

**Neutral Citation No: [2025] NICC 17**

**Ref: 2025NICC17**

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

**ICOS No: 17/097375**

**Delivered: 04/07/2025**

**IN THE CROWN COURT IN NORTHERN IRELAND  
SITTING AT LAGANSIDE COURTS, BELFAST**

---

**THE KING**

**v**

**DAMIAN DUFFY  
and  
SHEA REYNOLDS**

---

**Sam Magee KC and Robin Steer KC (instructed by the PPS) for the Crown  
Dessie Hutton KC and Lauren Cheshire BL (instructed by Phoenix Law) for  
Shea Reynolds**

**Brendan Kelly KC and Stephen Toal KC (instructed by KRW Solicitors) for  
Damian Duffy**

---

**HER HONOUR JUDGE SMYTH  
Recorder of Belfast**

***Introduction***

[1] The defendants are jointly charged with six counts on the indictment arising from the deployment of a Swann wildlife camera on two occasions in September 2016. Counts 1-3 relate to the deployment of the camera at Annaghone Road, Coalisland and counts 4-6 relate to its deployment at Drumnabreeze Road, Magheralin, the home of Mr X, a retired police officer. The camera was retrieved by police from Mr X's home and replaced with a dummy replica which was monitored in real time, until its retrieval by two individuals, alleged to be the defendants, on 20 September 2016.

[2] In short, the prosecution case is that that the camera was deployed with a view to gathering information which could be used by terrorists to carry out acts of terrorism. A statement of agreed admissions is attached at Appendix A.

***The indictment***

***Count 1 - Preparation of terrorist acts at Annaghmore Road***

[3] Between 3 September 2016 and 9 September 2016, with the intention of committing acts of terrorism or assisting another to commit such acts, engaged in conduct in preparation for giving effect to their intention, namely the deployment of a camera device at Annaghmore Road, Coalisland.

***Count 2 - Possession of articles for use in terrorism regarding the deployment at Annaghmore Road***

[4] Between 3 September 2016 and 9 September 2016, possessed an article, namely a camera device, in circumstances which gave rise to a reasonable suspicion that their possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

***Count 3 - Making a record of information likely to be useful to a terrorist regarding the deployment at Annaghmore Road***

[5] Between 3 September 2016 and 9 September 2016, collected or made a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely information relating to the movements of vehicles along Annaghmore Road, Coalisland.

***Count 4 - Preparation of terrorist acts at Drumnabreeze Road***

[6] Between 13 September 2016 and 21 September 2016, with the intention of committing acts of terrorism or assisting another to commit such acts, engaged in conduct in preparation for giving effect to their intention, namely the deployment of a Swann wildlife camera device at Drumnabreeze Road, Magheralin.

***Count 5 - Possession of articles for use in terrorism regarding the deployment at Drumnabreeze Road***

[7] Between 13 September 2016 and 21 September 2016, possessed an article, namely a Swann wildlife camera, in circumstances which gave rise to a reasonable suspicion that their possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

***Count 6 - Attempting to make a record of information likely to be useful to a terrorist regarding the deployment at Drumnabreeze Road***

[8] Between 13 September 2016 and 21 September 2016, attempted to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely information relating to the movements of a former member of the Police Service of Northern Ireland.

[9] The defendants were the subject of a planned surveillance operation which involved undercover officers (Oscars) and a police helicopter allegedly tracking the movements of a Golf car VRN SUI 7104 (the Golf). The surveillance evidence is supported by ANPR evidence relating to the Golf, disclosed after the surveillance officers had given evidence, the reliability of which was the subject of challenge.

[10] It is not disputed that others were likely to have been involved in the criminal activity and that other persons and vehicles were of interest to police. The surveillance evidence is recorded on a contemporaneous log, supplemented or amended in the course of a debrief and subsequent statements. All the officers gave evidence based on the log and their statements and most had no independent memory of the details recorded. In some cases, officers had made more than one statement of evidence at the request of the investigation team, which did not become apparent until cross-examination.

[11] The case against each defendant is circumstantial in nature. The prosecution relies on evidence of various circumstances leading up to and subsequent to the deployment of the camera and submit that when all these circumstances are taken together, they establish an overwhelming case against each defendant with the only conclusion to be drawn that the defendants committed the offences as alleged.

[12] Whilst each count must be considered separately, the prosecution case is that taken as a whole, the evidence proves that the acts alleged are connected and form part of a strategy by the defendants to target individuals for a terrorist purpose. The prosecution submits that whether an individual was being targeted when the camera was deployed at Annaghone Road or whether this was a “dummy run” for subsequent terrorist acts is irrelevant. What can be inferred from the evidence is that the objective in deploying and retrieving the camera was to collate information which could be used to assist terrorists. Whilst it is not required to prove the specific terrorist purpose, the prosecution submits that the ultimate purpose was to assassinate a person regarded as a “legitimate target”, such as Mr X, a retired police officer.

[13] Both defendants deny the charges. They were arrested on 21 September 2016. In the course of police interviews they were questioned about a number of matters including their movements and the movements of the Golf on the dates on which they were observed by surveillance officers, which are set out at Appendix A. Both were legally represented and declined to answer questions. They were charged on 26 September 2016. Mr Duffy made no reply to the charge. Mr Reynolds replied “I have no knowledge whatsoever that the camera was to be used for the acts of terrorism.”

[14] In their defence statements, they challenge every aspect of the prosecution but make no positive case. It is submitted that the evidence is insufficient to justify conviction and even if the court were able to place weight on the prosecution

evidence, at its height, it is consistent with myriad other possible scenarios, including the possibility that the defendants were not the persons involved in the criminal activity and that others, who are not before the court are guilty.

[15] It is also submitted that the court should not convict because it could not be sure that the evidence is full, accurate and truthful. This submission is based not only on the alleged unreliability of the surveillance evidence but also on allegations that the crime scene at Mr X's home may have been interfered with in order to implicate the defendants.

[16] Finally, it is submitted that the trial has been so materially unfair to the defence that the trial should be stayed as either an abuse of process or a trial process where the defendants fair trial rights have not been respected contrary to article 6 ECHR and section 6 Human Rights Act 1998. This overlaps to a degree with the previous submission. In particular, on behalf of Mr Reynolds it is submitted that he has been inhibited in progressing his defence due to:

- (a) the inability to fully investigate the authenticity of the prosecution evidence relating to the heli-tele evidence due to police restrictions;
- (b) the inability to fully explore the circumstances surrounding the finding of the camera due to the admission of Mr X's evidence as hearsay due to fear;
- (c) the admission of evidence of other officers who provided continuity evidence at the scene as hearsay due to illness;
- (d) the refusal to issue witness summons for those officers to give evidence for the defence along with officers who did not make statements.

[17] At the conclusion of the prosecution case I refused applications on behalf of each defendant that they had no case to answer. I also refused an application on behalf of Damian Duffy that proceedings should be stayed as an abuse of process on grounds of delay in bringing the proceedings to trial, the police failure to operate a digital recording system for surveillance observations and the use of two disclosure officers, one dealing exclusively with sensitive material, which resulted in initial failures in the disclosure process. I also refused an application to exclude the identification/recognition evidence from surveillance officers on the ground that the prosecution had allegedly failed to use a digital recording system in order to manipulate the evidence. I refused an application to reconsider a ruling admitting Mr Duffy's previous conviction for a terrorist offence as bad character evidence and refused to reconsider hearsay rulings relating to Mr X and other officers who attended the scene at Drumnabreeze Road on grounds of fear or ill health.

[18] After I had refused the applications of no case to answer I addressed counsel for each defendant in turn in the following terms:

“Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the court may draw such inferences as appear proper from his failure to do so?”

[19] Mr Kelly KC for Mr Duffy said that he had advised his client. Mr Duffy declined to give evidence.

[20] Mr Hutton KC for Mr Reynolds also said that he had advised his client. Mr Reynolds declined to give evidence.

### *Core legal principles*

[21] I remind myself of the following core legal principles relating to criminal trials:

- (a) The prosecution must prove the case against each defendant. A defendant is not required to prove anything.
- (b) I must be satisfied beyond reasonable doubt of the guilt of a defendant, in other words I must be sure or firmly convinced of their guilt before I can convict.
- (c) I must look at the whole of the evidence and the case against and for each defendant separately.
- (d) I can draw inferences based on evidence I consider to be reliable.
- (e) There is a special need for caution before convicting a defendant in reliance on the evidence of identification because it is possible for an honest witness to make a mistaken identification. An apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses. It is necessary to examine carefully the circumstances in which the identification by each witness was made and to consider any specific weaknesses in the identification evidence.
- (f) Bad Character evidence may be admitted under a number of gateways. Where Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (“the 2004 Order”) is asserted to be the relevant gateway, evidence is admissible if, but only if:

“(d) it is relevant to an important matter in issue between the defendant and the prosecution.”

The prosecution assert that the important matter in issue is the rebuttal of an innocent explanation of, or an explanation of coincidence in relation to the various circumstantial strands relied on by the prosecution and that the bad character evidence strengthens other evidence tending to establish guilt.

I admitted Mr Duffy's convictions after trial of offences of assault occasioning actual bodily harm, false imprisonment and attempting to elicit information likely to be of use to terrorists.

I remind myself that I must not convict Mr Duffy wholly or mainly because of those convictions. The fact that he has committed terrorist offences in the past does not prove that he did so on this occasion. His previous convictions may only be used as some support for the prosecution case if, having assessed the evidence, I am satisfied that it is right so to do.

- (g) I remind myself that that the defendants are entitled to remain silent, decline to give evidence and to make the prosecution prove their guilt beyond reasonable doubt.
- (h) However, two matters arise from their not giving evidence. The first is that I try this case against each defendant according to the evidence, and neither of the defendants has given evidence to undermine, contradict or explain the prosecution evidence. The second is that I may draw such inferences as appear proper from their failure to do so.
- (i) Should I decide to draw inferences from their failure to give evidence it will be on the basis that given the case against each defendant I would have thought that that defendant should have given evidence to give an explanation for or an answer to the case against him.
- (j) I can only draw such inferences if I think it is a fair and proper conclusion and I am satisfied that the prosecution's case is such that it clearly calls for an answer and, further, that the only sensible explanation for a defendant's silence is that he has no answer, or none that would stand up to examination.
- (k) Finally, I may take it into account as some additional support for the prosecution's case against that defendant, but I cannot find any of the defendants guilty only, or mainly, because that defendant did not give evidence.

[22] Because the case against each defendant is circumstantial, I have carefully considered the authorities and the approach the court should take to assessing its strength. In *R v Kincaid* [2009] NICA 67 at para [22], the Court of Appeal considered this kind of evidence:

“The case against the applicant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well-known passage from the judgment of Pollock CB in *R v Exall* 1866 4 F&F:

‘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 fall. It is more like 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. Consider, therefore, here all the circumstances clearly proved.’”

[23] In *R v Meehan & Ors* [1991] 6 NIJB Hutton LCJ also said:

“Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength, it should not be incorporated into the rope ... We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and that, when

woven together with other strands, it may constitute a case of great strength.”

