

Neutral Citation No: [2020] NICC 8

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

Ref: HOR11249

Delivered: 11/05/2020

19/02269

IN THE CROWN COURT OF BELFAST

R

v

FRANCIS LANIGAN

HORNER J

A. INTRODUCTION

[1] On 31 May 1998 at around 2am John Stephen Knocker (“JSK”) aged 22 years was shot dead at the Glengannon Court Hotel, Dungannon, Co Tyrone (“the hotel”), with a 9mm Browning pistol. Just moments before his death JSK had given Francis Lanigan aka “Frankie” or “Studs” Lanigan a severe beating. The fight was captured in full by CCTV cameras in the car park of the hotel. This brutal murder was carried out in a most brazen fashion as patrons left the disco, also described as a rave by some witnesses, at the EXIT 15 nightclub attached to the hotel. JSK was shot twice in the head, once on the back of the head and the other on the left hand side of the head. The shot to the left hand side had been fired at point blank range, probably within a range of 4 inches according to Professor Crane who carried out the autopsy. JSK’s death would have been fairly rapid. The murderer appears to have revelled in the attention of the onlookers as he slowly swaggered to the Cavalier car in which he made good his escape, brandishing the weapon that he had used to take another man’s life. By any standards this was an appalling act of barbarous inhumanity.

[2] Francis Lanigan of 61 Phibblestown, Clonee, Co Meath, Republic of Ireland, is charged with the murder described above and also with the possession of a firearm and ammunition, namely the gun used to carry out the murder and a quantity of suitable ammunition “with intent by means thereof to endanger life or cause serious injury to property or to enable some other persons by means therefore to endanger life or property contrary to Article 17 of the Firearms (NI) Order 1981.” The defendant has pleaded not guilty to both charges.

[3] The Director of Public Prosecutions has certified pursuant to Section 1 of the Justice and Security (Northern Ireland) Act 1970 that the trial should be conducted without a jury. Accordingly, I have heard all the evidence as a judge sitting alone and it is I, as a judge, rather than a jury who will give the verdict of the court together with my reasons.

[4] Finally, I should at the outset acknowledge the hard work put in by counsel and solicitors on both sides. I am indebted to all counsel for the comprehensive and insightful submissions, both oral and written, which were made. Mr Murphy QC for the PPS and Mr Lyttle QC for the defence took all possible points for their respective clients but did not pursue hopeless ones.

B. BACKGROUND INFORMATION

[5] The case against the defendant is primarily a circumstantial one. The prosecution is relying upon the evidence of various circumstances relating to the crimes and the defendant, which they say when taken together, will lead to the same conclusion, namely that it was the defendant who shot and killed JSK at the hotel in the early hours of 31 May 1998.

[6] The three main strands of circumstantial evidence relied upon are:

- (i) the evidence of the eye witnesses present at the time of the murder;
- (ii) the evidence of Nuala Delaney, a former girlfriend of the defendant and present in the car park when the murder was committed and in the getaway car which drove the murderer away from the scene; and
- (iii) the DNA evidence.

[7] It is important to remember that there is other evidence upon which the prosecution seeks to rely, which includes:

- (a) the evidence of the bad character of the defendant;
- (b) forensic evidence;
- (c) the failure of the defendant to give sworn testimony and so submit himself to cross-examination by counsel for the prosecution; and
- (d) the fact that the defendant fled the murder scene to escape arrest by the RUC, it is claimed, and crossed over the border to the Republic of Ireland, where he assumed a new identity as Ciaran McCrory until he was apprehended many years later by An Garda Síochána (“AGS”).

C. LEGAL ISSUES

Burden of Proof

[8] It is common case that:

- (i) The burden of proof lies upon the prosecution to establish the defendant's guilt.
- (ii) As this is a criminal trial, the standard of proof is beyond reasonable doubt, namely that the court should be firmly convinced of the defendant's guilt. This test has to be applied to each count on the indictment and a separate verdict must be returned in respect of each count.
- (iii) The prosecution must satisfy the court to the relevant standard on the evidence which is adduced at this trial.

Circumstantial Evidence

[9] The prosecution case depends primarily on circumstantial evidence, namely that the combination of circumstances establishes an overwhelming case against the defendant, namely that he was the gunman who shot and killed JSK. It is the task of the court to look at all the strands of circumstantial evidence relied upon by the prosecution and decide which, if any, to accept and what, if any, to reject and what fair and reasonable conclusions the court can draw from any evidence that it accepts. The court must weigh and examine all of the circumstances as established by the evidence in deciding whether there is an inference consistent with innocence.

[10] In *R v William Courtney* [2007] NICA 6 at para [20] the Court of Appeal in Northern Ireland commenting on the well-known decision of *R v Exall* [1866] 4 F and F 922 said:

“Where, as in this case, the prosecution rely on circumstantial evidence to establish the defendant's guilt, it is well established that a particular approach to the evaluation of the evidence is required. This is perhaps best encapsulated in the well-known passage from the judgment of Pollock CB in *R v Exall* [1866] 176 ER 850 at 853 (endorsed in this jurisdiction by the Court of Appeal in *R v Meehan* [No: 2] [1991] 6 NIJB 1):

‘What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and

probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fail. It is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of’.”

[11] Furthermore, in *Wootton and McConville* [2014] NICH 41 the Court of Appeal said at paragraphs [148] and [149]:

“[148] There is helpful analysis in the approach to circumstantial evidence in *R v Hillier* [2007] 233 ALR 63, High Court of Australia. The case is cited as authority at paragraph 10-3 of the latest edition of Archbold. The general approach is set out at paragraph 46:

‘It is often been said that a jury cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances. It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence.’

[149] Paragraph 48 of *Hillier* then deals with the importance of ensuring the circumstantial evidence is examined as a whole rather than piecemeal.

‘Often enough, in a circumstantial case, there will be evidence of matters which, looked at

in isolation of other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs CJ and Mason J said in *Chamberlain* [No: 2]:

‘At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness “separately in, so to speak, a hermetically sealed compartment”; they should consider the accumulation of evidence; cf *Weeder v The Queen*.’”

[12] Blackstone’s Criminal Practice [2020] states at F1.22:

“However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason it has been said that: ‘it is now necessary before drawing inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference’. (*Teper v The Queen* [1952] AC 480 at page 489 per Lord Normand at 489).”

Bad Character

[13] Bad character evidence is admissible if, but only if, it falls within a specific statutory permission or *gateway*; see Article 6(1) of the Criminal Justice (Evidence) (NI) Order 2004. The fact of the conviction for a firearm offence committed on 11 August 1984 by the defendant is admitted. The gateway on which the

prosecution seek to rely is propensity: see Article 6(1)(d). In so doing the court should ask itself:

- (a) Does the history of the conviction establish a propensity to commit offences of the kind charged?
- (b) Does propensity make it more likely that the defendant committed the offences of which he is charged?
- (c) Is it unjust to rely on the conviction of the same description of the category; and, in any event, will the proceedings be unfair if the evidence of the conviction is admitted?

[14] I have asked those questions, then considered them at length and having answered the first two in the affirmative, I am satisfied that it is neither unjust to rely on the conviction nor would the proceedings be unfair if the evidence of the conviction is admitted. Therefore, I am satisfied that it would be appropriate to admit into the evidence at this trial the fact that the defendant was convicted at Belfast Crown Court on 2 May 1986 of the offence of possession of a firearm and ammunition with intent to endanger life on 11 August 1984. The defendant has been guilty of a serious firearm offence some 14 years before. It is one which demonstrates the defendant's previous contact with firearms and ammunition and his ability to access them. Such a conviction does not of course prove the defendant's guilt, but it does provide useful background information. It assists me in reaching a verdict in this case which when taken with the other evidence leads to a finding that the defendant is guilty in respect of both of the offences with which he is charged.

Failure of the defendant to give evidence

[15] The court may draw an inference adverse to the defendant because of his failure to give evidence if the court is satisfied that the defendant was aware:

- (a) The stage had been reached at which evidence could be given for the defence;
- (b) The defendant could, if he wanted, have given evidence; and
- (c) The defendant chose not to give evidence.

[16] In this case the defendant was offered the opportunity to give evidence and warned of the consequences if he failed to give evidence in his defence. He chose not to give sworn testimony. However, the court should not consider whether or not it is proper to draw an inference that the defendant is guilty of the offences as charged unless it is satisfied that the defendant has a case to answer and such a case is disclosed by the other evidence in respect of the two offences with which he is charged.

D. THE EVIDENCE

[17] I am going to set out a short summary of the evidence relied upon by the prosecution. I have deliberately not rehearsed all the evidence given before me, much of which is not in dispute. For example, I have not set out the proof that the DNA samples taken in Dublin and Belfast respectively were samples of the defendant. The challenge has been to the lawfulness of how these samples were obtained and/or whether those samples should be admitted in evidence because to do so it is claimed would constitute at common law an abuse of process and/or would have such an effect on the fairness of the proceedings contrary to Article 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE") that it should be excluded.

