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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**22/12/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

RAYMOND O'NEILL

Martin O'Rourke KC and Colm Fegan (instructed by McIvor Farrell Solicitors) for the Appellant
David McDowell KC and Michael Chambers KC (instructed by the PPS) for the Respondent

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Before: Keegan LCJ, McCloskey LJ and Fowler J

Introduction

[1] This is the unanimous judgment of this court to which all members have contributed.

[2] Leave to appeal having been refused by the single judge, Humphreys J, Raymond O'Neill (the "applicant") renews his application for leave to appeal before this court. By this application he seeks to challenge the unanimous verdict of a jury convicting him of the murder of Jennifer Dornan (the "deceased") and the further offence of arson with intent committed at 2 Hazel View, Dunmurry on 2 August 2015. On 24 June 2022, having previously been sentenced to life imprisonment, the minimum term was set at 22 years by Scoffield J ("the judge"). A concurrent indeterminate sentence with a minimum period of seven years was imposed in respect of the second count.

The prosecution case

[3] The murder of Jennifer Dornan aged 30, occurred in the early hours of the morning of Sunday 2 August 2015. A man entered her house shortly after she had

returned home after a night out socialising. She was found upstairs in her bedroom. She had been stabbed three times to the chest with a knife that had been taken from her kitchen. One of the wounds entered her left lung while another went through her heart. The third penetrated her diaphragm entering her liver. The heavy bleeding resulting from her wounds caused her death. Sometime after killing her, the murderer set fire to her house, badly burning the body such that her identity could only be confirmed through dental records.

[4] CCTV from the neighbouring house at 17 Hazel View showed a man entering her home at 3:11 hrs, approximately 20 minutes after Ms Dornan had returned home at 2:52 hrs. He climbed over her front fence and went to the rear of the house where he gained access through the back door. He was wearing a coat which he had pulled up over his face and head as he passed the camera at No.17. The coat worn by this man, as captured by the CCTV, was relatively distinctive, in that it bore a large square or rectangular pocket with a flap on its lower front, on the outside of the coat. It had no hood and appeared to be light toned. The coat would become the first lead in the investigation.

[5] Over the next hour or so, the intruder was captured on CCTV, appearing outside Ms Dornan's house on a number of occasions. Once, when a floodlight came on, he again put his coat up to cover his face. Each time, he returned to the house. Lights in the house could then be seen switching on and off over the time he was inside. He left at 4:18 hrs, just after a source of light could be seen in the upstairs front windows of the house. A few minutes later, flames became visible. The man turned left out of the premises, the opposite direction from which he had come. He made his way around a recreational area, through a gap in fencing, and onto Lagmore View, a road running parallel to Hazel View, on the other side of the recreational area. A lone figure could be seen walking left to right on the other side of the sports pitches, in the area of a bus turning circle on Lagmore View.

[6] The murderer must have disposed of the murder weapon while making his way up Lagmore View because, in the course of house-to-house enquiries by police on 10 August 2015, a knife was found in the garden of 16 White Glen, which backs onto Lagmore View. It was an orange-handled kitchen knife of a type that matched the set found in Ms Dornan's kitchen. DNA matching that of Ms Dornan was recovered from an area of red/brown staining visible on its cutting edge. According to the prosecution, there could be no sensible dispute that the man who made his way down Lagmore View, in the direction of White Glen, was the murderer. The sole question was whether he was the applicant, Raymond O'Neill.

[7] Megan Cunningham, a 13 year-old girl, was watching in the area. The CCTV showed her nearby at 4:21 hrs, almost exactly three minutes after the man had left Ms Dornan's house. As she walked, she was scared so was on the phone to her friend, whom she had just left, who told her to try to get to her taxi as quickly as she could. This girl remained on the phone as she walked across the grass beside the sports pitches. She saw a man at the corner of a street (White Glen, off Lagmore View) as if

he was walking into that street. This girl described the man as wearing a jacket like a green army jacket with dark baggy workman bottoms and dark boots. She also said that he had on a black monkey hat or beanie with his hair sticking out of it as if he needed it cut. She said he did not have a beard and was skinny with big shoulders.

[8] At 4:23 hrs, a CCTV camera at 56 White Glen captured footage of a man walking from the direction of Lagmore View. He was wearing dark trousers and a light top. He was carrying a light-toned coat in his left arm. At one point he bowed his head and momentarily quickened his stride, perhaps because he had noticed the camera. A police officer viewed the footage from this camera for between 0204 hrs and 0504 hrs and no other person walked past the camera. It was, the prosecution contended, reasonable to conclude that the man carrying the light-toned coat was the man that the girl had seen going into White Glen.

[9] Police conducted a number of timed walks in order to estimate how long it might take someone to walk between the various points relevant to the case. The time between the man leaving Jennifer Dornan's home at 19 Hazel View and the man being seen at 56 White Glen was 4minutes 50seconds. When the police walked the route that the man was believed to have taken, it took them 3m 38s, although the murderer had disposed of the knife *enroute* and may have been moving more slowly in an attempt to avoid being seen.

[10] A further material aspect of this case was the applicant's movements earlier that night which included the following. He and another person were driven to the home of the deceased for the purpose of collecting her. They did so and all then went to another person's home where they had a drink. They all continued to remain together when Ms Dornan, with another lady, were driven to another private address. By virtue of the preceding events, both Ms Dornan and where she lived became known to the applicant.

[11] Ms Dornan continued to socialise. Having gone with the aforementioned lady associate to certain licensed premises where they remained for approximately three hours, they were driven to their friend's home. There, the applicant was present with her friend's male partner, having a drink. The deceased too consumed further alcohol. She then walked to her home. The applicant too left soon afterwards, at approximately 03:00 hrs.

[12] The applicant owned a cream waist-length padded coat with no hood, which bore similarity to the coat worn by the murderer. He was wearing that coat on the night of the murder. He could be seen wearing it on CCTV earlier at 12 Devonshire Close, the home of his nephew, at 3.14pm that day. He also wore jeans and dark-toned boots. He was known to commonly wear these clothes, in particular his cream coat. That coat was not seen in his possession again after the night of the murder. It was never recovered.

[13] Later in the evening the applicant did not have his coat on even though it was "lashing" with rain. A witness, Paul Smith, said the applicant asked for his jumper and jeans but he told him they would not fit him. He gave him a Barcelona football shirt that he was wearing under his jumper.

[14] Another material episode in the narrative was the applicant's interaction with Shane O'Neill, his nephew. This began with the applicant getting a taxi which, as far as Mr Smith knew, left to purchase alcohol from George's shop on the Falls Road. CCTV showed the applicant's arrival at his nephew's home at 5:33 hrs. He was wearing a Barcelona football shirt and carrying a grey t-shirt and a can of beer in his hand. Mr O'Neill was a prosecution witness at the trial. He gave evidence that he was woken up by his uncle who asked him to take him to the shop so he could get some drink. The applicant then went to another house where he stayed the night. Witnesses including Ms McIlvenney noted blood on his clothing and the applicant rocking backward and forward, as if he was disturbed.

[15] Shortly after these events, the applicant left the jurisdiction and travelled to the Republic of Ireland. He was apprehended and remanded in custody before he was ultimately extradited to Northern Ireland in November 2018.

[16] The applicant gave evidence at his trial. He confirmed he was from Andersonstown and had friends in Lagmore and in Poleglass. He claimed he had suffered a stroke due to being poisoned by prison staff in Portlaoise with an overdose of methadone in October 2016. He said that, as a result, he had lost his memory of everything that had occurred on the night of the murder. He claimed to have forgotten everything that had ever occurred in his life. He claimed not to know his sons or his mother, although "slowly and surely all the memories about my family come back." Asked whether he had had to re-learn how to exercise personal care, he agreed. He said he couldn't shave himself to this day. He could not remember how long it took him to be able to talk again. No medical evidence was called to support his claims. Despite this, he was able to say that he had not committed murder claiming that he "would like to think that anybody that killed somebody can remember it."

This appeal

[17] There are eight grounds of appeal, as follows:

(i) prosecution impeaching its witness Mr O'Neill;

(ii) non-admission of evidence about an army officer;

(iii) refusal of the admission of Kevin Caughley's bad character evidence;

(iv) refusal of the renewed application to adduce bad character evidence;

(v) admission of the applicant's criminal record as bad character evidence;

(vi) admission of forensic gait evidence;

(vii) admission of expert video analysis evidence; and

(viii) the conviction was against the weight of the evidence.

The court will address these grounds *seriatim.*

[18] The following chronology was prepared jointly by the parties upon the request of this court, having regard particularly to the first ground of appeal.

DATE	EVENT	REFERENCE
2 August 2015	Jennifer Dornan (the deceased) is murdered, and her home is set ablaze at *circa* 03:00-04:00 hrs.	
2 August 2015	The applicant, Raymond O'Neill, arrives at 12 Devonshire Close, the home of his nephew, Shane O'Neill, at *circa* 05:20 hrs. Also present in the house at the time of the applicant's arrival was Suzanne Hazley and the couple's son - Corey. Suzanne Hazley was Shane O'Neill's then partner.	
5 August 2015	Shane O'Neill's first witness statement.	p191-195 of the appeal hearing bundle (part 1)
6 August 2015	Shane O'Neill's second witness statement.	p196-197 of the appeal hearing bundle (part 1)
11 August 2015	Shane O'Neill's third witness statement.	p198 of the appeal hearing bundle (part 1)
27 August 2015	Suzanne Hazley's original police statement. During the trial, the Crown did not call Suzanne Hazley, with the agreement of the defence, based on her original police statement (which the judge described as "anodyne": see [1] of the judge's written ruling)	p199-200 of the appeal hearing bundle (part 1) p9 of the authorities bundle.
14 February 2022	The applicant's trial commences before the judge.	