[24] I have also carefully reflected on the reasons circumstantial evidence must be examined with great care. In *R v Gary Jones* [2007] NICA 28 Higgins LJ explained the dangers at para [33]:

“Circumstantial evidence can be very compelling. It requires to be approached with care. Not only must the judge and jury be satisfied that the circumstances are consistent with guilt, but they must also be satisfied that they are inconsistent with any other rational conclusion than that the accused is guilty. Thus, a fact or circumstance which is proved in the evidence, and which is inconsistent with a conclusion of guilt is more important than all the other circumstances, because it undermines the proposition that the accused is guilty. In a case that depends on circumstantial evidence, a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together.”

### *The Golf car*

[25] The Golf was owned by Ciaran Magee (a co-accused who is not before the court) but was frequently driven by Mr Reynolds who was a named insured driver and others. It was found parked outside Mr Reynolds home on the day of his arrest and although no admissions have been made regarding the identification/recognition evidence by the surveillance officers, Mr Reynolds accepted through his counsel that he is the person captured on CCTV exiting the Golf at the Maxol Filling Station on the Lough Road, Lurgan at 23:25 hrs on 14 September 2016, after the prosecution allege that he had deployed the wildlife camera in the driveway of the retired police officer, Mr X.

[26] The prosecution relies on mobile phone data from phones attributed to both defendants and Ciaran Magee, including cell site analysis and evidence of data transmissions or the absence thereof during relevant periods. It is accepted that cell site analysis can only place a phone within an area of coverage and cannot pinpoint a phone to a specific location. When the coverage of the cell ID is found to be extensive, as in this case, it cannot show the location of the phone without other

supporting evidence as it can be anywhere within an area of coverage. In theory a mobile phone can connect to a cell over 17km away. This can occur in rural areas where there may be fewer cell sites. It is less likely in built up urban areas where cell site locations are closer together. The phone data evidence should be understood in that context.

[27] It is also accepted that the phone attributed to Mr Duffy ("Mr Duffy's phone") was found in the living room of his house, was registered to a Cera McStravick, was not password protected but a web account was linked to "Dee Duffy."

#### ***4 September 2016***

[28] The prosecution case is that on 4 September 2016, Mr Reynolds and Mr Duffy were involved in deploying the camera in flora on the Annaghone Road.

[29] The surveillance evidence, supported by ANPR captures of the Golf and phone data evidence is: Mr Reynolds was observed by Oscar 483 at 18:23hrs driving the Golf on the North Circular Road and again at 18:25 hrs, with another male believed to be Luke O'Neill in the front passenger seat, on North Street Lurgan. ANPR evidence captures the Golf at 18:26:31 on North Street, confirming Oscar 483's evidence relating to its movements. Mobile data evidence also places Mr Reynolds' phone in the Lurgan area at 5pm an hour or so, earlier.

[30] The Golf was observed, driven by Mr Reynolds at the junction of Circular Road turning right onto Antrim Road with two other persons, one of which the prosecution alleges is Luke O'Neill. At 18:41hrs the Golf was observed on North Street heading towards Church Place, with Luke O'Neill in the passenger seat. ANPR evidence captures the Golf at 18:41:35 on North Street heading Southwest into Lurgan.

[31] At 18:53 hrs the Golf was observed with Mr Reynolds and Luke O'Neill in the front and someone in the back, at Church Place Lurgan. At 19:30 hrs, Mr Duffy was observed in the Golf with Mr Reynolds and Luke O'Neill. The prosecution submits that it is plausible that he was the third person observed at 18:53 hrs in the back of the car because mobile data evidence from the phone attributed to him places it in the Lurgan area at 18:27 hrs and in the Killeen area (his home) at 18:00 hrs. At 19:38 hrs Oscar 483 observed Mr Reynolds driving the Golf on William Street, Lurgan turning right onto Charles Street. Mr Duffy was observed in the rear and Luke O'Neill was in the front passenger seat.

[32] At 19.43 hrs, the Golf was observed by Oscar 327 at the Balancing Lakes, three occupants having exited and walked along the footpath. Luke O'Neill was observed to have exited from the front passenger side. At 20:16 hrs, Mr Duffy and Luke O'Neill and another male were observed by Oscar 424 at the side of Craigavon Water Sports Centre. They walked through the centre car park and on to the

footpath at the edge of the lake before walking along the lake edge towards roundabout 2 on map CH7.

[33] At 20:50 hrs Oscar 424 observed the Golf stopped at Kiln Road, Lurgan at the entrance to Silverwood Green and a male matching Luke O'Neill's description walking towards 30 Silverwood Green. At 21:12 hrs the Golf was observed by Oscar 487 turning from the Kiln Road onto the Lough Road in the direction of the motorway. ANPR evidence captures the Golf at 21:12:49 on the Lough Road heading towards the motorway, and again at 21:14:45 at Derrymacash heading Southwest in the near-side lane, confirming the observation of Oscar 487.

[34] At 21:17 hrs, Oscar 504 observed the Golf on the motorway, country bound, passing the Birches Interchange. ANPR captures the Golf at 21:23:23 on the M1 offslip at the Tamnamore interchange and less than twenty minutes later in the general vicinity of Mr Duffy's home at Killeen, coming from the direction of Washing Bay Road towards Hillhead. At 21:30 hrs, evidence from the phone retrieved from Mr Duffy's home placed it in the Killeen area.

[35] At 22:26 hrs, the Golf was observed reversing into a laneway on Annaghone Road. A male was observed standing on the side of the Annaghone Road with his back to the Coagh Road. The male was then seen making off towards the Coagh Road. At 22:38 hrs a parked vehicle was observed 100m from the junction of the Coagh road with its main beam on, the VRN noted as SUI 7104. At 22:46 hrs two people were observed standing in the area, with the Golf parked. One was wearing a dark top with a green top underneath. The other was in a grey hooded top and blue jeans with the hood up. As surveillance officers passed them, Oscar 477 observed the persons turning quickly away and placing their hands in the genital area as if to urinate. At 22:51, the Golf was observed travelling on the Coagh Road.

[36] It is the prosecution case that the Swann wildlife camera was installed on the Annaghone Road at this time, by the defendants. The SD card subsequently retrieved from the camera, contains a number of AVI clips (exhibit 165) which when compared with photographs contained in AC1, exhibit 193, I am satisfied, confirms the positioning of the camera within the flora on the Annaghone Road where the Golf was observed on 4 September 2016.

[37] One of the clips (exhibit 165 clip 5) shows a male in a hooded top deploying the camera. The quality of the image is insufficient to conclude that it is Mr Reynolds although there is some slight resemblance and so I afford some weight to it, but not a great deal. I am mindful that this evidence must be assessed in light of all the surrounding circumstances to see whether the weight is strengthened or reduced.

[38] The clips are date stamped, but because they were located in unallocated space the accuracy of the clips cannot be forensically proved. Whilst police and Mr Lacey, a defence expert from Bekttek gave evidence that one possible explanation

for the clips being in unallocated space is that there was an attempt to delete them, I also accept Mr Lacey's evidence that there may be other explanations and ultimately, he was unable to reach any conclusions due to restrictions placed on the examination of the camera device or the SD card.

[39] On examination by Simon McConnell, the camera was noted to be only two minutes out and a file created on the date of examination (20 September 2016) was accurate in date and time. It was also noted that the file names for the dates and times between 4-8 September 2016 (when the prosecution alleges the camera was deployed and retrieved by the defendants from Annaghone Road) are listed in the same way on the SD card and are consistent with the evidence in relation to the Golf's movements and surveillance identifications on both dates.

[40] Mr Lacey was instructed by the defence to carry out an examination of the authenticity of all the digital material, including the date stamps. He noted different pixel dimensions and frame rates in relation to some latter clips which can occur for a number of different reasons. The simplest reason he offered is that the setting was changed manually between the recording of the clips on 14 and 20 September however, without examining the device he could not say if the camera had lost power or the settings may have reverted to some default setting. He accepted there may be other explanations. Mr Lacey was specifically asked whether he could say that all the clips were recorded using the camera retrieved from the Drumnabreeze Road by police. He said he could not express an opinion on that issue without access to the card and the device.

[41] Whilst full access to the device, the card and the footage was refused he was permitted to carry out an examination and the disclosure judge Kinney J had specifically directed how the inspection should be conducted. In the course of the inspection Mr Lacey accepted that there was no limit on the amount of replaying, fast forwarding or rewinding of the footage and nothing to prevent him watching any part of any recording. Whilst he was unable to carry out a full forensic examination, he accepted that on a visual examination, the footage appeared to contain recorded information from beginning to end and there was no obvious discontinuation in the progression of overlaid date and time stamps, which was consistent with authenticity.

[42] After the camera was deployed, the prosecution case is that the Golf was observed travelling towards the Mourneview Estate on Mountjoy Road, Coalisland (Oscar 327) at 23:12 hrs, towards the village of Brockagh (Oscar 484) and entering the main Killycolphy Road from Albany Road (Oscar 302). At 23:19 hrs, the Golf was observed parked up beside the church graveyard on Mountjoy Road towards Clonoe roundabout (Oscar 486) and at 23:22 hrs, it was observed along Moor Road, Coalisland in the direction of Ballynakilly before being observed at 23:26 hrs travelling onto the M1, eastbound carriageway at the Tamnamore interchange (Oscar 509).

[43] These observations are confirmed by ANPR evidence: at 23:26:08 on the onslip of the M1 at Tamnamore, making its way towards Lurgan; at 23:35:23 at Derrymacash on the M1, a short distance from the offslip for Lurgan and at 23:37:21 on the Lough Road making its way towards the town.

[44] At 23:37 hrs the Golf was observed on Lough Road, Lurgan heading towards Kiln Road junction from the M1, with at least two people on board, by 23:39 hrs the Golf was on Kiln Road making its way towards Lough Road (Oscar 504) and by 23:43 it was observed on the Levin Road having come from Lake Street. (Oscar 487).

[45] The prosecution case is that the Golf was returning to Mr Reynolds' home in Lurgan with the third male, having left Mr Duffy back at his home in Killeen. Mobile phone data records confirm that there were no data transmissions between 20:58 and 23:58 hrs (Exhibit 188, report MW7 at p 6, 8-9, 10 and 13). The prosecution submission is that the phone may have been switched off during this period, but the defence submission is that the phone may have remained in Lurgan and thus this is a fact pointing away from guilt. It is not possible to reach any conclusion on the phone's movements during that period and I therefore consider this to be a neutral circumstance.

[46] The prosecution case is that the camera remained in situ on the Annaghone Road until 8 September 2016. Clips from the SD card include multiple vehicle movements on 8 September (see Exhibit 209 clips 120, 130, 135, 160, 165, 170 and 175). It is alleged that this extended duration would enable terrorists to establish patterns of vehicle movement, critical to effective targeting of potential victims, such as retired police officers.

[47] On behalf of Mr Reynolds it is submitted that the court could not be sure that he was in the Golf or involved in the deployment of the camera because there is no positive identification of him after 19:38 hrs. He and Ciaran Magee lived close to each other, both drove the Golf (as did others) and could have changed places. The third male at the Balancing Lakes is unidentified, despite Oscar 424's evidence that he observed the men for 4-5 minutes from a distance of within two metres at points, with no obstructions, in an area of good streetlighting.

[48] It is also submitted that the surveillance evidence at the Annaghone Road was confused, contradictory and unreliable.

### ***8 September 2016***

[49] The prosecution case is that on 8 September 2016 both defendants returned to the Annaghone Road to retrieve the camera. The prosecution relies on similar surveillance observations, supported by ANPR evidence and images recorded on the camera.