CCTV

[18] The court was shown CCTV footage of a fight between JSK and a person who it is claimed by the prosecution is the defendant. It is not so much a fight as a brutal beating dished out by JSK to the other party at around 2am outside the disco. JSK is seen throwing any number of punches together with various kicks. Many of these connect with the intended recipient. This was a bad beating and one in which the party on the receiving end displays what might be described as a peculiar passivity, offering no resistance whatsoever. It is not possible to make a positive identification of the person being assaulted save to note that he does have a similar build to that of the defendant.

Affidavit Evidence

[19] In an affidavit sworn on 16 December 2013 the defendant averred:

"In May 1998 I was attacked outside the Glengannon Hotel and, arising from that, John Knocker lost his life."

[20] Accordingly, it is clear from this and other evidence that the defendant was the person physically attacked outside the hotel by JSK. The affidavit also links to that attack JSK's loss of life but is silent on the nature of the connection.

Eyewitness Evidence

[21] Pdraig Edward Mulryan is a part-time bus driver for Ulsterbus. His unchallenged evidence was that he arrived to collect 35 disco goers who were travelling back to Omagh from the EXIT 15 nightclub at the hotel. He deposited them at the hotel at 9:45pm on 30 May 1998. When he returned before 2am he could not get into the car park and parked on the road outside by the fence just past the first entrance. He was sitting up in the bus and had a view over the cars so he could see partygoers exiting the nightclub and standing about. From his seat in the front

of the bus he saw a scuffle develop at the turnstile between a man wearing jeans and a red top and another man whom he described as 6 feet tall, slim, of athletic build and in his early to mid-twenties. The man in the red top then took off running and ran out of the entrance to the left and up the hill. He described the other man, who he thought was wearing a light coloured grey T-shirt, follow him out. He then heard 3-4 cracks, like bangers and the man in the red top dropped to the ground. He was able to see that the other man who had followed him out onto the road was holding a gun in his right hand and he could see smoke coming from it. The gunman then ran out through the same gateway that the man in the red top had used. He was jogging as he ran past the bus. He ran up to the man in the red top who was lying helpless on the ground. He pointed the gun in his right hand at the man lying on the road, reached down with his left hand to move his head slightly and shot him again at point blank range. The gunman was only about 1½ feet away when he fired. At this stage a light coloured Vauxhall Cavalier arrived with its wheels spinning and stopped in front of the bus. He could see the driver was a male in his mid-twenties with dark brown or black hair. The gunman got into the front passenger seat. A female who was in the car park was shouting and screaming. She was wearing a pink top and short pink skirt and had long blondish hair. She was in her mid-twenties. She walked over to the Cavalier. She seemed to have trouble walking and Mulryan was not sure whether this was because she was intoxicated or was rather a direct consequence of the footwear she was wearing, namely platform shoes. She shouted "Nobody seen nothing" to everyone in the car park rather than to anyone in particular. She repeated this once or twice and followed it with a high pitched "right". She got into the back driver's side of the Cavalier. The car then took off, wheels again spinning in the gravel. Missiles were thrown by those who had left the disco and the back window and driver's side window were broken. Mulryan ran up to the man lying on the ground but it was clear to him that he was dead.

[22] Claire Stratton attended the nightclub with six other friends. She admits having quite a bit to drink. Her unchallenged evidence was that she left the disco at 1.50am/2.00am. She climbed into the back of a Mitsubishi Space Wagon parked in the car park. She heard shouting and then what sounded like fireworks. She was then aware of a male in a red top running fast from the nightclub towards the side road. He ran past the Mitsubishi to get to the side of the road. He ran up left followed by another person who she described as being 6 foot tall, slim build with broad shoulders and around 30 years of age. He had dark short hair. He was dishevelled looking and she thought he was wearing an approximately three quarter length dark jacket. She could also see a light coloured Vauxhall Cavalier registration number IDZ 1233. A girl was standing at the open rear door. The girl was a slim build with long curly blonde hair with a clip or bangle in it. She was wearing a short dark blue denim jacket, sandals and a mini skirt. The gunman calmly strode towards the car with a gun in his right hand resting it on his shoulder. She was shocked by how relaxed he appeared to be. He did not speed up even though the girl shouted at him. He then got into the front passenger seat of the Cavalier. She saw that there were four people in the Cavalier. The two men were in the front and

the two girls were in the back. She also described the people leaving the disco as throwing bottles and stones at the Cavalier. This Cavalier was later recovered from a laneway which runs from the junction of Premier Drive and Fortwilliam Parade in north Belfast.

[23] Karen Fitzpatrick had also gone to EXIT 15 at the hotel in the same group as Claire Stratton and in the same Mitsubishi Space Wagon. She remembered a commotion and then someone ran past her. She thought that the person who had run past her was wearing a "red hoodie" and jeans. Another man chased him. He was short, stocky and dark. He was wearing denims and had a gun in his right hand. They ran out of her view to her left up the hill. She then heard a number of shots. She could not see the first man but the gunman was at the entrance. There was a delay of some 10-20 seconds. She then heard another shot or shots. The gunman walked back down past the gate. He still had the gun in his right hand which was raised in the air at his shoulder level. He was in full view. He then got into a Cavalier car which had stopped in the entrance. She heard a female shouting words to the effect of "come and get into the car." She noticed the gunman walk over to the car and get into the passenger side. She also described the Cavalier as being attacked by some persons with missiles and she could hear glass breaking. She described the gunman as wearing a dark denim jacket top and jeans with shoulder length hair like Neil Morrissey, the actor.

[24] At 2.00am Caroline Pike was driving her dark green car along the Old English Road. As she approached the hotel she saw a young lad come running towards her on the centre of the road. She thought he was being chased. He was running fast. He ran past her driver's door on the right side past her. She described him as running for his life. He was wearing an orange and red top and was wearing blue jeans. As he passed her car she heard three bangs. She drove on down towards the main entrance to the car park. She saw a man standing with his arms outstretched holding a gun, one hand clasped the other arm's wrist. He was wearing a dark grey or black jacket. He was pointing the gun in the direction she had come from. He appeared very calm. He had dark hair and was of medium build. He was 25-30 years old and about 6 foot tall. She thought he was wearing a dark grey or black jacket. She was very frightened and drove past the entrance towards the bypass.

[25] Una O'Boyle's evidence of what happened the night in question was somewhat confused and it was difficult to follow chronologically. This is scarcely surprising given the time that has passed. She remembered leaving the rave with two friends to meet a private bus. She had gone through the turnstile across a gravel area and was sitting on a wall. She was aware of a fight in the car park as she walked to the wall. She had a vague recollection of two other men fighting. She remembered a lady with her hair tied back in a ponytail and a man who was short and skinny. The lady shouted "get down this is serious". She thought this was a strange comment. She noticed the lady handed something to someone who ran up the hill. A man in a red shirt ran past her out of the entrance and up the road. There was another man who ran up the road too. She heard shots almost immediately.

She did not see what had happened to the man in red. She thought that there was 5 to 6 in total. She saw a car parked adjacent to the fence. It was light blue. Either its bonnet was up slightly or this could have been a spoiler. There were 3 to 4 people in the car. She did not want to be involved. In cross-examination she said that she had a vague recollection of two other men fighting. She described the female she saw as being young with black hair tied back in a ponytail and the male as being short and skinny. She thought the female had handed something to the short and skinny man who ran up the hill before she heard the bangs.

[26] Stephen Quinn had also gone to the EXIT 15 nightclub at the hotel on 30 May 1998. He was another passenger in the Mitsubishi Space Wagon. He was outside in the car park when he heard 2 to 3 bangs. He saw a "guy" with smoke arising around him. At the same time he also saw another man with a red top on. This man was crawling right down on his belly. They were about 30 yards away from him. The man with the smoke around him walked on to the road where the other man was crawling. He saw that he was carrying a gun. He stood over the other man who was crawling and pointed the gun at his top half of the other guy's body. He then heard at least one shot and realised that the man on the ground had been shot. The gunman then started to walk back down the road a short distance to the car park entrance. He then became aware of a light coloured Vauxhall Cavalier which had pulled up. One of the passenger doors opened and a girl got out. She was 19 to 20 years old, average build and 5 feet 5 inches tall approximately with a lot of fair hair. She was wearing a short mini-skirt, dark colour and a dark bomber jacket. She told the gunman to hurry up and get in. The gunman was just casually walking towards the car "like he was showing off." He did not run or hurry in any way and was apparently "not concerned in any way." He described him as being 6 feet tall, medium build, lean, between 25-30 years old with dark collar length hair, quite a heavy head of hair and he was wearing dark clothing. He got into the passenger side of the Cavalier car although he was not sure whether it was the front or back. The car then moved off and the crowd threw missiles at it. Mr Quinn admitted having 8 or 9 half pint bottles of beer that evening.

