Neutral Citation No. [2012] NICC 10 | *Ref:* **GIR8437**

Judgment: approved by the Court for handing down | *Delivered:* **30/03/12**

*(subject to editorial corrections)**

IN THE CROWN COURT SITTING AT BELFAST

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THE QUEEN

-v-

JOHN PAUL WOOTTON, BRENDAN McCONVILLE AND SHARON WOOTTON

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GIRVAN LJ

[1] This case arises out of the murder of Police Constable Stephen Carroll ("the deceased") who died on 9 March 2009 as a result of a bullet wound to the head. The deceased was a serving member of the Police Service of Northern Ireland. He was born on 4th November 1960 and was 48 years of age at the time of his death. He died in circumstances demonstrating that whoever shot him did so simply because he was a serving police officer and that his personal identity was irrelevant to the killer. It is clear that he died as a result of a murderous terrorist plan to kill a serving police officer.

The relevant charges

[2] On Count 1 of the Bill of Indictment the defendants, Brendan McConville and John Wootton, are charged with murder contrary to common law the particulars being that on 9 March 2009 they murdered Stephen Carroll.

[3] On Count 2 the same two defendants are jointly charged with possession of a firearm with intent contrary to Article 58(1) of the Firearms (Northern Ireland) 2004. The particulars are that on 9 March 2009 they had in their possession a firearm, namely, an AK 47 assault rifle together with a quantity of 7·62 x 39 mm cartridges with intent to endanger life or to enable another to do so. The evidence establishes that it was that weapon which was the rifle from which the bullet was fired that caused the death of Stephen Carroll.

[4] On Count 3 John Paul Wootton is charged alone with attempting to collect or make a record of information likely to be useful to a terrorist in that on a date unknown between 10 January 2009 and 10 March 2009 he attempted

to collect information of that kind, namely the home address of a serving police officer.

[5] At the outset to the judgment I remind myself of a number of principles which I must apply in deciding whether the Crown has proved its case against the defendants:

(a) The burden of proof lies on the Crown to establish the defendant's guilt.

(b) Before the court can convict either defendant it must be satisfied of his guilt beyond reasonable doubt. I remind myself of the meaning of the standard of proof beyond reasonable doubt set out in the Bench Book standard direction 2.1.

(c) There must be a separate consideration of each case against each defendant. A separate verdict must be returned in respect of each defendant.

(d) The court must decide the case only according to the evidence produced before the court.

(e) If the Crown proves the involvement of a defendant in the shooting of the deceased the court must be satisfied beyond reasonable doubt that the defendant did the act in question with the intention to kill or really seriously injure the victim of the shooting.

(f) The prosecution case depends on circumstantial evidence rather than direct evidence. Circumstantial evidence simply means that the prosecution relies upon evidence of various circumstances relating to the crime which, when taken together, establish the guilt of the defendant because the only conclusion to be drawn from that evidence is that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all of the questions raised in a case. It would be an unusual case in which a court could say that it knew everything there was to know about the case. It is not necessary that each fact upon which the prosecution relies taken individually proves the defendant is guilty. The court must decide whether all of the evidence has proved the case again him. I remind myself what was stated by Pollock CB in R v. Exall [1866] 4 F&F 922 at 929. Circumstantial evidence must be examined with great care for a number of reasons. First of all, such evidence can be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of

the human mind to look for and often to slightly distort facts in order to establish a proposition whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant. I further remind myself of what Lowry LCJ stated in R v. McGreevy [1972] NI 125 at 134:-

> ". . . doubt as to one circumstance would have to be set against a possibly strong adverse view of the other circumstances in order to assess its ultimate effect on the case."

(g) Where, as in the present case the prosecution case is that the defendant committed the offence together with other unidentified persons as part of a joint enterprise it must be borne in mind that each participant in a plan to commit a crime may play a different role but if they are acting together as part of a joint plan they are each guilty of it. Put simply the question is were they in it together. If, looking at the case of each defendant, the tribunal of fact is sure that he committed the offence on his own or that he did an act as part of a joint plan between themselves and/or with others to commit it he is guilty.

(h) In relation to expert evidence I remind myself of the usual direction given to a jury when approaching expert evidence. A witness called as an expert is entitled to express an opinion in respect of his findings and the matters put to him. The tribunal of fact is entitled to and no doubt would wish to have regard to this evidence and to the opinion expressed by the expert when coming to its conclusions about that aspect of the case. Having given the matter careful consideration the tribunal of fact does not have to accept the evidence of the expert and does not have to act upon it. Indeed it does not have to accept even the unchallenged evidence of an expert. Where two or more experts have given conflicting evidence it is for the tribunal of fact to decide which evidence and whose opinion it accepts, if any. It must remember that the evidence relates only to part of the case and whilst it may be of assistance it must reach its verdict having considered the whole of the evidence.

Circumstances leading up to the shooting

[6] The relevant events commenced at No 33 Lismore Manor, Lurgan. Lismore Manor is a small private development of housing located off the Brownlow Road close to the Drumbeg Estate and on the other side of the Brownlow Road there is a housing area known as Ardowen. The Lismore

Manor development comprised some 29 house some still under construction at the time of the shooting. The front of No 33 (where its kitchen is located) faces onto a grassy area which leads towards the Drumbeg Estate. At the back of the house there is a back yard which can be approached by a vehicle entering Lismore Manor.

[7] In the course of the evening of 9 March a brick was thrown through the kitchen window of No 33. At 8.41 p.m. a 999 call was received at Banbridge Police Station from a female claiming that a window had been smashed at 33 Lismore Manor, Craigavon. This call simply recounted what had happened. The caller was informed that the police would send a car.

[8] DC Mowbray received a call at about 8.45 p.m. relating to the window incident. Initially there were no police call signs to attend and it was considered that in light of the area involved it would be safer to use an armoured car. DC Mowbray attempted to contact the 999 caller on two occasions unsuccessfully. It was arranged that a Tactical Support Group ("TSG") call sign would attend the scene with DC Mowbray's vehicle which was an unmarked armoured Ford Mondeo vehicle. The call sign support vehicle was an unarmoured silver Skoda vehicle Reg No WCZ 8638 with the codeword Blue 5.

[9] It was agreed that the cars would meet up at roundabout No. 3. DC Mowbray and DC McCullough made their way from Portadown Police Station along Northway, turning left at Roundabout 4 and onto Lake Road to Roundabout 3. Blue 5 was already there. DC Mowbray spoke to the driver of Blue 5 who was PC Stephen Carroll. He was the driver of the silver Skoda car. DC Mowbray received directions from PC Carroll identifying the location of Lismore Manor. DC Mowbray and DC McCullough eventually saw the house as the number "33" was painted in white paint on a wooden fence at the back of the house. The Mondeo car was reversed back into No. 33 with the car facing outwards. The Skoda could be seen from that point. The front of the Skoda was facing towards the main road. It was parked outside No 23 Lismore Manor partly on the pavement at the end of the side roadway leading down to No. 33. DC Mowbray and DC McCullough both got out of their vehicle. Almost immediately after this two shots were heard. DC Mowbray then saw the front seat passenger of the Skoda out of the car. He appeared to DC Mowbray to be delirious and was pointing his weapon in a number of directions. DC Mowbray saw another police officer with a rifle crouching behind the vehicle behind a fence. The passenger in the other vehicle said: *"My driver's dead".* The incident was immediately reported and medical assistance was sought.

[10] One of the first police officers to arrive at the scene was PC Keith Robinson who arrived a short time afterwards. He parked just to the front of the silver Skoda. He saw PC Dyer and PC Adamson and he ran to PC Carroll who was sitting in the front driver's seat. He checked the left side of his neck

for a pulse but could not get any. He saw blood at PC Carroll's right ear, shoulder and neck. Shortly after this a paramedic arrived. Shortly afterwards a full ambulance crew arrived. A decision was made to take him to hospital where he arrived at 10.05. At the hospital PC Carroll did not respond to treatment and remained pulseless. After a period of 20 minutes he as pronounced dead at 10.28 pm. The body of PC Carroll was duly identified by his brother.

[11] A murder investigation then began into the circumstances surrounding this murder. This comprised the forensic examination of scene; follow-up searches of a number of addresses in the area; the seizure and forensic examination of a number of items and the subsequent arrest, interview and charging of the Defendants.

Forensic evidence relating to the weapon and ammunition used

[12] As a result of a detailed search of the vehicle on 10 March 2009 a copper (bullet) jacket was found in the rear driver foot well of the Skoda vehicle together with a bullet and fragments from the dashboard. A further search of the vehicle resulted in the recovery of a piece of copper under the front passenger seat and the finding of a small hole in the headrest of the driver's seat. The headrest was taken apart and a small piece of metal was recovered. A fragmented bullet head was also found on the carpet of the driver's seat.

[13] Lynn Henderson, a crime scene investigator, recovered two 7·62 X 39 mm calibre spent brass cartridge cases on the grass bank facing onto the rear of Lismore Manor. They were in good condition and bore a head stamp "NNY1982" indicating that they were of Yugoslavian origin and had been manufactured in 1982. Microscopic examination of these items established that they were fired from the same firearm.

[14] On Saturday 14th March 2009 a house at 607 Pinebank, Craigavon, the home of Teresa Magee, was searched. At 3.19 p.m. a search was commenced at the rear yard of the property. When rubbish in a blue coloured wheelie bin was examined Sgt. Bell recovered a number of white coloured latex gloves in a plastic bag with the logo "Around a Pound" printed on it.

[15] While searching around the base of the oil tank in the yard PC Reid removed one of breeze blocks at the base of the oil tank. As a result access was gained to the area behind the blocks and beneath the oil tank. The witness observed at this stage what appeared to be a long barrelled weapon wrapped in a black bin bag and cling film, lying on the ground behind the breeze block to the left. Sgt. Bell also noticed in the backyard a piece of cardboard with what appeared to be a mobile phone number written on it. This was in a blue plastic bag which was sitting on top of rubbish in a green wheelie bin amongst waste which had removed from the blue bin.

[16] An Army Technical Officer, Sgt. Blythe, who came to the scene at 7.30pm, examined the suspect weapon and identified it as an AK variable rifle ("the murder weapon"). A black plastic bin bag with a magazine in it was located next to the weapon under the oil tank. The magazine contained approximately 24 rounds of ammunition.

[17] The firearm related items, namely the items taken from the car in which the deceased had been seated, the spent cartridge cases, the weapon and the magazine from Pinebank and associated items were examined by John McLaughlin, a firearms expert.

[18] Comparisons were carried out to test fire cartridges from the AK 47 rifle and to compare them with the spent cartridge case found by Ms Henderson. The murder weapon had a Romanian type fore-grip beneath the barrel. It was successfully test fired in semi automatic and full automatic modes. Microscopic examination showed that the cartridges had been discharged from that weapon.

[19] Mr McLaughlin also examined the impact damaged copper jacket recovered from the rear footwell of the Skoda car. The rifling marks on the item were consistent with the rifling in the murder weapon. Upon microscopic examination it was compared to test fired bullets from the AK 47 rifle. This showed that the copper jacket had been discharged through the barrel of the murder weapon. This evidence establishes clearly that this AK 47 rifle was the murder weapon.

[20] The 7·62 X 39 mm calibre magazine with 24 7.62 X 39 mm cartridges found at 607, Pinebank were also examined. The magazine was corroded but mechanically functional. It was capable of use with the AK 47 rifle. The cartridges which bore the head stamp "NNY1982" were successfully test fired. They bore the same marking as the cartridges found at the scene.

[21] Mr McLaughlin set out to determine the ejection pattern of the cartridges after the rifle was fired. They consistently ejected to the right to a distance of at least 5·5 m and forward by a distance up to 2·7 m. This measurement assists in the determination of a more accurate firing point. A map (CM2) was prepared which shows the location of the recovered cartridge cases and the closest building which was under construction. Mr McLaughlin concluded that the man firing the rifle must have been in the area of the path between the lamppost and the corner of the closest building within an approximate range of 50 m from the deceased. The fragment of copper jacket recovered in the Skoda was compared to test fired bullets from the AK 47 rifle. Tests showed that it had been discharged through its barrel.

Forensic evidence relating to the wrapping on the AK47 rifle

[22] Brian Craythorne, a forensic expert, was asked to carry out an examination to determine whether or not there was any association between

the black plastic bags and cling film from the murder weapon and the magazine found at 607 Pinebank and any other black bin bags and cling film found or acquired during the investigation. He considered cling film from a number of different sources and from physical examination of the cling film items no association could be established.

[23] He compared the black plastic bin bag from the magazine and two black plastic bin bags removed from the weapon with comparison black plastic bin bags submitted to him for examination and comparison. These included black bin liners seized in the yard of 309 Drumbeg, Craigavon by PC Gault in a search carried out on 18 March and given the exhibit numbers DG6 and DG7. The witness also considered 107 examples of black bin bags purchased for comparison purposes in the locality in various retail outlets. With the exception of four of the bags found in 309 Drumbeg the other comparable bags differed in their manufacture from the black bags found round the AK47 rifle and the magazine. It was not possible to find any black plastic bags of similar make and manufacture within the 82 different packets of bags sourced from shops within the locality and from shops of major retailers in Northern Ireland. This provided evidence that the bags around the weapon and magazine were not a common type of bag. The bags from the weapon and magazine and the bags taken from the yard of 309, Drumbeg were compared. Measurements established an approximate migration of extrusion lines of 1 cm between bags which would result in a repeat occurrence of an extrusion feature with respect to the longitudinal heat seal approximately every 294 bags manufactured. Having regard to the extrusion markings produced during the manufacturing process as shown on the bags round the weapon and the magazine and as shown on the bags found in 309 Drumbeg the conclusion reached by the witness was that the first bag in DG7 found at 309 Drumbeg would have been the first of the bags removed from a roll and the first of the bags in TJS 3 (the bags round the weapon) would have been the last. The evidence strongly supported the proposition that the two black plastic bags in TJS3 originated from the same roll of bags as the two similar bags in DG6 and the two similar bags in DG7 and that in the sequence within the roll there would have been approximately 6 bags in between bag number 2 in TJS3 and bag number 1 in DG6. There was thus compelling evidence of a linkage between the bags used to wrap up the weapon and magazine and the bags located in 309 Drumbeg. The distance between the car parking space in front of 309 Drumbeg and the point from which the fatal shot was fired was 237 metres.

[24] The address at which these items were found, No. 309 Drumbeg, is close to the area in which Wootton's car was parked prior to and at the time of the murder. The car then left the area shortly after the shooting occurred.

Citroen Saxo – Reg. No. FCZ9046

[25] The registered owner of the Citroen Saxo was established by a witness from the DVA as John Paul Wootton who resided at 16 Collingdale, Lurgan, Craigavon. He was the registered keeper of the vehicle from 29 May 2008. The movements of that vehicle around the time of the shooting and afterwards were relied on by the prosecution to support the Crown case and will be necessary to consider in detail the evidence on that aspect of the case later in this judgment.