[50] At 19:48 hrs Oscar 483 observed Mr Reynolds driving the Golf on Roundabout 1 (Map CH 1) with a female in the front passenger seat and at 19:52 hrs Oscar 436 observed him at Rushmere Shopping Centre. Cell Site data between 20:13 hrs and 20:35 hrs indicates that Mr Reynolds' phone was using cells providing service in the Lurgan area.

[51] At 20:48:22 the Golf was captured by ANPR on the M1 at Derrymacash heading towards Tamnamore and at Tamnamore at 20:57:12, confirming the surveillance evidence of Oscar 504. The prosecution allege that Mr Reynolds was driving the car to Mr Duffy's house in Killeen and Oscar 424 gave evidence that at 21:06 hrs the Golf was parked on Lisclare Road close to Mr Duffy's home.

[52] By 21:22:08 the Golf was observed to be on the move again with Mr Duffy on board and ANPR captured it at that time on its way toward Hillhead from Washing Bay Road. The prosecution allege that it was returning to the Annaghone Road, with the defendants in it, to retrieve the camera which had been deployed four days earlier.

[53] At 21:23 hrs the Golf was observed on the Coagh Road just past the Annaghone Road junction by Oscar 0504 and two minutes later, Oscar 0424 observed a car slowing down and possibly stopping on the Annaghone Road about 100 metres from the junction with the Coagh Road but did not describe the driver as he didn't think he was relevant to the investigation. Mobile phone data from Mr Reynolds' phone is consistent with the handset being in the Stewartstown area at approximately 21:25 hrs. At 21:29, Oscar 0504 observed the Golf passing through Stewartstown village on the Hillhead Road with two people on board. Mr Duffy was identified by Oscar 424 as the front seat passenger.

[54] The prosecution notes the proximity to Mr Duffy's home and the fact that the Golf had been observed outside his home twenty minutes earlier.

[55] AVI clips from the SD card show images of the inside of a car which is alleged to be transporting the camera to Mr Duffy's home at 10 Westclare Court, Killeen. Clips 194-195 reveal the reflection of a face which is alleged to be Mr Duffy but I attach no weight to it because it is a mere reflection, of very poor quality. It is not possible to make a positive identification of the Golf from the photographs.

[56] Clip 204, timed at 21:33, is alleged to show Mr Reynolds' face in Mr Duffy's kitchen. There is no dispute that the camera clips do record Mr Duffy's kitchen with comparable images contained in photographic bundle exhibit 169. From a comparison of the custody photograph of Mr Reynolds, and his CCTV image exiting the Golf at the Maxol Filling Station, I accept that there is a notable resemblance to Mr Reynolds and I afford weight to the clip, although the ultimate strength of the identification again depends on the strength of the combined circumstances. The weight attached to the time stamp on the clip is strengthened by cell site evidence that between 21:25 and 21:27 hrs, phone was using cells in the Annaghone Road,

Stewartstown area and between 21:32 and 22:12 hrs his phone was using cells providing service in the Westclare Court, Killeen, Coalisland.

[57] The defence submit that even if Mr Reynolds was in Mr Duffy's house on the alleged date and times, that does not point towards guilt since there is a familial relationship between Mr Duffy and Mr Reynolds. Whilst that may be so, I attach significant weight to the fact that an SD card from a camera retrieved from a retired police officer's home, clearly deployed for a terrorist purpose, was inside Mr Duffy's house and has recorded a person with a notable resemblance to Mr Reynolds on it, at relevant times.

[58] Although the defence challenge all of the date stamps, they are consistent with the camera being retrieved as alleged and there is no evidence that those dates or the surveillance evidence of the defendants' movements are inconsistent with the prosecution case.

[59] Surveillance evidence shows the vehicle containing only a driver at the Tamnamore Interchange at 22:18 hrs and the Golf car is captured on the Derrymacash ANPR, en route to Lurgan at 22:29 hrs. Mr Reynolds is observed driving the car at 22:29 hrs with no other occupants. The prosecution case is that Mr Reynolds was returning home to Lurgan, having retrieved the camera from the Annaghone Road and dropped Mr Duffy at his home. Between 22:12 and 22:26 hrs, Mr Reynolds' phone was using cells providing service in an area east of Coalisland and the M1 between Junction 14 at Tamnamore and Junction 11 at Craigavon and between 22:27 and 23:24 hrs his phone was using cells providing service in the vicinity of 75 Kilwilke Road, Lurgan.

[60] On behalf of Mr Reynolds, it is submitted that the evidence is insufficient to prove that he was in the Golf when the camera was retrieved from the Annaghone Road. Although mobile phone evidence places his phone in the Stewartstown area at approximately 21:25 hrs, none of the surveillance officers identify him in the Golf after 19:52 hrs until an hour after the activity at the Annaghone Road when Oscar O506 gave evidence that he "thought" he saw Mr Reynolds in the Golf.

[61] Oscar 424's evidence is relied on as strong evidence pointing away from guilt because he said he could have described the driver (alleged to be Mr Reynolds) at 21:29, but did not because he did not think the person was relevant to the investigation although he knew who Mr Reynolds was.

### ***14 September 2016***

[62] This is the date on which the same camera was allegedly deployed by both defendants in the driveway of Mr X's home, at Magheralin, positioned in such a way as to capture the movements of vehicles to and from the home. The prosecution case is that it would have been apparent from the camera's earlier deployment at the Annaghone Road that it was capable of recording such information.

[63] The surveillance evidence for this date begins at 16:35 hrs. Mr Duffy was identified in the passenger seat of a white Mini Countryman, VRN MA 13 EKX, with a female driving and a child in the rear at Kinnego Embankment, which then turned onto Annesborough Road, Lurgan.

[64] At 17:56 hrs, Mr Reynolds was identified by Oscar 483 getting into the Golf on Victoria St, Lurgan wearing a navy hooded top and light blue top underneath. A male was in the front passenger seat wearing a red top.

[65] At 18:08 hrs, Mr Duffy was again seen in the passenger seat of the Mini Countryman on Northway, Portadown heading towards Portadown at the junction with Highfield Road. Mobile data evidence from the phone attributed to him is consistent with it being in the area of the A3 between Portadown and Armagh between 18:14 hrs and 20:25 hrs. The Mini was again driven by a female.

[66] AVI clips record the camera in Mr Reynolds' kitchen that evening and specifically at 19:28 hrs, a person whose legs can be seen wearing skinny jeans with damage to one knee and Nike trainers matching clothes and shoes seized from Mr Reynolds' house on arrest, can be seen. The prosecution case is that Mr Reynolds was testing the camera in anticipation of deploying it at Drumnabreeze Road and captured himself in the process. Whilst the person cannot positively be identified as Mr Reynolds from facial features, I attach weight to the fact that similar clothing was seized from him upon arrest. Whilst this type of clothing is mass produced, the damage to the jeans at the knee may be considered an identifying factor. I also attach significant weight to the fact that the camera was in Mr Reynolds' home on this date.

[67] In relation to the surveillance evidence, the prosecution notes in particular that at 20:12 hrs there is an unconfirmed sighting of Mr Reynolds in the passenger seat of the Golf with Ciaran Magee confirmed as the driver and at 20:36 hrs, the Golf was observed parked on the left-hand side of Levin Road approximately 20 metres from Lake Street facing in the direction of Kilwilke Road, with Mr Reynolds the passenger and Mr Magee the driver.

[68] At 20:59 hrs the Golf was observed by Oscar 415 parked in a layby opposite the entrance to the Primary School on Tarry Lane, Lurgan, facing Cornakinnegar Road, with at least two people on board. At 21:05 hrs, four people were observed walking from a laneway onto Tarry Lane and towards Cornakinnegar Road - a road without street lighting. The Golf was empty. At 21:07 hrs Julie Hayes, operating a police heli-camera observed three persons walking along Tarry Lane towards Cornakinnegar Road and at 21:09 hrs she observed them getting into the Golf and driving off into Levin Road.

[69] At 21:10 hrs the White Mini was observed on the Ballygittle Road, Coalisland driven by a female with a child passenger and Mr Duffy now absent from the vehicle.

[70] At 21:12 hrs Julie Hayes observed the Golf stopping close to Deeny Drive from Levin Road with one person walking towards Mr Duffy's mother's home on Levin Road and then back to the car. Three persons were observed in the car. The car moved off, stopped again and one person got out and walked to 27 Levin Road before returning to the car which then moves off towards Lake Street.

[71] At 21:17 hrs Mr Duffy was observed by Oscar 505 walking in the area of the Post Office on the corner of Deeny Drive and Levin Road.

[72] It is the prosecution case that Mr Duffy re-entered the Golf at 21:17 hrs, having engaged in anti-surveillance tactics and the car was then tracked by Julie Hayes, who retained the footage, and gave evidence about her observations:

- At 21:18 hrs to the Dromore Road towards Gambletown, then left onto the Lough Road onto the Drumnabreeze Road.
- At 21:29 hrs travelling along the Drumnabreeze Road, left onto Lismaine Road then left onto the New Forge Road and back to the junction with the Dromore Road at 21:36 hrs.
- At 21:39 hrs, having arrived at Dromore Road, turning left onto the Lough Road before again turning left onto the Drumnabreeze Road.
- At 22:06 hrs the Golf was observed on the Dromore Road, travelling back along Springhill Road and onto the Lurgan Road towards Magheralin.
- At 22:10 hrs Oscar 471 observed the Golf on the Lurgan Road into Magheralin from the direction of Dollingstown, which the prosecution submits is consistent with it having turned right at the junction towards Moira through the village of Magheralin.

[73] The evidence in relation to the deployment of the camera that night from the undercover officers, assisted by the (heli-camera) aerial support operated by Julie Hayes is that the Golf made four loops of the area, during which the prosecution alleges that the camera was deployed in Mr X's driveway. Julie Hayes gave evidence that she was tracking the vehicle using thermal imaging techniques, based on the size and shape of the Golf that was being tracked. She was assisted by surveillance officers on the ground and although there were short periods when her vision was obscured by trees, she was confident that the car remained under surveillance throughout.

[74] Mr Polito, an imagery analyst, provided expert opinion on behalf of the defence about the footage from the heli-camera and the possibility of error in the tracking of the Golf due to the short periods when the vehicle was obscured. He had

not been given a photograph or any information about the car in question and accepted that although he cannot be sure that the vehicle tracked throughout was the same vehicle, he cannot rule out the possibility that it was the same vehicle. It is equally possible that it was another car of similar size and shape to the Golf.

[75] He felt “comfortable” in opining that the vehicle in question was similar to a hatchback but was “not comfortable” to say whether it was a five door or three door model. Mr Polito agreed that it was appropriate to take into account other information which might support the identification of the vehicle, such as ANPR and if CCTV was available to enable comment on the colour and shape.

[76] It is accepted that there is no direct evidence of the defendants deploying the camera, but the prosecution submits that if the court is sure that it was the Golf doing the loops, it can infer that the purpose was to enable those involved in the deployment to be dropped off and collected. The following morning it was found by Mr X who photographed it and contacted police.

[77] The reliability of the observations and the footage from aerial support was challenged in cross-examination although no direct accusation of manipulation or lies was made to any of the witnesses. The defence challenge the authenticity of the footage because interviewing officers repeatedly put to both Mr Reynolds and Mr Magee that the Golf stopped during one of the alleged loops for a period of six minutes. If this is correct, the defence submit that this is not the video relied on by the prosecution since no break is observed.