[27] Eric Morrow had also gone to EXIT 15 at the hotel in the company of two friends. He had stayed in the club until just before 2.00am when he had gone outside to check for his lift, a pre-booked taxi for between 2.00am and 2:15am. He became aware of a man running fast out of the car park on to the Old English Road. He was well built and he thought he was running fast for such a big man. He looked to his left and saw a man making his way towards the Old English Road. He was running fast and he had his right arm tight to his side and extended. He then saw the second man stop, take aim and fire 3 or 4 shots. He is fairly certain it was 4. He saw the man on the Old English Road fall face down and lie still. The gunman then walked from the car park on to the road and up to the body. He saw the gunman kick the man lying in the back and he then stood off. He walked round the body at the car park side of the road, lent down and fired once more towards the victim's head. The gunman then turned round and started to walk back down the hill. Mr Morrow saw a taxi driver get out of his car and move towards the gunman. But

he shouted at him to get into his car and ran over and got into the car with him. He then saw a silvery coloured Vauxhall Cavalier come out of the car park. The nearside rear passenger door was open. He heard a woman's voice shouting things like "hurry up, get in". The gunman ran past and got into the Cavalier by the near rear side door. Its registration number was IDZ 1233. He described the gunman as being in his mid-twenties, short dark hair, no obvious moustache, beard or glasses. He thought he was wearing a dark coloured long sleeved shirt.

[28] Joseph McCabe, who is now deceased, described himself as being an occasional drug user, using the drug Ecstasy for recreational purposes. He was a regular visitor to the EXIT 15 nightclub. On that night he took at least four 'E' tabs. He had left the club at about 1.45am and went to his car to warm it up. He saw a fight in the car park but his view was not very good. He could see a man swinging his arms, punching someone "like he was swimming". He did not recognise this man who he thought was bare chested although he said he had known JSK "since he was a kid." The fight he thought only lasted about 20 punches. He then saw another man not involved in the fight being given what looked like a claw hammer or a wheel brace by a girl. He thought she was 5 feet 4 inches tall, slim average build with brown/dark hair possibly shoulder length. He thought she was wearing trousers or tracksuit bottoms but he was unsure. He then saw a man wearing a red shirt running between two buses. Next he heard four shots. Mr McCabe then drove towards the entrance to get a better look. He heard another shot. He saw a silvery Vauxhall Cavalier arrive. A man got into the front passenger seat. He only saw the back of him. The girl who had handed over the package got into the rear driver's side passenger seat. Someone shouted "nobody seen nothing" or "nobody seen fuck all". He then saw a brick smash the Cavalier's back window. The car then drove off. He then realised that the girl he had seen moments earlier had handed over a gun which had been fired and that they were making their escape. As McCabe drove forward and turned the corner he saw a body lying in the road. He recognised this man as JSK. He checked for his pulse and found he had none. He believed that this was the person he had seen running between the buses.

[29] Carrie Anne McAleer had gone to the disco at the hotel with her boyfriend, Darren McArdle, having travelled there on Mullaney's bus from Monaghan. At about 1.00am Darren and Ms McAleer decided to leave and walk from the backdoor towards the car park and headed over to the bus but it was locked and empty. There was a large old coach parked nearby with the driver on board. They asked if they could sit on board to keep warm and he agreed. They then got off the coach, walked over to the main gate to speak to a friend when they heard 3 or 4 bangs. They looked round and could see a male person with what appeared to be a pistol in his hands. There was a person lying on the ground at his feet and the person standing up was leaning over this figure with a gun pointed towards him. She then heard two more bangs and realised that the person on the ground had been shot. She saw smoke rising from the area of the figures. She was not able to describe the gunman at this point. She noticed a female standing a short distance from the gunman beside the coach that they had got off. She was screaming at no one to come over. She was

wearing a short blue halter neck type dress and had long straight shoulder length blonde hair and was of average height. The gunman then walked away up the grass bank, got over the fence and walked towards one of the cars that was parked on the roadside. He did not get into the car but instead turned and came back over to the fence and started walking around aimlessly like someone who was drunk. She could see the gun in one of his hands which was raised at or above his head and he seemed to be waving it about. She described him as wearing dark clothing and a heavy overcoat three quarters length, like a German army coat. His hair appeared dark and untidy. She described him as having some kind of facial hair. She was not sure. She thought he was in his thirties and about 6 foot in height and of medium build. She described him as looking "very shabby and not properly dressed". She panicked and got down under the front bumper of a car. She heard a few more shots being fired but she was not sure from where. Five minutes later she was told that it was safe to come out as the gunman had gone.

[30] Michael Connelly had also gone to the disco at the hotel on 30 May 1998 on a bus which goes from Omagh every Saturday night. He stayed at the club until the DJ announced the last song of the night. He then left so he would not get caught up in the rush at the end. He got onto the bus to get his coat and went back to the turnstile hoping to get the offer of a lift back to Omagh saving him from having to travel back on the bus. He heard a girl screaming at the turnstile. She seemed to be trying to stop two boys from fighting. He knew one of the participants was JSK whom he had known for about 18 months although he had not seen him for a year. He saw JSK start to walk away. He then saw the other boy pull something out of his jacket or his waistband which he thought was a bottle. He then heard a girl shout "don't do it". As JSK walked away the other boy walked after him. JSK looked round and then began to run. The other boy ran after him shooting at JSK. He did not hit JSK with the first 3 or 4 shots as JSK kept on running so he lost sight of them. He then saw JSK on the road. He saw the other boy lean over JSK and put another shot into him. He kept well away from the scene. He described the gunman as wearing a dark jacket, dark short hair, not shaved, probably medium build but not overweight. He appeared to be of average height.

[31] Shane Coleman was a bouncer on the main disco on the night of 30 May/31 May. About 1.45am he walked out to the gate of the compound where the turnstile is. He was speaking to two other doormen one of whom was Noel O'Neill when he saw a tall fella come out of the disco with a woman with him. When he saw him go into the car park he saw him and another fella getting engaged in a fight. This other fella who Coleman now knows is Knocker seemed to be getting the better of the other fella who he described as being over 6 feet tall. The tall fella tried to get through the gate and he was refused entry. He could see the tall fella had a lot of blood around his face. He saw them fighting against the wall beside the turnstile. He then saw the tall fella going down the car park in a jogging fashion. He described the tall fella as running around the back of a private bus and the next he heard was 4 or 5 shots coming from the direction of the other side of the bus. He and the two other doormen went towards the Old Eglis Road. They could see a

fella lying in the road with his head turned sideways, this was the person who was fighting in the car park with the tall fella. He was wearing a red shirt over his trousers which he thought were black. He then left the area and awaited the ambulance arriving.

[32] Noel O'Neill had originally gone to the hotel for a drink and he had been asked to help out as a doorman. He agreed and was posted on the back gates where the turnstile is. He was working with two other doormen, one of whom was Shane Coleman. He related that "Studs", the nickname of the defendant whom he knew, and JSK were fighting, or rather JSK who was the smaller of the two was hitting "Studs" who made no attempt to fight back. The defendant tried to get through the gate unsuccessfully. There was a girl present who was trying to stop the fight. The defendant was bleeding from a cut over his eye. O'Neill noticed JSK going over to an old white Renault car. He then started to run towards the buses. He saw "Studs" jog down after him. His view then became obscured by the buses. He heard 2 to 3 shots. Then it was quiet. Then he heard two more shots. He and the other doorman got everyone into the compound. He could see JSK lying on the ground. He knew both JSK and the defendant from previous occasions. He remembered JSK wearing a red shirt and denim trousers. He could not give a description of the clothes the defendant was wearing. When cross-examined he said it was not a fight. It was one fellow, the defendant, getting a beating from the other, JSK who was smaller. The defendant was definitely being punched but he was unsure if he was also being kicked. He said that the defendant had his hand over his head. He put his arm through the turnstile begging for help. He did not remember a girl asking for him to be let in. He did not attempt to intervene and could give no reason why none of the doormen went to his aid. He said that no one tried to stop the fight. He was aware that the defendant had a cut above the eye and that there was blood on his face. But he neither saw a gun nor did he see shots being discharged. He did not know Gregory Fox. He agreed that the defendant was neither stocky nor stumpy.

[33] Sabrina O'Prey was JSK's girlfriend. She lived with him in the Suffolk estate. She accompanied JSK to EXIT 15 on 30 May together with her two friends, Karen Moore and Debra Etnamonagh. They had travelled down in JSK's white Renault car. Sabrina O'Prey was 5½ months pregnant with JSK's child. About 1.55am the rave ended and she made her way to the doors. They could not get out because the bouncer said there was a gunman out in the car park. She discovered from somebody standing outside that JSK had been shot. She saw the ambulance man taking a stretcher out of the back of the ambulance and putting a blanket over her boyfriend's face. It was at stage that she realised that he was dead. She became hysterical.

[34] The paramedics who arrived at the scene found JSK lying face down on the road. He had a visible gunshot wound to his right temple. There were no signs of life. Dr Lane examined him in South Tyrone Hospital in the Casualty Department and pronounced life to be extinct at approximately 2:25am on 31 May 1998.

[35] I pause to note that the stories told by all the witnesses of the main events that night are strikingly similar, although the descriptions of precisely what happened and of who was involved do differ. I will give three examples, but there are many more:

- (a) Mulryan describes the gunman as wearing a grey T-shirt. Claire Stratton, for example, says it was a three quarter length black coat.
- (b) Some of the witnesses described the gunman as medium height. Others that he was 6 foot tall. Karen Fitzpatrick thought he was short and stocky.
- (c) Claire Stratton thought the gunman had short dark hair. Karen Fitzpatrick said the gunman had shoulder length hair.