[26] At 3.54pm on 10 March Sgt Lockhart observed John Paul Wootton approach Ardowen flats 401A to F from the direction of the Brownlow Road. He went to the ground floor window of the flat and around to the far side of the building. He emerged shortly afterwards walking towards the Brownlow Road. Police approached him and asked him to accompany them to the rear of the Land Rover. He agreed and started to walk. As he walked he asked why. The police officer took hold of his left arm and informed him that he was arresting him. At that stage he broke free. He was held by the police and informed that he was arrested under Section 41 of the Terrorism Act 2000. He was cautioned and made no reply. The police removed from him car keys which belonged to the Citroen Saxo which was then seized by the police outside 401 Ardowen. It was transferred to the Major Investigation Team Hangar at Maydown on 11th March 2009 and driven by a CSI Hayley Strachan to a CSI garage where it was photographed and swabbed. The boot was swabbed for firearm discharge residues. The interior and exterior of the car together with items in the car were also swabbed. A number of items were recovered from the boot. These included a brown jacket, a blue hooded sweatshirt, a black body warmer and two seat covers from the boot.

DNA findings on the coat in the car

[27] Faye Michelle Southam, a forensic scientist based at Forensic Science Service Limited in London with over 25 years experience with a specialism in the analysis of biological evidence such as body fluids and textile fibres was called by the Crown. Her field of expertise includes the interpretation of DNA profiling results. She carried out examinations of clothing items found in the boot of the Citroen Saxo car comprising of a brown jacket HGS3, ("the coat in the car"), black body warmer HGS4 and blue sweatshirt HGS5. She had reference samples from, inter alios, Brendan McConville and John Paul Wootton.

[28] When an individual has contact with an item of clothing, for example by wearing or handling, it is possible that his DNA, for example, in the form of skin cells, may be transferred to the item. Factors affecting the transfer and persistence of the DNA on the item include the individual's shedding patterns, the nature of the contact and the actions that occur to the item after it is handled. Secondary transfer can occur. Depending on the strength of the DNA (weak, medium or strong) it may be possible to assess how the DNA

might have been transferred. The stronger the DNA result the less likely it will be that it has resulted from the transfer of skin cells.

[29] DNA testing on the black body warmer and a blue sweatshirt provided no match to the reference profiles and thus can be disregarded for evidential purposes. Sixteen samples were tested in respect of the samples taken from the inside surface of the coat in the car, namely from cuffs, collar, elbows, armpits, pockets and zip pull. A sample from the inside back of the collar was tested. A full DNA profile of medium strength matching Brendan McConville was obtained. The result from a sample from inside the right cuff showed DNA from more than one person. The major part of the profile was a full profile of and matched that of Brendan McConville's. It was of medium strength. The weak result showing DNA from more than one person was obtained from the sample taken from inside the left cuff. While the majority of the component present matched Brendan McConville's profile it was unsuitable for a statistical evaluation. Five samples gave weak results unsuitable for saying whose DNA could be present.

[30] Ms Southam evaluated the findings using two alternative propositions. The first proposition was that Brendan McConville was the regular wearer of the coat. The second proposition was that he was not the regular wearer. The DNA findings, in particular the full DNA profile of medium levels in the inside of the collar and the right cuff are what might be expected if he was the regular user. Ms Southam proceeded to consider McConville's case that he did not own the jacket. She therefore made an assumption that he had never worn the jacket. She would have a low expectation of obtaining the medium level full profile found on the jacket by secondary transfer which would not explain the DNA being found on the inside of the jacket. If Brendan McConville was not the owner or regular wearer of the coat the true wearer had only deposited low levels of DNA, if any, on it. In particular no DNA results attributable to John Paul Wootton were detected in the areas of the jacket tested although there was some DNA evidence that might have been consistent with John Paul Wootton's DNA. Even if Brendan McConville had had direct contact with the coat or spoken over it any such actions would not readily account for the distribution of the DNA inside the jacket and the absence of significant amounts of the true wearer's DNA.

[31] In the second report of 4 November 2011 and in her oral evidence Ms Southam provided details of the type of DNA testing used. All the testing done was using standard SGM+ profiling. No enhancement techniques such as low copy number testing applied.

[32] The collar showed evidence of discolouration which could have been attributable to grubbiness or to it being well worn or both. The DNA profile in the collar sample was such that the chance of a person unrelated to Brendan McConville matching the profile was 1 in 1 billion. The DNA profile of the

major contributor in the cuff sample was of the same evidential quality. The right cuff sample showed a majority of components matching Brendan McConville's profile but it was unsuitable for statistical evaluation. None of the hairs in the coat had the fleshy roots suitable for standard DNA testing.

[33] Ms Southam was of the view that if Brendan McConville had touched the coat while he was in the car any such proposed activity would have to account for the absence of any significant or full profile from the owner of the car Mr Wootton which could be expected if he was the habitual wearer of the coat. In her view the DNA findings were more likely to be obtained if Brendan McConville was the regular wearer of the jacket. It was not possible to determine when the DNA would have been deposited on the coat.

[34] In cross-examination Ms Southam accepted that a sneeze over the coat could in theory deposit DNA evidence but for that to be a meaningful possibility the sneeze or sneezes would have had to occur over the inside of the collar and the cuff. Handling the coat could deposit DNA depending on the DNA skin shedding characteristics of the handler. If Brendan McConville had handled a collar and the inside of the cuff and shed DNA readily the DNA could have been deposited by handling. In relation to the suggestion that DNA could be transferred by the handler depositing other bodily materials on his hands, for example saliva from his mouth, Ms Southam stated that casework experience and studies had been done which showed that little DNA would be transferred by transfer via an intermediate object. Ms Southam accepted that at least three people contributed DNA to the collar area of the coat but only Brendan McConville's DNA presented a major profile of the evidential strength established.

[35] Ms Southam was closely cross-examined on her approach to the formulations of the propositions that she considered in relation to the DNA. She had been informed of a statement given by Brendan McConville to the police in which he stated that he had been in the relevant car as a frequent passenger but that he did not own the coat. She considered the DNA evidence in the light of Brendan McConville's denial that he was the owner. If information came to light that he may have worn the coat once or twice without being the owner she would have had to re-evaluate the findings. It should be interjected that Brendan McConville never suggested to the police at any stage that he had worn the coat in the car and in his interviews he declined to answer any questions about the coat. Mr Devine for Brendan McConville put to Ms Southam that she should have addressed the possibility that he may have worn it on occasions but was not the owner or habitual wearer. She said that she could have addressed that opportunity but there was no evidence or statement from Brendan McConville claiming or suggesting that he had worn the coat though he was not the owner. She did point out that her evidence was based around the activity of wearing the coat rather than on any information or allegation from the police that Brendan

McConville was the habitual wearer. When dealing with the suggested possibility that the absence of DNA from the regular owner and wearer of the coat could be explained by him having poor shedding qualities in relation to his skin, Ms Southam accepted that the question did depend on the ability of someone to shed their DNA but the more times somebody wears an item such as the coat in the car the greater the chances that there will be depositions of detectable DNA even if the wearer is a poor shedder.

[36] Ms Southam accepted that some of the remainder of the DNA on the coat not attributable to McConville matched John Paul Wootton's DNA although it was not a good fit. However, because of the very limited detail she concluded that there was insufficient evidence to support the view that the DNA came from John Paul Wootton.

Identification evidence

[37] Some eleven months after Brendan McConville's arrest and remand in custody Witness M came forward with evidence that he had seen the first defendant close to the scene of the shooting at a time close to the murder. Witness M lived in Hillcrest Manor. On the evening of the murder he decided to go for a walk to settle one of his children. He left his home about 7.00 o'clock with his partner, two children and a dog. He walked past the recreation centre and library intending to go to Drumbeg North. It was a dark miserable night. The streetlights were on. He went along the underpass under Tullygally Road. Where the path divided into two in the vicinity of Lismore Manor he took the pass to the left. He saw a group of five people near a small electric box painted green and orange ahead of him. A small pick-up truck coming from the direction of Drumbeg South came along very slowly. It was on the path on the right. It was full of brambles and bush cuttings in the back overflowing over the side. There was a driver in a van with a passenger and the driver had his hand over his face. The van stopped further on, the passenger getting out and running to the driver's side. This was about 300 feet away from the witness. As he walked towards the electricity box and a few minutes before the truck arrived two of the group had walked away towards Drumbeg. Two of the other men turned round with their back to M and one man stood there looking across at M. He said hello addressing M by name and M said hello back. He identified the man as Brendan McConville whom he said he knew from when he was very young and whose nickname was Yande. Brendan McConville was wearing a green army jacket. After the exchange M walked on. He said it took about 15 minutes to get to where he had had the exchange with McConville and 10-12 minutes thereafter to reach his destination where he stayed for about 1¾ to 2 hours. He returned by the same route. The same group were standing there at the power box. One of M's children began playing in the field as they walked back and M looked up and saw a man standing at the top of the hill near a burnt out lamp post. As he walked past the group he again recognised

Brendan McConville wearing the same jacket which was zipped up. M claimed that he clear view of McConville. When M saw the man standing on the hill looking down he felt nervous. He wanted to get back home as quickly as possible. He saw no sign of cut bushes which had been in the van earlier having been dumped anywhere nearby. He said that he got home around 9.00-9.30. After he got the children ready for bed he made a cup of coffee and went outside for a smoke where he heard a helicopter. He went back in and having put Teletext on the television he learnt that a police officer had been shot in Lismore Manor. According to him a couple of months later one evening some time after it was dark after 6.00 pm he heard a knock at his door. When he went to the door there was a man there and there was another man at the bottom of the path who appeared to be a man of about 40 although he could not see him clearly. The man at the door kept looking at him and said "Keep your mouth shut". Initially M thought this was a wind up but the other man said it was not a joke. He said "I mean it. Keep your mouth shut" and he just turned round and walked away. M realised that it must have had something to do with the murder of the police officer who had been shot at Lismore Manor. When M first talked to the police about the matter he identified the man who came to the door, although in his evidence-in-chief he indicated he was not sure that that was said the first time that he saw the police. He had said initially that he had seen that man in the area before, although in the course of his examination-in-chief he appeared to state initially that he had seen him afterwards in the area.

[38] In cross-examination the witness asserted that the threat by the man at the front door occurred 1-2 months after the shooting. He indicated that there also had been episodes on a couple of occasions of his house being watched. He identified the person who made the threat at the door as person A. During his cross-examination the witness was questioned about his eyesight and it was put to him that he needed glasses to drive and it was put to him that he was "as blind as a bat". He ultimately admitted that he had gone to an optician in Lurgan but claimed that he only wore glasses for fashion purposes. He went to the police on Sunday 14 February 2010 and went back on 17 February. He was interviewed on 21 February and again on 28 March 2010. When initially asked about the identification of the man making the threat at the front door he said that he said he did not know his name when he was on tape but said that he did tell the police when he was not being recorded not on tape. He said that he told DCI Harkness when he was in the latter's car. He said the reason why he did not name him in his formal statement was because of fear for his family's safety. In relation to the knock at the front door it was put to him that he had varied his account as to when that had happened. His evidence was that the incident had occurred a couple of months after the murder. According to his interview with the police he had suggested a timeframe of 3-4 weeks. Mr Harkness's note recorded that he said that it had happened two days after the murder. When that two day timescale was put to him the witness said that Mr Harkness must have got his note

wrong or he must have picked up M incorrectly. Mr Harkness when he gave evidence noted that he had recorded the period as two days and that was his recollection of what was said but he accepted that he may have got it wrong. In police interview M said initially that he was 90% sure that the person who had come to the door was person A who was named during the cross examination. Later towards the end of his interview he adjusted that to 50% sure. In relation to the coat which M said Brendan McConville was wearing he described it as a green army camouflage jacket. He said McConville always wore the same jacket. M thought it had a hood on it, though he is not completely sure he had seen it on that night. The coat McConville always wore did have a hood. He said he would say that it was knee length. It was a big long jacket. He did not accept police questions suggesting that he might have been mistaken about the colour because of the street lighting which was bright orange. However, he remained adamant as to its colour. As far as he was aware there was nothing hidden in the jacket. The witness was also challenged about the length of time he had been allegedly out on that particular evening. He told Mr Harkness initially that he said stayed 45 minutes at the house where he was going. In his evidence in court he put a timescale of 1¾-2 hours on it and in his interviews he said it was 1-1½ hours. He claimed that the walk to the house in Drumbeg took 20 minutes with 20 minutes returning. It was put to the witness that the outcome of the police interview with his partner was that she said that she did not notice anyone on the way home and did not concentrate on any people on the way to Drumbeg. In his police statement he had said that she had said to him after the exchange between M and McConville "Do you know him". This was not mentioned in her statement.

[39] In relation to his eyesight and glasses M appeared to be impatient with defence counsel and was offended by the defence line of questioning and about the proposition put to him that he "as blind as a bat" He insisted that he only wore glasses for fashion purposes although he did indicate that had glasses for reading. It was clear from the way in which he read the notes that were put to him during the course of the cross-examination that he could read perfectly adequately without glasses. He made the point that he was happy to dispense with the use of glasses and did not regard his eyesight as at all relevant to his evidence of having seen McConville on the night in question. It was also put to M that he was a man given to heavy drinking and indeed when he rang the police on two occasions he was drunk. He was also questioned about the financial arrangements entered into under the witness protection scheme. Before he agreed to give evidence he owned his own home with his partner and he and his partner had good jobs. He now claims to have no job but he receives a weekly payment of £210 (previously receiving £230 a week as a wage subject to tax). He accepted that childcare costs were paid and he received a loan of £3,250 to help him to put in a new kitchen in the house to which he had been moved under the scheme and he is still paying that back at £50 a week. He also received a loan of £3,000 for a car which he has paid back.

He said that he had saw a Mr Sheridan, a security man, in the recreation centre the evening he saw McConville. It was put to him that Mr Sheridan did not see him.

[40] Evidence was obtained from the optician who examined witness M's eye in March 2007 and who, according to the records, had prescribed lenses for glasses contrary to M's assertion that he had not been prescribed glasses. Mr Page, an ophthalmic surgeon, was called by the Crown to explain the prescription and deal with the question whether M had any material visual impairment. In addition to considering the optician's clinical findings and prescription Mr Page also considered two pairs of glasses which were provided to him for examination. These glasses had been given to a police officer by witness M following a request by the defence and which purported to be glasses which he had at his disposal. Mr Page explained the optician's findings and prescription which were recorded in notes dated 15 March 2007. In the right eye M's vision before correction was 6/9 and in the left 6/12. Those measurements related to the vision of a person sitting at 6 metres from a visual acuity chart. A person with normal vision would be able to read line 6 at 6 metres and would be given a score of 6/6. With the right eye M could see a line at 6 metres which a person with normal vision could see at 9 metres. In the left he could see a line at 6 metres which a person with normal vision could see at 12 metres. Mr Page concluded that the witness had a very small degree of myopia (short-sightedness). The patient also had a degree of astigmatism which is a common condition affecting 20-25% of the population in varying degrees. The front of the eye, the cornea, should normally be fully spherical in shape. With astigmatism there is more curvature in one meridian of the cornea than the other, causing some distortion of vision. While witness M had a measurement of 2 dioptres of astigmatism in the left eye it was close to only one dioptre in the right eye. A person in everyday life has the benefit of the functional use of the better of the two eyes both in terms of myopia and astigmatism. In the result Mr Page concluded that a person with witness M's eyesight could lead a completely normal daily life. As he got older he would require glasses for reading. He would, however, be able to drive, walk in crowds and see normally in daylight. Mr Page concluded that the patient's eyesight had in fact improved somewhat compared to the position in the 1995 optician's record. M had become less myopic but he had developed more astigmatism. With age the curvature in the eye had changed somewhat. However, Mr Page's overall view was that the vision had improved somewhat. In relation to the effect of reduced light Mr Page accepted that in a myopic patient the myopia can be accentuated when his pupil is dilated. In good ambient lighting the effect is negligible. If a person is in the dark looking towards an area lit by street light the pupil would contract and the vision would be normal for the patient. Mr Page stated that if M wore glasses he could see more crisply but he could manage perfectly well without them. The glasses in question were broadly in accord with the optician's prescription. There were minor discrepancies in that in relation to the spherical

measurement the lens for each eye was slightly stronger than the prescription given and the cylindrical slightly weaker. He thought that this was probably just within the tolerance of the instrumentation which had been used to compare the glasses with the prescription. Mr Page concluded that in normal daylight the witness would have no difficulty in making out facial features within 10 yards. In a situation of darkness with street lighting that measurement might be reduced by a couple of yards.