[78] The defence submit that the court should not be satisfied of authenticity because the defence experts were not permitted to carry out examinations that might have confirmed authenticity forensically. However, the correct question is whether authenticity has been proved by all the evidence called by the prosecution taking into account any evidential challenge to its veracity or reliability.

[79] The aerial footage is discontinued at 22:10 hrs as the helicopter leaves the area to refuel and from that point, surveillance officers track the vehicle through Moira, back to Lurgan and then back to Killeen. After refuelling, Julie Hayes observed the Golf again at the Maxol Filling Station at 23:25 hrs. The reliability of her observation is supported by ANPR evidence which confirms the Golf at Tamnamore on the onslip at 23:13:57 and again at Derrymacash at 23:23:20, and also Mr Reynolds’ admission that he is the person seen exiting the Golf at the filling station. Mr Magee is observed on CCTV within the store.

[80] Oscar 504 observes the Golf on Main Street, Moira with three people on board at 22:14 hrs and ANPR confirms the Golf in Moira on its way to the Motorway at 22:14:04. At 22:23 hrs the Golf was observed outside 27 Levin Road Lurgan and at 22:30 hrs two people were observed on foot in the area of Tarry Lane junction with Cornakinnegar Road. At 22:31 a Golf, with no VRN identification turned onto Levin Road from the North Circular Road, Lurgan, at 22:35 hrs the Golf in question

was observed on Levin Road with at least three males on board and at 22:39 hrs the Golf was observed travelling on the Lough Road towards the M1 interchange from the Annesborough Road. ANPR evidence confirms that the Golf was on the M1 at 22:41:45 at Derrymacash heading towards Tamnamore.

[81] In short, the prosecution case is that the Golf was in Moira on its way to Lurgan and then back to Killeen to drop off Mr Duffy. At 23:01 hrs the Golf was observed parked close to Mr Duffy's home. Three males, one of whom was identified as Mr Duffy were seen standing together on the footpath, near the car which had the driver's door open. The prosecution case is that the identification of Mr Duffy is supported by evidence that the phone attributed to him was in the area of the M1 west of Junction 11 and Killeen area between approximately 22:45 hrs and 22:59 hrs and mobile data events are consistent with the handset being in the Killeen area at 23:00 hrs. The surveillance evidence is that the two other males matched the appearance of Mr Reynolds and Mr Magee.

[82] ANPR confirms that subsequently, the Golf was at Tamnamore on the onslip at 23:13:57 and again at Derrymacash at 23:23:20 and at 23:25 hrs, it is accepted that Mr Reynolds is observed on CCTC exiting the Golf at Lough View Maxol Filling Station. Ciaran Magee is alleged to be buying items in the shop. This is after the prosecution say the camera was deployed at Mr X's home and Mr Duffy dropped back to his home.

[83] The prosecution rely on text messages between Mr Reynolds and Ciaran Magee. One such message was a request "for the motor" that night. A 14 second phone call was then had and a text confirmed an agreement to leave the Golf down to Mr Magee later that evening.

[84] Messages from Mr Magee's girlfriend Lauren Lavery to him that night reveal contact from her at 18:05 hrs and 22:48 hrs. No reply was received until 23:33 hrs, which the prosecution points out is 12 minutes after the Golf stopped at Lake Street. In response to her query about where he was and what he had been doing, Mr Magee said he had not had dinner because he had "no money" and in response to her query "Shea not owe u" he replied, "He had no bank card." The following exchange then occurs at 22:41 hrs:

"What did yas do" with his reply at 23:43 hrs.

"Watched the football then went for a spin called into shears mates house had a cup of tea and listened to them talk the biggest load of shite about dogs."

[85] I accept that it is apparent from Snapchat application information that Mr Reynolds uses the username "Shearey 93" and that "Shears" relates to him.

[86] There was a dispute as to whether the hearsay rule applied to these messages, no hearsay application having been made and no objection having been raised at the time the evidence was adduced. Having considered *R v Twist* [2011] EWCA Crim 1143 it is clear that the determination is dependent on the purpose for which the communications are sought to be admitted. I accept that the only admissible purpose is to prove an association between Mr Reynolds and Mr Magee on the night in question, not to prove the truth of the messages and for that limited purpose, no hearsay application is required.

[87] Mobile data evidence from Mr Magee's phone is also consistent with the handset being in the Lurgan area between approximately 18:20 hrs and 19:50 hrs and in the Lake Street area of Lurgan between approximately 23:32 hrs and 23:40hrs, but there were no mobile data events or device data records at all between 20:14 hrs and 23:23 hrs.

[88] The defence rely on the mobile phone evidence which is consistent with Mr Reynolds' phone remaining in the Lurgan area between 17:51 and 23:51 hrs (as well as being consistent with the phone being switched off). Sightings earlier in the evening are consistent with text messages that the Golf would be left down to Mr Magee that evening. The defence submit that the absence of sightings between 20.36 and 23:25, when Mr Reynolds was captured on CCTV at Lough Road Maxol Filling Station also supports the submission that Mr Reynolds was not involved that night. I consider the absence of data on the phone to be a neutral factor since it is equally consistent with the prosecution and defence contentions. I also note that at 23:25 hrs, both Mr Reynolds and Mr Magee were captured on the CCTV.

[89] The defence rely on the fact that in the CCTV footage, Mr Reynolds is wearing different footwear to the person in skinny jeans pacing Mr Reynolds' kitchen in AVI clips time stamped at 19:38 that night, which the defence submit shows the timestamps are unreliable. The defence submission in relation to the AVI clips and the inferences that should be drawn is elaborated upon below. Suffice to say, I do not consider different footwear to be a circumstance from which unreliability of the time stamps can reasonably be inferred.

[90] The defence relies on the evidence that although four persons were observed walking close to the Golf at Tarry Lane at 20:59 hrs, only three persons were observed getting into it. This again is said to support the inference that he was not present or involved in the activity that night.

[91] The weight to be attached and the conclusions reached with regard to all of the surveillance evidence relating to the 4, 8, and 14 September 2016 will depend on and have to be assessed in the light of all the surrounding circumstances to see whether it is strengthened or reduced. I therefore deal with the issue of weight in my consideration and conclusion.

*The finding of the camera by Mr X on 15 September 2016*

[92] Mr X provided two statements to police, one dated 16 September 2016 and a further statement dated 5 September 2023 in support of an application to admit the earlier statement as hearsay on grounds of fear and additional stress and worry arising from his wife's serious illness. The hearsay application was granted. A further statement was made to the Police Ombudsman. The defence rely on inconsistencies in timings of when police personnel arrived at his home, descriptions of the area in which the camera was found and a failure to create a serious crime log as evidence that the court has not been told the truth about events at the crime scene and therefore should not be satisfied of the veracity and reliability of any of the prosecution evidence.

[93] In his initial statement, Mr X described noticing a glint directly opposite him as he was walking out of his garden at around 09:00 hrs on 15 September 2016. He went towards it and saw a small box shaped item, sitting between two trees which he realised on closer inspection, was a camera. It would have a view of any vehicles or persons entering or leaving his driveway. He had not noticed the camera when he had been working in the lane the previous evening. He used his phone to take five photographs of the camera and did not touch or move it in any way. He then contacted police about the finding.

[94] Mr X's phone was seized by police and relevant communications were provided to the defence. The defence was dissatisfied with the material disclosed by the prosecution, particularly regarding the finding of the camera, and a number of disclosure applications were made, culminating in a PII hearing before the disclosure judge, Kinney J. He was critical of the prosecution for not complying with previous directions. It was explained that error had occurred because two disclosure officers were involved, and assurances given to the court by the investigating officer had been made in the absence of knowledge that relevant sensitive material existed but had not been provided to her. It had been provided to the Public Prosecution Service.

[95] Kinney J ruled that there was material surrounding the communications between Mr X and police either formally or informally which should not be disclosed in the public interest because there is a real risk of serious prejudice to an important public interest, namely the methods involved in a proper investigation of crime and the safety of individuals if a full disclosure of the material and information he had seen is disclosed. However, he ordered that the gist of it should be provided to protect the defendants' fair trial rights:

“...Mr [X] is a retired police officer, he discovered a camera along his driveway and after contacting police on the non-emergency number at 9:28am he then contacted, among others, Joe Harper. Mr Harper is a police officer and Mr [X] had known him for some time. Mr [X] took photographs of the camera before contacting Mr Harper

and then sent those photographs to Mr Harper. The photographs were subsequently provided to special operations branch. The prosecution does not hold any materials or information regarding the telephone calls between Mr [X] and Mr Harper including the precise content of the conversations between Mr [X] and Mr Harper or when they took place other than those disclosed as part of the call records for Mr [X's] phone. The prosecution do not hold any materials or information regarding any other calls that may have been made informally between Mr [X] and other police officers, prior to the attendance of police at Drumnabreeze Road on the afternoon of 15 September 2016, other than those which form part of the call records for Mr [X's] phone."

[96] The defence applied for a number of witness summons in respect of police personnel who had not provided statements or who had given statements which were admitted as hearsay due to illness. The content of those statements was uncontroversial and I was satisfied that the criteria for admission were met. I ruled that the test for issuing the witness summonses was not met and refused the application. The defence submit that this ruling has further inhibited a full exploration of events at Mr X's home, since Mr X's statement was also admitted as hearsay. It is unclear how the defence has been in any way inhibited from challenging the prosecution case against either defendant.

#### *The retrieval of the camera from Mr X's home and the dummy replacement*

[97] On 15 September, the police retrieved the camera for examination and replaced it with a dummy replica. The scene was then monitored remotely by police with a live video feed. On 20 September, at 21:14 hrs, two individuals, alleged to be the defendants entered Mr X's property and removed the dummy replica. One, alleged to be Mr Duffy was wearing a pair of gloves and climbed over the gate into the field before going back over the gate after retrieving it and walking towards the Drumnabreeze Road with the other person. Whilst the defence expressed concern that the original camera may have been retrieved by police on 15 September from another position, suggesting interference with the crime scene and deliberate manipulation of evidence, the unnamed individuals do not appear to have had any difficulty locating the dummy replica, which suggests that it was left at the same spot where Mr X found the camera. There is no evidence that Mr X or anyone else interfered with the crime scene.

[98] The prosecution invites the court to consider whether a positive identification can be made from the facial features and clothing observed on the two individuals who retrieved the dummy camera. It is accepted that a number of officers who knew the defendants were unable to identify them from the footage. Having

considered the footage and a still, I am not satisfied that a positive identification of either Mr Duffy or Mr Reynolds can be made to the criminal standard.

[99] Mobile phone data from the phone attributed to Mr Duffy is consistent with the prosecution case that he made his way to Lurgan in the early part of the evening. There is consistent evidence that the handset was in the area of Levin Road, Lurgan between approximately 17:48 hrs and 17:58 hrs. Similar evidence in relation to Mr Reynolds is consistent with his handset being in the Lurgan area between approximately 18:11 hrs and 20:59 hrs.

[100] The Golf was observed by Oscar 424 at 20:50 hrs travelling out of Kiln Road Lurgan onto the Lough Road before turning onto Annesborough Road. Oscar 470 then observed the Golf on Levin Road at 20:57 hrs on Levin Road, towards North Circular Road with at least two people onboard.