[36] It is perhaps not surprising that there were different descriptions given. These were eye witnesses trying to do their best in very testing circumstances. This was a highly charged emotional event. Some had consumed alcohol. Some like McCabe had taken drugs which obviously affected his senses. His recollection was unreliable. He thought the assailant was bare chested when the other witnesses described him as wearing a red shirt. He did not recognise JSK although he had known him for a long time. In the circumstances I did not consider his testimony to have any evidential worth.

There was lighting but it was neon lighting and could be distorting. What happened took place more than 20 years ago. It can only be expected that there will be differences, sometimes glaring differences among the various accounts about what they observed, whether recorded in their contemporaneous written statements or given to the court by way of oral testimony. Indeed, it would be highly suspicious if all the accounts were the same. Observation can be very subjective and memory can be both slippery and selective. So it is important to look at all of the eyewitness evidence in the round before examining each of the particular versions. It can be said with some confidence that the evidence of those eye witnesses established that:

- (a) There was a fight outside EXIT 15 between JSK and the gunman in which JSK was the obvious aggressor.
- (b) The gunman, and I am satisfied from all the evidence that there was only one gunman, sustained facial injuries and was bleeding, although this was only mentioned by some of the witnesses.
- (c) JSK was shot in the head.
- (d) The gunman got into a Vauxhall Cavalier, registration number IDZ 1233, and was driven off from the scene. There were definitely two others in the car and highly likely that there were two women and another male.

- (e) The gunman got into the passenger side of the Cavalier car. Two of the eyewitnesses are clear that he climbed into the front passenger seat.

The prosecution say that the person who JSK physically assaulted, that is the defendant, is the same person who immediately afterwards obtained a gun from one of the two female passengers in the Cavalier and shot JSK twice in the head, once at long range and the other at close range, killing him dead.

[37] There was only one fight in the car park caught on CCTV that night just before 2.00am. This is the fight that immediately preceded the shooting of JSK who was involved in that fight. As I have said I am satisfied that at the relevant time there was only one fight taking place and that was the one between JSK and the defendant. Some of the descriptions of the fight do not altogether match what I witnessed on CCTV. Again, that is not surprising given that there were divergent descriptions offered by the onlookers although they were broadly similar in general outline.

The evidence of Nuala Delaney

[38] Nuala Delaney was at EXIT 15 with the defendant and Cathy Keenan and Gregory Fox ("Foxy") on the night of 30 May and the morning of 31 May 1998. She was originally charged with murder. Following the direction of the PPS her charges were reduced to:

- (a) Assisting an offender, contrary to Section 4(1) of the Criminal Law Act (NI) 1967.
- (b) Possession of a firearm, namely a Browning pistol, contrary to Article 33 of the Firearms (NI) Order 1981.
- (c) Possession of a firearm without a firearm certificate, contrary to Article 3(1)(a) of the Firearms (NI) Order 1981.

[39] She pleaded guilty and was given 2 years' detention on the first two charges and 12 months on the third charge all to run concurrently and to be served at Her Majesty's Young Offender's Centre ("YOC").

[40] It was claimed by the defence that a deal was done between Nuala Delaney and the prosecution whereby the charges against her were reduced from murder to the ones to which she pleaded guilty. This was denied emphatically by the prosecution and I conclude that there was no such deal. There was no evidence adduced before this court that would permit it to conclude that there had been any deal entered into between the prosecution and Nuala Delaney.

[41] I must warn myself that I should proceed with caution where there is material to suggest that a witness's interests may be tainted by an improper motive. I should remind myself that Nuala Delaney had a motive for minimising her role, such as when she claimed it was Cathy Keenan who handed over the package with the gun to the defendant and not her. I should take into account that she might be trying to put the defendant in the frame so as to permit the real perpetrator, who it was alleged by Mr Lyttle for the defence was Gregory Fox, to escape justice for his actions. I should also be alert to the fact that Nuala Delaney has a bad character as evidenced by her convictions. I also note that she was interviewed by the police in respect of another very serious matter although she denied any involvement in that. I also note that Detective Sergeant McMullan accepted that police officers interviewing the defendant put it to him that the police view of Nuala Delaney was that she had been lying. It was also suggested that her evidence was coloured by the fact that while she was the defendant's girlfriend at the time of these events they were no longer together and he had formed other relationships.

[42] I was fortunate to have the opportunity of being able to closely observe Nuala Delaney when she gave her evidence-in-chief and when she was cross-examined by video link. Mr Lyttle did not put a positive case to Nuala Delaney. Nor did he challenge directly her evidence about the gun and what the defendant had done with it after the murder or her claim that his client had committed a murder and that was why he had gone on the run. Instead, he cross-examined her to demonstrate that her testimony was not worthy of belief. I was especially mindful of all the reasons why I should treat her testimony with the greatest of caution. She had every reason to minimise her role in the events of 30/31 May 1998. I have concluded that she did indeed try to minimise her own role in that night's event. However, I was impressed by her steely resolve when she gave her testimony in respect of what the defendant did that evening. Having observed her closely giving sworn testimony I am satisfied that she spoke the unvarnished truth when she told the court that:

- (a) The defendant got into the front seat of the Cavalier IDZ 1233 and placed the Browning pistol in his lap. She said she took the gun off him and put it on the floor at her feet. If she had been trying to minimise her involvement she could easily have said that Cathy Keenan performed this task. There was no reason for her to volunteer her involvement in this criminal act.
- (b) She then described taking the gun after the car had stopped and trying to hide it at a telegraph pole in the countryside. She was unable to climb the bank because of its steepness. Gregory Fox, aka "Foxy", ultimately had to take the gun off her and conceal it. Again, if she had been lying and seeking to minimise her involvement she could easily have said that Fox had taken the gun from the car and omitted any reference to her role in trying to conceal the murder weapon.

- (c) Finally, she has been charged and sentenced. She now lives in the Republic of Ireland. She had no need to give sworn testimony. She could have avoided giving evidence. It was to her credit that she came forward and gave voluntary testimony by video-link to this court from the Republic of Ireland.

[43] Accordingly, having had the opportunity to observe this witness and her demeanour, I have no doubt that firstly the defendant did bring the gun which had been used to shoot JSK into the car and placed it in his lap. Secondly, Nuala Delaney took the gun from the defendant and put it in the back at her feet. Thirdly, she tried to conceal it by climbing up a bank to leave it at a telegraph pole. The gun has since been recovered from the location where she tried to conceal it and it was almost certainly the gun which was used to shoot JSK, according to the unchallenged forensic evidence.

[44] Most importantly when asked for the reasons why she and the defendant changed addresses immediately after the shooting, she said:

“Don’t remember asking but obviously Frankie knew that he had murdered somebody and needed to lie low.”

The somebody, she alleged the defendant had murdered, was JSK.

[45] I am wholly satisfied that Ms Delaney’s evidence on these key issues is both credible and truthful. The defendant had just used the gun which he brought into the car and placed on his lap in the early hours of 31 May 1998 to murder JSK. Nuala Delaney did help to try and dispose of it. She then went on the run with the defendant, her boyfriend at the time, because he had murdered JSK and wanted to evade capture, which he managed to do successfully for many years.

Forensic Evidence

[46] There was no challenge to the accuracy of the forensic evidence. However, the defence hotly contested parts of the forensic evidence in respect of its relevance and/or admissibility. The Browning pistol was retrieved from the base of the telegraph pole at the Ballyutoag Road’s junction with the Lylehill Road. Detective Sergeant Lynas’s evidence was that Gregory Fox had placed it there after Nuala Delaney had been unable to climb the steep bank. Ian McNeill, scenes of crime officer, gave evidence of retrieving the pistol, IMcN 23, from a telegraph pole on the Ballyutoag Road opposite the T-junction. The magazine contained 2 rounds of ammunition, “IMcN 21” and there was another round of ammunition in place in the chamber, IMcN 22. Constable John Kyle had retrieved a bullet head lying on an area of waste concrete adjacent to the perimeter fence of the hotel complex, “JK3”. Constable John Magee found a spent case, “JM1”, beside a pool of blood on the Old Eglisk Road. There was a bullet head, “JM2” in the pool of blood. He also found 4 spent cases, “JM3”, in the carpark close to the fence on the Old Eglisk Road.

[47] Firstly, there was a post mortem examination carried out by Professor Crane. He concluded that the cause of death was bullet wounds to the head, one to the back of the head and one to the left side of the head but behind the ear. The first shot was likely to have been fired at long range. The second shot was likely to have been fired at close range given that it had left sooting, soiling and punctate discharge abrasions. Other injuries on the body were consistent with JSK having fallen forward on to the ground having been shot first at long range. This ties in with the evidence of the onlookers seeing the gunman firing a number of shots at long range at JSK, and him falling to the ground when he was hit. The gunman then advanced so that he could finish JSK off with a bullet to the brain at close range as he lay prostrate on the ground. This he was observed to do.