Application to exclude the evidence of Witness M

The first defendant's argument

[41] Mr Kelly QC on behalf of Brendan McConville sought to have the evidence of witness M excluded under Article 76 of PACE Order (Northern Ireland) 1989 which provides that the court may refuse to allow evidence which the Crown proposes 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 proceedings that the court ought not to admit it.

[42] This being a non-jury trial, nothing turns on the fact that the defence did not seek to exclude the evidence by means of a voire dire in advance of the hearing of the disputed evidence. The better course and the one followed in this case in a non-jury context is for the court to hear the whole of the prosecution case including the disputed evidence before any voire dire is heard. In approaching the question whether the evidence should be excluded the concept of the burden of proof has no part to play in the exercise of discretion under Article 76. In R v. Walsh 91 Criminal Appeal Reports 161 the court stated:

> "So far as a defendant is concerned it seems to us to follow that to admit evidence against (the defendant) which has been obtained in circumstances where the standards (set out in the Order or the Codes) have not been met cannot but have an adverse effect on the fairness of the proceedings. This does not mean, of course, that in every case of significant or substantial breach (of the order or the code) the evidence concerned will automatically be excluded. Article 76 does not so provide. The task of the court is not merely to consider whether there would be adverse effect on the fairness of the proceedings but such an adverse effect that justice requires the evidence to be excluded."

Furthermore while bad faith by the police will usually lead to the exclusion of evidence the contrary does not follow. Good faith will not excuse serious breaches of the order or codes.

[43] Mr Kelly's submission was founded on a failure by the investigating officer to hold an identification procedure. The relevant code is the Terrorism Act 2000 (Section 99) Code of Practice ("the code"). The identification procedure set out in paragraph 2(5) to 2(10) may be used if the suspect's identity is known to the police and is available. The procedure comprises video identification, an identification parade or a group identification where the suspect is seen in an informal group of people. The relevant provisions of the Code relied on is set out in paragraph 2.12. It provides:

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

[44] Mr Kelly took the court to what he submitted were relevant parts of the evidence. He referred to portions of the interviews of witness M carried out by the police which it was argued highlighted inconsistencies in M's evidence. At one point M talked of knowing the defendant for 10 years and later claimed

to have known him since he was a nipper. There was, it was argued, no clear evidence to explain how the defendant would know the name of the witness who had been away from the area for a prolonged and indeterminate period. M and Brendan McConville had never spoken before. The coat allegedly worn by McConville as described by witness M (knee length with a German logo) was different from the coat being worn on 4 March by Brendan McConville at the Benefits Office as seen on CCTV. M was unclear about distances and lighting conditions when he alleged he saw McConville (ranging from 12 feet to 30 feet and further). M had been rigorously cross examined about his use of spectacles. Mr Kelly's submitted that M had repeatedly lied about the condition of his sight, why he wore glasses and what sort of glasses he wore or needed. His assertion that he only needed glasses for reading had been shown to be wrong. His claim to have bought glasses in Specsavers was not borne out by the broken glasses which he produced to the police or by the Lurgan optician's prescription. Mr Page had failed to mention M's short sightedness or astigmatism and it had appeared to give undue support to M's case. Mr Page said that a person with M's eyesight would have difficulty with facial features when more than 8 yards away. Measurements indicated that the shortest distance between the path along which M walked and the energy box where McConville was allegedly standing was just over 16 yards. M had not informed the police of his visual impairment. Witness M's assertion that he was sure the named man A was at the electricity box was in due course reduced to a 50% certainty. The police clearly doubted his reliability of the identification of A and that should have underlined the need to have a proper identification process in relation to M's assertion to have recognised with certainty Brendan McConville on the night.

[45] Counsel contended that once M had purported to identify Brendan McConville at the rear of Lismore Manor there ought to have been an identification procedure. The Code exists so as to limit the prospects of mistaken identification. It was clear to the investigation officers that the first defendant would challenge M's identification. It was accepted by DCI Harkness that he understood McConville to be, in effect, denying being anywhere near the place. There was real uncertainty as how the witness knew the defendant. The police were bound to properly investigate the matter and the witness was inconsistent in his evidence. Counsel stressed that the issue was how well the defendant was known to the witness. They had never spoken previously. In addition despite the officer's evidence the coat described by the witness was clearly different to that seen on Brendan McConville in the Benefits Office and it formed a substantial part of witness M's description. The prosecution's argument that an identification procedure would have served no useful purpose was unsustainable. The failure to hold a parade or other procedure resulted in the defendant losing an opportunity for challenge at a time and stage that such could be made. The Code exists to protect a suspect. In this case the witness knew the first defendant was already before the court. In those circumstances there was more than normal

reason for rigour in testing the identification as opposed to its mere acceptance. The witness clearly lied about his eyesight and the concern was as to why. Had he declared to the police that he was short sighted that would have called for caution and further investigation of the identification. Had the police known that such a condition could worsen in the dark even more caution would have been required. Those investigating the matter ought to have known the truth. Because the witness had lied the defendant would otherwise be deprived of the protection of the code. If they had known that there would be difficulties identifying facial features at a distance of more than 8 yards then it is likely that they would have been concerned to test the identification of the witness. Given the importance of the identification it was incumbent on the investigation to enquire of M as to his eyesight and its quality. An investigating officer is bound to pursue all reasonable lines of enquiry. The holding of a parade was entirely practicable and the charging of the defendant had no bearing on the code. Police failed to follow up independent strands to support the identification. The person M had visited and M's partner were not spoken to at the time. The security guard who allegedly was spoken to was not relied upon by the prosecution. In the circumstances counsel submitted that there had been a breach of the mandatory provision of the code.

The Crown's response

[46] Mr Murphy QC accepted that if there had been a breach of a statute or a code of practice designed to ensure fairness or reliability of evidence a substantial breach may lead to the exclusion of the evidence. He argued that there had been no breach of the Code and even if there had been a breach the evidence should nevertheless be admitted. He argued that the Code should be viewed in the context of the law in relation to identification evidence and the safeguards and warnings to which the tribunal of fact must have regard. The present case was a case of alleged recognition of a person known to the witness. The fact that purported recognition of a person is usually more reliable than identification of a stranger does not, of course, absolve a judge from reminding the jury that mistakes even in relation to close relatives or friends can be made. The court should also have regard to any other evidence capable of supporting the identification. In a recognition case the risk is not that the witness will pick out the wrong person on a parade but at the time of the offence he mistakenly thinks he recognised the offender. That being so lends support to the submission that an identification parade was not required.

[47] Counsel argued that there were a number of good reasons why an identification parade would not be appropriate in a case of this nature. The witness knew the defendant for many years. The information from the witness came over a year after the event during which time it was known that Brendan McConville was arrested and charged, a fact publicised through the media. The integrity of an identification procedure would be undermined. The defendant

would have been bound to allege that an identification procedure carried out in those circumstances would not achieve the statutory purpose of the Code and that identification would be of little value. No prejudice flowed from the failure to follow an identification procedure.

[48] The only potential benefit of an identification procedure would arise if the defendant was not identified by the witness in the identification procedure. This was, counsel argued, a highly unlikely scenario. The defendant had presented a no comment approach to any evidence put to him and if he had done so again in respect of the new evidence of the identification by M then that would have resulted in him not voicing a dispute in respect of identification which was a pre-condition to the Code's requirement for an identification procedure.

[49] If there had been a breach of the Code then the jury should be told in assessing the whole of the case they would have to take account of the fact that the defendant had lost the safeguard of putting the eyewitness' identification to the test giving that such weight as it though fit. This is the warning approved by the House of Lords in R v. Forbes [2001] 1 AC. The Crown submitted that, in reality, this was a recognition case and that in the spectrum of identifications cases it fell to the upper end in terms of the quality of the identification. The only matter that might have been an issue related to the eyesight of the witness and the assertions that he could not see properly. The Crown submitted that that was far from correct and his eyesight was of the level referred to in his evidence and now supported and confirmed by Mr Page. The Crown submitted that the following factors should be taken into account in support of identification evidence generally.

(a) This was a case of recognition.

(b) McConville was known to witness M for years.

(c) McConville was a person well known in the area.

(d) McConville is a person of distinctive physical appearance in terms of hair colour and general build.

(e) The witness alleged that he was wearing a coat of a particular type. The witness maintained his description of that coat despite reference to other potential coats that he might have been wearing. The defendant was seen to be wearing a coat of a similar type in photographic evidence.

(f) The witness observed McConville while directly facing him.

(g) The witness was greeted by name by McConville.

(h) The witness was a short distance away without obstructions in an area that was well lit. There was no suggestion that there was difficulty in terms of the general visibility.

(i) There was no suggestion that he did not face him or know him or recognise him or have been unable to recognise him. The identification was confirmed on the second occasion later in the same evening when the same person was seen again in the same place wearing the same coat so further strengthening and supporting the original identification.

[50] The identification was further supported, according to the Crown, by the fact that the defendant was living in the locality. A coat on which the defendant's DNA was present was found on a car a relatively short distance from the alleged point where he was seen. The assertion by the witness that he was warned regarding what he had seen by person A supported the account by witness M that he had seen something highly relevant that evening and been present that evening. The account in relation to person A supported rather than contradicted the credibility of witness M as it would be a complex and sophisticated invention to suggest that threats to him occurred involving the persons that had been referred to about whom he was in fear in order to support, on the defence case, the false identification of McConville at the firing point.

Conclusions on the exclusion application

[51] Following M's provision of the identification evidence to the police paragraph 2.12 (i) of the Code became relevant. M had identified a suspect before an identification procedure had been held. Furthermore, paragraph 2.12 (ii) was also in play. It is true that the duty to hold an identification procedure arises only when the suspect "disputes" being the person the witness claims to have seen. However, the police recognised that the first defendant was denying presence at the scene of the crime. In effect this was a case in which it should have been recognised that there was a dispute about the defendant being the person allegedly seen. This triggered a requirement to hold an identification procedure unless –

(a) it was impracticable to hold one (which the Crown did not contend); or

(b) it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence.

An example is given in the Code of a situation within (b) (namely when it is not disputed that the suspect is already well known to the witness who claims to

have seen commit the crime.) The purported identification of Brendan McConville by a witness at the electricity box during the relevant time was never put to the first defendant. The circumstances in which the requirement to hold an identification procedure do not arise could not be shown to exist at the time. Hence there was no reason why the duty under the Code should not apply.

[52] DCI Harkness did not consider it appropriate to hold an identification procedure because the defendant was already in custody. It is true that if a defendant were identified in such circumstances by a person who had purported to recognise him such a confirmation would be open to the criticism that the witness would be likely to be influenced consciously or unconsciously by the knowledge that the defendant was in custody. A renewed recognition of a person by the witness who thought he had seen him earlier would not be of any real probative value nor it would the identification procedure be much of a safeguard for the defendant. It would have no relevance in relation to a case of a witness giving false evidence of having recognised a person at the scene. If the witness, however, failed to recognise the first defendant again this would of course be significant and of great assistance to the defence case. An identification procedure which was not an impracticable procedure could not be considered to be one with no possible utility in the investigation and it was one that could have provided the defendant with a safeguard.

[53] In the context of the present case one must bear in mind that the first named defendant consistently refused to comment on any questions put to him and may well have continued to take such a stance in relation to the new evidence of the purported identification. He may well have been advised, however, to co-operate in an identification procedure for he was bound to be advised that such a procedure could not damage to his case. A renewed identification would be of little or no probative value for the reasons given. If, however, the witness failed to recognise the defendant again that would assist the defence.

[54] The failure to carry out an identification procedure is a matter which the defendant can rely on and the court would have to warn itself as the tribunal of fact of the breach of the Code and the danger which that presents in relation to the fairness of the procedures followed in testing the identification of the accused. The breach of the Code in the circumstances of this case which is a case of purported recognition, while significant, can be counter balanced to an extent by the court carefully directing itself on the shortcomings in the evidence and the need for real caution and the requirement to carefully analyse the evidence and its shortcomings. This can be done in the context of the court reminding itself as the notional jury that recognition cases carry their own particular danger that a person may honestly think he has recognised a person but that be honestly wrong. In this non-jury case the defendants also have the protection of an automatic right of appeal. Balancing all these matters, as I

indicated at the conclusion of the exclusion application, I concluded that the admission of the evidence of M would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Forensic evidence in relation to the particles found on the coat

[55] It was not in dispute between the forensic experts called by the Crown, Ms Shaw and Mr McMillen and the defence expert, Mr Doyle that the firing of a gun results in the formation of particulate residues from the ammunition fired. These residues are known as gunshot residues (GSR) sometimes also called cartridge residue (CDR), terms which can be used interchangeably. The particles produced may be deposited on the skin and clothing of the firer, on the skin or clothing of persons near to the firing point and on nearby surfaces. They may also be transferred to other services by direct physical contact with a source of residue (for example a spent cartridge, a recently fired gun or a surface contaminated with residues). This latter transfer is known as secondary transfer. The numbers of particles recovered will be dependent on a number of factors. These include the type of gun, the type of ammunition, the number of shots fired, whether the firing is indoors or outside and the mechanical condition of the gun.

[56] For a bullet to be ejected from a firearm it must be propelled at great speed and force from the weapon. To achieve this propulsion a cartridge contains a propellant of an organic nature generally comprising nitrocellulose, sometimes with nitro-glycerine. The activation of the propellant is achieved by the triggering of a percussion primer contained in a primer cup. Once the trigger is pulled the explosive material in the primer is activated. This results in the produce of great heat and the propellant is activated. Most modern ammunition contains a mixture of chemicals (lead, barium and antimony being the commonest). They may also contain aluminium and tin. Three types of GSR are commonly encountered in case work: Type 1 comprises lead, barium and antimony; Type 2 lead, barium, antimony, aluminium and barium/aluminium; and Type 3 lead, barium, antimony and tin. Older forms of prime or formulations are based on mercury, containing a mercury fulminate and would have produced residue referred to as mercuric.

[57] GSR can be recovered from a surface by a process of taping or by vacuuming. Primer residues are identified used a scanning electronic microscope ("SEM") and organic residue by means of sensitive chromatographic methods. These latter methods can indicate the presence of other organic materials such as pentaerythritol tetranitrate ("PETN"). Amounts of residue are defined as low (one to three particles), moderate four to twelve, high thirteen to fifty and very high more than fifty particles.

[58] The examinations by Ms Shaw and Mr McMillen of the spent cartridge LH7 showed that the GSR contained combinations of antimony, tin and

mercury. Ms Shaw described some of those residues as being *characteristic* particles and some *indicative.* She used the term *characteristic* as referring to the particles containing the full complement of key elements in types of GSR. Where particles do not contain all or a combination of some of the key elements she referred to these particles as *indicative* of GSR. An alternative term is the word consistent. Mr Doyle in his evidence criticised the widespread use of the term indicative and the misuse of the word characteristic. Nothing in my view turns on the terminological expressions used and I consider that the words indicative and consistent for present purposes can be used interchangeably. A particle which is indicative is obviously of considerably less probative value than a particle which is characteristic. The primer in the cartridge in question was a mercury based primer and fell within the Forensic Science Service's Type 7

[59] Ms Shaw's examination of the sample taken by FSNI from the chamber and muzzle of the gun showed that the majority of the GSR particles contained elements antimony/tin. In the absence of a mercuric element in the particles such particles were not characteristic but indicative.