9 March 2022	Shane O'Neill gives evidence for the Crown.	See the relevant transcript at p485-503 of the transcripts (part 2 of the hearing bundle, folder 2)
10 March 2022	Suzanne Hazley approaches police after purportedly reading about Shane O'Neill's evidence in *Belfast Live.*	See p265 of the appeal hearing bundle, see para 23 of– the Crown's synopsis of Suzanne Hazley's ABE evidence, (part 1)
11 March 2022	Suzanne Hazley attends at PSNI Garnerville and conducts an ABE interview.	See ABE transcript at p201-260 of the appeal hearing bundle (part 1)
20 March 2022	The defence provide written submissions challenging the admissibility of Suzanne Hazley's evidence	These submissions are not within the appeal bundle but can be provided if required
21 March 2022	Oral argument about the admissibility of Suzanne Hazley's evidence. Defence counsel's oral submissions from 12:41-13:23 hrs. Crown Counsel's submissions from 14.27-15.27	Transcript is not within the transcripts bundle. The relevant times of Counsel's oral submissions are set out in the adjacent column.
22 March 2022	Scoffield J provides his ruling: *R v Raymond O'Neill Ruling (Number 8) on the admissibility of Suzanne Hazley's evidence* [2022] NICC 11.	p9-26 of the authorities bundle.
22 March 2022	The synopsis of Suzanne Hazley's evidence was finalised. The Crown produced this synopsis to identify the topics from which her examination-in-chief was to be led by the Crown. This synopsis was provided to the judge.	p261-266 of the appeal hearing bundle (part 1)

24 March 2022 – 25 March 2022	Suzanne Hazley gives evidence.	p574-717 of the transcripts (part 2 of the hearing bundle, folder 2)
28 March 2022	Shane O'Neill is recalled following Suzanne Hazley's evidence.	p718-732 of the transcripts (part 2 of the hearing bundle, folder 2)
1 April 2022	Crown counsel's closing speech.	p792-828 of the transcripts (part 2 of the hearing bundle, folder 2)
5-7 April 2022	The LTJ's summing up.	p829-1076 of the transcripts (part 2 of the hearing bundle, folders 2 and 3)
8 April 2022	The applicant is convicted by the jury.	

Consideration of the grounds of appeal

Ground 1: prosecution impeaching its witness

[19] The contours of this ground of appeal are ascertainable firstly from the chronology of the trial set out above. In a nutshell, there was a rather dramatic and unusual development mid-trial, consisting of the following. Ms Hazley came forward to the police after her former partner, Mr O'Neill, had given evidence, which was reported and came to her attention.

[20] Her account to police (and her ensuing evidence at the trial) was, in summary, the following. Ms Hazley was then the partner of Mr O'Neill. She was present when the applicant had arrived at their shared home just after 05:30 hrs on the night of the murder. She and Mr O'Neill were awoken by banging at the door and Mr O'Neill arose and admitted the applicant. Having walked in, the applicant told Mr O'Neill that he had killed someone, elaborating "… it wasn't him. It was the drink and drugs that made him do it." According to Ms Hazley, the applicant sounded very panicky and spoke rather fast. She was able to hear because she was in the bedroom above the hallway. She shouted down for a drink, as she wanted to go down and see what was happening. The applicant sent Mr O'Neill up with a drink. Mr O'Neill seemed really panicky. He told her to keep quiet, that she had heard nothing and to say nothing to anyone. She asked about going down and Mr O'Neill told her she did not want to see the applicant in that state. She later heard a "load of change hitting the stairs."

[21] Ms Hazley then heard them go round to the back garden and she could hear diesel or petrol containers being lifted and banging off each other. They were taken down the side of the house through a gate to the front. She then heard her car leave

with Mr O'Neill driving. She went downstairs to find the television on the news channel. She remarked that they never watched the news. She went to sleep and woke up the next morning. Mr O'Neill was there when she awoke. She asked him about what had happened and he told her that Raymond thought he had killed someone and they went for a drive where the man was supposed to have been left, but the man was not there so they assumed he was ok.

[22] The following day, they took their young son to a park. On their way back, they drove to Magheralave Road, a secluded country lane near Lisburn. Ms Hazley knew the road, a dead end, and that it was used for dumping and burning. She said that Mr O'Neill appeared to be having a look to see if there was anything on the ground. Magheralave Road is 3.1 miles from Smiths' home. The drive from there to Magheralave would have taken five minutes at 06:00 hrs.

[23] Summarising, Ms Hazley's evidence at its core was that she had heard the applicant confessing to Mr O'Neill that he had killed someone soon after the murder of Ms Dornan. Furthermore, her evidence laid the ground for an inference that the applicant and Mr O'Neill her partner had combined to destroy incriminating evidence. She said she had first been in contact with the police just before Christmas to tell them she had information to divulge but had not ultimately told them all she knew.

[24] The prosecution satisfied itself that Ms Hazley was a witness capable of belief and proposed to call her to give evidence at the trial. Mr McDowell KC submitted to this court that the prosecution acted with scrupulous care to ensure fairness to the applicant. An Achieving Best Evidence ("ABE") interview was directed, rather than a witness statement taken, so that there could be no doubt about what she had said. Thereafter, an extensive disclosure process was undertaken, involving the collation of material from a number of third parties and its provision to the defence, as appropriate. The purpose of this was to best equip the defence to respond to her evidence, thereby ensuring maximum fairness to the applicant. None of the foregoing was controversial before this court.

[25] Section 3 of the Criminal Law Procedure Act 1865 (Lord Denman's Act - "the 1865 Act") provides:

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to

> the witness, and he must be asked whether or not he has made such statement."

Section 3, properly analysed, enshrines four rules, which may be summarised thus:

(i) It is impermissible for the prosecution to impeach the credit of a prosecution witness "by general evidence of bad character."

(ii) However, in a case where the trial judge is of the opinion that a prosecution witness is "adverse" to the prosecution case, it is permissible for the prosecution to "… contradict him by other evidence" ("adverse" denoting "hostile").

(iii) Or, as an alternative course, in situation (ii) it is permissible for the prosecution, with the leave of the judge, to contradict their witness by a specific mechanism, namely to "… prove that he has made at other times a statement inconsistent with his present testimony ..."

(iv) But, before the mechanism specified in situation (iii) can be activated, a specific requirement must be observed, namely "… the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such a statement."

The fourth rule is repeated in section 4. Its out-workings are detailed in sections 4 and 5.

[26] The trial judge (the "judge") admitted the evidence of Ms Hazley for reasons contained within a written decision *Ruling (Number 8)* [2022] NICC 11. Having reviewed commentary in certain authoritative texts concerning the ambit of the common law rule and its statutory form (supra), at para [19] of his ruling the judge posed two questions:

> "(a) First, and most importantly, would Ms Hazley's evidence, if permitted, be called by the Crown *to show* that Mr O'Neill was of bad character or discreditable? Put another way, would it represent the prosecution impeaching the witness's *credit*? Or would that merely be a side-effect of the evidence she was called to give, the central purpose of which would be to speak to facts in issue in the proceedings (namely, the applicant's confession and attempts to conceal his crime)? If the latter, is that an exception to the rule against impeaching one's own witness?

(b) Second, is there anything inherently wrong or unfair in the prosecution calling evidence the effect of which will be to suggest to the jury that another of its witnesses had given evidence which was false?"

[27] As to the first question, the judge cited commentary in *Blackstone's Criminal Practice* 2022, at F6.48 and *Phipson on Evidence*, 20th edition, at 22-11, in support of the prosecution contention that the rule against impeaching one's own witness does not preclude evidence which bears on an issue in the case, even though it may also have the effect of damaging the witness's credibility. Both texts placed reliance on the case of *R v Ross* [2007] EWCA Crim 1457 (infra). The judge supplied a negative answer to the second question.

[28] The judge expounded on the rationale underpinning his formulation of the rule at para [25]:

> "[25] It seems to me that the fundamental purpose behind the rule against a party impeaching its own witness's credit (whether in its statutory or common law form), at least in the case of criminal trials, is to avoid confusing the jury by a party at one and the same time calling evidence from a witness but also urging the jury to view that witness as someone whose evidence is deliberately untruthful or inherently unreliable through a propensity to untruthfulness or untrustworthiness. It is a prohibition against impeaching the witness's *credit*; rather than impeaching him in any respect. It is a nonsense to present a witness simultaneously as a witness of truth and a witness on whom no reliance could or should be placed. The adversarial process would be upended if a party could call witnesses and then wholly rubbish their reliability. That is the mischief at which the rule is aimed. As discussed further below, **the flexibility allowed by the courts to parties, including the prosecution, where conflicting evidence is provided by their witnesses, including where a witness gives testimony upon only part of which the party calling him wishes to rely, is considerable**." [emphasis added]

He continued, at paras [26]-[27]:

> "[26] Phipson, at 22-10, quoting from *Ewer v Ambrose* (1825) 3 B&C 746 KB, at 750 (*per* Holroyd J), explains the matter thus:

> 'The law regards a party as implicitly putting its own witness forward as credible, such that:
>
> 'it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath, but he may shew by other evidence that he is mistaken as to the fact which he is called to prove.'
>
> [27] One cannot therefore seek to undermine the general reliability of one's own witness by challenging their credibility. That does not mean, however, that a party is hamstrung with the version of events provided by the first witness they have called who speaks to a particular event. They are entitled to call contradictory evidence, as discussed in further detail in the next section of this ruling. **The exception to the general rule against impeachment discussed above makes plain that, where the 'bad character' evidence against the first witness is itself directly relevant to the facts in issue and is adduced for that purpose, rather than simply to undo the effects of certain aspects of their evidence by undermining their credibility generally, the rule will not be engaged. The provision of the further evidence promotes the ends of justice, notwithstanding its potential collateral effects, and should be heard**." [emphasis added]

[29] Next, the judge identified an analogy with the policy underpinning Article 3 of the Criminal Justice (Evidence) Northern Ireland Order 2004 ("the 2004 Order") which defines evidence of 'bad character.' He concluded, at para [30]:

> "[30] In the present case, I am satisfied that the prosecution are not seeking to call Ms Hazley to show that Shane O'Neill is of bad character or to impeach his credit. They are not calling this evidence to seek to undermine the testimony he has already given in any material respect (or, in the words of Blackstone at section F6.52, calling evidence "designed to show that the witness is not to be believed on oath"). Rather, they seek to call Ms Hazley to establish important facts relevant to the jury's assessment of the guilt or innocence of the applicant, particularly his alleged confession to his nephew. In the words of section F6.48 of Blackstone, they seek to rely on the evidence "because it supports some other discrete part of the prosecution case."

> Accordingly, I do not consider the general rule against impeaching one's own witnesses to be engaged."