[48] Secondly, there was evidence of Mr Rossi from the Forensic Science Agency NI. He examined items 1, "JM1" and 3, "JM3" which consisted of 5 spent 9mm cartridges. Forensic examination revealed that they had been discharged from the pistol found at the telegraph pole, item 54, IMcM23. Items 2 "JM2", 7 "JK3" and 44 "IMcM14" consisted of 3 impact damaged 9mm lead bullets. A detailed microscopic comparison showed that these were devoid of rifling detail and Mr Rossi could not say whether they had or had not been discharged from the barrel of the Browning pistol, Item 54. However, the bullets were of the same type as those in the ammunition which accompanied the pistol. This comprised a magazine and 2 rounds of 9 mm P ammunition. Mr Rossi's examination revealed that the pistol, using reloaded ammunition, had discharged at least 5 shots. This was the pistol referred to by Nuala Delaney which she tried to hide at the side of the telegraph pole, the same one she had told the court the defendant had brought back to the Cavalier immediately after JSK had been shot.

[49] Mr Brian Irwin, forensic scientist and Senior Scientific Officer at Forensic Science Northern Ireland, accepted when cross-examined by the defence that there had been a failure to adequately examine the gun and in particular the barrel and the slide. There were no fingerprints found on the handle which was unsurprising given it was cross-hatched. Mr Irwin agreed that an explanation for neither fingerprints nor DNA being present on the gun which was found on 2 June 1998 is that mechanical washing coupled with fungal and bacterial elements in the natural environment could have caused the DNA to be broken down and destroyed. He was also of the opinion that the handling of the weapon by others would have affected the retention of DNA. Hard surfaces such a gun handle are not as good for DNA retrieval as absorbent surfaces. The original swab carried out in 2007 would have included testing for DNA from blood, skin and saliva. The clear inference is that the murder weapon had been washed or wiped clean after the shooting and before it was hidden given that the defendant was fleeing a murder scene and would not wish to leave any of his traces on the murder weapon which had been jettisoned, just in case it might later be uncovered.

DNA

[50] Donna Maureen Knowles is a Senior Scientific Officer at the Forensic Science Department. She received 64 items at the laboratory between 1 June 1998 and 21 July 1998 relating to the events which occurred in the early morning of 31 May 1998 at the hotel. She was able to determine after the murder that the blood on the wall at the murder scene, the blood on the stone and on the turnstile was male in origin but did not belong to JSK as the typing characteristics were different. She was also able to determine that the blood recovered from the Vauxhall Cavalier IDZ 1233 was not that of JSK. She thought that the DNA profile could have originated from the same source as the blood identified at the scene, in the vehicle and on JSK's hands. In other words it was the same source of blood on the items at the scene of the murder, the getaway vehicle and the hands of JSK. She was not in a position at that stage to determine the identity of the person who had left this blood.

[51] Mr Irwin told the court that the blood samples were re-profiled years later using the SGM PLUS system. This was the system used to obtain the DNA profile from the coffee cup discarded by the defendant at the gym in Dublin. This method types DNA using 11 simultaneous but independent tests, one of which determines the gender of the sample donor. A blood sample attributable to JSK was used in the re-profiling.

[52] The SGM PLUS DNA profile obtained from a rim of a paper cup used by the defendant was then compared with the blood samples referred to above. The results were a match for the DNA profile obtained from the paper cup and the DNA profiles obtained from the following samples:

- (i) The turnstile sample part of item 48 - JK11;
- (ii) The sample taken from a stone item 9 - JK5;
- (iii) The partial profile from a wall item 6 - JK4;
- (iv) A piece of glass recovered from the Vauxhall Cavalier IDZ 1233, item 26 - PG 1;
- (v) The profile from the front nearside door handle and sun visor of the Vauxhall Cavalier IDZ 1233 item 15;
- (vi) The multiple profiles obtained from samples taken from the deceased's hand, item 35 - IMcN 3.

[53] The defence argue that even if the DNA is admitted it is not of any real probative value as the defendant has admitted being at the hotel on the night in question. The prosecution case is that he received a severe beating and that his "face was covered in blood" and that his hands had blood upon them. Therefore, all the

DNA evidence establishes is that the defendant was present at the hotel and was bleeding as a result of being beaten up. Further, the absence of DNA from the gun and the fact that none of the witnesses observed any blood or facial injury on the gunman is highly supportive of the conclusion that the gunman was not the defendant.

[54] However, all of this ignores:

- (i) The evidence of the onlookers such as Mr Mulryan, Claire Stratton, Karen Fitzpatrick and others who saw the gunman get into the Vauxhall Cavalier, 2 of whom observed him climb into the front passenger seat;
- (ii) Noel O'Neill gave evidence of the defendant bleeding from a cut over the eye following the beating he received from JSK. He saw the defendant run after JSK and then heard 2-3 shots followed by a short break and two more, although his view of the shooting was obscured by the buses;
- (iii) The deposit of the defendant's blood on the handle of the Cavalier and on the visor;
- (iv) The evidence of Nuala Delaney that the defendant brought the gun which was used to murder JSK back to the Vauxhall Cavalier IDZ 1233 and that they then drove off to where she tried to help dispose of it and from where it was later recovered.

[55] The defence also claim that there were different descriptions given of the gunman. But the evidence taken as a whole is clearly to the effect that at around 2.00am there was only one gunman, the defendant, operating in the car park of the hotel. Eyewitnesses' descriptions can be unreliable as I have already discussed. The point is made by the defence that none of the witnesses gave evidence that the gunman they saw operating that night was bleeding. But there was nothing to stop the defendant from wiping any blood from his face after the beating, so absence of blood does not necessarily prove anything. The eyewitnesses did see the gunman get into the Vauxhall car and blood was left in the car. That blood, and only that blood, belonged to the defendant.

DUBLIN DNA

[56] In August 2005 Detective Superintendent Dominic Hayes attached to the National Bureau of Criminal Investigation, Harcourt Square, Dublin which was responsible for the investigation of serious and organised crime in the Republic of Ireland received confidential information relating to the activities of the defendant. This indicated that he was living in Dublin, working in a barber's shop attached to a gym and using the name of Ciaran McCrory. He was suspected of involvement in

the murder of JSK in 1998. He tasked members of the National Bureau of Criminal Investigation to conduct enquiries in an effort to locate the defendant. On 13 February 2007 he was informed by Garda A that the defendant was working in the barbers attached to Carlisle Gym, Kimmage Road West, Dublin 6W. The members of the PSNI team investigating JSK's murder outlined to him the circumstances surrounding the Knocker murder and the progress of their investigation.

[57] Detective Superintendent John McMahon gave evidence that he met with Detective Chief Inspector Glen Wright and Detective Sergeant Ronnie Gibson on 16 February 2009 at Harcourt Square. Detective Chief Inspector Wright and Detective Sergeant Gibson gave to Detective Superintendent John McMahon details of the investigations into the murder of JSK which had taken place on 31 May 1998. They asked if AGS would carry out further enquiries as to the defendant's whereabouts. He was also asked that AGS should try and uplift any sample which had been in the defendant's possession and discarded by him, which was deemed suitable for the recovery of a DNA sample for evidential purposes. It was agreed that there was no impediment to covert surveillance being placed on the defendant with the view to obtaining a source of DNA from any item which he might discard. The request was made under legislation pertaining to the PSNI's jurisdiction according to Detective Superintendent McMahon. In early July 2009 Detective Garda B was tasked with carrying out covert surveillance of the defendant so as to confirm his address and to assess what opportunities existed to recover items discarded by the defendant that might be used to obtain his DNA profile.

[58] Detective Superintendent McMahon was made aware by Detective Garda B that the defendant was residing at 61 Ibbetson House, Clonee, County Meath, on 31 July 2009. He relayed this information to Detective Sergeant Ronnie Wilson in Northern Ireland. On 21 September 2009 Detective Chief Inspector Glen Wright provided Detective Superintendent McMahon with an authorisation for directed surveillance granted to the PSNI effective from 11:00 hours on 10 September 2009 to 23:59 hours on 9 December 2009. Following the meeting Detective Superintendent McMahon tasked Garda B to obtain a DNA sample from the defendant if possible. On 10 October 2009 Detective Superintendent McMahon was informed that Garda B had retrieved a paper coffee cup discarded by the defendant at the Carlisle Gym where the defendant was working as a barber. It was brought to the forensic science laboratory at Garda HQ at Phoenix Park, Dublin in order to generate a DNA profile from it. This profile was obtained from the rim of the paper cup by Dr Stephen Doak. As I have observed previously this profile was identical to the DNA evidence retrieved and obtained by the Police in the course of their investigation of the murder of JSK. On 5 May 2010 the PSNI requested that the coffee cup together with the vouching documents including the statement supporting its retrieval, examination and development of the DNA profile be supplied to them. The evidence so requested was duly handed over on 30 March 2011. This request was made formally under the Criminal Justice (Mutual Assistance) Act 2008, a Republic of Ireland statute.

Grounds of objection

[59] The defendant has objected to the admission of the Dublin DNA evidence on the grounds that it should be excluded as unfair evidence pursuant to Article 76(1) of PACE and/or the prosecution should be stayed as an abuse of process.