[60] She carried out an examination of the coat found in the boot of the Citroen Saxo car. She found a high level of particles containing the element antimony/tin on the outer surface of the jacket with the majority present in the front and sleeves. She found a moderate level of similar particles inside the waist area. Some of the particles contained lead and copper. Ms Shaw said that a further analysis to semi-qualitative measure the levels of antimony/tin showed a large proportion of the particles contained antimony tin in a 1:1 ratio. A small number of the particles were ones where tin or antimony dominated. The particles were very unusual ones and apart from mercuric ammunition she knew of no alternative source that could be identified. The particles were of a spherical appearance. This morphology indicated that the particles were fusions of elements brought about at very high temperature. This morphology was consistent with the particles having a firearm source. Samples were taken from the inside surface of the jacket using adhesive tape to recover residues. A very high number of particles comprising antimony/tin were found. These were, in Ms Shaw's view, indicative of Type 7 residues. She concluded that as the garment had been previously taped during earlier forensic examination this suggested that there originally had been even more particles within the coat.

[61] Ms Shaw found a low level of particles indicative of Type 7 on the face of the body warmer taken from the boot. No indication of organic residue was found in it. No primer or indication of organic residue was found on any of the samples from the blue hooded sweat shirts. She found there was a high level of GSR on one of the car seat covers taken from the boot with the majority on the upper side. They were not Type 7 but the actual type of GSR was unclear. No organic residues were found on it. On the other car seat

cover a low level of particles indicative of Type 7 residues were found on the lower side of the seat cover. In her report of 23 December 2009 Ms Shaw concluded that it was not possible to determine whether the particles indicative of Type 7 found on the jacket had originated from a firearm or another source. Such particles, however, were not usually seen in the environment or in case work. They are similar to those found in the muzzle of the gun which could be a potential source. If they originated from a firearm the very high levels suggested that the jacket may have been wrapped around the gun when it was fired. She said she would not expect the amount by transfer alone given the significantly higher amounts of particles on the jacket than found elsewhere. Small amounts could easily be transferred to the car or other items in it. It was unlikely that any given significance could be placed on the particles on the car seat covers or the body warmer as they were together in the boot. The high level of non-matching residues in the car seat cover originating from a source of particles different from the source of the particles indicative of a Type 7. The presence of GSR on the car seat cover suggested that it had been in contact with a recently fired gun cartridge case or other item heavily contaminated with residue but that did not include residue from the murder weapon using a cartridge of the nature of L87.

[62] In her second report dated 7 April 2010 Ms Shaw considered the possible alternative of non-firearm sources of antimony/tin particles. She identified the other materials containing antimony/tin of which she was aware. These comprised bearing metals, pewter type metals used in older forms of printing presses, bullets, optical secondary materials, car battery grids, solder and lead free solder the latter mainly used in the electronic industry. With the exception of some pewter and lead free alloys all those materials contained other elements in addition to antimony/tin. Pewter is a high tin alloy with low antimony. Lead free solder is mostly tin and copper or silver 95% tin and 5% antimony and is available for specialist applications. A sample of a lead free solder was obtained from a Scottish company. A soldering iron was used to melt a small amount of the metal and a semi-quantitative analysis of the proportions of antimony in the solder material ranged from approximately 2 to 6%. Ms Shaw concluded that lead free solders of a similar nature were therefore not the source of the particles found on the brown jacket. In a report dated 29 November 2011 she stated that antimony/tin particles in the absence of other elements are rarely observed in case work particularly with both elements at high levels. She based this proposition on over 20 years' experience in the forensic science field in which she was experienced in the examination of the chemical composition of environmental and firearm related particles found in a wide range of case work. This suggested to her that even if there was an as yet unidentified non-firearm related source it was very rare otherwise the particles would be observed more frequently. Ms Shaw concluded that antimony/tin particles were produced by the ammunition in question and were present in the murder weapon. Since mercury was volatile it was not unusual for mercury to

be absent from GSR produced by such ammunition. Her conclusion was that the production of the antimony/tin particles from the firing of a cartridge "would be expected". She concluded that if the particles had originated from a firearm the amount suggested the gun may have been fired whilst wrapped in the jacket. The relative levels of the elements in antimony/tin on the particles on the jacket and the absence of an alternative non firearm source suggested that they were more likely to have originated from a firearms source than not. They were consistent with the GSR adduced by the last ammunition fired by the murder weapon but not exclusive to it.

[63] During the preliminary investigation Ms Shaw under cross examination had accepted that while the particles were in her opinion more likely to be from a firearms source she could not exclude the possibility that they were from a non-firearm source. She could not say with certainty that the particles came from any firearm or from the murder weapon. She said that because of the volatility of the mercury on complete ignition mercury is vaporised and one will not find it in particles deposited on the firearm or anyone standing nearby.

[64] In her oral testimony Ms Shaw accepted that she could not be 100% certain that the particles came from a firearms source. When asked by Mr Kelly on behalf of Brendan McConville as to what percentage she could be certain she replied "It is very difficult to put a figure on it but certainly greater than 95% that there is no other source to which I have found to date from the particles with high levels of antimony and tin apart from mercuric ammunition." The clear tenor of her oral evidence was that she was reasonably satisfied in her own mind that the particles very probably come from a firearm using mercuric fulminate primer and she placed that degree of satisfaction as being of the order of 95%.

[65] Mr McMillen examined a number of items potentially relevant to the case against the first and second named defendants. The purpose of his examination was to examine the items for the presence of residues that could be attributed to the discharge of a cartridge from a firearm and to compare any residues found with one of the empty cartridge cases found at the grass area from which the fatal shot was fired and with residues in the murder weapon.

[66] In carrying out his examination Mr McMillen examined a large number of items. The ones relevant in the present case were:-

(a) The empty casing from the grass area and the AK47 weapon.

(b) Items attributed to John Paul Wootton comprising a laboratory prepared swab kit taken from him and a number of clothing items SK9, SK10 and SK12.

(c) Items attributed to Brendan McConville comprising a laboratory swab kit and articles of clothing which included a pair of black knitted gloves, a blue grey knitted glove, a black suede black jacket, a pair of brown suede like gloves and another jacket belong to Mr McConville.

(d) The swabbing kits used on the gold Citroen Saxo car and items found in the boot comprising the brown jacket, a beige coloured to and a white coloured top and seat covers.

[67] His examination of the residue inside the spent cartridge marked NNY1982 was found to comprise particles antimony/tin with or without mercury. Copper was present in varying quantity in many of the particles. Some mercury/antimony and mercury/tin particles were also present. The combination of elements within the particles was a consequence of a fusion of the elements brought about by very high heat involved in the detonation brought about by the triggering of the primer.

[68] Three swabs were taken from the murder weapon, one from the muzzle, one from the chamber of the barrel and one from the breech face, ejector and extractor areas. Representative areas of those samples were examined. The particles detected were predominantly antimony/tin. A small portion of these also contained mercury. Many of the particles contained varying amounts of copper. Mercury was also found in association with other elements such antimony or tin. Lead antimony tin and lead antimony particles were also detected.

[69] Mr McMillen referred to a laboratory test using the murder weapon from which colleagues discharged indoors various rounds of the same type of ammunition. This showed that the particles deposited on the hands, face and clothing of the firer were mostly lead antimony with lower number of antimony/tin in a ration 3:1. A few particles with composition lead/antimony tin were also detected. After the test firing the weapon was wrapped in fabric which on examination was found to mostly contain lead antimony and antimony/tin in the ratio of some 2:1. A further test established that the gases released from the muzzle contained a much higher number of lead antimony type particles.

[70] Mr McMillen accepted that the multiple test shots fired from the weapon after it was found could have resulted in the build-up of a metallic deposition within the barrel. Those deposits could be released on the discharge gas of subsequent firings and the mix with the residue from the cartridge primer. The weapon when used in the test was not in the same condition it was in when submitted to FSNI. Lead antimony particles detected in test firing could be the result of metallic depositions in the barrel or from

undertaking the test in an indoor range. Mr McMillen accepted that the results of the test firing were of limited evidential value.

[71] No gun shot residues were detected in the laboratory swabs taken from John Paul Wootton. One particle of lead antimony barium and one antimony tin particle were detected on a black orange grey hooded top on the outer front and sleeve with none in the hood. In the pockets three lead antimony and one lead antimony particles were found. In a white hooded top no residues were found. In a pair of black Adidas bottoms one lead antimony particle was found in each of the upper and front and waist area and the pockets. Mr McMillen concluded that the presence of these particles provides moderate support for contact with a firearms source but only one antimony/tin particle was found. This was a low level finding and the evidence did not provide a probative link between the items and the firearm used the murder.

[72] In relation to the items taken from Brendan McConville's house at 5 Glenholm Avenue, Lurgan particles with the composition lead/antimony were found on a pair of black knitted gloves HS25 with 15 on the left one and 3 on the right. 3 particles of lead barium were found on a black suede like jacket. On a pair of brown suede like gloves three particles. One lead/antimony tin and two antimony/tin particles were found. In Mr McMillen's view the presence of a high number of lead/ antimony particles on the glove strongly supported a contact with a source of those particles which were indicative of GSR but they did not provide support for contact with the mercuric fulminate ammunition. The other findings provided weak support for contact with a source of the particles.

[73] Mr McMillen subsequently examined MG8, a black male Easy brand coat seized at 5 Glenholm Avenue. This coat was of the same make and size as the coat in the car. A total of 57 antimony/tin particles and 2 lead/antimony particles were located on the inner pockets inside lining and the outer surface. He concluded that the high number of particles, mostly antimony tin with two lead antimony tin, strongly supported a contact between that coat and the source of the particles. Those were particles of a type produced but not exclusively by the discharge item LH7.

[74] Mr McMillen gave evidence of the detection of PETN from a sample from the coat in the car. PETN is to be found in Semtex explosive and also in other explosive substances such as detonating cord used to initiate explosive devices. PETN was found on 5 individual areas, from left and sleeve front right and sleeve back and waist area and right lower pocket. The spread of the presence of traces of PETN led to the conclusion there was less likely to have been casually picked up by secondary transfer.

[75] In relation to the Citroen car a total of 33 lead/antimony particles were detected in the parcel shelf, single lead/antimony particles were detected in the passenger foot well and on the rear offside foot well and one particle with the composition lead/antimony/tin was detected on the rear nearside foot well. These were all classed by Mr McMillen as being indicative of GSR. In the boot 2 lead/antimony/barium, 6 lead/antimony/tin, 4 antimony/tin and at least 180 lead/antimony particles were found. The lead/antimony/barium particles were characteristic of GSR, the remaining ones being classed as indicative. Mr McMillen concluded that the presence of a large number of particles on the rear parcel shelf and in the boot of the Citroen Saxo items comprising a mixture of particle types predominantly lead/antimony and lead/antimony/tin, antimony tin and lead/antimony/barium supported a close contact with a firearms source but they suggested a source other than the AK47 using mercuric fulminate ammunition. They originated from a modern primer composition.

[76] Mr Doyle, a consultant forensic scientist with expertise in gunshot residues, did not accept the prosecution's reliance on the evidence of particles found on the coat as evidence of gunshot residue consistent with being residue from the relevant ammunition shot from the murder weapon. He considered that the complexity of the evidence made reliable interpretation difficult. If the particles detected were GSR then they originated from a discharge of at least 3 different types of ammunition. The antimony/tin particles were, in his view, unlikely to have originated from the firearm discharging a LH7 type cartridge. He considered that in relation to primer compositions incorporating mercuric fulminate there had been much less research focused on such primer compositions than in the case of modern primers and there was little specific guidance. In his view it was difficult to come to clear conclusions.

[77] He accepted that when a firearm was discharged the reacting primer composition in the ammunition initially produces gaseous products which then condense to form liquid droplets which rapidly cool to form solid particles. The morphology of the condensed primer residue is typically spheroid. The explosive reaction of mercury fulminate results in the formation of mercury. Its relatively low boiling point and ability to form alloys with for example elements in the cartridge case account for its limited detection in GSR from mercury fulminate based primers. Relying on studies by *Zeichner* and *Wallace* he concluded that it was significant that there was no evidence of mercury among the almost 400 antimony/tin particles recovered from the coat. In his view it pointed away from the involvement of a mercury based primer. Whilst mercury is not often detected in GSR particles produced by a mercury based primer the relevant studies demonstrate that at least some mercury will be detected and it would be reasonable to assume that the greater the number of GSR particles detected the greater the likelihood that mercury will also be detected. Mercury had indeed been detected on samples from the murder weapon, the spent cartridge and the test firing conducted by

Mr McMillen. In his view given the circumstances if ammunition containing mercury fulminate in the primer mixture was the source of the antimony/tin on the coat some mercury should have been detected. Since it had not been detected in his opinion the primer in the relevant cartridge was unlikely to have been the source of the antimony/tin particles detected on the coat.

[78] The witness considered that research demonstrated that the residue in the spent cartridge was not representative of the ejecta. The residue remaining in the cartridge could not be used as a basis for comparison with GSR particles found on people and items suspected of being in proximity at the time of firing. The basis for comparison should be the particles recovered from the weapon. Mr McMillen in his view was using a different reference material from that of Ms Shaw. Whilst Mr McMillen had apparently withdrawn the results of the test firing on the ground that the experiment was flawed he had not explicitly stated that he would not now consider lead antimony particles to be reference particles. Good practice is to conduct as complete a forensic characterisation of the reference ammunition and the weapon as possible and this had not been done in this instance.

[79] Mr Doyle was very critical of the ways in which Ms Shaw and Mr McMillen had considered the materials and reached their conclusions. In his view their evidence lacked coherence. In particular test firing recorded the detection of mercury and that should have been reported in Mr McMillen's statement. Amongst his criticisms he stated Mr McMillen left out of account the lead/antimony particles as reference particles. Ms Shaw who had suggested the firearm may have been fired while wrapped in the coat failed to take account of the absence of any area of discolouration or blackening in the jacket. Although discounted by Mr McMillen the test firing which he arranged produced lead antimony and antimony tin particles in ratios 2 and 3 to 1.

[80] Taking account of the findings of particles in the car and items of clothing attributed to John Paul Wootton and Brendan McConville more than one type of ammunition was in evidence and the presence of 13 different types of particles represented significant firearms activity and the possibility that any GSR particles detected originated from a source other than the cartridge in question should be carefully considered.

[81] Mr Doyle was of the opinion that evaluative opinions were opinions of evidential weight based on the calculations or estimations of a likelihood ratio. This is a ratio of the likelihood of a finding/observation/result given a proposition favourable to the prosecution divided by that likelihood given to the proposition favourable to the defence. For any candidate GSR particle detected there were only three relevant sources namely the firearms discharge that resulted in the death of the deceased, a firearms discharge other than that which resulted in the death of the deceased and a non-firearms source. The

second and third sources would favour the defence case. The first source favoured the prosecution case. Mr Doyle considered that the question was "what is the likelihood of detecting only antimony/tin given the prosecution proposition compared to the defence proposition that the particles were from a different source than the discharge that killed the deceased?" The findings and results were –

(a) Antimony tin particles may not have a firearms source.