The judge then addressed the issue of the propriety of the prosecution calling evidence suggesting that other prosecution evidence was false. This issue, for the judge, was uncomplicated. He considered that there is both judicial authority and academic commentary supporting the view that a party may contradict their own witness by adducing other contradictory evidence, with the jury having the task of deciding which evidence to accept.

[30] The particulars of this ground of appeal are:

(a) Ms Hazley's evidence ought to not to have been admitted as offending the common law rule that a party cannot impeach its own witness.

(b) Its admission contravened section 3 of the 1865 Act.

(c) In the alternative, Ms Hazley's evidence ought to have been excluded under Article 76 of PACE.

The gist of the submissions of Mr O'Rourke was the following. The judge erred in his assessment that the evidence of Ms Hazley did not offend the rule that a party (in this case the Crown) cannot impeach its own witness; did not contravene section 3 of the 1865 Act; and that its admission did not have such an adverse effect on the fairness of the proceedings that it ought to have been excluded.

[31] Developing this ground, counsel submitted that the prosecution, in putting Mr O'Neill forward as a witness, had invited the jury to believe and accept his evidence. However, after Ms Hazley had come forward days later, the jury received evidence from her that both expressly and implicitly implied that Mr O'Neill was an accessory after the fact to the murder and, further, took steps to cover up his, and the applicant's, involvement. The effect of Ms Hazley's evidence was to "wholly rubbish" (in the judge's language) Mr O'Neill's reliability and credibility before the jury. It was further submitted that the judge, having identified what he considered to be an exception to the general rule, applied that exception without fully evaluating the real effect and import of Ms Hazley's evidence in relation to Mr O'Neill and his credit. The judge's analysis of the issue and his conclusion that any discrediting of Mr O'Neill was to be viewed as a by-product of the evidence and not the sole or central purpose of the evidence being elicited was, counsel submitted, overly simplistic.

[32] The kernel of Mr O'Rourke's submission was this. It would be difficult to imagine a clearer challenge to Mr O'Neill's credit than for another prosecution witness to suggest that he was complicit in the murder by assisting the offender, destroying relevant evidence, giving false testimony about the events and was responsible for coercing another witness (Ms Hazley) to also lie to police. According to Ms Hazley,

Mr O'Neill had lied about the applicant's confession to him, had assisted the applicant after the fact and as such had personal culpability for the offences.

[33] The riposte of Mr McDowell is summarised thus. The distinction between what is permitted and that which offends the rule against impeaching one's own witness is that a generalised attack on the creditworthiness of a party's witness where that is the only purpose of the evidence is impermissible. However, the rule does not prevent evidence being called which is relevant to an issue in the case but which incidentally leads to the conclusion that the previous witness's evidence was false. In passing, one may observe that this submission has echoes of the true, or dominant, purpose principle canvassed above.

[34] Mr McDowell, responding to the applicant's complaint that he was left in the invidious position of having to support Mr O'Neill's credibility in respect of one matter, while seeking to undermine it in respect of another, submitted that this is an inevitable consequence in any instance where the prosecution relies on part only of a witness's evidence but does not accept another part. This, it was argued does not, of itself, occasion unfairness, in particular no unfairness which was incurable by the trial process.

[35] At this juncture, it is necessary to consider a series of relevant reported cases, some of incontestable pedigree and notable antiquity. Any examination of reported cases is, of course, at all times overshadowed by section 3 of the 1865 Act (reproduced above), which contains the dominant legal rules. Section 3, properly analysed, enshrines four rules. These invite the following summary:

(i) It is impermissible for the prosecution to impeach the credit of a prosecution witness "by general evidence of bad character."

(ii) However, in a case where the trial judge is of the opinion that a prosecution witness is "adverse" to the prosecution case, it is permissible for the prosecution to "… contradict him by other evidence" ("adverse" denoting "hostile").

(iii) Or, as an alternative course, in situation (ii) it is permissible for the prosecution, with the leave of the judge, to contradict their witness by a specific mechanism, namely to "… prove that he has made at other times a statement inconsistent with his present testimony ..."

(iv) But, before the mechanism specified in situation (iii) can be activated, a specific requirement must be observed, namely "… the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such a statement."

The fourth rule is repeated in section 4. Its out-workings are detailed in sections 4 and 5.

[36] The jurisprudential trail begins with *Ewer v Ambrose* [1825] 3 B&C 745. There, in a case involving a partnership dispute, the following occurred at the trial. The applicant called a witness to prove the partnership. The witness proved the contrary. The applicant then sought to adduce evidence contradicting the witness's evidence. The case was concerned with common law principles only. The court ruled that the contradictory evidence was not admissible as its only effect was to discredit the witness. Two features of the judgments delivered are noteworthy.

[37] First, the two main judgments made no distinction between purpose and effect. In the judgment of Bayley J the terminology is "in order to … [discredit the witness]." In the judgment of Holroyd J, one finds both linguistic formulae: "… to shew that …" and "the … its effect …" Holroyd J was unequivocal in the following passage:

> "But it is undoubtedly true that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath, **but he may shew by other evidence that he is mistaken as to the fact which he is called to prove**."
> [emphasis added]

Second, the court made a clear distinction between the situation postulated by Holroyd J and that entailing the adduction of evidence to discredit the testimony of a party's witness.

[38] In *Greenough v Eccles* [1859] 5 CB (MS) 786, another case predating the 1865 Act, the focus was on section 22 of the Common Law Procedure Act 1854, the exact forerunner of section 3 of the 1865 Act. This was another civil case, in which a witness called by the appellants gave an account which in substance mirrored that given by the plaintiff. The appellants then sought to adduce in evidence a contradictory oral statement of their witness. This was refused by the trial judge. The plaintiff succeeded and, upon the appellants' appeal, the central question was whether the statutory word "adverse" denoted "hostile" and not merely "unfavourable." The trial judge had espoused the former construction and this was upheld on appeal. In the judgment of Willes J at [323], one finds the description of the witness in question as someone who:

> "… without any sinister motive or ill feeling, honestly gives a different account of the matter in the witness box from what he had given on a former occasion, without fraud upon the party who calls him."

This we consider to be a highly fact specific formulation which was plainly not designed to be exhaustive.

[39] In this case each of the two main judgments delivered – those of Williams J and Willes J – took care to emphasise the already established common law principle described by Williams J as "... the right of a party to contradict his own witness by other evidence relevant to the issue …" (at [322]). For both judges, the novelty introduced by the 1854 statute was the new mechanism whereby, in addition to the foregoing, the party in question could with the leave of the judge prove that the witness had made previous inconsistent statements.

[40] The meaning and reach of section 3 of the 1865 Act have been the subject of a series of more modern decisions of the English Court of Appeal. We can dispose quickly of two of these which were brought to our attention. The first is *R v Prefas* (unreported, 11 November 1986) which has the twin noteworthy characteristics that (a) section 3 of the 1865 Act does not feature and (b) this is an intensely fact sensitive decision involving the designation of a prosecution witness as hostile on the basis that the witness had deliberately refrained from telling the truth. Given these two factors the limitations of this decision are clear.

[41] The second of these two cases is *R v Pacey* [1994] (Lexis Citation 3316), which invites essentially the same analysis as in the immediately preceding paragraph. Furthermore, the passage in the judgment of Hobhouse LJ containing the statement "… the prosecution must accept the credit of the witnesses who they have called and placed before the jury" does not purport to be a comprehensive rehearsal of the legal rules in this sphere.

[42] The first landmark post–*Greenough* decision is *R v Cairns* [2003] 1 WLR 796, a conspiracy to supply drugs case involving three applicants, where an important prosecution witness, to whom the heroin had allegedly been supplied, gave evidence implicating two of the applicants but exculpating the third (his spouse). The challenge to the admissibility of the witness's evidence both at trial and on appeal on the basis that it was unworthy of belief and contending that it was not open to the prosecution to rely on the witness's evidence viz-a-viz two of the three applicants only was dismissed.

[43] The judgment of Longmore LJ is especially noteworthy for its espousal of the "overriding criterion of the interests of justice", at [34]. Referring to both *Prefas* and *Pacey*, the judgment continues at [38]:

> "But the prosecution is entitled to call other evidence which contradicts part of the evidence of its witness, while still relying on those parts of his evidence which are not to be contradicted …"

The important feature of this passage is that, as appears from what precedes it at [37], the Court of Appeal was demonstrably alert to the distinction between the hostile witness procedure (on the one hand) which, (in its words) operates "to attack the

credit of its own witness" and (on the other hand) the entitlement of the prosecution to adduce evidence contradicting part of the evidence of its witness, while maintaining reliance on other parts.

[44] *R v Jobe* [2004] EWCA Crim 3155 is the next in this line of cases. It concerned a ruling by the trial judge designating a prosecution witness as hostile. In short, the scenario was one of an important prosecution witness unexpectedly introducing evidence favourable to the applicant which was not contained in his two prior witness statements. Was this a case of positive inconsistency or omission? The English Court of Appeal considered that it was both. Potter LJ stated at [68]:

> "We have approached this issue on the basis that there was positive inconsistency between Mr Sarver's evidence and his earlier statements. Had the correct analysis been that there was merely an omission on Mr Sarver's part, we would nonetheless consider that, in appropriate circumstances, an omission is capable of constituting an inconsistency, and this is such a case. Mr Chambers submits that the dearth of authority on the point suggests omissions are not capable of founding inconsistencies. In our judgement, it rather suggests that it is generally assumed that omissions are capable of founding inconsistencies. Everyday practice in the Crown Court certainly supports that conclusion. It is, for example, a common occurrence for a prosecution witness to say something in evidence which he or she has not mentioned in a prior witness statement; for defence counsel then to cross-examine the witness on what is referred to as the inconsistency; and for the judge, when summing up, to direct the jury as to how they should approach the 'previous inconsistent statement."

This was, first and foremost, a hostile witness case. However, in addition, it provides support for the view that the statutory appellation "adverse" can, in principle, be applied to omissions in a prosecution witness's sworn evidence.

