasion.

[223] Bradley admitted that he was aware that McLaughlin had been arrested and charged with the murder of Mr Black, at the time he identified him via the CCTV evidence. McKinley said that he did not think he was aware of McLaughlin's arrest. Neither of them could point to any distinguishing feature shown in the CCTV evidence which pointed to the person being McLaughlin. Specifically Constable McKinley was asked to comment on whether or not the person shown had a "*bulbous nose*" as described by Detective Constable Beggs. He said that he would not use that term but suggested "*prominent*" as an appropriate description.

[224] Overall I have concerns about the purported identification evidence. It was clear that all the officers, bar McKinley, were aware that McLaughlin had been charged with the murder of David Black. It is clear from the timings of the identifications that they were arranged because of the difficulties the prosecution were encountering with Mr Brady. Two of the officers were actually interviewing the suspect and four others were also shown photographs which clearly showed McLaughlin at the same time as they were being asked to identify him from the CCTV evidence. Notwithstanding this and the fact that they knew McLaughlin two of the officers were unable to identify him. I consider that there must be a very high risk of confirmation bias in relation to these purported identifications.

[225] Most importantly of all I have had the opportunity to consider the CCTV evidence on a number of occasions. I consider that any attempt to identify the person shown in the CCTV evidence is fraught with difficulty. He is moving for most of the time. He is wearing a "*beanie*" hat which makes it very difficult to see his facial features because of the height at which the camera is in relation to him. There is only a very short time at which he looked at the camera. The quality of the footage is poor and grainy. I could not for my part identify any particular feature of the person shown briefly in the footage. I too have had the opportunity of seeing the

stills of the photographs which clearly show McLaughlin and of observing him throughout the course of the trial. I do not consider that reliable identification could be made from the CCTV evidence. To me the images do not contain any facial detail which would allow a meaningful identification. Nor do they reveal any other details such as height, posture or age which might assist identification.

[226] It is correct to say that the CCTV evidence tends to suggest a rather “*bulbous*” nose or “*thick*” nose. Insofar as this is the case it would seem to conflict with the very clear photograph shown of McLaughlin at the funeral which appears to show a thinner or narrower nose.

[227] It may well be the case that the officers who have identified the defendant are convinced of the correctness of their identification. However, I could not be satisfied beyond reasonable doubt that their identification is correct. Even if the identification is correct it does not of course link the defendant with the vehicle as it only relates to his presence in the shop.

[228] In coming to this conclusion I bear in mind the need for caution in relation to the correctness of identifications in accordance with the Court of Appeal guidelines in **Turnbull** [1977] QB 224.

[229] Mr Pownall directed me to other features of the evidence which point against McLaughlin’s guilt. He says that the CCTV footage of what takes place outside the garage contradicts Brady’s account. This relates to what he took with him when he left the garage, what exactly he did when he left the garage, where the car he approached, if any, was parked on the Mohill Road and whether he actually had any contact with the Toyota Camry which was involved in the murder.

[230] He submits that the suggestion the car he alleges he worked on was that used in the murder is inconsistent with the known distances and travel times from Carrigallen to the north and the confirmed sightings of the car in the north. This involved a careful and detailed analysis of the various sightings of the vehicle, the relevant distances between the locations at which it was sighted and the relevant travel times. I do not consider it necessary to set out the detail of this evidence for the purposes of this application other than to say that I have taken all of the evidence into account in coming to my final conclusion on the ruling.

[231] Having considered all of the evidence in the case I do not consider that there is sufficient “*supporting evidence*” which addresses or compensates for the very high risk of unreliability of the statements made by Brady.

[232] Whilst I have addressed in this ruling the matters which have informed my conclusion, for the sake of completeness I specifically address again the statutory matters set out in 18(2) of the 2004 Order.