(b) Mercury is detected on samples from the AK 47.

(c) Mercury was detected in the GSR from test firing.

(d) Mercury was detected in the ejector from the discharge of ammunition containing mercury fulminate.

(e) Mercury was not detected in the coat.

(f) Antimony tin may have originated from ammunition other than LH7.

An objective assessment of the above evidence, in his view, should have led to the conclusion that the GSR evidence was more supportive of the defence case than the prosecution case, a conclusion which he also applied to the findings on MG8 and other detections of antimony/tin. Ms Shaw concluded that antimony/tin particles were produced by the ammunition in question and were present in the AK47.

[82] In relation to the Crown experts' purported detection of the presence of PETN on the coat, Mr Doyle considered that its detection was based on very small poorly shaped peaks with poor resolution for the purposes of the high performance liquid chromatography (HPLC) and pendent mercury drop electrode (PMDE) tests. There were only small peaks for gas chromatography (GC) and the thermal energy analysis (TEA) purposes. He concluded that it was not appropriate to interpret these as establishing the presence of PETN. He also argued that there had been surprising variations in methodology given the questionable suitability and doubtful validity of the methods used. The reported detection of PETN could not be considered unequivocal or certain. Given the admissions by Ms Shaw as to the impossibility of linking GSR to a specific cartridge or determining whether or not particles had a firearms source because of the recognised limited firearms utility of GSR evidence, its complexities, limited research and the variable quality of the evidence given by Ms Shaw and Mr McMillen, Mr Doyle questioned the value of the Crown's GSR evidence and whether the Crown case on the issue assisted in the court in its deliberations.

[83] In cross examination Mr Doyle did accept that the antimony/tin particles on the coat in the car could have come from mercury fulminate primer. The tin was not evidence of mercury fulminate but could be evidence of a compound of the primer assembly which had a tin foil element. He made the point that there is ammunition available that has tinfoil as part of the primer assembly which does not contain mercury fulminate. However, the tin antimony particles were not, he accepted, consistent with a modern primer. When asked what ammunition the particles would be consistent with other than mercury fulminate he replied "I can't offer an ammunition that would produce antimony tin particles but contained a primary explosive other than mercury fulminate but I don't have a data base available to interrogate to be certain of that." He also accepted that he had not suggested any alternative non-firearms source for the particles in this case. He concluded his cross examination by saying:-

> "A. As I say, both experts agree that they are indicative particles so I would suggest that really just meets the criterion of probability.
>
> Q. And they are indicative of the gunshot residue produced by the last ammunition used?
>
> A. Fired by the weapon."

These answers appear to qualify and to an extent contradict an earlier answer that:-

> "my conclusion based on the absence of mercury is that they are unlikely to be associated with a discharge event that is in issue here."

Also in an earlier passage of the transcript he said:

> "Q. Are you or are you not saying that findings of particles of antimony tin would be consistent with the particles being from a firearm."
>
> "A. To answer it even more fully from the image I have seen, the actual micrography and the spectra I have seen both the size, morphology and shape of the particles are consistent with gunshot residue and indeed the composition is consistent with gunshot residue. But I would emphasise that I am not saying that it is probably gunshot residue."

[84] In relation to the evidence of PETN on the coat found in the car Mr Doyle rejected the FSNI analysis subjecting it to a number of criticisms. He concluded:-

> "In summary I am saying that the analytical science here is of a poor quality and in my opinion insufficient to say with a high degree of certainty or the certain degree of certainty required that – yes – PETN is present."

[85] He did go on to say:-

> "A. I mean just to be absolutely clear it probably is. I am not saying it is not sufficient to give an unequivocal yes it's there.
>
> Q. Yes, you are challenging the results as they are presented to you, conceding that it probably is.
>
> A. Well I don't concede that, no I think that's a fair comment to make.
>
> Q. Yes.
> A. . . . but I would – its such poor – well the reason that I don't say it's not there is that they have got two methods coming into the same result, and you have to give some weight to that.
>
> Q. Yes.
>
> A. But this – the quality of these results is poor."

[86] Mr McMillen in response to Mr Doyle's criticisms in respect of the finding of PETN on the coat pointed out that FSNI was externally accredited and approved by the UK accreditation service and the work undertaken in the laboratory for the identification of explosive residues were assessed and accredited by that body. The technique used was widely accepted and had been used by other agencies. The combination of the two methods gave competence that a compound had been detected and was present in the sample. In terms of the identifications that were achieved during casework the results would have been checked and verified by another competent person before the results were presented. FSNI participated in quality assurance trials. Mr McMillen was of the opinion that the separation peaks in the analysis were clearly identified as relating to different compounds and the retention time of those compounds could be relied on. He rejected Mr Doyle's

claim that the base line in the analysis was noisy and unstable. Rather, in his view, it was quite a good base line for the chromatography system applied.

[87] Both Mr McMillen and Ms Shaw rejected Mr Doyle's use of the likelihood ratio. Mr McMillen considered that the use of the likelihood ratio and statistics were only applicable where there was sufficient statistical data and data based on which to base conclusions. The data bases would need to be nationally accepted or certainly accepted within the sector of field of work. Ms Shaw did not consider the case was an appropriate one in which to use an evaluative or likelihood ratio approach she applied and properly applied an investigative approach.

[88] In R v. T [2010] EWCA Crim 2438 the English Court of Appeal considered the use and application of the likelihood ratio. It was a case which raised an identification issue arising out of footwear marks. The central issue in the case was the use of the likelihood ratio in forming an evaluative opinion on the degree of likelihood that a mark had been made by a particular item of footwear. The Court of Appeal accepted the definition of likelihood ratio in "Principles of Interpretation – Application of the likelihood ratio in marks cases" by Jackson Champod and Evett.

> "The probability of the observations (or Evidence) given that the event (C) was true and given the truth of the background information (I) divided by the probability of the observations (E) given that event was not true (C) and given the truth of the background information (I)."

[89] The Court of Appeal summarised the principles of the admissibility of expert evidence in the following way. The court will consider whether there is a sufficiently reliable scientific basis for the evidence to be admitted but if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted it will leave the opposing views to be tested in the trial before the jury. It was not the experts function to evaluate other evidence in the case.

[90] It is clear that the likelihood ratio is permitted as a means of expressing a statistical opinion in DNA cases. The court noted that no case had been drawn to its attention suggesting a mathematical formula is appropriate where it has no proper statistical basis. An approach based on mathematical calculations is only as good as the reliability of the data used. In that instance there was an insufficient data base to found an application of the likelihood ratio. It was in the court's view impossible to see on the present state of information how any mathematical figure could be properly calculated to express a more definitive evaluative opinion there being too many variable and uncertainties in the data. The court went on to endorse the approach expressed by Rose LJ in R v. Adams who concluded that the use of the likelihood ratio

was inappropriate for use in jury trials for a number of reasons. The jury's task is to assess the evidence by common sense and their knowledge of the world and not by reference to a formula. Outside the field of DNA and possibly other areas where there is a firm statistical base the English Court of Appeal made it clear that Bayes theorem and likelihood ratio should not be used.

[91] The fact that there is no reliable statistical basis does not mean the court cannot admit an evaluative opinion. I remind myself of what Hughes LJ said in R v. Atkins and Atkins [2009] EWCA Crim 1876:

> "The absence of a data base is something which will undoubtedly be exposed in cross-examination . . . The witness's answers may be satisfactory or unsatisfactory but will be there to be evaluated by the jury which will have been reminded by the judge that an expert's expression of opinion is that and no more and does not mean that he necessarily is right. Similarly the expert may be expected to be tested (in that case upon the extent of which he has not only looked for similarities but actively sought out dissimilarities). Cross examination will also be informed by the fullest disclosure of his method, generally arising out of his working notes in the particular case being tried."

[92] In R v. T the court considered that the expert footwear examiner can in appropriate cases use his experience to express a more definitive evaluative opinion where the conclusion was that the mark could have been made by the footwear in question. While R v. T was dealing with a different evidential context the statements of principle made therein have relevance in the context of the present case.

[93] Both sides relied on and called in aid to support their conclusions two articles. One was by *Zeichner Leven and Dvorachek* ("*Gunshot residue particles formed by using ammunitions that have mercury fulminate primers").* The other was by *J S Wallace "Discharge residue from mercury fulminate primed ammunition".* The abstract from *Zeichner*'s article states that "it is observed that much lower percentage of mercury containing GSR particles were found in samples taken from a shooter as compared to the percentages of such particles in samples from cartridge cases. This fact must therefore be taken into account when interpreting case results".

[94] In relation to samples taken from a shooter's hands in the case of Russian 7.62 mm mercuric fulminate ammunition 95% of the sample particles taken from the cartridge cases showed evidence of mercury whereas none of

the 40 particles taken from the shooter showed any mercuric content. A similar result was found in relation to 9 mm Italian ammunition. In the case of Egyptian 9 mm mercury ammunition and 7.62 mm ammunition where there was strong mercuric content in the sample cartridges there were only 12% and 11% representation of the mercury in the samples taken from the shooter's hand. The experiments demonstrate that in the case of some mercuric based ammunition there can be no evidence of mercury in the samples taken from the shooter's hands. The explanation proffered for the absence or very diminished representation of mercury is the vaporisation of mercury at high temperatures affecting the GSR particles moving with the burning propellant and ejected on the shooter. The findings of a complete absence of mercuric content related to numbers of particles less than those found on the coat in the present case.

[95] Wallace in the introduction to his article pointed out that *"despite the frequent use of mercury containing ammunition in shooting incidents in Northern Ireland discharge residue particles containing mercury have been rarely encountered in casework."* He noted as possible reasons the volatility of mercury and the age of the ammunition. The experiments carried out produced large number of particles ranging from 291 to 306 particles in the case of the mercury based ammunition tested. While the proportion of mercury containing particles was very low there was some evidence of mercury in the samples. Wallace noted that the variation in mercury levels in the ammunition would introduce large errors in the percentage recovery some in the region of + or – 16%. Given the low percentage of mercury containing particular detected in properly collected residue from indoor firings under favourable laboratory conditions he concluded that it was not surprising that very few mercury containing particles were detected in casework.

The Tracker Device Evidence

[96] A member of the army identified by a personal identification number ("PIN") 8625 gave evidence that he was tasked to deploy for intelligence purposes a vehicle tracking device on the gold Citroen Saxo car FCZ9046. The device which had a serial number B22085 with an electronic signature code 100.020 was fully functional. The witness was responsible for retrieving data from the device. When retrieved the data was stored on a stand alone computer at his base. The last fix in the download which he took was at 1.15 am on 10 March. On 10 March he downloaded the data between 1.15 and 3.15 am and he did so at the direction of another officer PIN 2010. Subsequently on 11 March he was tasked to go to Maydown PSNI base and retrieved the device which he brought back to his base. There he put it on a table in the storage garage area taking no further steps in relation to it. The next day he went on leave. After his return some six days later he was asked to look at the device to see if he could retrieve information from it but he could not do so because the device had been cleared of its data. The data which was downloaded between 1.15 and 3.15 am on 10 March recorded information as to the precise

longitude and latitude of the vehicle thereby providing evidence of a precise location. If the vehicle was on the move it gave a new fix every 2 minutes. If it was static it recorded a fix every 2 hours. The witness accepted that as a result of the wiping of the material from the device no information was available in relation to the vehicle subsequent to 1.15 am. The witness could not provide an explanation why the equipment was wiped. This had occurred in breach of an unwritten protocol that information on the device should not be wiped until all the data had been downloaded and until the equipment was needed for reallocation.

[97] Another army officer PIN 1413 handed over the device to DCI Harkness having recovered the device from the secure storage area. He confirmed that the normal procedure in respect of a device after retrieval from one intelligence operation would be to remove the data in preparation for redeployment. The device had not in fact been redeployed. The witness accepted that it would normally be a simple matter to determine who could have deleted the equipment.

[98] An officer with PIN 2010 who was PIN 8625's superior officer gave evidence that he was aware of the deployment of the vehicle tracking device. He was on leave between 9 and 16-18 March. On his return he was made aware that the police were trying to retrieve the tracker device. The device should have been in the same condition it was in when it was when it was retrieved from the Citroen Saxo car but it had been cleared as if made ready for redeployment. At that stage PIN 8667 was the person responsible for storing tracker devices but the tracker device was being kept in a separate storage facility different from the normal facility. It had remained in the area for which PIN 8625 was responsible when he left the device there before his leave. The witness could not identify who had deleted the data. He accepted that the tracker device should have been bagged and labelled. He agreed that officers were trained on the proper use and issue of tracker devices.

[99] PIN 8667 had responsibility for the maintenance and accounting of equipment and had issued the tracking device to PIN 8625. He did not regain possession of it until about 20 March. It was his function to maintain the security of such items. He had locations which he would define as storage in which to keep such material but there was also an area where qualified soldiers could keep the equipment themselves. Records were kept of transactions relating to such equipment. A form 10/33 was issued when the equipment was issued. Normally that record would be destroyed when the equipment was returned. The equipment remained with him until 24 July. He was made aware by PIN1413 that particular pieces of information might be required from the tracker device as part of an investigation. Shortly prior to 24 July PIN 1413 requested him to hand over the tracker device to the police.

[100] DCI Harkness gave evidence that he became aware a few hours into the investigation following the murder that there had been some form of surveillance on the car. The conversion of the downloaded information into longitude and latitude to trace the locations and movements of the vehicle was done through another police department responsible for surveillance activity in Northern Ireland. The timing of the location of the car in Drumbeg was a matter of real interest to the police. The investigation team was only given approval to tentatively explore the information from the tracking device sometime around 23 March 2009. DCI Harkness was only given the go ahead to recover the actual tracker device in July. It is clear that there was disagreement between the Army and the PSNI about the release of the tracking device and a great deal of uneasiness on the part of the Army in relation to the use of the equipment and the information on it. So concerned were the police in relation to the information that they considered obtaining a warrant to seize the device from the MOD. Mr Harkness suspected that the Army's concerns arose because the device was an intelligence tool, was highly sensitive and had not previously been used for evidential purposes in the United Kingdom.