[45] This was followed by *R v Ross* [2007] EWCA Crim 147, another drugs case. There, the evidence of a prosecution witness (Cole) was expected to establish that he had received a payment from the applicant said to be the proceeds of drugs for a vehicle said to be criminal property: this related to two of the four counts on the indictment. Part of the prosecution case was that the applicant and Cole had travelled together by ferry to Amsterdam and France three times. Cole gave evidence that these three trips were for innocuous purposes. The trial judge acceded to the prosecution's application to adduce in evidence Cole's previous drugs convictions. This evidence was designed to show that the purposes of these trips were far from innocent. The

judge's ruling was made pre-trial, before Cole had been sworn. The Court of Appeal ruled at para [33] that:

> "… the sole purpose of adducing the convictions was to enable the jury to disregard the evidence that the witness was in fact going to give that the drugs were not drug related …"

This "sole purpose" became apparent, it would seem, only after the witness had begun to give evidence. While deeming this an "irregularity", the appellate court was nonetheless satisfied that the conviction was safe. Two observations are appropriate. First, the decision in *Ross* is a paradigm illustration of the first of the three rules in section 3 enumerated in [39] above. Second, it is a self-evidently an intensely fact sensitive decision.

[46] In *R v Clarke* [2011] EWCA Crim 407, one of the main issues was whether the prosecution had impermissibly impeached the credibility of one of its witnesses. This case concerned a murder conviction. An important plank in the prosecution case was that the applicant had kicked the deceased person's head several times. Two eyewitnesses, who were prosecution witnesses, each testified that they had observed one kick only. Prosecuting counsel, in his closing speech, invited the jury to disbelieve the evidence of both witnesses regarding that issue. Jackson LJ, delivering the judgement of the court, formulated the following principles at para [38]:

> "From this review of authority, we derive the following principles which are relevant to the present appeal:
>
> (i) The prosecution may call a witness to give relevant evidence on some issues in the case, even if his or her evidence on other issues appears to be incorrect.
>
> (ii) If the prosecution witnesses give inconsistent evidence on particular issues, the prosecution may suggest to the jury which evidence on those issues should be preferred.
>
> (iii) However, the prosecution may not explicitly attack the credit of its own witness or suggest that the witness is deliberately lying in parts of his or her evidence, unless the prosecution has obtained the court's permission to treat the witness as hostile."

Adding at para [39]:

> "In some cases the operation of these principles may create a somewhat artificial result. However, the principles have

> a firm statutory and common law foundation. They can be applied in practice without undue difficulty."

[47] The main ground of appeal succeeded. The basis upon which it did so emerges from para [49]:

> "We turn next to the prosecution closing speech. At this stage of the case prosecuting counsel was drawing the threads together and identifying the key pieces of evidence for the assistance of the jury. By that stage there was conflicting evidence concerning the number of kicks to Collins' head. Counsel was quite entitled to refer to, and place reliance on, the evidence of Pounder, Cox and the pathologist. He was quite entitled to invite the jury to prefer that evidence and to conclude that the appellant must have kicked Collins' head more than once. Unfortunately the prosecution closing speech went much further than that. There came a point in his speech when counsel suggested that Jackson and Hill were deliberately lying in parts of their evidence and that, therefore, the jury should reject Jackson and Hill's evidence that there was only one kick. Counsel should not in his closing speech assert that a witness is deliberately lying, unless he has put that suggestion to the witness. In the case of one's own witness, this involves obtaining the permission of the court to treat the witness as hostile."

In short, prosecuting counsel's presentation to the jury had crossed the notional line separating the permissible from the impermissible.

[48] It is not clear that this decision provides any real assistance in this court's resolution of the first ground of appeal. It is, once again, a fact sensitive decision. Furthermore, its central foundation was the conduct of prosecuting counsel which, as we shall explain *infra*, is not an issue of concern in the present appeal.

[49] The last, and most recent, in this line of decided cases is *R v Smith and Others* [2019] EWCA Crim 1151. This concerned a prosecution witness who was "honestly mistaken." Leggatt LJ formulated the following principles, at [28]:

> "(1) Subject to the overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.

> (2) It is open to the prosecution - and indeed the interests of justice may require it - to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.
>
> (3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness's evidence which the prosecution considers to be inaccurate or false, and to invite the jury to reject that part of the witness's evidence.
>
> (4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness."

En route to this passage Leggatt LJ noted that *Greenough* is the *fons et origo* of the principle that section 3 of the 1865 Act is not confined to cases involving a designation of hostility by the trial judge. The impeachment ground of appeal was rejected. We concur with the formulation of Leggatt LJ.

[50] We resolve this ground of appeal in the following way. First, we return to the purpose/effect dichotomy noted above. Where (as here) there is an ensuing appeal against conviction, it is likely that there will be a debate about both purpose and effect (as in this case). We consider that in the ordinary run of cases, effect will be the more important consideration. Furthermore, in such cases, this court will enjoy an advantage not available to the trial judge in the first (predictive) of the two situations to which we turn, namely the evidence actually given will be available for scrutiny.

[51] Two distinct situations must be recognised. In the first (the present case), the trial judge is required to rule on the admissibility of the evidence of a witness who has not yet been called to testify. In this situation, everything is predictive and there is no factor of effect. As a result, purpose will unavoidably lie at the centre of the debate. In contrast, in the second situation, the evidence of the witness has been given. This might be followed by debates in the trial arena about directions to be given to the jury or, *in extremis*, discharging the jury. In this situation the main focus will normally be on effect.

[52] In the first situation, the trial judge will be exercising a discretion. In the second situation, the function of the trial judge will be mainly one of trial management, in particular determining appropriate directions to the jury and, possibly, revisiting admissibility. Judicial alertness to the triangulation of interests doctrine will be essential in both contexts. So too the applicant's right to a fair trial, which could conceivably raise issues such as the recall of a prosecution witness and the adduction

of rebuttal evidence. A judicial balancing exercise will be required. The outcome will reflect the formation of an evaluative judgement on the part of the judge. There will inevitably be finely balanced, borderline scenarios. Given this combination of elements, the threshold for intervention by an appellate court in the trial judge's ruling, directions *et al* will typically be not insubstantial.

[53] Next, we consider that the legal rules in this discrete sphere are to be viewed through the prism of Lord Steyn's celebrated "triangulation of interests" principle:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

(*Attorney General's Reference No 3 of 1999* [2001] 2 AC 91, 118)

Echoes of this can be discerned, imperceptibly, in the decided cases considered above.

[54] Reverting to the present case, we consider first the issue of purpose. We are satisfied that, in the purely predictive scenario, the prosecution's overarching purpose in seeking to elicit evidence from Ms Hazley was to illuminate several highly important factual issues bearing on the conduct of the applicant in the wake of the killing, all of them of unmistakable materiality to the central issue of guilt or innocence. In this context and at this stage of the trial, Mr O'Neill and his (already completed) sworn evidence were situated closer to the periphery than the heart of the picture unfolding before the jury.

[55] We are satisfied that at this, the predictive ("purpose") stage, the purpose of the prosecution was plainly not to attack the credit worthiness or honesty of its witness Mr O'Neill. In a context where this prosecution witness had already given evidence and had done so broadly in accordance with expectations, the prosecution had no reason for seeking to do so. Rather, the primary purpose of adducing the evidence of Ms Hazley was to incriminate the applicant. The predictive probative value of this evidence was clear beyond peradventure, subject only to the usual vagaries of life (witness retracting or crumbling, brilliant cross–examination, sudden illness *et al*). At this predictive stage, one possible effect of Ms Hazley's evidence was that the creditworthiness of Mr O'Neill could be undermined. But this was purely secondary, or incidental, however unavoidable.

[56] Furthermore, the course which the prosecution pursued upon receipt of Ms Hazley's account was to seek to adduce this in evidence. This falls to be viewed through the prism of the prosecution duty to adduce all relevant evidence. The

evidence of Ms Hazley was a far cry from the description of leading authors of what is prohibited by the first rule in section 3. In *Blackstone's* 2025 edition this is described at para F6.52, as:

> "Evidence of previous misconduct, convictions or other evidence designed to show that the witness is not to be believed on oath."

In *May on Evidence* it is stated at para 21-14:

> "Section 3 restates the common law prohibition against impeaching the credit of a party's own witness …
>
> Accordingly, a hostile witness may not be cross examined about his previous convictions, bad character or disposition."

[57] We turn next to consider effect. Viewed in the round, we are satisfied that, in the event, the effect of the evidence of Ms Hazley accorded with the purpose of the prosecution in adducing it. In this respect we have considered carefully the material passages in the transcripts. The jury verdict is of course inscrutable. Admittedly, and realistically, the evidence of Ms Hazley almost certainly cast a shadow over the evidence of Mr O'Neill: he had only told half the story within his knowledge, omitting the damning second chapter. But this does not detract from the analysis that the effect of the evidence of Ms Hazley was, incontestably, to fortify the prosecution case against the applicant.

[58] Mr O'Neill became a prosecution witness in circumstances where he had made three statements to the police, each written and signed. His main statement contained (*inter alia*) a detailed account of the applicant's arrival at Mr O'Neill's home at around 05:30 hrs on the Sunday morning and their movements thereafter in a car driven by Mr O'Neill during some 90 minutes. According to his first statement, his last contact with the applicant had been at around 07:00 hrs on the Sunday morning. In his second statement, he added a description of direct interaction with the applicant later that afternoon involving collecting the applicant in his vehicle; bringing the applicant's washed clothing to Mr O'Neill's home; having the washing dried there; bringing the dried washing to the applicant's bedsit; driving the applicant and another person to a shop; and, finally, having spoken by phone to the applicant on a number of subsequent occasions.

[59] The exercise of juxtaposing Mr O'Neill's written statements with the transcription of his evidence at the trial reveals that, broadly, the latter aligned with the former. In short, it would have accorded broadly with the expectations of both prosecution and defence. The cross-examination of Mr O'Neill probed his recollection of certain aspects of his movements with the applicant and was essentially unremarkable. The latter stages of the trial were, in the usual way, occupied by the

prosecution closing address, the defence closing address and the trial judge's summing up to the jury. Notably, defence counsel did not raise any issue about prosecuting counsel's closing address.