[233] In relation to:

- (a) The hearsay evidence is the sole or decisive evidence in the case. In those circumstances the court needs to look critically at the admission of the evidence given the obvious and important disadvantage suffered by the defendant because of his loss of ability to confront his accuser. In the circumstances of this case the reliability of the evidence is crucial.
- (b) There is no other evidence which links the defendant to the vehicle which was used in the murder of Mr Black. There is some evidence which supports the identification of the defendant as speaking to Mr Brady in McHugh's garage. The court has considered this evidence and has concluded that it is insufficient to establish beyond a reasonable doubt that McLaughlin is the person shown in the CCTV evidence. Even if it was it does not directly link him to the vehicle.
- (c) As in (a) above it is the sole or decisive evidence. In those circumstances its admission in hearsay form needs to be critically examined.
- (d) The circumstances in which the statements were made point strongly against their admission as hearsay. For the reasons set out above the circumstances in which the statements were made raise a very high risk of unreliability and in the court's view the admission of the statements would be unfair.
- (e) The court has very considerable concerns about the reliability of Brady and if the evidence is admitted the defendant will not have the opportunity to test his reliability.
- (f) The evidence of the making of the statement is reliably established and the court has had an opportunity to hear and see the circumstances in which the statements were made.
- (g) For the reasons set out in this ruling I consider the prosecution could have arranged to compel the attendance of Brady in the jurisdiction of the Republic of Ireland for the purposes of giving oral evidence on the matter.
- (h) The inability of the defendant to challenge the statements of Brady is an important and significant disadvantage.

- (i) Given that this is the sole or decisive evidence the likely prejudice to the defendant facing the evidence in the absence of challenge is obvious.

[234] Having heard the evidence in the case, including the evidence of the three Garda who conducted the interviews, I cannot believe that it was contemplated that the interviews with Brady would be relied upon in any criminal prosecution. I consider that Detective Garda Gantley was correct when he accepted that he did not ever envisage that the contents of the interviews would be scrutinised in a court of law and that he understood why a court would have concerns about the contents of the interviews. The impression I formed was that the true purpose of the interviews was to seek information from Brady rather than obtain evidence for the purposes of a criminal prosecution. Whatever be the situation, the cumulative effect of the criticisms I have made leads me to the conclusion that the risk of unreliability of Brady's statements is such that they should not be admitted by way of hearsay.

[235] I have therefore come to the conclusion that the evidence should not be admitted under the provisions of Article 18(1)(d) of the 2004 Order. I am not satisfied that it is in the interests of justice for the hearsay evidence to be admitted. To the contrary, because of the particular circumstances in which the evidence was obtained, I consider that it is necessary in the interests of justice that it should not be admitted and that a trial depending upon it should not be allowed to proceed because any conviction based on that evidence would be unsafe.

[236] It should be clear from what I have said that even if I am wrong in relation to my findings on Article 20 of the 2004 Order I consider the hearsay evidence should be excluded under the provisions of Article 76 of PACE. I consider that having regard to all the circumstances, including in particular the circumstances in which the evidence was obtained, that the admission of the evidence would have an adverse effect on the fairness of the proceedings and the court ought not to admit it. It is precisely because of the manner in which the statements relied upon were obtained from Brady that leads to the high and obvious risk of unreliability. In my view it would be unfair and unsafe for the defendant to be convicted on the basis of such evidence in circumstances where he is not in a position to challenge or test the accuser.

[237] I would add that if I had reached the close of the case for the prosecution, on the basis that I take any outstanding evidence at its height from the prosecution's point of view I would conclude that the evidence provided in Brady's statement is so unconvincing that considering its importance to the case against the defendant I would acquit the defendant on the grounds that his conviction for the offences would be unsafe.

[238] Accordingly, I rule as follows:

- (a) The application to admit the statements of Mr Stephen Brady under the Criminal Justice (Evidence) Order (Northern Ireland) 2004 is refused.
- (b) The statements of Mr Stephen Brady are excluded under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.