Relevant statutory provisions and legal principles

[60] It is well established that a judge as part of his duty to ensure that the defendant receives a fair trial has a discretion “to exclude otherwise admissible prosecution evidence, if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value”: see F2.36 of Blackstone 2020. But subject to that the common law position is as set out by Lord Goddard CJ on behalf of the Board in *Kuruma, Son of Kaniu v The Queen* [1955] NICA 197 at page 203 where he said:

“... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships’ opinion it is plainly right in principle.”

[61] In *Jeffrey v Black* [1978] QB 490 Lord Widgery QC said at page 497 in respect of the above comment:

“I have not the least doubt that we must firmly accept the proposition that an irregularity in obtaining evidence does not render the evidence inadmissible.”

See also the decision of the House of Lords in *AG’s Reference (No 3 of 1999)* [2001] 2 AC 91 at 123A-C.

[62] The common law position was altered in Northern Ireland by the coming into effect of Article 76(1) of PACE in 1989 which provides:

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

[63] In *R v Heather Ramsey* [2016] NICA 13 the Court of Appeal set out the three steps which should be taken by a court in determining whether any evidence should be excluded.

- (i) The court should firstly have regard to all the circumstances;
- (ii) The court should then determine whether the admission of the evidence would have an adverse effect on the fairness of the proceedings balancing the interests of the prosecution and the defence;
- (iii) Finally, the court should exclude evidence where the adverse effect would be such that the court ought not to admit it.

[64] The defence also argue that the prosecution should be stayed on the basis that to continue it would be an abuse of process. The question of what constitutes an abuse of process was discussed by Neill LJ in *R v Beckford* [1996] 1 Cr App by Neill LJ when he said:

“... The constitutional principle which underlines the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions.”

[65] In *Connelly v DPP* [1964] AC 1254 at 1354 Lord Devlin said that:

“The courts have an inescapable duty to secure fair treatment for those who come or are brought before them.”

[66] In *R v Martin McNally and Joseph McManus* [2009] NICA 3 Kerr LCJ said at paragraph 14:

“[14] The general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process are now well settled. There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a fair trial – see, for instance, *R v Sadler* [2002] EWCA Crim 1722 and *R (Ebrahim) v Feltham Magistrates’ Court* [2001] EWHC Admin 130. The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue – see, *Attorney General’s Reference (No 2 of 2001)* [2004] 1 All ER 1049 and *R v Murray and Others* [2006] NICA 33.”

[67] Blackstone on Criminal Practice 2020 says at D3.62:

“There are two main categories of abuse of process:

- (a) cases where the court concludes that the accused cannot receive a fair trial;
- (b) cases where the court concludes that it would be unfair for the accused to be tried.”

[68] It is worth also considering the comments of Lord Dyson in *DPP v Maxwell* [2010] UKSC 48 at [13] and those of Sir Brian Leveson PC in *R v Crawley* [2014] EWCA Crim 1028 at [17]-[18] Sir Brian Leveson said that there were two categories of case in which the court has power to stay proceedings for abuse of process, namely where it will be impossible to give the accused a fair trial and where it concerns the integrity of the criminal justice system and the court concludes that the accused should not be standing trial at all irrespective of the potential fairness of the trial itself. He went on to say that in the second category of the case where the court is concerned to protect the integrity of the criminal justice system a stay will be granted where the court concludes that in all the circumstances a trial will offend the court’s sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute.

[69] As Lord Griffiths said in *Reg v Horseferry Ct ex p Bennett* [1994] AC 42 at p62 B:

“The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of the abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.”

Defence arguments

[70] In the instant case the defence say that the DNA obtained from the discarded coffee cup should not be admitted in evidence. The defence say that the AGS ignored the provisions of the Criminal Justice (Mutual Assistance) Act 2008 which was “an Act to enable effect to be given in the Republic of Ireland to certain international agreements, or provisions of such agreements, between the state and other states relating to mutual assistance in criminal matters.” Further, the legislation which operated in the Republic of Ireland was not complied with and the uplifting of the cup and the obtaining of the surrogate DNA sample was obtained outside the provisions of the Criminal Justice (Mutual Assistance) Act 2008 and in particular section 75(7) which provides inter alia that a member of AGS “shall not enter any place in furtherance of the request without the consent of the occupier or the entry being authorised by an order under this section.” The occupier, it is

claimed, did not consent and nor was an appropriate order obtained from a judge of the District Court. Given that this statute gives effect to an international treaty obligation this court should have grave reservations about admitting such evidence. Such fundamental failures on the part of the assisting state should persuade this court from admitting such evidence in a murder trial.

Prosecution arguments

[71] The prosecution responded by making the following points:

- (i) There was no requirement to comply with, inter alia, Section 75 of the 2008 Act because the provisions of that Act had not been engaged when the cup was collected. The Conventions provide for formal and informal requests for mutual assistance and do not exclude in any way normal police to police co-operation. This is made clear by the Home Office guidelines on Mutual Legal Assistance; see also *Rea's Application for Judicial Review* [2015] NICA 8 at paragraph [7].
- (ii) The appropriate mechanism to be used to obtain evidence from overseas usually depends on the type of assistance being sought and the domestic legislation under which the assistance is sought.
- (iii) The only legislative requirement in respect of UK law was that because the request which had been made for investigation from the AGS amounted to "directed surveillance" under Section 26(1) and Section 26(2) of the Regulation of Investigatory Powers Act 2000 ("RIPA") an authorisation was required. This may involve surveillance outside the UK: see Section 27(3). The evidence obtained on foot of the RIPA authorisation fully complied with the UK law. Counsel had considered the relevant documents and there was nothing to disclose on the face of the authorisation: see *R v GS* [2005] EWCA Crim 887.
- (iv) The AGS did not act unlawfully because as Detective Superintendent McMahon said they were acting upon a request for "mutual assistance" and not a formal request by way of an International Letter of Request ("ILOR"). What the AGS did was something that they were able to do under the relevant domestic legislation in the Republic of Ireland: see, for example, *People (DPP) v Wilson* [2019] 1 IR 96 in which the Supreme Court held there was nothing illegal or unconstitutional in retrieving a cup or item from a public space for testing, even if that might encroach on an individual's right of privacy. Furthermore, under the Criminal Law (Jurisdiction) Act 1976, the AGS have also powers to retrieve items in relation to the investigation of certain offences in Northern Ireland, including murder.

- (v) In any event Garda B was a member of the Carlisle Gym and had at the very least implied permission to be on the premises.
- (vi) In conclusion, the prosecution submit that the provisions of the 2008 Act were not engaged at the time the cup was lifted in October 2009 because no formal request had been made by way of an ILOR under the Crime (International Co-operation) Act 2003. The formal ILOR request was dated 5 May 2010 and related solely to the production of relevant evidence by the Garda to the PSNI. This request came under Section 75 of the Criminal Justice (Mutual Assistance) Act 2008 and the evidence was duly provided to the PSNI on 30 May 2011.

Decision on admissibility of Dublin DNA

[72] I am satisfied that the prosecution is correct in its submissions. I can see no evidence of any misconduct by the PSNI or AGS in obtaining the Dublin DNA sample. Both the surveillance of the defendant and the retrieval of the used coffee cup complied with the law of the United Kingdom and the law of the Republic of Ireland. The PSNI and AGS were providing mutual assistance and co-operating in a normal police to police basis, pursuant to the relevant Conventions and treaties, the CPS guidelines and the 2003 Act. The defendant has not been able to demonstrate to this court that there have been any breaches of the 2000 Convention, the Schengen Convention, RIPA, the 2003 Act, the Criminal Justice Act 2006 or the 2008 Act or the decision of the Supreme Court in the Republic of Ireland in *People (DPP) v Wilson* given the nature of the informal assistance being provided at that time.

[73] The evidence was formally produced to the PSNI following an ILOR and pursuant to Section 75 of the 2008 Act. More importantly the DNA evidence is:

- (a) Relevant to an important investigation into the murder of JSK;
- (b) No case has been made, indeed no case has sought to be made that the DNA does not belong to the defendant; and
- (c) There is no suggestion, never mind evidence, of any possible contamination of the DNA which was gathered in Dublin.

[74] The relevant circumstances I should consider include:

- (i) The seriousness of the offences;
- (ii) The interests of the defence;
- (iii) The interests of the prosecution;
- (iv) The incontrovertible fact that the DNA sample obtained is that of the defendant;
- (v) The compliance with the law of Northern Ireland and the guidance given by the CPS; and

- (vi) The compliance with the law of the Republic of Ireland.

[75] I do not consider that the admission of this evidence would have an adverse effect on the fairness of the proceedings. Indeed there was a marked absence of any submissions, written or oral, on behalf of the defendant, setting out why there would be an adverse effect on the fairness of the proceedings other than that the Dublin DNA evidence should be excluded because of an alleged non-compliance with section 75 of the 2008 Act. Further, I do not see any basis upon which I could stay these proceedings as an abuse of process.