[60] Whilst no specific ground of appeal was specifically directed against the conduct of senior prosecuting counsel, the submissions of Mr O'Rourke contained some rather faint references to the prosecution closing speech, in particular these passages:

> "There was no reason whatsoever [for the applicant] to go to his nephew's, particularly at 05.30 on a Sunday morning to wake the whole family up with his banging unless it was something urgent. Something that needed Shane's help desperately, the nephew who clearly had a soft spot for his uncle, family. What was so serious that it could have taken him away from his drink? …
>
> What was so serious that Shane when he was woken up didn't tell [the applicant] where to go for waking him up at 05.30 on a Sunday morning? But he didn't tell him to sling his hook, instead he gave him a lift somewhere. He said to get drink, he must be some nephew, heart of gold. Unless this was one of the most important moments in the life of the wider O'Neill family because Raymond had just committed murder. Doesn't this piece of the jigsaw fit … with what [SH] told you? Let me make it clear, we say that even without her evidence there was more than enough to convict Raymond O'Neill of this crime even if you didn't believe her, and we do not invite you not to believe her for one second, there would still be enough. But doesn't this odd, odd thing that happened of him coming to his nephew's door at 05.30 rather than going to get the drink that he had planned to get and his nephew agreeing to drive him about, doesn't it just fit with the rest of the jigsaw? That's an easy bit to put in, isn't it?"

[61] In a later passage, senior prosecuting counsel, in the course of outlining to the jury certain strands of evidence which had emerged during the trial, stated:

> "Most importantly of all members of the jury, why [the applicant] even went to [SO's home] at 5.30 on a Sunday morning and why on earth Shane, of his own free will, got into a car to take him somewhere at that time. Take account of those strands too for they help you with a picture of the jigsaw, do they not? And then members of the jury there is Suzanne Hazeley …

> Shane O'Neill was called by the prosecution in this case … because he provided evidence … about matters upon which we invited you to rely, the drying of the washing in preparation for the trip to the south, the trip to White Glen at 5.00 o'clock, after Tescos on a Sunday, Quinn asking him … whether [the applicant] had been wearing a coat when he arrived at Devonshire, a pretty important piece of evidence not only to implicate [the applicant].
>
> That is not to say that we invite you to accept everything that Shane O'Neill says members of the jury. Indeed, on what was said in the hallway and what happened after that, immediately after that, the prosecution specifically invite you to reject what he says and prefer the evidence of Suzanne Hazeley and it is perfectly proper for us to do that, her having come forward when she did …
>
> It was obvious, wasn't it, and understandable too, that she was no fan of Shane O'Neill and his family but it would be quite some step to make up a confession in a murder case … Do look at her account and the detail in there because you might find detail we suggest to you that has the hallmark of truth, that people really wouldn't make up in a false account …
>
> Shane O'Neill told her that [the applicant] was supposed to have attacked a man and that they went to where he had left him and that he wasn't there so they thought he must be OK. Now wouldn't that be an odd thing to make up, a cover story, if you were just making up a confession?"

There was one further reference to the Mr O'Neill/Ms Hazley "interface":

> "The circumstances of her not telling for years on her evidence members of the jury, is understandable. Now what is her motivation? …
>
> She said having heard some of the dreadful details of [the] death and having read in the press what Shane O'Neill had said in evidence the day before she came forward."

[62] The trial judge, at the outset of his summing up, addressed:

> "… the question of what witnesses you believe, what witnesses you consider to be reliable and accurate, what

> facts you find proved and what conclusions you draw from the parts of the evidence that you accept …"

In a later passage the judge revisited the Mr O'Neill/Ms Hazley conflict:

> "But there is also a clear conflict between what Ms Hazeley says and what Shane O'Neill says …
>
> You will have to consider what you make of the evidence of Suzanne Hazeley. That is because … if you accept her evidence as true, it has the potential to change the nature of this case from a circumstantial case to one which is based not simply on circumstantial evidence, but also on direct evidence of guilt. That is because she says she heard the applicant confess to killing someone …
>
> On that aspect of the prosecution case, hers is the crucial evidence and the question for you is do you believe her. The evidence tending to rebut the making of the confession includes the testimony of Shane O'Neill and Raymond O'Neill and there are a range of matters relating to Ms Hazeley's credibility which you will need to consider."

Other passages containing references to the evidence of Mr O'Neill are essentially anodyne.

[63] It is obviously relevant that by this stage of the trial Ms Hazley had completed her evidence, which included rigorous cross-examination on behalf of the applicant, and Mr O'Neill had given further evidence upon recall at the instigation of the trial judge. Observance of the limitation and the discharge of the duty canvassed in the immediately preceding paragraph required of prosecuting counsel, in the particular context of this case, appropriate care. The ruling of the trial judge had established certain boundaries, which were not necessarily of the bright line variety. Caution and restraint on the part of prosecuting counsel was, therefore, required.

[64] We consider that senior prosecuting counsel's closing address reflects the caution and restraint necessary in what was undeniably a difficult scenario. Fundamentally, the requirement which had to be observed by prosecuting counsel in his closing presentation was that of avoiding any impeachment of the character of Mr O'Neill, subject to the exclusionary dispensation of permissible purposes. Prosecuting counsel was also subject to the adjuration contained in the memorable words of Lord Bingham in *R v H and C* [2004] UKHL 3 para [13] not to obtain a conviction at all costs but to act as a minister of justice." Counsel clearly invited the jury to accept certain aspects of Mr O'Neill's evidence while rejecting other aspects, specifically those which were in conflict with the evidence of Ms Hazley. In making

this distinction, counsel did not employ the language of unreliable, untruthful or not credible. Counsel could not realistically have avoided addressing the Mr O'Neill/Ms Hazley "interface." By well-established authority counsel was entitled to invite the jury to accept certain parts of Mr O'Neil's evidence while rejecting others. In our view, prosecuting counsel's closing address was harmonious with the restrictions to which he was subject flowing from section 3 of the 1865 Act.

[65] Further, we take into account the absence of any representation to the judge by defence counsel at any stage following completion of senior prosecuting counsel's address. We also take into account the absence of any challenge to how the trial judge handled this issue in his summing up. It is appropriate to add that his treatment of this issue was demonstrably fair and balanced. Therefore, it cannot be said that prosecution's closing was not contaminated by the kind of impurity identified in *R v Clarke* (see [62] above) or anything comparable. It was fair and balanced and navigated the notional tightrope successfully. Therefore, this aspect of the appeal must fail.

[66] Next, we give consideration to the third and fourth of the section 3 rules (see [50] above)]. The purpose of doing so to explore the issue of whether in the unexpected circumstances which materialised mid-trial with the advent of Ms Hazley's evidence the only course available to the prosecution was to proceed via the route of the third rule. This would have required a judicial designation of hostility viz-a-viz Mr O'Neill and, only with the leave of the trial judge, the adduction of evidence that Ms Hazley had "… made at other times a statement inconsistent with his present testimony …" This issue is not formulated in any of the grounds of appeal. Notwithstanding, the riposte is in our view relatively straightforward.

[67] In *R v Joyce* [2023] NI 67, this court considered the test to be satisfied for the attribution of hostility to a witness, at para [79]:

> "… The test of whether the witness has evinced an unwillingness to tell the truth and, in the language of **Phipson**, paras 12–61, '… Bears a hostile animus to the party calling him.' This test, self-evidently, will not be easily satisfied. The hurdle to be overcome is a substantial one."

And at para [80], this court sketched the typical hostile witness scenario in these terms:

> "Where the trial judge accedes to an application to designate a witness hostile, the scenario which will normally (though not invariably) materialise will be that of the jury receiving evidence from the witness concerned which will typically have four sources, or mechanisms: their initial oral evidence; the previous inconsistent statement; evidence elicited by cross examination on behalf

> of the party calling the witness; and evidence elicited by cross examination on behalf of the other party or parties."

[68] The factor of a prosecution witness's previous inconsistent statement surfaces with some regularity in practice. However, it is not an essential pre-requisite to a judicial designation of hostility. Rather, the third rule enshrined in section 3 is free standing. It operates as an alternative to the second rule. Moreover, the requirement of seeking the leave of the trial judge applies to the third rule but not the second. Furthermore, the second rule applies where the evidence of the witness is hostile or (merely) unfavourable, since section 3 did not affect the common law rule to this effect: see *Greenough* and *Ewer* (above).

[69] In the present case, the contradiction (the statutory term) between the evidence of Mr O'Neill and that of Ms Hazley was unrelated to any previous inconsistent statement of Mr O'Neill. There was no such statement. Rather, the contradiction arose out of critical omissions in Mr O'Neill's witness statements and sworn testimony. His anodyne account of what had been transacted when the applicant came to his home in the middle of the night in question was contradicted by the account which became available from Ms Hazley. The omissions related to (a) the applicant's account of having murdered someone and (b) the further conversation between Mr O'Neill and the applicant at Mr O'Neill's home and the conduct of both there.

[70] As noted above, Ms Hazley's account to the police materialised after Mr O'Neill had completed his evidence under oath at the trial. No question of hostility arose at that stage. Irrespective of whether one views the matter through the lens of "adverse" or "unfavourable", the contradictory elements of his evidence (namely the critical omissions), as set out above, did not arise until later. Those contradictory elements did not include a previous "statement inconsistent with his present testimony." There was no question of seeking the leave of the trial judge to prove any such statement. Accordingly, no question of the prosecution pursuing a designation of hostility arose.

[71] In determining this ground, we are alert to the invocation of common sense in some of the decided cases. This has particular resonance in the present appeal. It aligns with the triangulation of interests principle. Furthermore, it co-exists with the applicant's right to a fair trial. We are satisfied that the fairness of the applicant's trial was in no way impaired by the impugned ruling of the trial judge or the evidence (of Ms Hazley) which followed. It is appropriate in this context to draw attention to a fundamental principle of criminal justice: no defendant's trial is rendered unfair by the adduction of material incriminating evidence, subject to any recognised exception to this rule.

[72] Standing back, it would be offensive to any concept of justice, contrary to common sense and reason and inimical to the triangulation of interests to have excluded the highly material and incriminating evidence of Ms Hazley on the ground of what was, ultimately, a purely technical objection having no bearing on the fairness of the applicant's trial.

[73] At this juncture, we return to our analysis of section 3 of the 1865 Act: see para [25] above. Of the several rules enshrined in section 3, the second was plainly engaged. Having analysed and expounded section 3 and its associated jurisprudence above, we conclude that in the particular factual context that pertained (a) the ruling of the trial judge which permitted the adduction of the evidence of Ms Hazley is unimpeachable and (b) the ensuing evidence of Ms Hazley was compatible with the common law rule and section 3. For the reasons given, whilst we consider the leave threshold to be satisfied, this ground of appeal is without merit and is dismissed accordingly.