[101] At 21:27 hrs, 12 minutes after the individuals left Mr X's home, having retrieved the dummy camera, the Golf was observed on the Belfast Road, towards Cottage Road, from the direction of Lurgan although it is unclear where the vehicle was before that observation on the Belfast Road. Mr Reynolds was observed driving the Golf. Three persons were observed in the car and one officer described the male in the rear in his mid-40s, short dark hair with a square shaped head and wearing a dark coloured top.

[102] At 21:39 hrs, Oscar 470 observed the Golf driving on the Cottage Road towards the junction with Kilmore Road and Oscar 481 observed it turning right into Lurgantarry from Levin Road, Lurgan. At 21:48 hrs the Golf was observed outside Mr Magee's house in Lake Street and the driver was believed to be Mr Reynolds who exited the Golf and walked towards Mr Magee's house. A male was seated in the front passenger seat. At 21:52 hrs an officer believed but was unable to confirm that Mr Duffy was the front seat passenger of the Golf while it was on Lake Street, Lurgan. At 21:56 hrs the Golf was observed parked on Levin Street before moving off towards Lake Street.

[103] The prosecution case is that the Golf was travelling to Mr Duffy's home at this stage and relies on ANPR evidence that the Golf was captured on the M1 offslip at Tamnamore and at 22:22 hrs, the Golf was observed on Lisclare Road, Killeen close to Mr Duffy's home at 10 Westclare Court. Evidence from the phone attributed to Mr Duffy, is consistent with the handset being in the area of Westclare Court.

[104] The Golf is then captured on ANPR at Tamnamore at 23:06 hrs and then at Derrymacash in the direction of Lurgan at 23:15. Oscar 495 observed the Golf exiting the roundabout at Junction 10 of the M1 and driving on Lough Road towards Lurgan City centre. The prosecution case is that Mr Reynolds was making his way home after leaving Mr Duffy off.

[105] Relevant internet searches of the phone attributed to Mr Duffy on 20 September between 22:26 hrs and 22:41 hrs include queries why the SD card was not working and clips could not be played. The web searches are:

“Jazz JDC 77 saying please plug card out means”  
([www.fixya.com](http://www.fixya.com))

“SD card unreadable” ([www.fixya.com](http://www.fixya.com))

“I get asked to please plug out card what does this mean?” ([www.akaqa.com](http://www.akaqa.com))

“What does it mean when you put a sd memory card in the camcorder and it tells you to “PLEASE PLUG OUT CARD wha?” (Yahoo answers)

(For a second time) “Jazz JDC 77 saying please plug card out means” ([www.fixya.com](http://www.fixya.com)).

[106] The prosecution case is that the searches demonstrate Mr Duffy’s attempts to activate the dummy replica that had been replaced by police and monitored at Mr X’s home.

[107] On behalf of Mr Reynolds, the defence point to the questions and assertions put to Mr Reynolds, Mr Duffy, Mr Magee, the co-accused and Mr Stevenson (another suspect) during police interview as evidence that the court could not be sure that it was Mr Reynolds or Mr Duffy involved in the deployment of the camera. For example, police put to Shane Stevenson that he was the person who climbed over the fence to retrieve the dummy camera on 20 September, and it was also put to Ciaran Magee that he was the second male with Mr Duffy who retrieved the dummy camera on that date.

[108] The defence also rely on the sighting of the Golf at 20:57 hrs, six miles from Drumnabreeze to support the submission that neither the Golf nor its occupants were involved in the retrieval of the dummy camera from Drumnabreeze. The absence of any evidence of distance timings or possible routes means that I cannot draw any inference from this fact. It is a neutral circumstance.

[109] The defence also rely on the surveillance officers’ observations that at 21:27, the vehicle was on the Belfast Road from the direction of Lurgan. It is submitted that these observations would make no sense if the Golf and its occupants had been involved in the retrieval of the dummy at 21:14. The prosecution has submitted that a possible route from Drumnabreeze at the relevant time would explain the Golf’s sighting. Again, the absence of any evidence of distance, timings or possible routes means that I cannot draw any inference from this fact. It is a neutral circumstance.

[110] Regarding the internet searches, on behalf of Mr Duffy it is submitted that at their height, the searches indicate that whoever was operating the phone was having trouble with an SD card. There is no evidence about who that was, where that person had been that night, whether he used a vehicle to go there or if so what vehicle or who he had been with at any particular time. Since the phone attributed to him was not password protected, was registered to someone else (although “Dee Duffy” is a web address) and found in his living room, anyone could have made the searches.

[111] As with the earlier dates during which the camera was alleged to have been deployed and retrieved from Annaghone and then deployed in Mr X’s driveway, the weight to be attached and the conclusions reached with regard to the evidence will depend on and have to be assessed in the light of all the surrounding circumstances to see whether it is strengthened or reduced.

[112] The internet searches on the phone attributed to Mr Duffy are clearly relevant both in time and content and I attach significant weight to them.

*The defence case on behalf of Mr Duffy regarding the surveillance evidence on 4, 8, 14 and 20 September*

[113] I am dealing with the case on behalf of Mr Duffy separately because these submissions are based on the evidence of Mr Brian Murphy, Consultant engineer. Mr Murphy was instructed to prepare a report concerning the circumstances in which specific identifications/recognitions were made, and the obstacles that might impede accuracy. He used different camera settings in an attempt to replicate the lighting and other relevant circumstances but accepted the subjectivity of the exercise.

[114] Mr Murphy adopted his two reports in evidence. They concerned surveillance evidence at the following locations and dates:

- William Street: 4 September 2016 – O483
- Lisclare Road: 8 September 2016 & 14 September 2016 - 0424 0478 (8<sup>th</sup>) and 0471 (14<sup>th</sup>)
- Annaghone Road: 8 September 2016 - 0424
- Hillhead Road: 8 September 2016 – 0424
- Levin Road: 14 September 2016 - 0505
- Lake Street: 20 September 2016 – 0424.

[115] The first report concerned all six locations and the second related to Levin Road. The first report took into account a number of imponderables and Mr Murphy indicated that if further information became available to clarify certain matters, he would provide a further report. The second report concerned only Levin Road. In evidence, he summarised his opinion in respect of each location, making the following points.

### ***William Street***

[116] Mr Murphy explained that in order to express an opinion in relation to Oscar 483's identification, it would be important to know whether he was travelling in a vehicle and if so what direction he was travelling in. The orientation of travel would be very relevant to his ability to see a rear seat passenger, alleged to be Mr Duffy. He made the general point that would be reasonable to assume that persons in the front of a car would draw the attention of the surveillance officer rather than the people in the back. Mr Murphy stated that sunset was 20:08 hrs and the observation occurred 30 minutes before sunset. In the absence of confirmation as to the speed of the vehicles concerned, he opined on the likely distance and time available to make observations depending on whether both cars were driving at 30mph or 20mph. At 30mph, the closing speed would be 60mph which is equivalent to 26.8m/second. Thus, at two seconds, the cars would have been 53.6m away. At 20mph then the closing speed would be 40mph. This is equivalent to 17.9 m/second. Thus, at two seconds the cars would have been 35.8m away.

### ***Lisclare Road***

#### ***8 September 2016***

[117] Mr Murphy makes the point that sunset in nearby Stewartstown was at 19:59 hrs. Oscar 424 observed the Golf parked between Claremount Drive and Westclare entrances on the Lisclare Road at 21:06 hrs which was nearly 1 hour and 7 minutes after sunset.

[118] Oscar 478 observed the Golf parked at the entrance to Claremount Drive at 21:34 hrs. The car was facing Stewartstown. This observation occurred at 1 hour and 35 minutes after sunset.

[119] Mr Murphy also points out that in respect of both of these observations the purported observation of the Golf are within areas covered by streetlights, which he illustrated on a plan (Plan 2).

#### ***14 September 2016***

[120] On the assumption that Oscar 471 was in a car when he purportedly identified/recognised Mr Duffy (because there was mention of the car's headlights,

and three of those locations were some distance from Killeen), he raises a number of points:

- (i) Oscar 471 made his statement on 14 July 2017, 10 months after the events.
- (ii) Although Oscar 471 described the Golf as stationary at the junction of Lisclare Road, it was not clear what junction was being referred to. However, since Oscar 471's evidence is '...I saw Duffy's face clearly as he was looking towards the Lisclare Road...' Mr Murphy has assumed that the junction referred to is that of Lisclare Road with Westclare Court.
- (iii) Mr Murphy was not able to infer from Oscar 471's evidence the orientation of the Golf, nor was it clear which footpath the men were standing on ie northern or southern pavement.
- (iv) Neither was it clear whether Oscar 471 was travelling towards or away from Stewartstown.

[121] Whilst Mr Murphy accepted that calculations of the time available for an identification for a passing car would depend on clarification of those imponderables, he took a series of photos (numbered 25-37) to illustrate the circumstances of an identification.

[122] He also raised other issues including:

- (i) Obscuring effect of the other men.
- (ii) The effect of the Golf's headlights.
- (iii) The effect of the headlights in Oscar 471's car.

[123] Taking into account all of the imponderables he has set out, Mr Murphy's view is that, depending on the circumstances, identification could be more difficult than could otherwise be the case.

### *Annaghone Road*

[124] Sunset in Stewartstown on 8 September was 19:59 hrs, so Oscar 424's observation that '...at 2125 hours I observed an unconfirmed for the grey VW Golf slow down and possibly stop on the Annaghone Road/Stewartstown, about 100m up from the junction, with the Coagh Road, Stewartstown ...' occurred 1 hour and 26 minutes after sunset. Mr Murphy makes the following points:

- (i) This is a rural area and there no street lights.
- (ii) No mention is made of whether the car lights were on or off.

(iii) The registration number is not quoted.

[125] Mr Murphy has assumed that Oscar 424 was travelling on the Coagh Road at the time of the observation. His next observation was four minutes later in Stewartstown so Mr Murphy assumes that the observation was made from a vehicle, although the direction of travel was not clear. Accordingly, he considered two possible directions, i.e. north out of Stewartstown or south towards Stewartstown. He stated that the view into the Annaghone Road is restricted to the south by the hedges and to the north by Delamere House. He took a number of photographs both north and south of the junction. The distance between these positions is 10 metres and a car travelling at 30mph would cover this distance in just under  $\frac{3}{4}$  second. The time to view a car parked approximately 100m from the junction would be less than this. In addition, he noted that this section of the Coagh Road is governed by the national speed limit and at the time of his inspection the traffic was travelling considerably faster than 30mph.

### *Hillhead Road*

[126] Mr Murphy's opinion relates to observation of Oscar 424 that '...at 2129 hours I again observed the grey VW Golf registration SUI7104 on the Hillhead Road, Stewartstown. I saw a person I believed to be Damian Duffy sitting in the front passenger seat of the Golf at this time...'

[127] Mr Murphy notes that the statement does not specifically mention the location within Stewartstown from which the observation was made. As mentioned previously sunset was at 19:59 hrs and this observation occurred 21:29 hrs - 1.5 hours after sunset.

[128] He raised the following imponderables namely:

- (i) Where on Hillhead did this identification occur?
- (ii) Were both vehicles moving?
- (iii) What direction was officer travelling if in a vehicle?

[129] He considered it reasonable to assume both vehicles were using dipped headlights and travelling in opposite directions given the purported identification was of a person in the front passenger seat. On that assumption he raised two issues:

- (i) Effect of the subject's headlights on the accuracy of the identification
- (ii) Indicative timings: even in normal daylight the time available would be restricted by the closing speed of the two cars, so if the two vehicles were

travelling at 20mph, their closing speed would be 40mph and if both at 30mph the closing would be 60mph.