BELFAST DNA

[76] On 17 September 2019 after extradition from the Republic of Ireland, the defendant was removed from Maghaberry Prison and interviewed under caution in relation to two other murders, an attempted murder, possession of a firearm and membership of a proscribed organisation. When the defendant arrived at Musgrave Street Police Station, two DNA samples (barcode 34730106) were taken from him. These samples were delivered to the laboratory at the Forensic Science Northern Ireland and were profiled there by a forensic scientist. Those samples unsurprisingly produced the same profile as the Dublin DNA and thus, like the Belfast DNA, provide cogent and compelling evidence of:

- (a) The defendant's presence at the scene of the fight;
- (b) The defendant having contact "with JSK given his blood on JSK's hand"; and
- (c) The defendant leaving the scene in the getaway car, the Vauxhall Cavalier IDZ 1233, most likely in the front seat where he deposited blood on the visor.

Grounds of objection

[77] The defendant seeks to exclude such evidence on the basis that:

- (i) It is an abuse of process because it was evidence obtained after he was extradited from the Republic of Ireland in breach of the Specialty Rule;
- (ii) It is an abuse of process because of the bad faith demonstrated by the police in trying to manipulate the collection of evidence;
- (iii) Finally, the Belfast DNA should be excluded as being evidence that it "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit pursuant to Article 76(1) of PACE."

[78] I have already set out the legal position with respect to Article 76(1) of PACE. It is not necessary for me to rehearse it.

Relevant statutory provisions and legal principles

[79] In *R v Beckford* [1996] 1 Cr App R 94 Neill LJ said that:

“... the constitutional principle which underlines the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions.”

It is of course important to remember the exhortation of Sir Brian Leveson PC in *R v Crawley* [2014] EWCA Crim 1028 when he said at [18]:

“... (T)here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is a remedy of last resort.”

[80] Sir Brian said that cases in which it “may be unfair to bring the accused (the second category of case) will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct.”

[81] On 17 December 2012 a European Arrest Warrant was issued against the defendant in respect of the murder of JSK. The warrant was passed to the appropriate authorities in the Republic of Ireland for them to execute. On 17 January 2013 the defendant was arrested under the European Arrest Warrant and formal proceedings were commenced to have him brought to Northern Ireland to face trial for the murder of JSK and possession of a firearm with intent. On 23 January 2019 the defendant made his first appearance in Northern Ireland when he appeared at Dungannon Magistrates’ Court. He has been remanded in custody in Northern Ireland ever since. On 17 September 2019 as I have stated the defendant was taken out of Maghaberry Prison and interviewed under caution in relation to other serious offences. There, samples of his DNA were taken.

Circumstances in which DNA was obtained

[82] Detective Inspector Harris gave evidence of the circumstances in which the buccal swab for DNA was obtained. She had consulted the PPS in April 2019 about interviewing the defendant in respect of these other offences which were committed in 2004. No interview took place for some five months it is claimed because of her involvement in other investigations. She claimed that she was unaware that there was an old DNA sample on file although this was of a quality which could not be used in evidence. She could give no good reasons as to why she would not have

checked the DNA database in Northern Ireland. She claimed that the defendant's DNA needed to be retaken. In fact, the defendant's DNA had been submitted to the Forensic Science in 2004 along with 37 other people. There was no match. It was suggested that she was aware of this and obtaining the DNA sample in respect of the earlier crime was just a pretext. The Detective Inspector claimed to have no intention to mislead the court but I find it difficult to accept that she did not know that an attempt had been made to make a comparison with the defendant's DNA. The Detective Inspector claimed that she should have refreshed her memory but the case made by the defendant is that this was a deliberate ruse to obtain a fresh DNA sample in case the DNA sample obtained in Dublin was held to be inadmissible.

[83] I also heard sworn evidence from Detective Sergeant McMullan and Detective Constable Collins. I was told of a discussion on 18 September 2019 about this case at Castlereagh Police Station when the admissibility of newly obtained DNA samples relating to another investigation came up. During this conversation Detective Constable Collins claims to have volunteered the opinion that the samples, if obtained lawfully, should not be excluded from the case as new evidence. He advised that they should seek advice from the Public Prosecution Service.

[84] This "light bulb" moment was challenged very effectively by Mr Lyttle on behalf of the defendant. The more details he sought of this conversation from the witnesses the increasingly unlikely it became that it had actually occurred, or if it did, had taken place as originally described by the witnesses. I was certainly not satisfied that I was being told the whole truth. It seemed to be more likely that the DNA was being taken in September 2019 in respect of the 2004 criminal investigation so as to ensure that there was a fall back evidential sample that could be compared with the defendant's DNA if the Dublin DNA was held to be inadmissible. It is disappointing, to use as neutral a term as possible, that the police officers did not feel able to be frank with the court. The court is entitled to expect that police officers do not try and dupe the court regardless of whether their intentions, as here, were to adopt a "belt and braces" approach so as to ensure that evidence as to the defendant's DNA was before the court.

The Specialty Rule

[85] The defendant claims that under Sections 146-147 of the Extradition Act 2003 ("the 2003 Act") the requested person may only be dealt with for offences in respect of which they were extradited and cannot face proceedings for other offences that pre-date extradition. The defence assert that removing the defendant from Maghaberry Prison was not an action that was specified or requested in the EAW and is contrary to the principle that the requested person must only be dealt with in the requesting state for the offences for which they had been extradited. Nicholls, Montgomery and Knowles on the Law of Extradition on Mutual Assistance (3rd Edition) state at 5.72:

“Specialty is a rule of extradition law that is intended to ensure that a person extradited is not dealt with in the requesting state for any offence other than that for which he was extradited.”

The specialty rule has been preserved by Article 27(2) of the Framework Decision. The key provisions are set out in section 146 of the Extradition Act.

[86] In *R v Horseferry Magistrates’ Court ex parte Bennett* [1994] AC 42 the House of Lords held that the court had jurisdiction to enquire into the circumstances under which the person appearing before the court had been brought before the jurisdiction and, if satisfied that there had been a disregard of extradition procedures, to stay the prosecution as an abuse of process. Typically, these applications occur in cases where requesting states abuse their right to seek extradition. For example the requests may be made “for improper reasons or proceed in a vexatious or oppressive manner”: see 5.120 of the Law of Extradition on Mutual Assistance (3rd Edition).

[87] In *R (Ebrahim) v Feltham Magistrates’ Court* [2001] 1 WLR 1293 Brooke LJ giving the judgment of the Court of Appeal said:

“Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process:

- (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.
- (ii) The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.”

[88] The prosecution accepts that after extradition has taken place the requested person may only be dealt with for offences in respect of which they were extradited, pursuant to Sections 146-7 of the 2003 Act. The prosecution say that at all times the PSNI was guided by the CPS and the advice that pre-prosecution detention following extradition does not invoke “specialty” protection. The investigation of a suspect’s involvement pre-charge is not captured by the Specialty Provisions and does not cover a situation where the local police wish to arrest and interview a suspect following his return to this jurisdiction. Further, a pre-charge interview is

not an action for which surrender could be sought. In any event the defendant is not being prosecuted for these 2004 offences. In *Wikstrom v Serious Fraud Office* [2018] EWCA Crim 115 Gross LJ giving judgment on behalf of the Court of Appeal summarised the position as follows:

“The (specialty) rule is primarily one of international law, it is concerned with respecting the power of the extraditing State to refuse extradition and ensuring that insofar as the State has a discretion to refuse extradition, that discretion is not abused by the receiving State. Its principal purpose is thus to preserve the comity between States, rather than effect a protection for the accused. Given that such is the primary purpose, it is in our view comprehensible that the rules should not be concerned with the nature of the evidence and procedure followed in prosecuting the extradition offence.”

[89] So while the PPS could not prosecute the defendant for further offences it was in no way precluded from investigating other offences or from using evidence gathered in those investigations in the prosecution of the defendant. The decision to exclude or admit such evidence is a matter of judicial discretion governed by Article 76 of PACE.

[90] In *R v Aubrey-Fletcher ex parte Ross-Monroe* [1968] 1 QB 620 a dispute arose as to whether the prosecution could adduce any evidence other than that which had been put forward to secure the defendant’s surrender. The Court of Appeal held that there was no reason why further evidence could not be adduced in the committal proceedings. Lord Parker CJ rejected this as a novel point which would have alarming consequences. He said that the relevant section of the Extradition Act was:

“not in any way intended to interfere with the ordinary procedures and laws of evidence in this country whether in committal proceedings or at the trial.”

[91] Salmon LJ said at page 629:

“When, as in this case, the man who has been surrendered is being charged in this country with the very offences in respect of which a warrant was issued, and for the trial at which he was surrendered by the foreign country, seems to me that it would be putting a very strained, artificial and indeed ridiculous construction on Section 19, to interpret in the sense suggested by Mr Shaw. It would mean that these courts would have no power to try the man for the very crime in

respect of which he was extradited, or at any rate that most material evidence might be excluded.”

Abuse of Process

[92] The argument that it would be an abuse of process to allow the prosecution to use the Belfast DNA in the prosecution of the defendant for the offences for which he is extradited is a hopeless one. The rule of specialty does not apply to the gathering of evidence after a person has been extradited in general, and in particular, does not preclude as of itself, the use of the DNA samples which were obtained in the prosecution of the defendant. The specialty provisions are to protect a surrendered person against a member state circumventing the European Arrest Warrant Convention.