Ground (2): non–admission of evidence about an army officer

[74] The applicant's second ground of appeal is that the judge erred in prohibiting cross-examination to elicit the employment status of a British army captain who was registered to a telephone number ending in '440.'

[75] The ground of appeal arises in the following context. From late 2013, the deceased had been receiving sexually harassing communications from telephone numbers ending in '974', '369' and '399.' These calls included sexual violence, threats to her life and that of her mother. The deceased initially reported these calls to police in September 2013 and again in January 2014 at which time she had also received a text from '369' suggesting that she "ring him" on a number ending in '440.' The deceased reported she had not been in contact with the '440' number nor had it been in contact with her. By 30 April 2014, the deceased reported to police she has received no further communications of a threatening nature and there is nothing to suggest there was any further communications at any time from any of these numbers up to her death.

[76] There was considerable agreement, as to the facts arising from these threats and other threats to the deceased and her ex-partner from dissident organisations that could be placed before the jury and/or elicited from the investigating officer. It was clear the prosecution did not object to the defence cross-examining the investigating officer concerning these threats as being a reasonable line of enquiry under section 23(1)(a) of the Criminal Procedure and Investigation Act 1996 and the relevant Code of Practice. The issue in dispute was specifically whether employment as a captain in the British Army could be elicited before the jury.

[77] The defence contended that the fact the number ending in'440' was registered to an army captain was relevant because it raised the possibility that someone was aware of contact between the deceased and the captain which may have provided a motive to cause her harm. Either based on suspicion she was providing information, or simply such an association would be extremely unwelcome within her community. The prosecution argued that the captain's employment was irrelevant hearsay evidence.

[78] The judge addressed this issue in a written ruling *R v O'Neill (Ruling number 6)* [2022] NICC 10, where he considered that the introduction of the employment of the captain was designed to invite the jury to speculate the deceased may have been killed because she may have been an informant. He considered the following matters as material. There was no evidence the deceased spoke to the captain at any time, or that she was contacted on, or that she contacted anyone on, the '440' number. There was no evidence to suggest that the deceased was targeted by dissident republicans because she was or suspected of being an informant. There was no evidence that the captain had any role in military intelligence, and a judicially supervised disclosure exercise revealed no such evidence. To introduce this before the jury was simply to invite them into speculation unsupported by evidence. In these circumstances the judge was entitled to conclude as he did, that the occupation of the captain, who was registered to the '440' number, was not relevant. That it was not logically probative or disprobative of any fact in issue in the case.

[79] In terms of the hearsay argument, the judge was correct to conclude that the evidence of the investigating officer reporting what he had been told of the captain's occupation is hearsay. While such evidence would usually be agreed, the judge accurately determined that no gateway to admissibility was identified or argued by the defence under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). Even had it been argued, he concluded he would have been minded to exclude it under Article 30(1) of the 2004 Order.

[80] This issue was revisited by the defence relying on the decision of *R v Greenwood* [2004] EWCA Crim 1388. This case involved the exclusion of evidence that two men known to the deceased had been in the area when she was killed. One had a history of violence against the deceased and had phoned her home the night of her killing from a phone box close to the scene. The Court of Appeal held this evidence should have been admitted.

[81] Waller LJ identified the practice of prosecution counsel making admissions in relation to persons of interest who may have committed the crime in order to place this potentiality before the jury. He commented at para [40] that:

> "The practice of the Crown being prepared to make admissions in relation to facts which "might" point to a third party having committed the crime, which the applicant denies having committed, is long-standing. Such evidence is relevant and admissible to be weighed in the scales against the evidence adduced by the Crown …"

Waller LJ went on in para [41] to further observe that:

> "(i) If there is no issue that there has been a murder and the person on trial is saying that he did not do it, then he must by inference be asserting that someone else did.

> There is no obligation on the applicant to establish that someone else did the murder but, if he has evidence which proves that someone else did the murder, he must be able to adduce it. If he has any evidence that points to another person having a motive to do it he must be entitled to produce evidence of that motive. If he has any other evidence that would point to the possibility that another person might have done the murder he should be entitled to produce it."

[82] The judge considered *Greenwood* at paras [17]–[26] distinguishing it from the present factual circumstances. In the instant case there was no evidence pointing to the captain having killed the deceased, this was not raised as a possibility by the defence. Unlike the third party in *Greenwood,* the captain did not know the deceased, had never met her, had no phone contact with her, had no motive to kill, no history of violence, no opportunity to kill and was nowhere near the scene the night of the killing.

[83] The judge concluded that the captain's occupation was irrelevant to the issues in the case and his connection, if any, too tenuous to be of any relevance. In our view that approach was undoubtedly correct. However, the judge did allow the issues surrounding the sexually harassing phone calls and text messages to be explored and weighed in the balance by the jury with only the occupation of the captain excluded as irrelevant hearsay. We are of the view that the judge's findings in this regard are unimpeachable. Accordingly, this ground of appeal is unarguable and so leave is refused.

Ground 3: Refusing the admission of non-applicant bad character evidence

[84] This ground of appeal arises in the following context. Kevin McCaughley was a prosecution witness who lived opposite 71 Lagmore Avenue. In the days following the murder police carried out a CCTV trawl of the Lagmore area including McCaughley's address. No CCTV was present at his house. He confirmed that he previously had CCTV equipment installed but this had been removed before the murder took place. However, McCaughley provided a statement in which he stated he had seen the applicant wearing a cream jacket on the night of the murder after the applicant had returned from the Moneen Garage to Lagmore at around midnight. During the trial it became clear that this evidence was incorrect, CCTV footage established that the applicant was wearing a black fleece. Accordingly, the prosecution did not seek to rely on McCaughley's evidence concerning the cream jacket and would have agreed not to call him to give evidence. The defence, however, required him to testify.

[85] The prosecution disclosed to the defence that McCaughley had four convictions all of which arose out of his connection to the notorious killing of two British Army corporals, Cpl Woods and Cpl Howes, in 1988. The defence sought leave to adduce

evidence of his bad character and the fact that he had been found guilty of grievous bodily harm with intent and false imprisonment of the corporals. Also, that during the trial the judge found him to have told a "flagrant lie" in relation to an aspect of his evidence. Leave was sought pursuant to Article 5(1) of the 2004 order which states as follows:

> "In criminal proceedings evidence of the bad character of a person other than the applicant is admissible if and only if:
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which
>
> (i) is a matter in issue in the proceedings, and
>
> (ii) is of substantial importance in the context of the case as a whole, or
>
> (c) all parties to the proceedings agree to the evidence being admissible."

[86] In this case, Article 5(1)(b) was the relevant gateway for the admission of the bad character evidence. It was argued by the applicant that McCaughley's credibility was an issue in the trial. His convictions for serious offences in connection with the corporals' murder and his having previously lied under oath where of substantial importance in the context of the case as a whole.

[87] In addition, the applicant argued that the identity of the murderer was an important matter in issue in the trial and that the deceased had been the victim of threats from paramilitary organisations. It was contended that the presence of a person in the locality of this murder who had a propensity to inflict serious harm, particularly on behalf of a paramilitary organisation was somehow involved in the murder "could not be ignored."

[88] The prosecution submitted that the defence argument rested on the premise, which was no more than mere assertion, that McCaughley was either directly or through others involved in the murder. That there was no material or evidence to support this assertion and no indication of the basis for it. It formed no part of the applicant's defence case as articulated in his defence statement. It was also argued on behalf of the prosecution that McCaughley's evidence was not of particular importance and had not intended to call the witness until required to do so by the defence.

[89] The judge delivered a written ruling on the application (*R v O'Neill (ruling number 5)* [2022] NICC 7 in which he referenced the case of *R v Brewster* [2010] EWCA Crim 1194. Pitchford LJ gave the following guidance:

> "The trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it be said that the evidence is of substantial probative value on the issue of creditworthiness … The first question for the trial judge is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle … The second question is whether the bad character relied upon is of substantial probative value in relation to that issue. Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions" (paras [22] and [23]).

[90] The judge accepted that McCaughley's credibility was a matter in issue in the trial, having been called as a witness for the prosecution with relevant evidence to give on some aspects of the case. He then went on to consider whether McCaughley's credibility was a matter in issue of substantial importance in the context of the case as a whole for the purposes of Article 5(1)(b)(ii) and determined that the threshold of "substantial importance" was not met. As identified by the single judge in his leave determination, this is an important part of the statutory scheme since, in very many cases, the credibility of prosecution witnesses will be in issue but the statute seeks to limit the occasions on which bad character evidence in relation to those witnesses may be adduced.

[91] The reasons for this conclusion were set out in clearly by the trial judge at paras [27]-[28] being that McCaughley was not in the immediate company of the deceased at any material time, nor of the applicant either before or after the murder. The evidence he provided to support the prosecution case was of limited quantity, nature and significance, largely because the prosecution agreed that his evidence was in error and they had not been intending to rely on him.

[92] Possibly as a result of this, the defence sought to elevate the status of his evidence on the basis that either he or his acquaintance were possible candidates for involvement in the murder. The judge dismissed this as mere speculative suggestion, lacking any evidential foundation. This could not enable the bad character evidence to surmount the "significant hurdle" referred to in *Brewster*.

[93] For completeness the judge also went on to address the question of whether McCaughley's previous bad character, in terms of involvement in the corporals' killing and to lie under oath, was of substantial probative value. He concluded that it did insofar as it revealed a propensity to lie under oath but not in respect of the murder involvement theory. In any event, since the first question was answered in the negative, this did not assist the applicant.

[94] Evaluative judgements of the nature required by Article 5(1) of the 2004 Order are classically matters for a trial judge. An appeal court will be slow to interfere with such findings. The factual scenario in this case was far removed from that in *Greenwood* and from *Brewster* where the applicants had sought to cross examine the complainant in a kidnapping trial about her previous convictions for burglary, theft and manslaughter.

[95] In our view the judge's analysis of the statutory provisions and the factual basis for the bad character application are entirely coherent and accurate. It cannot be said that the evidence of Mr McCaughley, in the context of this case, was of substantial importance. This ground of appeal is unarguable and so leave is refused.