### ***Levin Road***

[130] Mr Murphy attended the area of Levin Road and Deeny Drive in daytime and nighttime and took photographs demonstrating his observations. He took into account the evidence given by surveillance officer 0505, in particular and provided the court with assistance from an engineering perspective from 0505's evidence both at the committal hearing and before this court.

[131] In summary, he made the following points from an engineering and surveying point of view:

- (a) Timing: the time available for observation of Mr Duffy is significantly shorter than that estimated by 0505. Dependent on the speed, the view available to identify must be a fraction of the second.
- (b) Sunset and available light: although there are streetlights in the vicinity, in my opinion, the ability to identify a subject would be adversely affected by sunset having been approximately one and ½ hours previous.
- (c) Other relevant factors include:
  - interruption of the view when the view changes from the windscreen to the side window
  - the busyness of Levin Road was evident on each time he visited with both pedestrian and vehicular traffic,

all of which Mr Murphy opined could have an adverse impact on recognising and recording the car registration number, because it occurred in a short time period of time.

### ***Lake Street***

[132] This relates to the observation of Oscar 424 on 20 September 2016. Sunset occurred at 1928 hours and the observation thus occurred nearly 2.5 hours after sunset. Assuming that Oscar 424 was in a car, Mr Murphy noted the following imponderables:

- (i) What direction was the officer travelling?
- (ii) Was the Golf static or moving?
- (iii) What direction was the Golf facing?

(iv) Was there anyone else in the car?

(v) Where was the Golf when the observation occurred?

[133] Mr Murphy indicated that if further information became available relating to the various loci after evidence was heard, he would prepare an update on these locations. As stated, his second report relates only to Levin Road.

[134] The prosecution challenged Mr Murphy's evidence, with specific reference to Levin Road on 14 September, the date the camera was allegedly deployed in Mr X's driveway. Mr Murphy accepted that the camera is not capable of replicating the human eye, which will have a sharper focus on a face. He also accepted that there are a lot of limitations to the exercise he performed.

[135] I have taken into account Mr Murphy's evidence in respect of each of the specific identification/recognitions challenged. Ultimately, the weight to be attached and the conclusions reached with regard to the evidence will depend on and have to be assessed in the light of all the surrounding circumstances to see whether it is strengthened or reduced.

#### *The fingerprint evidence in relation to Mr Reynolds*

[136] A fingerprint sample from Mr Reynolds was taken on 23 September 2016 by Lorraine Reid and on that same date, an imprint was located on the camera retrieved by police from Drumnabreeze by Sarah Jane Kelly. On 26 September 2016, Kate Wilson a fingerprint expert employed by PSNI Fingerprint Bureau received two national fingerprint forms relating to Mr Reynolds, signed by Lorraine Reid. Mr Reynolds' fingerprint sample was smudged and at a later stage, a further set of fingerprints was taken. Prior to Mrs Wilson beginning her examination, using the initial sample, the mark on the camera had already been compared against the fingerprint of Mr Duffy, Mr Magee and Mr Stevenson, with negative result.

[137] Mrs Wilson has been employed by the PSNI Fingerprint Bureau for 30 years and is an expert in her field. She successfully completed an Advanced Fingerprint Course which qualifies her to give expert evidence in court and her name was included in the National Register of Fingerprint Experts, which existed previously. She is required to successfully complete bi-annual competency tests and her work is dip sampled for quality analysis. She has conducted probably, thousands of fingerprint comparison exercises in her assessment and her work has never been the subject of criticism.

[138] Mrs Wilson explained the procedure she followed in carrying out her analysis of the scene of crime mark from the camera and Mr Reynolds' fingerprints. I accept that the procedure, including verification of her conclusion by two other fingerprint experts was in line with the accreditation of the PSNI Fingerprint Bureau at that

time. As a result of recommendations from the Forensic Regulator, the current system of accreditation (17025) requires fingerprint analysis to be carried out in a more transparent way with detailed notetaking and verification to be conducted *blind* in the sense that the reviewer is unaware of the original findings.

[139] In line with the procedure adopted in the Bureau at that time, and the relevant accreditation, Mrs Wilson's notes are relatively short and largely record her conclusion of a fingerprint match. However, she gave evidence, which I accept, that in line with best practice, the crime scene mark was examined first under a magnifying glass, to look for things such as a pattern, which she found in this case. The importance of examining the crime scene mark first is that it will always be of poorer quality than the fingerprint taken in controlled circumstances from a suspect. Examining it first, reduces the possibility of cognitive bias.

[140] Only after examining the crime scene mark did she compare it with the fingerprint from Mr Reynolds finding 11 characteristics in agreement and none in disagreement in respect of the thumb. A non-numerical standard is now applied in fingerprint analysis, and if any characteristics are found to be in disagreement, no identification should be made. She stated that she was certain of a match. Mrs Wilson subsequently carried out a comparison with Luke O'Neill's print with a negative result.

[141] Whilst the examination in 2016 was conducted using the poorer quality print, in 2017 when Mrs Wilson was asked to provide a statement in relation to her fingerprint analysis she carried out the analysis afresh, in line with the accreditation process at that time, using the better quality set of prints from Mr Reynolds. Her conclusion was the same: she was a hundred percent *certain* of a match. In the course of these proceedings Mrs Wilson was requested to provide an enlargement of the images for the court and again, analysing the marks, reached the same conclusion for the third time.

[142] Mrs Wilson accepts that the Forensic Science Regulator, following the Fingerprint Inquiry Scotland Report 2011, now recommends that experts should not express their view as 100% certain since it may suggest, wrongly, that fingerprint evidence is infallible. She also agreed that since 2018, the Bureau has followed this approach. She then clarified that in her expert opinion, she was sure of a match, and that neither of the two experts who independently peer reviewed her work, expressed any doubt of that conclusion. Although they did not give evidence, their signatures are present on the relevant paperwork and that evidence was not challenged. The peer reviewers did not carry out their reviews blind in the sense that they did know a match had been found, but they were not provided with any details of Mrs Wilson's examination.

[143] Mr Simon Bunter, the sole reporting fingerprint expert employed by Borer's Consultants gave evidence challenging Mrs Wilson's findings. He accepts that it is a general recommendation or requirement of the Forensic Science Regulator that in

subjective forensic disciplines such as fingerprints, there should be peer review. His work was reviewed blind by Mr Guy Cooper, who he acknowledged is not a fingerprint expert.

[144] Whilst having no fingerprint qualifications, Mr Bunter said that Mr Cooper has successfully performed fingerprint competency and proficiency tests within Borer's, and Mr Bunter considers him to be an expert. In order to become a fingerprint expert, a person has to have worked in a police environment and completed the Police Advanced Experts course. Mr Cooper has not done so, but Mr Bunter took issue with that requirement and asserted that his expertise is based on prolonged casework, training and successful external proficiency tests which is a sufficient basis for expertise in other disciplines of forensic science.

[145] Mr Bunter did accept that Mr Cooper could have completed the Initial Fingerprint Examination Course although he had not, but stated that in any event, this course would not have enabled him to be classified as a fingerprint expert.

[146] Mr Bunter uses a digital examination process. There is no evidence that the digital process is superior to the traditional method using a magnifying glass. In line with the Forensic Regulator's recommendations, he made detailed notes demonstrating how his comparison was conducted and in particular, confirming that like Mrs Wilson, the crime scene mark was examined prior to examining the better quality mark from Mr Reynolds.

[147] Although it is not a recommendation of the Forensic Regulator, Mr Bunter (in accordance with Borer's practice) analyses the quality of characteristics noting them to be high or low quality marks. Mrs Wilson, as is the practice in the Fingerprint Bureau, makes no distinction in the quality of marks that she finds in agreement. Applying his method, Mr Bunter agreed with Mrs Wilson that four characteristics were in agreement (1, 2, 3 and 11), because he considered them to be high quality, he found five characteristics in agreement with low confidence because they were not as clear as 1, 2, 3 and 11 and found two in agreement during the comparison process to which he attributed less weight. In short, both experts found 11 ridge characteristics in agreement, but because Mr Bunter also found 13 differences, he opined that the result was inconclusive.

[148] He considered that it was not safe or reliable to provide a result of either identified or excluded and nor was it appropriate to provide a meaningful opinion on the likelihood as to whether the relevant mark belonged to Mr Reynolds. He in line with the accreditation process at that time said that "in [his] mind, what you have here is the significant possibility that there is somebody else out there whose fingerprint would match this mark a lot better than Mr Reynolds fingerprint does."

[149] Mr Bunter accepts that his attribution of marks as high or low quality is a method used by Borer's and is not a recommendation of the Forensic Regulator. He

did however rely on the following recommendations of the Fingerprint Inquiry Scotland Report (2011) to explain his rationale:

- findings in relation to fingerprints are based on personal opinion;
- this opinion is influenced by the quality of the materials that are examined, their ability to observe detail in mark and print reliably, the subjective interpretation of observed characteristics, the cogency of explanations for any differences and the subjective view of sufficiency;
- in order to allow the court to assess the strength of their evidence, fingerprint examiners should highlight the variables relevant to their assessment and how they have formed their conclusions in the light of those variables;
- the Scottish Police Authority Forensic Services (SPSA), in conjunction with members of the academic community as appropriate, should design a practical system for examiners to assess and evaluate (a) tolerances and (b) any reverse reasoning;
- fingerprint examiners should assess tolerances during the analysis stage so that when they come to evaluate whether the mark and print match they are conscious of the risk of applying excessive tolerances;
- SPSA guidance to fingerprint examiners should emphasise the need at the evaluation stage to reflect on: tolerances, the quality of similarities, the nature of differences, any explanations for differences, the extent to which reverse reasoning may have been employed and the sufficiency of matching characteristics;

[150] The methodology adopted by the PSNI Fingerprint Bureau, in line with its accreditation in 2016 and explained by Mrs Wilson, accords with the terminology used by The Forensic Regulator and the recommendation of the Fingerprint Inquiry. The word “difference” should be understood in the context of characteristics which are in “agreement” or “disagreement” in fingerprint comparison. “Agreement” is defined as “the ridge flow characteristics and/or details appear in the same relative position with the same intervening ridge count, allowing for explainable differences so as to enable the practitioner to reach their conclusion.” Disagreement is defined as “where the friction ridge flow between impressions differ, the ridge characteristics and/or details do not appear in the same relative position, do not have the same intervening ridge kind and/or there may be differences that cannot be explained.”

[151] Mrs Wilson said that there were explanations for the differences found by Mr Bunter, such as compression due to pressure when the crime scene mark was left and so she did not regard them as points in disagreement. She also made the point

that the digital system employed by Mr Bunter can lead to further distortion of a mark, affecting the ridge characteristics.

[152] An example of the dispute between the experts related to Mrs Wilson's explanation of marks as subsidiary ridges with Mr Bunter referring to the same marks as differences. They appear on the crime scene mark only. Mrs Wilson explained that these marks can be caused by pressure when the mark is left at the scene which explains why they are not on the better quality mark from the suspect. They are not actually identifying differences. Mrs Wilson discounted the possibility that compression could also result in similarity of characteristics.

[153] Much of the debate also concerned a detailed examination of the marks and whether or not a particular mark was a pore, a ridge ending or was fragmentation of the mark, whether there were crossover lines present, whether there were thin lines between two ridges and if so how many, whether a feature was a gap between two ridges or whether it showed at least one bifurcated and possibly an intervening ridge.