[101] The Crown called Witness K, an electrical and electronic specialist in navigation systems. He has experience working for the Government in that field. He is a Fellow of the Royal Institute of Navigation. He conducted tests on the tracker device in question on 18 and 19 January 2010. The device provided the accuracy the GPS system is known to provide having an accuracy of approximately 4 metres throughout the day. At one point only it was inaccurate to the order of 8 metres. The device tracks the position of the vehicle and measures the time delay from the satellite to its antenna. It measures that time delay and then computes from that knowing the time that the signal left the satellite and where the satellite was on its position on earth. The data downloaded from the tracker device provides sequential fix numbers. The date and time is recorded. The precise latitude and longitude is shown. The data shows whether the vehicle is stationery or moving and the number of satellites being tracked is shown. In one column what is called the dilution of precision is shown if the figure is over 6 in that column the accuracy is bad and if it is under 1 it is very good. The data in fact recorded reliably accurate fixes. The witness analysed every fix from the data downloaded at 1.15 on 10 March between 8 March and 10 March using the data and referring to a map prepared tracing the location of the vehicle at specified times. From the downloaded data it was possible for the witness to show the location of the vehicle at relevant times from which the approximate route followed by it when it was moving could be deduced. The witness prepared a schedule of GPS coordinates from fixed number 10448 on 8 March 2009 at 33 seconds after 11.02pm through to fix number 10678 on 10 March 2009 at 28 seconds after 01.15am. The vehicle was static at 16 Collingdale, Craigavon, the second defendant's home address, between 11.00 pm and 2.19 pm on 9 March. It then travelled to the vicinity of 5 Meadowbanks and

returned to 16 Collingdale at 2.25 pm where it briefly stopped before proceeding to the vicinity of 309 to 314 Drumbeg where it remained for a very short time before going to the Old Portadown Road and then to Levin Road before returning to the vicinity of 16 Collingdale where it arrived at 2.51 pm where it remained until 4.17 pm and travelled to near to 5 Meadowbank at 4.21 pm and thence to 6 Ardowen where it arrived at 4.25 pm. There it remained until 6.45 pm. It then proceeded to 501 Drumbeg and arrived at 6.48 pm. It remained there until 7.00 pm and then proceeded to Francis Street, Lurgan Sports Pavilion and after stopping there for just over a minute. It returned to 309 to 314 Drumbeg arriving at 7.11 pm and remaining there until 9.56 pm. It then moved off and at 10.05 pm was at Old Portadown Road. Just over 2 minutes later it was at the junction of Glenholm Park and Downshire Avenue. It returned to the vicinity of 16 Colindale, Craigavon arriving at 10.06 pm stopping briefly at Collingwood. The car remained close to 16 Collingdale, Craigavon until 10.16 pm. It then proceeded to Edward Street arriving at 10.25 pm remaining there until 10.30pm and then going to 613 Clonmeen, Craigavon where it remained until 11.11. Thereupon it went to 646 Ardowen arriving there at 11.15 where it remained until the data ended at 1.15.

[102] K was cross examined on behalf of Brendan McConville in relation to the recorded data relating to the proximity of the car to the first defendant's house at 5 Glenholm Avenue. There were fixes between 24 and 28 February which showed the car was stationery outside 5 Glenholm Avenue. Fixes 7596 to 7599 showed the car was there between 4.51 am and 8.48 am on 24 February and on 27 February a fix 8189 showed the car arrived there at 6.31 pm. K was challenged on the point that the data did not show the vehicle stopped outside that address although it was at the junction of Glenholm Park and Downshire Avenue. Witness K pointed out that the car was in the proximity of Glenholm Avenue and in terms of distance would have been approximately 200 metres away from 5 Glenholm Avenue.

[103] Witness J, a senior director of an electronic company with 29 years' experience in designing electronic surveillance devices and system, confirmed that the tracker device in question had been sold to the Ministry of Defence. It was tested on 27 August 2009 and it was found to be functioning accurately in accordance with its design specification. He confirmed that once data had been removed from the hard drive it was not retrievable. The device was programmed to record the location of the vehicle every 2 minutes when the vehicle was moving and every 2 hours when it was static. He had seen the data which had been downloaded and put on a working disc and he confirmed that it was reliable and had not been corrupted in any way. In relation to the deletion of the material from the hard drive he said that it would take 3 to 4 minutes to delete. A programme to delete would have had to have been run and whoever was doing the deletion would have had to respond affirmatively to a command "Do you want to delete?" Accordingly, it

was the witness's view that deletion would not have been something that could have happened purely accidentally.

[104] Counsel for the defendants made clear that they did not dispute the lawfulness of the authorisation of the deployment of the tracker device on the Citroen Saxo car. Further they indicated that there was no legal challenge to the admissibility in evidence of the downloaded data.

[105] I am satisfied that the tracker device was fully functional and was working accurately in recording the fixes which it did. None of the evidence in that regard was seriously challenged. I am satisfied that the data was downloaded at 1.15 am on 10 March 2009 by PIN 8625 and that data provides an accurate picture of the location of the vehicle at the times shown in Exhibit 244 (CGM9) and on the table prepared DFM1 prepared by DI McGrory. While the Crown witnesses from the Army who gave evidence about the clearing of the data from the hard drive were rigorously cross examined as to the circumstances in which the deletion occurred the absence of the data after 1.15 am on 10 March 2009 does nothing to call into question the evidence from the data before that time. That data provides compelling evidence as to the movements and location of the car in the hours leading up to and immediately after the shooting incident. The car arrived close to the scene of the shooting at 7.11pm, the distance from the car and the shooting location being just under 240 metres. It remained there until 9.55 some 10 minutes after the shooting. It was in close proximity to 309 Drumbeg where black bin bags closely linked to the bags used to wrap up the weapon and magazine were found. The car then proceeded to arrive at a point at the junction of Downshire Avenue and Glenhome Park which was in close proximity to the address of the first named defendant who was himself seen close to the shooting point according to the evidence of Witness M. The owner of the car, the second defendant, clearly knows the first defendant well and was seen in the company of the first defendant in the course of the afternoon at the Benefits Office. The evidence relating to Brendan McConville's presence in the Benefits Office with John Paul Wootton came from stills produced from CCTV recordings. Brendan McConville is to be seen to wearing an Army camouflage type coat or jacket which is consistent in appearance with the jacket which M described seeing on the night in question save that it is not knee length though it is clearly bulky nor is it possible to see on it a hood or German logo.

Evidence relating to Wootton's involvement with Republican para-militarism

[106] Evidence was downloaded from a computer recovered from 401A Ardowen (Ex 8) showing that John Paul Wootton was involved and associated with the Craigavon Republican Youth New Unit. The downloaded documentation makes reference to '*fully support and co-operate with all republican armies.*' It referred amongst other materials to *training recruitment* -

weaponry and *balaclavas*. Photographic evidence Ex 179 showed Wootton wearing a paramilitary uniform consisting of a black beret with an Easter Lily upon it, black sunglasses and a camouflage jacket. This evidence falls to be interpreted as showing Wootton dressed in paramilitary uniform and therefore representing himself to be a member of an active and committed terrorist organisation. A further photograph Ex 70, shows Wootton as a participant in a Republican colour party at a Republican event. Wootton is centre of the three man colour party. These pieces of evidence were introduced and relied on as relevant evidence of bad character pursuant to orders made by Hart J.

Wootton's involvement in gathering information useful to terrorists

[107] Witnesses E and B gave unchallenged evidence of Wootton's involvement in seeking to gather information relating to a member of the PSNI. This evidence clearly demonstrated efforts on the part of Wootton to obtain the address of a police officer a period of less than 2 weeks before the murder. The transcript of the evidence given by Witness E when interviewed included the following:

> "I met (John Paul Wootton) about a year ago. We would hang about with the same friends so I knew him through other people. And it must have been about two weeks ago on Thursday night he was, I was talking to him on MSN and he said he needed to talk to me. And eh he couldn't put it in writing so he come down in the car and he asked me was I going with a policeman's daughter. I said I was. Why is, why are you looking to know and he said address, and I told him to "f" off . And then I said he doesn't deserve to be shot for being a cop because that would be the sort of nonsense he would talk. And ehm he said a cop's a cop."

In addition to relying on that evidence in relation to Count 3 the Crown relied on that evidence to support its assertion that there was no innocent explanation for the evidence against Wootton. The Crown submitted that it made it more likely that he was involved and part of the murder in light of what he did and in light of his significant active association with a Republican movement involving the targeting of members of the PSNI for terrorist purposes.

Sighting of the car on 10 March 2009

[108] CCTV evidence recorded the arrival of the Citroen Saxo car at a car park in Lurgan adjacent to an ATM at 7.00 am on the morning of 10 March. The car

had two passengers. Money was then drawn from the ATM the relevant bank records showing that the money was drawn out of the account of Brendan McConville.

Interviews of the Defendants

[109] On 20 October 2009 Brendan McConville was arrested under Section 1 of the Terrorism Act 2000 and cautioned. He made no reply. He was interviewed by the Police between 11th March 2009 and 21st October 2009 on 43 occasions. The Court was provided with a synopsis of those interviews which had been agreed between the Prosecution and the Defence. The body of the interviews was admitted as an Exhibit. During the course of those interviews the Defendant was asked about his movements and associations and all the relevant evidence in the case was put to him. As was his right he made no reply to any questions which he was asked. During the course of the interviews on 23 March 2009 between 1935 and 2004 hours Mr McConville introduced a prepared statement:

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

[110] At 0305 hours on Tuesday 10th March 2009 Sgt. Lockhart was briefed to arrest John Paul Wootton. He was arrested and cautioned to which he made no reply. Mr Wootton was interviewed on 37 occasions between 11th March 2009 and 23rd March 2009. During the course of these interviews he was asked about his movements and the evidence in the case was put to him. As was his right he made no reply in relation to any questions that he was asked.

Applications that the defendants had no case to answer

The first named defendant's application

[111] Central to counsel's argument was the proposition that the Crown case against Brendan McConville depended entirely on the identification evidence and if that evidence was held at the direction stage to be of such poor quality that it had to be taken away from the notional jury there was no other evidence which could justify a jury convicting.

[112] The primary submission made by Mr Kelly was that this case was one in which the Turnbull guidelines clearly applied. Given the circumstances of this identification it was submitted that the court was bound to treat the quality of this evidence as poor. That being so a jury, properly directed, could only convict if the judge were to find that there was other evidence fit for the jury which went to support the evidence of identification. It was argued that the evidence as identified by the prosecution did not support the identification made by witness M. It was accordingly argued that the case ought be withdrawn from the tribunal of fact at the direction stage because in accordance with the Galbraith test 'no jury properly directed could convict in the circumstances'.

[113] In support of the direction application Counsel called in aid his submissions in the application to exclude the evidence. In the context of the direction application he argued that the combined effect of those observations upon M's evidence was to leave the evidence properly described as being of poor quality within the Turnbull principles. A number of specific complaints were made: (a) The witness had clearly lied about his eyesight. (b) The conditions of the identification were in darkness. There is no evidence as to whether or not the light at the site of the electricity box was working. There was further no evidence that the light would help the 'identifier'. (c) On both occasions rain was falling. On the second the rain was 'lashing down'. (d) The witness expressed a concern not to engage with the men. (e) Mr Page concluded that that the witness would not have been able to recognise facial features from the distance at which he was standing from the 'suspect'.

[114] Counsel referred to the questions adumbrated in Turnbull contended that each of the answers to the questions posed therein revealed the need for caution. On the question of the length of time the witness could have seen the person the answer was seconds face to face. On the question of distance the answer was 16-21 yards. On the question of whether the observation was impeded in any way the answer was that the witness had eyesight problems. On the question whether the witness had ever seen the person before it was unclear as to when though he had seen him previously. It was unclear as to how often he had seen him before. The lapse of time between the original observation and the identification to the police was 11 months. There was a material discrepancy as to the appearance as described and his actual appearance namely the description of the coat.

[115] Counsel finally submitted that Parliament had laid down a relevant mandatory code designed to protect the suspect in the light of what can often be dangerous in the sense that recognition identification can often be mistaken. In this case the Code had been ignored even if not intentionally. The first defendant had lost that opportunity to test the identification by way of proper procedure. All this heightened the need for caution and should lead the court to conclude, in this case, that the evidence was of poor quality.

[116] In meeting the Crown case on the identification which had been effectively set out in its submissions in the application to exclude the evidence of M, Mr Kelly said that the Crown's reliance on the fact that the first Defendant was living in the locality was misplaced. While that point might have had some force if he had been on his street or by his home in fact he was nowhere near his home when he allegedly sighted the first defendant in Lismore. Further there was no evidence that he has ever been there before. Thus it was argued that this evidence failed to support the identification. In relation to the finding of the coat in the car it was not established that this coat was in the car at the time the alleged identification took place. The coat was found, in the car, at 10.30 pm on the 11 March 2009 at Maydown. In the absence of direct evidence there was no justification for the inference that the coat was in the car at the relevant time. It could have been put there by his son or someone else on a previous occasion. Others apart from Brendan McConville had access to the car and the car had been tracked to his home on previous occasion. What, it was asked, if he had touched the coat or even left the coat in the car some time before. The car was not tracked to his home on the day of the killing. There was real chance that the coat may not even be his. If so or may be so then it could not support the identification. In addition there was evidence that at least two others, from time to time, could also have worn the coat. It would be wrong to afford strength to an inference from the identification itself for the obvious reason that the claimed support would no longer be independent. This coat was neither described by witness 'M' nor identified by witness M, despite there being clear opportunity to do the same. This failing was worsened by the effort by the officers to press M to say that Brendan McConville had been wearing the coat in the car. There was no other evidence that he was in the car on either the day or night in question. That greatly reduced the significance of the coat in the car. The evidence of DNA was equally consistent with it being there by virtue of secondary transfer. Counsel rejected the Crown's argument that M's honesty in not giving a positive identification in respect of Person A supported the identification case. That evidence did not support the correctness of the identification of Brendan McConville by M. Nor did that evidence that M had been threatened assist the Crown case. The witness may well have seen men in the vicinity on the night in question but the issue was what supported his identification that one of those men was Brendan McConville.

[117] The evidence of identification being of poor quality counsel contended that in the circumstances there was simply no independent evidence capable of supporting it. If the coat in the car was to support the identification it had to be shown to have been there be in the car at the relevant time. The evidence of that was weak and surrounded with coexisting circumstances which certainly weaken, if not destroy, any inference that it was. For a jury to be sure upon the basis of such a vital inference they would need to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The second named defendant's application

[118] Mr Harvey submitted that the case against John Paul Wootton was fatally flawed because there was no evidence that the particles from Wootton's clothing, the interior of the car, the boot and its contents were in any way connected to the shooting. The evidence pointed to them being linked to some other source unconnected with the shooting. The Crown witness's analysis of the forensic evidence relating to the particles on the coat and the car was entirely flawed. The atypical evidence on the coat of the very high levels of particulars of antimony-tin has simply not been subjected to proper scientific analysis. Although the Crown's experts had access to the murder weapon, a supply of NNY82 ammunition and magazine and the spent cartridges they had failed to properly test the evidence and disregarded contradictory evidence which showed the presence of particles with evidence of mercury and copper content. They had not established a suitable reference sample to be used in the interpretation of the particles detected on suspect items. They should have appreciated the need for reliable reference samples and the need to test the likely outcomes given the hypothesis that the code had been used to wipe or wrap the gun during or after the firing. Although Mr McMillen had sought to maintain the validity of his tests up till he gave evidence he had concluded the tests were compromised by the failure to clean the weapon. The scientific evidence was restricted because of the failure to carry out proper tests. Proper testing is predicated on the acceptance that what one is seeking to establish is the reasonable range of expectation of quantities and composition of particles transferred. The failure to carry out proper tests had a deleterious effect on the expert opinion unless there can be shown that a body of established and accepted research exists. Mr McMillen had concluded that his test results should be treated as of no validity and that was reached because of the failure to clean the weapons in which there could have been a build-up of lead from particles discharged but there was no scientific evidence offered for that conclusion. In effect the Crown had elevated the coat in the car to the status of its own reference sample. Having rejected the outcome of the tests carried out the Crown had inexplicably failed to carry out proper tests.

[119] Ms Shaw and Mr McMillen agreed the antimony/tin particles were indicative rather than characteristic of firearms discharge. Ms Shaw's strongly expressed conclusions that the coat particles were linked to a firearms source were not based on an adequate scientific basis. The finding in relation to the proportional composition of the antimony-tin particles was not based on a recognised method. No scientific justification supported the use of the energy dispersive spectroscope or as a method for quantitative analysis.