[93] The question the court must ask itself when it considers the police’s decision to obtain the Belfast DNA sample is whether the court should stay proceedings because “it offends the court’s sense of justice and propriety in those particular circumstances”: see Lord Dyson at [22] in *Warren v AG for Jersey* [2012] AC 22.

[94] The two key issues for the court to consider are:

- (a) To what extent is the accused prejudiced? and
- (b) To what degree are the rule of law and the administration of justice undermined by the behaviour of the investigators? See Blackstone at 3.70 page 1478.

[95] Manipulation of procedure can amount to an abuse of process. But it is not the role of the court to express “disproval of the police misconduct and to discipline the police”: see Lord Dyson in *Warren v AG for Jersey* at [36] and see also Lord Kerr’s comments at [83].

[96] In *R v Norman* [2016] EWCA Crim 1564 at 23 the Court of Appeal in England and Wales summarised the up to date position as follows:

“First it must be determined whether and in what respects the prosecutorial authorities have been guilty of misconduct. Secondly, it must be determined whether such misconduct justifies staying the proceedings as an abuse. This second stage requires an evaluation which weighs in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system and not giving the impression that the end will always be treated as justifying any means. How the discretion will be exercised will depend

upon the particular circumstances of each case, including such factors as the seriousness of the violation of the accused's rights; whether the police have acted in bad faith or maliciously; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability of a sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the accused is charged. These are merely examples of factors which may be relevant. Each case is fact specific."

[97] The factors I weighed in the balance included:

- (a) The seriousness of the offending;
- (b) The interests of the defence;
- (c) The interests of the prosecution;
- (d) The fact there was no dispute that the DNA sample was that of the defendant;
- (e) The nature of the misconduct which I do not consider to be grave, but rather ill-judged; and
- (f) Finally, the fact that the police could have lawfully obtained a sample of the defendant's DNA under Article 63 of PACE anyway even if the defendant did not consent. Both sides agree that Article 63(12) does not apply to the present circumstances.

[98] In the circumstances having carried out this balancing exercise I am wholly satisfied that the scales come crashing down in favour of admitting the Belfast DNA evidence. I should also make it clear that the balance still favours admitting the Belfast DNA evidence if I am wrong about whether or not the police could lawfully have taken a sample of the defendant's DNA under Article 63 of PACE.

Article 76 of PACE

[99] The court was also asked to exclude the Belfast DNA as being unfair evidence under Article 76 of PACE. The circumstances to which the court is to have regard, include expressly the circumstances in which the evidence was obtained: see *R v Looseley, AG's Ref (No: 3 of 2000)* [2001] UKHL 53 at [11].

[100] The test must always be whether it offends the fairness of the proceedings and should not be used by the court to mark its disapproval of the way it was gathered: see *R v Chalkely* [1998] QB 848 and Blackstone at F2.14.

[101] I have looked carefully at all the relevant circumstances in deciding whether to exercise my discretion to exclude the Belfast DNA because of the adverse effect it will have on the fairness of the proceedings. I do not consider that I should exclude the Belfast DNA evidence because I am not satisfied that the statutory test is met. Indeed, the submissions on behalf of the defendant were marked by an absence of any detail as to how the admission of the Belfast DNA evidence visited any unfairness on the defendant when it was clear it was the defendant's DNA, or, how the admission of such evidence would adversely affect the fairness of the criminal proceedings.

F. CONCLUSION

[102] I consider that there is an overwhelming case established from the eyewitness evidence, the evidence of Nuala Delaney, the forensic evidence including the DNA evidence, the bad character evidence and the affidavit evidence of the defendant that the defendant was the gunman who fired the gun which killed JSK:

- (i) There was a fight at about 2.00am in the car park outside EXIT 15 which was caught on CCTV;
- (ii) The participants in that fight were JSK and the defendant. It is not possible to be certain it is the defendant from the CCTV footage only although the person being struck is of the same physical build as the defendant. However, the defendant has accepted on affidavit that he was the one who was involved in the fight and that is clear from consideration of all the eyewitness evidence;
- (iii) The evidence of Mulryan is that there had been a scuffle between JSK and another man in a grey T-shirt in the car park. JSK was then pursued by the person whom he had been fighting with. He saw the pursuer with a gun in his right hand. He could see smoke from the gun and he then saw the gunman fire at point blank range into JSK's head. The gunman then got into a passenger seat of the Vauxhall Cavalier IDZ 1233;
- (iv) Claire Stratton described the murderer as getting into the front seat of the Cavalier. Stephen Quinn also saw the gunman getting into the passenger side of the Cavalier although he was not sure whether it was the front or the back;
- (v) Eric Morrow saw the shooting and a silvery coloured Vauxhall Cavalier IDZ 1233 come to collect the gunman who had lent down and fired into JSK's head. He thought he climbed into the nearside rear passenger seat;
- (vi) Noel O'Neill knew the defendant. He saw JSK punching "Studs" who did not defend himself. He noted that "Studs" had a cut above his eye and was bleeding. He saw "Studs" running after JSK. His view was then obscured. He then heard shots and then saw JSK lying on the road;

- (vii) Nuala Delaney was with the defendant that evening. She saw him bring the murder weapon into the front seat of the Vauxhall car. She took the gun off him and then helped in its concealment. She went “on the run” with the defendant because of what he had done, that is murder JSK;
- (viii) It was the defendant’s blood on the car handle and on the visor of the front passenger seat of the Vauxhall Cavalier IDZ 1233. That is where Claire Stratton and Nuala Delaney said the gunman had been seated.

[103] There is compelling evidence that the defendant shot JSK at long range bringing him to the ground. He then coldly and callously finished him off by firing a bullet at point blank range into his brain. It was a savage and barbaric act, devoid of any pity. Far from being ashamed of what he had done, the defendant gloried in this appalling act. In retrospect the defendant’s passivity when under attack from JSK must have concealed a resolve for bloody revenge which he was determined to exact in front of all those who had witnessed his earlier humiliation. By murdering JSK in full view of all those onlookers no doubt the defendant thought he had proved to the onlookers who was the boss.

[104] The defendant is entitled not to give evidence, to remain silent and make the prosecution prove his guilt beyond reasonable doubt. However, the court is entitled, and does draw an adverse inference against the defendant because of his failure to give sworn testimony. This means the defendant has failed to provide an explanation for:

- (a) His affidavit in which he admitted he was the person who was attacked by JSK and that as a result of this JSK lost his life, without providing further elucidation;
- (b) The eyewitness evidence of those in the car park after the disco ended at the hotel linking the victim of the assault by JSK to the person who chased the attacker through the car park and up the hill;
- (c) The evidence that the second man who chased the first man was described by a number of witnesses as being responsible for shooting JSK and he was seen by witnesses to get into the front passenger seat of the Vauxhall Cavalier IDZ 1233, although one witness did think he had got into the rear passenger seat;
- (d) Noel O’Neill’s evidence was that “Studs,” the defendant, was the one assaulted by JSK;
- (e) Nuala Delaney’s evidence of the defendant bringing the murder weapon to the front passenger seat of the Cavalier and then going “on the run” to avoid being arrested for the murder of JSK.

[105] I have no doubt that the defendant has chosen to remain silent because he has no answer to the prosecution's case and certainly none that would bear forensic examination. Further, the court also takes into account the defendant's determination to avoid detection by the police, his escape to Dublin and his assumption of a new identity, all designed to enable the defendant to avoid having to explain his actions of 31 May 1998. The evidence against the defendant in respect of both counts is overwhelming. Consequently, I am satisfied to the requisite criminal standard on the basis of the above evidence which I have summarised that the defendant was guilty of both the offences with which he is charged, namely murder and possession of a firearm with intent.

[106] There was no evidential basis for the allegation that JSK's murder was the responsibility of a third party, whether or not it was Mr Fox or some other unidentified person. I have no hesitation in dismissing such a suggestion as fanciful in the light of all the evidence.

[107] I should also make it clear that I am satisfied beyond reasonable doubt that the defendant is guilty of both offences on the basis of the eyewitness evidence, excluding the eyewitness evidence of Nuala Delaney and also excluding the DNA evidence, but taking into account the affidavit sworn by the defendant, the bad character evidence and the adverse inferences I draw from the defendant's escape to the Republic of Ireland and his refusal to give evidence.

[108] In the circumstances and for the reasons I have set out I have no hesitation in finding the defendant guilty of the murder of John Stephen Knocker on 31 May 1998 and of possession of a firearm and ammunition with intent to endanger life or property, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

[109] As the defendant has been convicted of murder I am obliged by law to impose a sentence of life imprisonment. I will set a date for a tariff hearing when I have the pre-sentence report. Then I will determine the minimum term the defendant will be required to serve in prison before he becomes eligible for release under article 5 of the Life Sentence (NI) Order 2001. I will also sentence the defendant for the other offence of which he has been convicted on that date after I have heard submissions from both the prosecution and the defence and considered any other relevant material.