[154] Mrs Wilson was cross-examined over several days. She accepted making a clerical error when preparing an explanatory document in respect of a characteristic, which in fact, was noted to be in agreement by both experts. For that reason, I am satisfied that nothing turns on that error. The defence criticise the manner in which Mrs Wilson gave evidence and the fact that only after a highly technical debate in the course of cross-examination, that error was accepted. The defence also submits that Mrs Wilson's expert evidence was illogical and wrong, on the basis that Mr Bunter disagreed with it.

[155] In determining this dispute, I am mindful of the directions given to juries when faced with conflicting expert opinion particularly when the court is considering expert evidence in a forensic field which is subjective. The starting point is that the opinion of an expert is only admissible when it is necessary to provide the court with information likely to be outside its own knowledge and experience in this case fingerprint evidence. As is the case with any other witness, it is my task to weigh up the evidence of the experts, which includes any evidence of opinion, and to decide what I accept and what I do not. In doing so, I should take into account the qualifications, practical experience, methodology, source material, quality of analysis, whether or not the opinion is based upon a statistical analysis, and the objectivity of the experts. The court must not substitute its own opinion for those of the experts for example by undertaking its own examination of the fingerprint.

[156] In written submissions, the prosecution invited me to examine the features on an enlargement and reach my own conclusion about the individual marks in dispute. I decline to do so and in the course of oral submissions the prosecution accepted the correctness of that position. Whilst a tribunal of fact is entitled to resolve disputes in expert evidence and decide what evidence to accept and rejects,

there is a clear warning that in an area of expert evidence it is inappropriate to carry out what is in effect, its own fingerprint examination.

[157] However, having considered the evidence of both experts very carefully I accept the expert opinion of Mrs Wilson. She is an expert of 30 years standing, she has now carried out an examination of the crime scene mark with the mark attributed to Mr Reynolds on three separate occasions, concluding on each occasion that it is an identification match. Two independent fingerprint experts have reached a similar conclusion. Mr Bunter's work was not peer reviewed by a fingerprint expert, despite his expressed total confidence in the work of Mr Cooper.

[158] The nub of the dispute is whether the differences noted can be explained. In this case, what Mr Bunter has described as "differences", have been explained by Mrs Wilson. Whilst her explanation is disputed and this is an area of expertise, I have taken into account her many years of experience during which her work has not been criticised, the analysis performed on three occasions with the same result, the peer review by two other independent experts and the fact that I accept she conducted the analysis correctly, albeit the steps are not noted in writing.

[159] I also note that the weighting scale applied by Mr Bunter - high confidence, low confidence etcetera is not recommended by the Forensic Regulator but is a system devised by Borers' Consultants based on their interpretation of the recommendations of the Fingerprint Inquiry. I accept that inevitably, some characteristics are likely to be clearer than others in the crime scene mark due to distortion fragmentation and/or smudging but that does not inevitably lead to an unreliable conclusion once it is compared with the suspect's prints. Ultimately, reliability depends on the quality of the mark and the expertise of the examiner.

[160] Both experts ultimately find 11 characteristics in agreement and there is no minimum number of characteristics which must be in agreement before a match can be made. Mrs Wilson's evidence was categorical that if there were any differences that could not be explained scientifically, she would not have concluded a match.

[161] In accepting Mrs Wilson's evidence, I am of course very mindful that fingerprint evidence is not infallible and the weight to be attached to this evidence must be assessed in light of all the surrounding circumstances, taking particular account of any circumstances that point away from guilt. In determining whether the evidence points beyond doubt to one conclusion only, I also bear in mind that Mr Reynolds' fingerprint on the camera is not in itself, a sufficient basis to find him guilty of any of these offences.

### *The bad character evidence in relation to Mr Duffy*

[162] At the end of the prosecution case I admitted bad character evidence in relation to Mr Duffy under Article 6(1)(d) of the 2024 Order:

“(d) it is relevant to an important matter in issue between the defendant and the prosecution.”

[163] I accepted the prosecution submission that the important matter in issue is the rebuttal of an innocent explanation of, or an explanation of coincidence in relation to the various circumstantial strands relied on by the prosecution and that the bad character evidence strengthens other evidence tending to establish guilt.

[164] The bad character evidence relates to Mr Duffy’s convictions after trial of offences of assault occasioning actual bodily harm, false imprisonment and attempting to elicit information likely to be of use to terrorists. The offences were committed on 14 August 1992 and the defendant was convicted on 4 February 1993.

[165] I took into account the written judgment of HHJ Pringle as he then was, which sets out the circumstances. These relate to an incident when a part-time UDR soldier, Paul Nolan was in a car in Lurgan with two other males. Mr Duffy approached the car and tried to physically drag Mr Nolan out of the car which moved off for a short distance before stopping. Mr Duffy and a co-accused dragged Mr Nolan out of the car and held him face down on the ground, and Mr Duffy was on his back with an arm around his neck, choking him, hitting him and asking him for names and addresses of members of the UDR and the police.

[166] HHJ Pringle was satisfied beyond reasonable doubt that Mr Duffy was the instigator of the incident.

[167] In admitting the evidence, I took into account the fact that despite the age of the convictions, terrorist offences are still, relatively rare and that the convictions are highly relevant to the question of guilt in this case, in light of the string of apparent co-incidences in time, location, AVI clips and internet searches on a phone attributed to him.

### *Consideration*

#### *Abuse of process*

[168] On behalf of Mr Reynolds, I am asked to conclude that the running of this trial has been so materially unfair to the defence that the trial should be stayed as either an abuse of process or a trial process where the defence’s fair trial rights have not been respected contrary to article 6 ECHR and section 6 of the Human Rights Act 1998. In tandem, the defence submit that the Court should not convict the defendant on the basis that it could not be sure that the Crown’s evidence was full, accurate and truthful.

[169] It is submitted that the court was in error in interpreting the submission of no case to answer in respect of Mr Reynolds as including an application to stay the

proceedings as an abuse of process, although that submission is now made. I refer to para 5(e) of Mr Reynolds' direction submission where it states:

"In any event the running of the trial has been so materially unfair to the defence so that the trial should be stopped at this juncture without requiring the defence to answer the Crown's allegations."

[170] It is unclear what was meant by this submission, other than an application for a stay since the point is separate from those made in support of the *Galbraith* test.

[171] In closing submissions, a stay is expressly sought on the following grounds:

- (i) the general nature of the surveillance evidence; and
- (ii) the nature of the evidence at the crime scene. A summary of the points is set out at para 68 of the closing submissions which in itself is a summary of paras 8 to 14 of submissions that were made in the course of the application of no case to answer.

They include:

- (a) The surveillance officers were primed to expect to see certain persons which affected the reliability of alleged sightings.
- (b) There is no system of recording and thus regulating observations that was transparent and excluded the possibility of manipulation.
- (c) The system allowed for contemporaneous records to be improved upon without proper transparency as to when improvements were made and how.
- (d) The surveillance logs in themselves were suspicious: the Crown had been called upon to prove the logs in their original format in the face of a warning that failure to do so would give rise to possible inference against the Crown. Despite this warning they failed to do so. Failure to do so gives rise to reasonable doubt as to the manner in which this evidence is collected.

[172] As an example, the defence rely on an "impossible" sighting of Oscar 471 on 14 September 2026 and the evidence of three surveillance officers who gave evidence about sightings of the Golf and its direction of travel on 20 September (although the defence relied upon it to submit that it could not have been coming from Drumnabreeze). This is said to place the entire cohort of surveillance evidence in dispute.

[173] In the written submission, the defence have set out instances where statements either contained material *Turnbull* evidence which was not contained in

the log even though the statement was made either weeks or months after the event or as in the example above, factual evidence given in court regarding direction of travel, or in some instances, conflicting evidence.

[174] The defence also rely on the failure of the prosecution to call witnesses to be cross-examined about the crime scene and the finding of the camera and the refusal of the court to issue witness summonses in respect of them, along with officers who had never made statements. It should be noted that the witnesses who had made statements were permitted to have their statements admitted as hearsay due to illness or fear. It was accepted that the contents of the statements were non-contentious but were necessary continuity statements for the prosecution. There was no application to have updated medicals, no indication their circumstances had changed and the test for issuing a witness summons was not met.

[175] On behalf of Mr Duffy, I am asked to conclude that there has been an abuse of process on the ground that he cannot have a fair trial for the following reasons:

- (a) disclosure failings have resulted in his inability to have a fair trial; and
- (b) the “purported deliberate decision to record the identification sighting as they were radioed in” means he is unable to have a fair trial.

[176] There are two grounds on which proceedings may be stayed as an abuse of process:

- (i) that it is impossible for the defendant to have a fair trial; and
- (ii) that it would be an affront to the court’s sense of justice and propriety to try the defendant in the particular circumstances of the case even though a fair trial is possible.

[177] I have considered the application under both grounds.

[178] I refuse the application to stay the proceedings on the ground that the defendants cannot have a fair trial. The deficiencies in the surveillance evidence have been exposed in cross-examination and will be taken into account in determining the weight that should be attached to it. The trial process is capable of dealing appropriately with these issues. It is also noteworthy that it was not put to any witness explicitly that the identification/recognition evidence of Mr Reynolds was wrong either in error or as a result of fabrication. In respect of Mr Duffy, it was put to only one witness that his identification was wrong.

[179] There were failings in the disclosure process and Kinney J expressed his criticism in a written ruling. Notwithstanding the investigating officer’s explanation and her assurances to the court that there had been no bad faith, it is clearly

unacceptable that one police officer did not have responsibility for the entire disclosure process. However, senior Crown Counsel has confirmed that he has personally seen all material, and that disclosure has been properly dealt with.

[180] With regard to events at the crime scene which the defence argue could not be explored due to the unavailability of witnesses, Kinney J confirmed that PII attached to some material and carefully directed the gist of information required to ensure the defendants' fair trial rights.

[181] In any event, the defence has been unable to articulate how the purported inability to question witnesses has affected the fairness of the trial. This is not a case where entrapment has been pleaded or alleged in evidence nor is there any evidence to support the inference that the camera or the crime scene was manipulated or interfered with. It is unclear what manipulation or interference is suggested or how it might have influenced the fairness of the trial. There is a bare denial from both defendants, and every aspect of the prosecution case has been challenged.

[182] If the camera had been retrieved from some other part of the driveway or tampered with in some way, the two individuals who came to retrieve it certainly had no difficulty finding it. That strongly supports the inference that they knew exactly where to look for it. There is no reasonable basis for inferring that the crime scene was manipulated nor has the defence explained how it might have been manipulated to falsely implicate these defendants. I do not accept that the inability to question Mr X or any of the officers who attended his home has rendered this trial unfair in any way.

[183] The submission appears to be that if cross-examination of witnesses at the scene revealed that police did not give the court all the information in their possession about this terrorist plot, then it may follow that the court should not accept any of the evidence, specifically, the evidence of the surveillance officers. This was a planned surveillance operation and so it is highly likely that police had information which has not been disclosed because it is of a sensitive nature and the test for disclosure has either not been met or deemed to attract PII, in which case a gist has been provided on the direction of the disclosure judge. The weight that should be attached to the surveillance evidence depends on all the circumstances and the cumulative weight of the combined evidence to which I attach weight.