[120] The prosecution hypothesis as to how the particles got on the coat in the car were inconsistent with the evidence. Evidence that the particles on the coat came from the discharge event on 9 March 2009 was essential to the

circumstantial case advanced by the Crown and there was no direct or inferential evidence. It was inherently unlikely that if the defendant's vehicle was used to transport either the weapon or personnel that the vehicle would have stopped to dispose of the weapon but no other incriminating material and would subsequently return to the vicinity of the crime at a time when there would be police activity; that he second defendant would use his own vehicle, would remain at a location not immediately accessible to those to whom it was supposedly providing logistical support when there was another and then to remain some ten minutes after the shooting.

The Crown's response to the applications for directions

[121] Mr Murphy in his skeleton argument correctly stated the principles to be applied by the court in its approach to an application by a defendant at the close of the Crown case that the defendant has no case to answer. Where a Judge is sitting with a jury the principles are set out in R v Galbraith [1973] Cr.App.R 124 ("Galbraith") as applied in R v Courtney [2007] NICA 6 and Chief Constable v Lo [2006] NICA 3. The Galbraith principles are set out in Archbold 2012, paragraph 4-364. At 4-365 in the Editor's note reference is made to Brooks V DPP [1994] 1AC 568 at 581 where it was said that in the context of committal proceedings the question of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case. In a circumstantial case it indicates that the correct approach is to look at the evidence in the round and ask whether looking at all the evidence and treating it with appropriate care and scrutiny there is a case in which a properly directed Jury could convict: R v P [2008] 2 Cr.App.R 6 CA. In R v Goring [2011] Crim.L.R. 790 it was stated that it is necessary to make an assessment of the evidence as a whole and not simply the credibility of individual witnesses or evidential inconsistencies between witnesses. It is for the jury to decide what evidence to accept and reject.

[122] In respect of scientific evidence in R v Gian and Modh-Yusoff [2010] Crim.L.R. 409 the Court of Appeal stated:

> "The mere fact that as a matter of scientific certainty a proposition consistent with innocence cannot be ruled does not justify withdrawing the case from the Jury. The Jury must consider expert evidence in the context of all other relevant evidence and make judgments based upon realistic and not fanciful possibilities."

[123] R v William Courtney [2007] NICA 6 the Court of Appeal followed and adopted the approach in Chief Constable v Lo [2006] NICA 3 in the context of non-jury trial. At para 14 of Lo the Court said:

> "The proper approach of a Judge or Magistrate sitting without a jury does not, therefore involve, the application of a different test from that of the second limb in R v Galbraith. The judge must engage in the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that a Judge should not ask himself the question, at the close of the prosecution case, "do I have a reasonable doubt?". The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. When evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it would not conceivably support a guilty verdict."

[124] In Courtney the Court of Appeal stated that in a case which depended on circumstantial evidence it was essential that the evidence was dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it had to be judged. A globalised approach was required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case. The evidence falls to be considered in an all-encompassing basis.

[125] Between paragraphs 2 and 6.18 of its skeleton argument the Crown set out the basis for its argument that all the circumstances emerging from the evidence gave rise to a strong circumstantial case against both defendants. The Crown submitted that the court could not at this stage conclude that there was no circumstances in which a jury properly directed could convict.

Ruling on the direction applications

[126] It is necessary firstly to deal with the case made on behalf of Brendan McConville that M's identification evidence was of such poor quality that there was no case against the first defendant. There was no evidence on which the jury could rely as supporting independent evidence. In a case against a defendant depending wholly or substantially on the correctness of the identification of the defendant which the defence alleges to be mistaken, where the quality of the evidence is poor R v Turnbull shows that the case should be withdrawn from the jury unless there was other evidence capable of supporting the identification. Turnbull gives as an example of poor evidence identification of the basis of a fleeting glance or a longer observation made under difficult circumstances. If the quality of the identification is poor there must be an acquittal unless there is other evidence which goes to support the correctness of the identification. It need not be corroboration in the old technical sense provided the effect of the evidence is to make the jury sure

that there has been no mistaken identity. Lord Widgery CJ went on to say that odd coincidences can if unexplained be supporting evidence.

[127] In an identification case there are two separate questions for the jury to decide. Firstly is it satisfied that the identifying witness is honest in his evidence and are they satisfied that he genuinely thought that he had identified the defendant? Secondly if the jury is satisfied of his honesty is it sure that the identification witness has not made a mistaken identification. The question of the witness's honesty involves an issue of credibility which in this case should be left to the tribunal of fact. It could not be said that the evidence on that issue had been so discredited. That it should be taken away from the jury.

[128] At this stage of the trial the question arises as to whether the quality of the identification evidence falls to be treated as "poor" within the sense of that word as used in Turnbull because of the various criticisms made by Mr Kelly of the evidence in the course of his submissions. In R v Oakwell 66 Cr. App. R. 174 Lord Widgery CJ referring to Turnbull (in which he had delivered the judgment) said that it was really intended to deal with "the ghastly risk run in cases of fleeting encounters". In Turnbull itself the court pointed out that recognition may be a more reliable basis for identification than the identification of a stranger, but even then the jury should be reminded that mistakes in recognition can occur if close relatives or friends.

[129] Turnbull indicates that the trial judge must make a judgment as to the quality of the identifying evidence and if in his opinion it is so poor that it should not be left to the jury the case should be withdrawn and an acquittal ordered in the absence of other incriminating evidence fit to be left to the jury. This should be done unless there is other evidence fit to be left to the jury which is capable of independently supporting the identification.

[130] In terms of the quality of the identification evidence Mr Kelly rightly identified a number of features in the evidence that went to substantially weaken its reliability. These have already been set out at length above. The Crown stressed on the other hand a number of features in the evidence that went to strengthen its reliability relying on it being a recognition case in which the defendant was known to M for years, was a person well known in the area, had a distinctive physical appearance in terms of hair colouring and build, was observed face to face on two occasions had spoken to the person he was identifying who was wearing a green Parka camouflage coat albeit it was not knee length and did not appear to have a German logo. Independent evidence did show McConville a few days prior to the shooting wearing a bulky green Parka coat at the benefits office.

[131] The Crown sought in addition to rely on independent evidence which it said was capable of supporting the identification. The coat found in the car bearing McConville's DNA established a sufficiently close personal connection between McConville and the car which was in the area at the time as to give rise to the inference that McConville was the owner of the coat, an inference supported by the presence of a similar coat of the same size (XL) and the same make found in McConville's own home. The evidence which the jury could have accepted was that the witness had been intimidated and told to keep his mouth shut. This was relied upon the Crown as being capable of supporting the accuracy of the identification because those who threatened the witness must have concluded that he had had an opportunity to identify persons involved in the relevant incident.

[132] The Crown also relied on the fact that M had consistently indicated that he was insufficiently sure to be able to definitively say who person A was. He had initially thought he was 90% sure of his identity and that was subsequently reduced to 50% sure but he said that he felt that even at 90% sure he could not be sure. The witness's approach in relation to the identification of witness A, the Crown asserted, supported his evidence against McConville which he expressed with certainty and conviction.

[133] The Crown also argued at the direction stage that the court should take the Crown case at its height. The allegations of alleged drunkenness, psychological problems, the fact that M was allegedly perceived to be a "Walter Mitty character" in the area, was motivated by monetary considerations were all matters put to M which he denied and at the stage of the close of the Crown case they had not been made good.

[134] I accepted the Crown case that at the close of the prosecution case there was a case for both the first and second named defendants to answer. On the identification evidence taking account of the shortcomings properly identified in respect of M's identification evidence, taking account of the Crown's points in support of the evidence and taking account of the evidence relied on by the Crown as independent evidence tending to support the identification there was sufficient evidence which could lead a jury to accept that there was a proper identification and other evidence to support it. I concluded accordingly that there was identification evidence fit to be left to the jury. I concluded that there was sufficient evidence to give rise to a prima facie case against he first named defendant calling for an answer.

[135] In respect of the second named defendant's application for a direction I was also satisfied that he had a case to answer. The evidence in relation to the particles on the coat was such that it was for the jury to

assess which conclusions were to be drawn from the totality of the evidence, both the evidence relating to the particles on the coat and the car and all the surrounding circumstances. The scientific evidence which fell to be analysed by the forensic experts in a scientific context must ultimately be considered having regard to all the circumstances of all the evidence. The evidence in relation to particles cannot be seen in a vacuum. The particles found on the coat were found in a car which at a very material time have been parked in close proximity to the scene of the shooting at a house close to a house from which bags were taken to wrap the firearm when it was being prepared for hiding. The coat bore the DNA of Brendan McConville in circumstances indicating prima facie a very close physical connection between McConville and the car. He denied ownership something which the jury may have rejected in the light of the evidence. The jury could have accepted the evidence that McConville was at the scene of the shooting and that in the circumstances he was connected to the car at the time. That car contained evidence of firearm residue indicating its close proximity to other gun related crimes. The car was owned by John Paul Wootton who subsequently accepted he was the driver that night having regard to the way questions were put in the course of the cross-examination of Mr Harkness. John Paul Wootton was an active participant in a branch of Republican paramilitarism still actively involved in terrorism. The coat and the car also bore evidence which could satisfy a jury that its wearer had been in contact with Semtex explosives, an explosive substance widely used in terrorism. All these circumstances taken with the fact that John Paul Wootton had two weeks before the shooting actively sought to gather information about the whereabouts of the policeman could lead a jury to conclude that J P Wootton was an active participant in the events on the night in question. I was accordingly satisfied that the second named defendant had a case to answer.

[136] Following the court's rejection of the direction applications the court addressed counsel for the defendants in the usual terms indicating that if the defendant chose not to give evidence the court might draw such inferences as appeared proper from their failure to do so. I duly asked if the defendants intended to give evidence and if not whether they had been advised about the inferences which might be drawn if they chose not to do so. Both Mr Kelly and Mr Harvey on behalf of their respect clients stated that their clients did not intend to give evidence and they further stated that their clients had been advised about the inferences which might be drawn from their failure to do so.

[137] The defendant is entitled not to give evidence, to remain silent and to make the prosecution prove his guilt beyond reasonable doubt. Two matters arise for him not giving evidence. The first is that the case is tried according to the evidence. The defendants have given no evidence at their trial to undermine, contradict or explain the evidence given by the

prosecution. Secondly, the law is that the court may draw such inferences as appear proper from the failure on the part of the defendants to give evidence. The court must decide whether it is proper to hold the defendant's failure to give evidence against him in deciding whether he is guilty. The court may only draw and adverse inference against the defendant for failing to go into the witness box to give an explanation for or an answer to the case against him if the court considers that it is fair and proper conclusion for the court to reach. The court must first be satisfied that the prosecution case is sufficiently strong to clearly call for an answer by the defendant. Secondly it must be satisfied that the only sensible explanation for his silence is that he has no answer or none that would bear examination. I remind myself that the courts should not find the defendants guilty only or mainly because they did not give evidence. But the court may take into account some additional support for the prosecution case the fact that the defendants have not given evidence when deciding whether the defendant's case is true or not.

[138] The first named defendant called as a witness was Mr Sherridan who 2009 worked as a security guard at the Brownlow Leisure Centre. His job involved patrolling the car park area. After M had told the police about his claim to have seen McConville on the night in question the police spoke to Mr Sherridan about a month later and again in February 2012. He indicated that he did not know M and he could not say after that length of time to whom he said hello that night. He was not asked if he had seen a family comprising of a man, a woman and two children and a dog. His evidence was that he would rarely see families going that way. He said that night he never saw a family and he said that no one in a family group had nodded to him or spoken to him on that occasion. He accepted in cross-examination that what he had said to the police was that he would say hello to a lot of people and he would find it hard to remember everybody he had said hello to.

[139] When the first named defendant was interviewed by police he made the statements set out above. He denied putting the AK47 rifle to his shoulder and shooting PC Carroll. He made reference to having been in the Saxo car on many occasions and denied owning the coat in the car. I remind myself of the standard direction to the jury as set out in paragraph 4.22 of the Bench Book that the court may consider that less significance should be given to his explanation and denial because it was not made on oath, has not been supported on oath and has not been tested by cross-examination as would have been the case if the first named defendant had given evidence.

[140] In this case the court heard evidence against the defendants implicating them in involvement in firearms offences and implicating the second named defendant in Republican paramilitarism. These pieces of

evidence were introduced under Article 6(1)(d) of the Criminal Justice Evidence (Northern Ireland) Order 2004. Leave to do so having been given by the disclosure judge. That evidence is thus properly before the court. The court may use that evidence of the defendant's bad character if it may help to resolve an issue between the prosecution and the defence. The court may take it into account when dealing with the credibility of such statements as the defendants have made by way of defence to which the court must have regard. In the first named defendant's case this refers to the statement he made to the police. In the second defendant's case part of the defence case put on his behalf related to his claim that he followed the route established by the tracker evidence for entirely innocent purposes of going to Edward Street to get a carry out. A person with a bad character may be less likely to tell the truth. It does not follow that he is incapable of doing so. The court must decide to what extent, if at all, his character helps when judging his evidence. If the court thinks it right it may take the evidence into account when deciding whether or not the defendants committed the offence with which they are charged. The Crown relies on the evidence to show the defendants' engagement in a campaign of Republican terrorism which involves, inter alia, attacking killing members of the Police Service. The tribunal of fact must decide to what extent the defendants' characters help it when considering whether or not they are guilty. Bad character cannot of itself prove guilt. The tribunal of fact must not jump to the conclusion that the defendants are guilty just because of the bad character.

Conclusions

[141] At the outset it is possible to state matters which have been clearly established to the satisfaction of the court beyond reasonable doubt on the evidence as adduced.

(a) PC Carroll was murdered by a shot fired from the murder weapon, an AK47, from a location duly proved at the rear of Lismore Manor. The ammunition used was of Yugoslav origin with a mercuric fulminate primer. The shooting took place shortly before 9.45 pm on 9 March 2009.

(b) The murder was the result of a planned terrorist plot which involved luring the police into the area. This was done by arranging for a brick to be thrown through a window at 33 Lismore Manor leading to the occupants of the house calling the police into the area. The evidence clearly points to the conclusion that this was a plot carried out by those committed to a Republican terrorist campaign by Republic terrorists still involved in an active terrorism campaign which included attacking members of the Police Service.

(c) It is inevitable that a planned operation of this kind requires a number of individuals to be involved. For the plot to work successfully it was necessary to arrange the bringing of an appropriate weapon and ammunition into the area, to ensure that it was working properly to arrange for a competent person to be there to fire the fatal shot. It involved the removal of the weapon from the scene and its secretion and it involved getting those involved in the action from the location bearing in mind that the police would arrive at the scene a short time after the shooting and the area would become a crime scene.

(d) Those involved in the plot had to be active and committed to the cause supposedly being served by the murder of a policeman.

(e) The murder weapon was wrapped up in black plastic bin bags and secreted at 607 Pinebank. The bags used for that purpose were obtained at 309 Drumbeg.

(f) The second named defendant's car Citroen Saxo registration number FCZ9046 was parked close to 309 Drumbeg less than 300 yards from the point where the gun was fired between 7.11 pm and 9.55 pm. It left the scene 10 minutes or so after the shooting. Leaving aside for the present the question of the coat and the car, this car was contaminated with residues not associated with the shooting that night. The evidence shows that the car must have been involved in connection with other firearms incidents and that those using the car had been involved in the use of firearms.

[142] I turn now the contentious issue of M's identification of Brendan McConville at the scene at a time closely connected to the actual shooting. In considering that evidence I remind myself of all the matters to which I have been referred and which were relied on by the second defendant as points which went to substantially weaken its reliability as evidence. I remind myself of what Mr Kelly added to the points he had already made in relation to the application to exclude the evidence in relation to the direction application and in his closing submissions. I remind myself of the principles set out in Turnbull and I remember again the dangers involved in a recognition case where an honest witness can make a mistaken identification even on the basis of alleged recognition.