Ground 4: Refusal of the renewed application to adduce non-applicant bad character evidence

[96] This ground is interrelated to ground 3 discussed above. Following Mr McCaughley's evidence at trial, the defence renewed the application to adduce evidence of his bad character. During his evidence he made comments to the effect that he would not lie under oath and that telling the truth would "keep you out of trouble." The defence at trial made the point that these comments were made to try and persuade the jury of McCaughley's creditworthiness and to balance that the jury ought to know that he had previously lied on oath in a murder trial.

[97] The prosecution drew to the trial judge's attention that the first question identified in *Brewster,* at para [23], and regarded as a "significant hurdle", which must be answered is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. The court had previously concluded in *Ruling No 5* at paras [27] and [28] that McCaughley's credibility was not such a matter.

[98] The prosecution made a submission to the judge that there was nothing in the comments made to the jury in evidence by McCaughley which would cause him to reconsider the issue of the bad character evidence. The same want of substantial importance was still evident. We agree with the prosecution and the judge's assessment and are of the view there is nothing of substance in this point. The position remained unchanged insofar as the importance of the evidence of this witness was concerned, it was not a matter of substantial importance in the context of the case as a whole. Accordingly, this ground of appeal is also unarguable and so leave is refused.

Ground 5: The admission of the applicant's bad character evidence

[99] The prosecution sought to introduce two categories of previous conviction namely (i) three convictions for offences of violence dated 1990, 2000 and 2010 and (ii) fifteen convictions for burglary all of which bar two were of domestic properties which occurred over the period 1996 to 2012. The prosecution served notice of intention to adduce evidence of the applicant's bad character under Article 6(1)(d) of the 2004 Order. The defence opposed this application by serving notice of objection.

[100] Article 6(1)(d) of the 2004 Order states that evidence of an applicant's bad character is admissible in criminal proceedings if and only if:

> "it is relevant to an important matter in issue between the applicant and the prosecution"

[101] Further guidance on what such an important matter in issue may be is given in Article 8(1) which provides as follows:

> "For the purposes of article 6(1)(d) the matters in issue between the applicant and the prosecution include –
>
> (a) the question whether the applicant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> …"

[102] Some assistance is also provided in respect of propensity in Article 8(2) which provides:

> "Where paragraph (1)(a) applies, the applicant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of –
>
> (a) an offence of the same description as the one with which he is charged, or
>
> (b) an offence of the same category as the one with which he is charged."

[103] Article 8(3) provides that para (2) does not apply if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that would

be just for it to apply. The court should reject the admissibility of evidence via Article 8(2) if it considers that it would be unjust to admit it for any reason.

[104] The judge's ruling in *(R v O'Neill (Ruling number 4*) was that given the length of time between the commission of the offences of violence and the index incident, together with their lack of similarity or shared special features between these offences and in the circumstances of the deceased's murder, it would be unjust to admit them as evidence of propensity and/or that their admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit them. In these circumstances, we are of the view that the judge was right to exclude the applicant's convictions for violent offences.

[105] However, the judge went on in his ruling to find that the convictions for burglary were clearly relevant and admissible. He observed that the applicant's:

> "… ability and experience in burgling houses and other premises is a matter which the jury ought to be able to take into account … It is relevant to the important issue of whether the applicant was the man who entered the house … The fact that the applicant has a significant previous history of burglary is in my view, as a matter of common sense, relevant to whether he was the person who entered the deceased's home on the night of her death … his experience in this regard makes it more likely that he would have behaved as alleged."

[106] The judge further determined that the admission of the applicant's significant previous record for burglary would not have such an adverse effect on the fairness of the trial and rejected an application under Article 6(3) of the 2004 Order to exclude it.

[107] The prosecution case was that the deceased was murdered by someone who had entered the deceased's home in the middle of the night and killed her; this person had concealed his identity by pulling his coat over his head when passing a CCTV camera close to the deceased's home; and that the applicant being a recidivist burglar of domestic premises, together with the other circumstantial evidence in the case, made it more likely that he was the individual who entered the premises as a trespasser the night of the murder.

[108] The defence advanced the argument at trial and on appeal that the burglary convictions ought to have been excluded as not being relevant to any fact in issue, given that there was no evidence that the house was in fact burgled. It was contended the murderer was a much more sophisticated burglar than the applicant's previous convictions would suggest. In his previous offending he had invariably been caught and convicted evincing a lack of forensic awareness or sophistication. Further support invoked for the defence argument being that there was no forensic evidence found at the scene of the murder or elsewhere to connect the applicant to the murder.

[109] Having considered the competing arguments we find that the judge was correct to conclude from the applicant's previous convictions that he would have no qualms in entering a person's home in the middle of the night without permission as a trespasser. He was correct to infer that the murderer took steps to avoid detection when entering the deceased's home: by entering the back door where he was less likely to be seen; by covering his head and face with his coat on two occasions when outside the deceased's home and by climbing the fence to her home at a point furthest away from the CCTV cameras; after the murder by setting fire to the deceased's property; and again taking steps to hide his identity by lowering his head and speeding up as he passed a further CCTV camera.

[110] Furthermore, we consider that the judge was right to find the applicant's bad character was relevant to the issue between the parties, specifically whether it was the applicant who entered the deceased's home that night and that this bad character evidence could operate as a further strand in the circumstantial evidence. It matters not that the evidence did not demonstrate a propensity to murder.

[111] The single judge considered the defence claim of sophistication to be rather overstated. We agree with this sentiment and his view that:

> "… the steps taken by the applicant might equally be taken by any criminal who was keen not to be identified or caught in the act. In any event, it was open to the applicant to make the case to the jury that the previous convictions ought to carry little weight for those reasons. The jury could then make an informed judgement as to the extent to which the bad character evidence goes to prove the prosecution case."

[112] Overall, the conclusions of the judge on this issue accord with the statutory provision and with common sense. They were clearly within the margin of appreciation available to him. This ground of appeal is also unarguable and so leave is refused.

Ground 6: The admission of forensic gait evidence

[113] This ground arises because at trial the prosecution sought to adduce evidence from an expert witness, Ms Nadia Asgeirsdottir, in relation to forensic gait analysis ("FGA"). This involved comparing the gait of the person captured on CCTV outside the deceased's home proximate to her murder and the gait displayed in a reference sample of CCTV footage of the applicant on another occasion. Ms Asgeirsdottir testified that there was a significant number of common gait features in the two sources of evidence. She concluded using her expert knowledge and applying a scale similar to that approved in *R v Atkins and Atkins* [2010] 1 Cr App R 8, that her forensic gait analysis:

> "… provides limited support for the proposition that the figure in the questioned footage is the subject in the reference footage."

[114] No issue was taken on appeal regarding the expert's character or cogency this evidence. Rather a focused argument developed on the following particulars of this ground of appeal:

(i) The evidence was not relevant and probative of the prosecution case; and

(ii) It ought to have been excluded under common law and/or Article 76 of PACE.

[115] The defence contention on appeal is that the FGA evidence was irrelevant and of no probative value, thereby rendering it inadmissible. It did not advance a positive case of the applicant's guilt and at its height simply did not exclude the applicant as being the person on CCTV proximate to the deceased's home at the material time. At best it was neutral and therefore irrelevant.

[116] The prosecution argues that "limited support" provides some support for the prosecution case rather than 'no support" and is therefore relevant and plainly admissible. The strength of the evidence and the weight to be attached to it were a matter for the jury. Relevant to this point the prosecution say is that no expert evidence was called either on the *voir dire* or trial by the applicant to question this position.

[117] After hearing evidence both on *voir dire* and trial, in a written ruling *R v O'Neill (Ruling number 9)* [2022] NICC 30, the judge came to the following conclusions:

> "I reject the submission that Ms Asgeirsdottir's evidence was of no probative value and thus irrelevant. Even if the proposed evidence was of limited value, it positively supported the Crown case both by indicating *some* support for the proposition that the person seen on CCTV outside Jennifer Dornan's house and the applicant were the same person; *and* by countering any suggestion that they could *not be* the same person (at least as far as the question of gait is concerned). As the prosecution observed, the finding of 'limited support' was above the finding of 'provides *no assistance* in addressing the issue' in the scale of support used by Ms Asgeirsdottir. That rendered it relevant to an issue in the case: indeed, to the key issue of whether the suspect shown outside the victim's home (whom the defence accepted to be the killer) was, or could be, the applicant… it was a strand of evidence upon which the prosecution was entitled to rely, if they wished to call her,

> in what was (at that stage) a circumstantial case. The contention that Ms Asgeirsdottir's evidence should be given little or no weight was a matter for the jury."

[118] Properly analysed the above conclusion is inescapably correct on the evidence. The contention that Ms Asgeirsdottir's evidence should be given little or no weight was a matter for the jury. In terms of the application to exclude the evidence under Article 76 of PACE, the judge held that the fact the FGA may be of modest probative value went to reduce the risk of prejudicial effect since the limitations would be brought to the jury's attention. This represents an unimpeachable exercise of the Article 76 discretion. Accordingly, this ground of appeal is unarguable and so leave is refused.

Ground 7: Admission of expert video analysis evidence

[119] The applicant renews his application for leave on this ground, having originally abandoned it before the single judge. He now seeks to amend his notice of appeal to include this ground as a result of material disclosed by the respondent after the lodging of this appeal relating to the case of *R v Rainey & Others*. The new ground of appeal which the applicant seeks leave to pursue by way of amendment to the notice of appeal is as follows:

(a) The expert, Matthew Stephens, should have disclosed concerns with his "approach and methodology" said to have been expressed by the Forensic Science Regulator in England and Wales; and this would have impacted the admissibility or weight of his evidence; and

(b) The evidence was not probative and wrongly admitted.

[120] The context which frames this application is important. In summary, following the applicant's committal to the Crown Court the defence applied to the court to order a 'No Bill' pursuant to section 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969. Colton J, in a written judgment (reported at [2019] NICC 12), refused the defence application. At the time of the 'no bill' application, the prosecution had not engaged Mr Stephens and were relying on the expert evidence of a Mr Kinnen, who had reviewed the relevant CCTV footage. The prosecution also relied upon the evidence of Professor Ivan Birch (an expert in forensic gait analysis). The net result of Colton J's ruling was that Mr Kinnen could be allowed to give evidence as a witness of fact but not to provide expert opinion evidence. Professor Birch's evidence was considered by Colton J in assessing the strength of the prosecution case but was of very limited probative value, in his view.