[184] In relation to the latter ground, that it would be unfair to try the defendants, I remind myself that there 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 thus a remedy of last resort. In *Crawley* [2014] EWCA Crim 1028 Sir Brian Leveson said at [21] that "cases in which it may be unfair to try the accused will include, but are not confined to, those cases where there has been bad faith, unlawfulness or executive misconduct."

[185] The purpose of a stay is to protect the integrity of the criminal justice system, and a balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose [per Lord Steyn in *Latif* [1996] 1 All Er 353]. This 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 [see *Norman* 2016 EWCA Crim 1564].

[186] In *Norman*, the Court of Appeal explained that “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 misconduct was committed and circumstances of urgency, emergency or necessity; the availability of a sanction against the persons 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.” (See also *McNally and McManus* [2009] NICA 3).

[187] I do not accept that it would be unfair to try the defendants.

#### *The case against and for each defendant*

[188] I remind myself that I can only convict either of the defendants if I am sure of their guilt. I am also mindful that in a circumstantial case I am required to consider the strength of each strand of the prosecution case, and what parts of the evidence are of sufficient weight to be considered part of or strands in this case. Each individual strand need not be proved beyond reasonable doubt. Rather, each strand, if probative of guilt should be given such weight as the court considers proper. Once all the strands are put together, they must be strong enough to exclude the reasonable possibility of an innocent explanation.

[189] The combination of those strands must also be reviewed in light of inferences that may properly be drawn from the fact that the defendants have declined to give evidence although I remind myself that I should only make such a finding if the evidence is such as to require an answer and there is no explanation for his failure to do so. Finally, I may take it into account as some additional support for the prosecution’s case against that defendant, but I cannot find any of the defendants guilty only, or mainly, because that defendant did not give evidence, and care must be taken not to equate silence with guilt.

[190] I am also mindful that whilst consideration of the evidence will involve looking at the impact on one or both defendants, the case against and for each defendant must be treated separately.

[191] Before turning to the central issues in the case, I accept that the only reasonable inference to be drawn from the deployment of a Swann wildlife camera in the driveway of a retired police officer's home is that whoever is responsible, intended that it should be preparatory to acts of terrorism. Whatever the precise purpose of deploying it at Annaghone Road, it is reasonable to infer that the events are connected and the content of the clips confirming the positioning of the camera so as to record registration numbers supports that inference.

[192] The surveillance evidence is the core of the prosecution case. It was not by chance that multiple undercover officers were positioned at the relevant points after briefings which included photographs of persons and vehicles of interest, including the Golf car. Nor was the police heli-camera in operation by chance, tasked with tracking the Golf on the night before Mr X located the camera in his driveway.

[193] I have considered the points made by the defence that:

- The existence of previous statements by surveillance officers was not referred to in subsequent statements and was only uncovered in cross-examination.
- Witness statements contained additional information relevant to the credibility of sightings which was not recorded on the surveillance log by the log keeper.
- In some instances, officers recorded "unconfirmed sightings" or did not purport to identify an occupant of the car.
- The occupancy of the Golf varied, and others who are not before the court, were also identified in it on the relevant dates.
- One officer was specifically told about details another officer had recorded and asked whether another statement could be provided, although he declined to make any additional statement.
- In some instances, evidence from officers about the position of the vehicle or how many persons were seen near the Golf conflicted.

[194] I bear in mind the circumstances in which identifications/ recognitions were made which make it inevitable that some errors may have occurred. The officers were in vehicles, sometimes in the dusk or darkness, trained not to stare or draw attention to themselves. Some identifications were no doubt not much more than fleeting and the court has reminded itself of the *Turnbull* warnings relevant to such cases. Whilst recognitions by numerous trained surveillance officers, pre-briefed, are likely to be more reliable than ordinary witnesses I do of course bear in mind that even a number of professional witnesses may be mistaken. The possibility of confirmation bias leading to error must also be borne in mind. I do, however,

consider it highly unlikely that all or most of them were mistaken, and Mr Murphy candidly told the court that the ability of the human eye to perceive detail is superior to any camera or artificial attempt to replicate a scenario.

[195] I also take into account that where officers were not sure of an identification, they said so and whilst criticism has been levied at the content of the surveillance log, unconfirmed sightings and no identification made at all in certain instances, those weaknesses are laid bare. If the purpose of the log had been to allow for manipulation, it would not have been difficult to remove any trace of uncertainty.

[196] Evidently, a digital system of recording contemporaneous surveillance communications would have provided absolute accuracy. In a fastmoving situation, where surveillance officers were on a planned operation, full details of each identification may not have been capable of being relayed or recorded manually with complete accuracy. For that reason, additions or corrections were permitted during the de-briefing, signed by the relevant officer. There is no basis for inferring a deliberate decision not to employ a digital system for improper reasons.

[197] The defence queried what appeared to be a different ink in part of the log and suggested it was evidence of alteration of evidence. The prosecution provided an explanation in writing to the defence which the defence objected to me seeing, on the basis that any explanation should be given in evidence. Nevertheless, the defence submit that I should doubt the reliability of the log, or the evidence based upon it because of the appearance of the ink. I decline to draw such an inference in those circumstances.

[198] However, I do accept that information in statements which was not recorded in the contemporaneous log is unlikely to be accurate when the statements were created weeks or months afterwards. It is significant that such detail supported the purported identification/recognition by including detailed *Turnbull* type information. This has a bearing on the reliability of their evidence.

[199] In light of these issues, along with some conflicting evidence, I accept that the weight to be attached to the surveillance evidence depends on what other evidence there is to support it.

[200] The ANPR evidence is clearly supportive because it conclusively confirms the surveillance evidence of sightings of the Golf at the relevant locations and at the relevant times. Whilst it relates only to the Golf and not its occupants, it is relevant to the veracity and reliability of the surveillance evidence generally.

[201] As well as ANPR, the surveillance evidence is supported by mobile data evidence, date stamps on the AVI clips from the SD card of the camera, the content of the clips and in the case of Mr Duffy, relevant internet searches. Whilst the date stamps cannot be forensically proved, they are consistent with the other strands of evidence. That is unlikely to be a coincidence and for that reason, taking into

account both prosecution and defence witnesses, I accept their accuracy. On behalf of Mr Reynolds, it is submitted that is equally possible that -

- (a) The SD card was in different cameras, with different frame rate and format settings on two separate occasions; or
- (b) The SD card had data transferred to it from other sources but ultimately from SD cards which had been inserted into other cameras with different settings.

[202] I do not accept that such inferences can reasonably be drawn from the evidence. Mr Lacey, on behalf of the defence said that although the most obvious reason for the technical anomalies could be a manual change in the settings between 14 and 20 September, he could not offer an opinion without a forensic examination. Without examining the device, he could not say if the camera had lost power or the settings may have reverted to some default setting and there may be other explanations.

[203] Whilst for security reasons, limitations, authorised by the disclosure judge, were placed on the extent of examination of both the footage and the device, Mr Lacey accepted that on visual examination the material appeared to be authentic.

[204] I have carefully considered the repeated suggestions during police interview that the Golf was stationary for a period of six minutes and the defence submission that the absence of such an occurrence on the heli-tele footage suggests that it has been tampered with. However, I take into account the evidence of both Mr Polito and Mr Lacey that they observed nothing to suggest that the footage is not authentic. The timing of the indisputable observation of Mr Reynolds on CCTV at the Maxol Filling Station, is also consistent with the heli-tele footage.

[205] I accept the evidence of Julie Hayes, which is also supported by surveillance officers, that the Golf did do four loops of the area around Drumnabreeze and that the footage played to the court is authentic. In my view, it is reasonable to infer that the camera was placed in Mr X's driveway during these loops.

[206] Taking into account all of the surveillance evidence and the evidence that supports it, including the ANPR evidence, the mobile phone data, the AVI clips, and the unlikelihood of coincidence, I attach considerable weight to it.

[207] I have considered the questions and assertions put to the defendants during interview, including the part believed to have been played by others. However, it is the evidence before this court and the inferences that should properly be drawn, applying the burden and standard of proof which is relevant, regardless of any knowledge or belief the police may or may not have had, or questioning techniques employed, at that stage.

[208] In order to determine whether the prosecution has proved beyond reasonable doubt that the defendants have been correctly identified as the persons responsible for these offences, I have to consider all of the strands of evidence that I have given weight to and evaluate its combined strength. It is of particular importance that I take account of any circumstances which tend to establish innocence and more especially circumstances which are inconsistent with guilt. I have to be satisfied that no explanation other than guilt is reasonably compatible with the circumstances.

[209] I am satisfied that there is a strong *prima facie* case against both defendants in respect of all charges from the combination of evidential strands and that there are no facts or circumstances which are inconsistent with a conclusion of guilt. There are matters that cry out for an explanation or contradiction of the evidence that has been heard: the presence of the camera in both Mr Reynolds' and Mr Duffy's kitchens, the defendants' movements on the relevant dates, whether Mr Reynolds positively disputes that his image appears on the clips at Annaghone and/or in Mr Duffy's kitchen or that the fingerprint on the camera belongs to him. Additionally, in respect of Mr Duffy, an explanation is required for the internet searches on the phone attributed to him.

[210] Neither defendant has given any evidence to explain or contradict the evidence in this case. I bear in mind that even if I consider that it is proper to draw inferences from silence, I may take it into account only as some additional support for the prosecution's case, but I cannot find either of the defendants guilty only, or mainly, because that defendant did not give evidence. (see *R v CD* [2025] NICA)

[211] On behalf of Mr Reynolds it is submitted that I should not draw an adverse inference because the court can take into account whether the giving of evidence by the defendant would have served to have implicated a co-accused or some other person (relying on para [44] *McKerr* Unreported)

[212] Furthermore, it is submitted that the decision on whether to give evidence is likely to have been influenced by the approach taken at interview in that where a solicitor for proper reasons advises a suspect not to answer questions at interview, the giving of evidence is likely to result in a request for the drawing of an inference in any event. It is suggested that the advice to remain silent during interview was proper advice on the basis of the questioning techniques employed and it was wise to advise silence, until the evidence was in fact served upon the defendant.

[213] The court has heard no evidence from Mr Reynolds's solicitor about the reasons for his advice, nor has it heard any explanation from Mr Reynolds as to why he chose to remain silent. As Lord Taylor CJ stated in *R v Cowan* [1996] 1 Cr App R 1:

“It cannot be proper for a defence advocate to give the jury reasons for his client's silence in the absence of evidence to support such reasons.”

[214] In any event, I do not consider that a possible motive not to implicate another co-accused is a proper reason for remaining silent.

[215] In my view, the combination of circumstances present in this case is such that I am satisfied that the only sensible explanation for each defendant's silence is that neither of them has an answer or none that would stand up to examination. Absent such explanation I draw the inference that if there were an innocent explanation for this combination of circumstances they could and would have been well capable of providing it to the court, but they have chosen not to do so.

[216] I have therefore, concluded that each of them has been correctly identified as principal participants in each of the offences, beyond a reasonable doubt. The fact that there may have been others involved does not affect that conclusion.

[217] In respect of Mr Duffy, that conclusion is inescapable even without considering his bad character. However, it is relevant that he has previously been convicted of using violence to extract information relating to police and UDR which would be of use to terrorists. It is relevant because the defence put forward on his behalf is that this is a case of wrongful identification, based on unreliable surveillance and other evidence. Implicit in that defence is a submission that the strands of evidence amount to no more than a coincidence. I reject that submission.

[218] I find both defendants guilty of all the counts on the indictment.