[143] At this stage of the trial the identification evidence must be reviewed in the light of where we stand in the trial. Having ruled that the first named defendant had a case to answer, I am satisfied that the tribunal of fact at this stage that there was a case of sufficient weight to answer that inferences can be drawn from the fact that the first named defendant declined to give evidence. The fact that the first named defendant has not gone into the witness box to

give evidence has two consequences. Firstly Turnbull, a decision which pre-dated the provisions of the Criminal Evidence (Northern Ireland) Order 1988, makes clear that though the accused's absence from the witness box cannot provide evidence of anything it does point out that the tribunal of fact can take into consideration the fact that the evidence of identification has been uncontradicted by any evidence from the accused himself. This principle appears to accord with what Lord Lowry stated in R v IRP ex parte Coombs and Co (1991) 2 AC 283:

> "In our legal system generally the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are or likely to be within the knowledge of the silent party and about which that party could be expected to give evidence. Thus depending on the circumstances a prima facie case may become a strong or even an overwhelming case. But if the silent party's failure to give evidence (or give the necessary evidence) can be credibly explained even though not entirely justified the effect of his silence in favour of the other party may be either reduced or nullified."

What Lord Widgery said in Turnbull in that connection pre-dated the provisions of the 1988 Order which permits the drawing of inferences against a defendant from his failure to give evidence. That appears to speak to a different issue. The inference can itself provide evidence. In the present case an inference can and I am satisfied should be drawn against the first named defendant in failing to go into the witness box to challenge the identification by M. The inference to be drawn is that the first named defendant does not have an answer to the identification evidence or does not have an answer that would stand up to cross-examination.

[144] Having seen and heard M and taken account of his demeanour and reactions to questions posed I am satisfied that he was telling the truth as he saw it, about having seen Brendan McConville on the night in question. It is true that he was belligerent and defensive and less than open when dealing with the issue of his eyesight and glasses. It is clear that he took great offence to the suggestion put no doubt on instructions that he was as blind as a bat which was not in fact correct having regard to the evidence put forward by Mr Page. He also took offence to the suggestions that he was profiting from being a witness in a witness protection scheme and I am satisfied that he is not. I am satisfied that he has been the victim of genuine intimidation and that his life has been seriously affected in consequence of coming forward with evidence of identification. I am satisfied that he did see a group of men on the evening in question and that those men must have been involved in the murder plot. I am satisfied that he honestly thought that he recognised

Brendan McConville who was a figure known in the area and who had distinctive features and colouring. The defence proffered no meaningful basis for suggesting that M was maliciously making up this evidence to incriminate McConville and I can see no reason why he should do so bearing in mind the consequences of the intimidation as far as his own personal life is concerned and the effect on his family life. I am satisfied that those who intimidated him did so because they felt that he had valuable and damaging information about which they wanted him to keep quiet. This supports the view that he came sufficiently close to be able to recognise one or more of the group. While bearing in mind all the points persuasively presented on behalf of McConville to undermine the evidence identification, not the subject of any contradictory evidence called by McConville himself, I conclude as a fact that McConville was present on the evening at the scene. This conclusion is fortified by the unexplained coincidence that within a short distance there was a car which was found the next day to have within it a coat bearing the DNA of McConville pointing to a close and intimate contact between him and the coat evidence to which I shall return shortly. This coincidence has not been explained. The evidence called from Mr Sherridan by the first defendant does not assist the defendant or undermine in any meaningful way the evidence of M. Mr Sherridan was clearly uncomfortable giving evidence. His initial police statements made the perfectly understandable point that he could not really be expected to remember speaking to any individual after the length of time involved. In his evidence in the box, notwithstanding the further passage of time he was more positive that he had not spoken to a person in a small group that he might have past that evening. I did not consider this positive assertion as persuasive and I conclude that the was giving positive evidence more to support the defence case than out of any conviction.

[145] I also considered it significant that Brendan McConville did regularly wear a green bulky Parka jacket as seen on the CCTV evidence in the Benefits Office a few days before the shooting and that M stood firm in his evidence to the police that the person he saw was wearing a green jacket notwithstanding the obvious police desire to put the first defendant into a differently coloured coat. The description of the coat as knee length with a logo and hood were peripheral details such as a witness might get wrong from seeking to recall he details of another coat the witness was associated with. The bulkiness and the colour of the coat were material pieces of evidence supporting the identification. It is also significant that no green coat was found in McConville's house during the search either of the kind seen on the CCTV evidence of a knee length. I also consider that M's evidence as a witness was fortified by his willingness to indicate that he could not be certain as to the identity of the person A referred to in the course of the evidence.

[146] I conclude from the evidence that McConville was present at the location on the night at a time sufficiently approximate to the shooting to

support the Crown case that he was involved in a group connected with the shooting.

[147] In relation to the evidence in respect of the coat in the car I shall deal firstly with the question of Brendan McConville's connection with that coat and I shall then deal with the question of the particles found on that coat. The DNA evidence in relation to the coat clearly points towards the conclusion that Brendan McConville was the habitual wearer of the coat. His DNA alone was clearly distinctly on the coat. His DNA was on the collar and one cuff with some evidence of it being present on the other cuff, the very places where one would expect to find the DNA of the usual wearer. There was no sufficient DNA to indicate any other habitual wearer. Faced with the strong prima facie case that Brendan McConville was the habitual wearer of the coat he has not gone into the witness box to present evidence contradicting that reasonable conclusion. The inference to be drawn from the fact that he has not given evidence is that he does not have an explanation to counter the conclusion that he was the habitual wearer. He has given no sworn evidence to back up his police statement which is unsupported by sworn testimony and little weight can attach to his statement.

[148] The finding that he was the habitual wearer of the coat leaves the conclusion that in saying that he was not the owner of the coat he was lying. There is no meaningful distinction between the owner of a coat and the habitual wearer of the coat. An habitual wearer of a coat is effectively what an ordinary parlance would be termed the owner of the coat. If a person knowing of the relevance of his alleged connection with the coat seeks to hide behind a denial of propriety ownership knowing he is the habitual owner his denial of ownership would be mere casuistry. Brendan McConville's statement that he was not the owner of the coat was made in the light of the questions posed to him in the course of previous interviews that he was the habitual wearer.

[149] Where a tribunal of fact is satisfied beyond reasonable doubt that the defendant has lied it must consider why he lied. The mere fact that a defendant tells a lie is not of itself evidence of guilt. A defendant may lie for many reasons for example to bolster true defence, to protect someone, to conceal other disgraceful conduct or out of panic or confusion. If the tribunal of fact thinks there may be or is some innocent explanation for a lie then it should take no notice of it. But if satisfied beyond reasonable doubt that he did not lie for such one or innocent reasons then the lie can be evidence supporting the prosecution case. The statement made was not the product of panic or confusion. The issue of the ownership of the coat or who its habitual wearer was related solely to the first defendant. I must consider whether he lied because the coat may have been involved in some other unrelated offence and the defendant sought to distance himself from the coat for such a reason. Having concluded that McConville was at the scene the conclusion to be

reached is that he lied in order to distance himself from involvement with the coat in the car which he knew was evidence supportive of his presence at the scene. The lie supports M's identification of McConville at the scene.

[150] I turn now the particles on the coat and the car. In reaching conclusions in relation to those particles it is to be borne in mind that the evidence falls to be interpreted in the light of the scientific evidence and in the light of the surrounding circumstances. Those giving scientific evidence cannot reach conclusions of fact in relation to other disputed evidence relating to circumstances which may nevertheless be highly relevant to what conclusions are to be drawn. As noted at paragraph 89 above it is not the expert's function to evaluate other evidence but the evaluation of the other evidence can assist the tribunal of fact in drawing conclusions of fact in respect of the contested evidence of the experts.

[151] Points of relevance in the present context are as follows:

(a) The particles were found in a car very close to the scene of the shooting and which was very close to the scene of the obtaining of the bags to secrete the weapon after the shooting.

(b) The coat was found the next day in the car.

(c) The coat was habitually worn by McConville who was close to the scene of the shooting in terms of relevant times.

(d) McConville had lied to distance himself from any connection with the coat.

(e) The car contained clear evidence of the presence of other firearm residues which could have no legal source.

(f) The car belonged to and was at material times driven by an individual who –

    (i) was an active and committed adherent to violent Republican terrorism which was still pursuing a campaign involving amongst other things attacks on policemen; and

    (ii) were actively engaged in seeking to obtain targeting information in respect of a policeman and who considered police to be legitimately targets for attack.

(g) The car left the scene of the murder after the shooting.

(h) The car followed a route which came close to the home address of the individual identified at the scene and who lied about his connection with the coat in the car which he knew was highly relevant to the police investigation.

(i) The coat in the car contained evidence showing a connection with Semtex explosives, an explosive used widely by Republican terrorists.

(j) Clothes articles in the houses of Brendan McConville and John Paul Wootton showed evidence of firearms residue. The items included a coat in McConville's house of the same make and size as that in the car.

[152] The antimony-tin particles on the coat in the car were indicative of GSR. Mercuric fulminate ammunition can produce antimony tin particles. The very large occurrence of solely antimony tin particles without any evidence of mercury is an unusual finding. It has been found in case work in Northern Ireland that is not unusual for mercury to be undetectable in GSR produced by mercuric fulminate ammunition, a point borne out by the evidence of Mr McMillen and Ms Shaw (which I accept on that point) and in the Wallace article, Mr Wallace himself having considerable Northern Ireland experience in this field. Such scientific research as has been carried out as shown by Wallace shows the presence of some detectible amounts in the ammunition tested in those experiments producing larger numbers of particles than in the case of Zechner's experiments in which smaller numbers of particles not evidencing any mercury were produced. The articles then support to the proposition that mercuric fulminate ammunition can on occasions produce gunshot particles without a trace of mercury. The experiments referred to in Zechner's article demonstrate that proposition the Zechner results related to much smaller numbers of particles than found on the coat in the car in the present instance. The experiments do not show that where the number of particles increases one would logically be bound to find more particles evidencing some mercuric content. Wallace's data does indicate in the experiments which he carried out in which larger number of particles were produced there was some evidence of mercuric content even if in small quantities. However as Wallace noted case work shows that on occasions few mercuric particles can be found and the gunshot residue is attributable to mercuric fulminate primers. Wallace's article did not produce data from which one could produce data from which one could draw a scientific conclusion that when one increases the number of particles found one will find more evidence of mercury. There is insufficient data to found a statistical scientific basis for such a proposition. Mr Doyle's conclusion in this regard was an intuitive but not scientifically based conclusion. What can be said is that the type of articles found on the coat in the car represent a type which can on occasion be produced as a result of the use of mercuric fulminate ammunition.

[153] The scientific evidence taken on its own with right regard to the surrounding circumstances satisfies the court that the particles were very probably firearms related. Although Ms Shaw and Mr McMillen's conclusions and methods were severely attacked by the defence and the experiments carried out by them were flawed in the sense that they were not reproducing the circumstances in which the actual shooting took place, no credible alternative source has been put forward by either side. Ms Shaw did consider alternatives and found no evidence of any meaningful alternative source. I accept the Crown's evidence about the ratio of tin to antimony in the articles being satisfied that the method adopted was in the circumstances acceptable. Mr Doyle was driven to suggest the possibility of some other sources but he could not identify any viable alternative source. The morphology of the particles points to the particles being the product of firearm residue produced at great heat. No source of such heat other than a firearm could be identified to produce particles of this nature and composition.

[154] The conclusion reached must be looked at in the light of all the surrounding circumstances to see whether it is strengthened or reduced. The circumstances to which I have referred in paragraph [152] go to produce a prima facie case that the particles had a connection to the events of the night in question. Just what that connection is is unclear. The hypothesis that the coat was used to enwrap the gun when it was being fired seems unlikely in the absence of evidence of some blackening or burning by such close proximity to the firearm. The hypothesis that the coat was used to cover the gun after the shooting when taken from the scene remains a possibility but it is to be noted the coat was dry when found suggesting it had not been exposed to the elements that night. Furthermore such experiments as were carried out did not produce the very large number of particles found which were not the entirety of the particles on the coat.

[155] The defendants gave no evidence to explain the presence of the particles on the coat. There was a sufficiently strong prima facie circumstantial case from the circumstances of the finding of a particles on the coat to indicate a connection with the events of the night to lead the court now to draw inferences against the defendants from their absence of any evidence. The inference which falls to be drawn against the defendants is that these were indeed firearms related particles which resulted from a connection to the events surrounding the murder. The inference strengthens the evidence in relation to the particles to the point of satisfying the court to the requisite level that they were connected. I remind myself that of what Lowry LCJ said in R v McGreevy namely that doubt as to one circumstance would have to be set against a possibly strong adverse view of the other circumstances in order to assess the ultimate effect on the case. In a trial the tribunal of fact will not be able to resolve exactly what happened in respect of every aspect of the case. The tribunal of fact must be satisfied from the total of the evidence that the guilt of the accused is established.

[156] The evidence shows clearly that the car was present in Drumbeg up until ten minutes following the shooting. The evidence shows John Paul Wootton was the owner and driver of the car and was the driver that evening. It shows also that it followed a route which came close to McConville's home address. In his interviews John Paul Wootton as he was entitled to gave no explanation as to the route which the car took from the scene or whether he was involved with the car at all or why it contained the coat or any other items. What route the car took thereafter and why. Subsequently and much later he came to rely on a case put forward that the car followed the route that it did for the innocent purpose for the driver going to obtain a carry out. He has not supported such a case by any sworn evidence. The court has found that McConville was connected to the car on the night in question and sought dishonesty to distance himself from any connection with it. The court has found that McConville was at the scene. The inference that has to be drawn in the circumstances is that John Paul Wootton was the driver of the car who brought the car to the location at Drumbeg close to the scene of the shooting and that McConville was connected to a car. John Paul Wootton has called no evidence to contradict the inferences. He was an active and committed supporter of the Republican terrorist campaign of violence which involved planning and carrying out attacks on police officers. He was involved two weeks prior to the events in the gathering of information in relation to a policeman and had a conversation in which he indicated that he regarded police officers effectively as legitimate targets. The second named defendant has not gone into the box to answer the clear prima facie case against him. The court accordingly concludes that the case is proven against him.

[157] Accordingly the cours concludes that the combination of circumstances presented to the court produces compelling evidence of the guilt of Brendan McConville and John Paul Wootton. The presence of McConville at the firing point, his association with Wootton on the night in question, the presence of Wootton and his car in Drumbeg at all material times, the presence of McConville's jacket in the boot of Wootton's car as against both the defendants, the gunshot residue on the jacket, the gunshot residue in the car, the documents from the computer, the photographs of John Paul Wootton in uniform and participating at a paramilitary event, his attempt to obtain the address of a police officer all combine to lead to the conclusion that they were both intimately involved in the plan to murder the deceased. The culmination of circumstances leads the court to draw the appropriate inferences. There is no account from the defendants. They have chosen to say nothing in relation to the case which is one which cries out for an explanation from each of them. In the circumstances the court must draw the inference, proper in the circumstances. If there were an innocent explanation they would have been easily capable of providing it to the court but chose not to do so.

[158] Accordingly I find the first and second named defendants guilty on Counts 1 and 2 and I find the second named defendant also guilty on Count 3.