[121] In the meantime, Mr Stephens was instructed in August 2019 on behalf of the prosecution following Colton J's ruling on the 'No Bill' application in April 2019. He was asked to analyse and report on the contested footage.

[122] Mr Stephens sets out his qualifications and experience in the introduction to his report as follows:

> "1. I am employed as a Senior Forensic Investigator at Diligence. Prior to my current employment I served in the Royal Air Force (RAF) in a number of technical roles based in the UK, along with overseas detachments to Cyprus and the Falkland Islands. I was trained as a Ground Electronic Technician at the No.1 School of Technical Training at RAF Cosford. My final posting in the service was at the Defence Crisis Management Centre (DCMC) located at the Ministry of Defence (MOD) Main Building on Whitehall.
>
> 2. On completion of my RAF service in September 2006, I joined BSB Forensic where I worked alongside and trained with individuals considered to be leading experts in the fields of audio and video processing and imagery analysis. In May 2011, the trade and assets of Berkeley Security Bureau (Forensic) Limited were purchased by Diligence where I am now employed in a dual Audio/Video Forensic role.
>
> 3. My area of expertise is in the technical processing and detailed analysis of video evidence. The subject of comparison within a video recording varies from case to case including, but not limited to, the morphological identification and comparison of facial, vehicle, clothing and object features. In addition, photogrammetry can be used to analyse heights, distances and average speeds of a subject.
>
> 4. I have provided expertise and forensic support in a great many criminal and civil cases, for the prosecution and defence, and I have given expert evidence at the Central Criminal Court, the Court of Appeal and other Crown and Magistrates' Courts.
>
> 5. I am listed in the UK Register of Expert Witnesses. I hold membership of the Forensic Image Analysis Division (FIAD) and affiliate membership of the Chartered Society of Forensic Sciences (CSoFS)."

[123] The substance of his evidence was a comparison between the CCTV footage of the offender on Hazel View, just before he entered Ms Dornan's house in the early hours of 2 August, and further footage of the man on White Glen, with other footage of the applicant, Raymond O'Neill, including that of him wearing his cream coat, as

he left his nephew's home at Devonshire Close in the afternoon of 1 August. This was of obvious interest given the clothing worn and the general issue of identification of the offender.

[124] The principal conclusions of Mr Stephens are found at para [54] of his report as follows:

> "54. In summary:
>
> (a) There are no irreconcilable differences between the jacket worn by the offender and that which was worn by Mr O'Neill on 01 August 2015.
>
> (b) The evidence lends LIMITED SUPPORT to the contention that the jackets are of the same tone, make and mass-produced model.
>
> (c) In the absence of any uniquely identifying features that could separate the 'source' or 'comparison' jacket from its mass produced article, the evidence lends NO SUPPORT to the contention that they are one and the same.
>
> (d) There are no irreconcilable differences between the trousers and belt worn by the offender and those which were worn by Mr O'Neill on 01 August 2015.
>
> (e) The evidence lends NO SUPPORT to the contention that the trousers and belt are of the same tone, make and mass-produced model.
>
> (f) There are no irreconcilable differences between the footwear worn by the offender and those worn by Mr O'Neill on 01 August 2015.
>
> (g) The evidence lends NO SUPPORT to the contention that the footwear are of the same tone, make and mass-produced model."

[125] In the body of his report Mr Stephens further opined that there was "no support" for the suggestion that the trousers, belt and footwear were of the same tone, make and mass-produced model. As to the jacket, he referred to "an apparent feature over the left hip, consistent in placement and structure to that of the square pocket/flap on Mr O'Neill's jacket." However, he was unable to verify the presence of a pocket on the upper left sleeve, stating that it could easily be argued to be a linear crease or seam.

[126] He also opined, in respect of the footage from White Glen, that:

> "A light-toned return on the top of the head could be consistent with a bald patch however the appearance of such could be reconciled by the subject passing directly beneath a strong light source (the street light) which may saturate what would otherwise be a dark-toned feature."

[127] None of the above evidence is controversial. Rather, what has taken centre stage in this appeal is the methodology employed by Mr Stephens referred to as the 'FIAG' or 'FIAD' scale to explain his findings. This scale is known to criminal practitioners as it has appeared in numerous case reports within the criminal justice sphere. To summarise, the genesis of this methodology, it was developed in 2006 by members of the Forensic Imagery Analysts Group which later became the Forensic Imagery Analysts Division of the Chartered Society of Forensic Science. The scale has six gradations, ranging from lending 'no support' to lending 'powerful support.'

[128] Expertise in this area has obviously developed as a reflection of modern times where CCTV imagery is often an element of criminal evidence. The courts have reflected this reality and the utility of expert assistance in this area in numerous decisions some of which we have been referred to. Of particular relevance is *A-G's Ref (No. 2 of 2002)* [2002] EWCA Crim 2373, [2003] 1 Cr App R 21 (321), and the summary provided by Rose LJ at para [19], as follows:

> "In our judgment, on the authorities, there are, as it seems to us (at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up) a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:
>
> (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (*Dodson & Williams*);
>
> (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (*Fowden & White*, *Kajalave v Noble*, *Grimer*, *Caldwell & Dixon* and *Blenkinsop*); and this may be so even if the photographic image is no longer available for the jury (*Taylor v The Chief Constable of Chester*);
>
> (iii) where a witness who does not know the defendant spends substantial time viewing and analysing

photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (*Clare & Peach*);

(iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (*Stockwell* 97 Cr App R 260, *Clarke* [1995] 2 Cr App R 425 and *Hookway* [1999] Crim LR 750)."

[129] In this case the applicant contends that point (iv) above was engaged and that the imagery was of insufficient quality for the jury to be permitted to perform that task referred namely to "give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury." Adjudication upon such a question also requires evaluation. In this case the judge undertook the evaluation and decided that there was some value in having the expert explain the imagery albeit the conclusions actually reached in the report were limited. Applying the appropriate appellate restraint, we see no reason to overrule the judge on this matter. We have seen from viewing the images ourselves that they were of sufficient quality to allow comparison. Specifically, the jury were well able to compare the coat worn by the offender with that worn by Mr O'Neill at Devonshire Close earlier and to conclude that they were similar or not. Also, the imagery expert was able to assist on how light may have saturated the image of a man's head at White Glen. Hence, we think it unarguable that this evidence would not have been of some assistance to the jury who could then reach their own conclusions.

[130] We pause to observe the fact that the prosecution served the report of Mr Stephens not so much to support its own case but as material disclosure that might also support the defence case. Of further relevance is the fact that it was open to the applicant to instruct an expert to support the assertions of counsel as to the quality of the footage and the reliability of Mr Stephens' conclusion. However, that course was not taken. The evidence therefore proceeded without substantial challenge presumably because Mr Stephen's opinion as to support was at the low end of the scale.

[131] However, this is not the end of the matter because at trial the applicant applied to exclude the evidence of Mr Stephens. It was argued by the applicant that the evidence did not "assist or advance" the prosecution case and that the report should be excluded. The judge disagreed and admitted the evidence, concluding that it provided "some positive support to the Crown case" and that the absence of irreconcilable differences was, itself, of some probative value in a circumstantial case: *R v O'Neill*, Ruling (Number 2) [2022] NICC 2, at [26]–[37]. He further declined to exclude the evidence under Article 76 of PACE.

[132] The gravamen of the judge's conclusion is as follows at para [43]:

> "[43] The jury will be shown the relevant footage and will have to make their own assessment of its evidential value, having been directed how to approach the evidence in the trial judge's charge at the closing of the case. Having expert evidence explaining only the very limited support (in the expert's assessment) for similarities between the two is to my mind to the defendant's advantage. I accept Mr McDowell's submission, for instance, that, in relation to the question of the suspect's 'bald patch', even if Mr Stephens' evidence were to draw attention to this issue, it will also temper the contention that this is of evidential significance because of (i) the alternative explanation he gives as to why this might seem apparent from the footage taken at White Glen; and (ii) his conclusion that there is no support for the contention that the defendant is the offender based on a comparison of facial features, including hairline (see para 43e of his report)."

[133] The judge highlighted further safeguards in favour of the defence in para [48]:

> "[48] By reason of the foregoing, I refuse the defence application to exclude Mr Stephens' evidence. In my view, the report is admissible and the jury should have the opportunity to consider and weigh it. If it transpires that, after cross-examination, Mr Stephens' evidence takes the prosecution case nowhere, or even turns out to undermine the prosecution case, that is a matter which can be addressed in the defendant's closing and in the charge to the jury. If and insofar as it is prejudicial to the defendant, any such prejudice would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[134] The above extracts amply demonstrate that the judge applied care and attention to the issue raised by defence counsel, applied the relevant law and, to our

mind, reached a conclusion that was well within his discretionary remit with which this appellate court will not interfere.

[135] The remaining point raised in support of this ground of appeal has arisen after the event and relates to a ruling of the Crown Court in the case *R v Rainey and others*, relating to the much publicised the murder of Ian Ogle, concerning the imagery analyst in that case, Mr Mark Buxton. Mr Buxton, like Mr Stephens, had been employed in the forensic department of Diligence International Ltd. Mr Buxton began his employment in January 2020, succeeding Mr Stephens after he left in December 2019. The evidence of Mr Buxton was excluded in *Rainey* although no written ruling was made by the trial judge, McFarland J. It is agreed that the reason given was simply that he was "not a credible witness." We note that, although the Regulator's correspondence with Mr Buxton was a subject of enquiry before McFarland J, his ruling did not opine on the dispute between them. It is also plain that unlike the trial judge in this case McFarland J did not consider that he required the assistance of an expert to compare the relevant images in that case.

[136] Self-evidently we must consider the nuances of the *Rainey* trial in deciding whether there is merit in the comparative point now raised by the applicant. In *Rainey* case material was sought and obtained from the Forensic Science Regulator ("FSR") in relation to the methodology employed by Mr Buxton by way of third-party disclosure. That material has also been provided to the applicant in this appeal and now takes centre stage in support of this appeal point.

[137] The applicant now relies upon the correspondence between Mr Buxton and the FSR in late 2021. Summarising same, the FSR stated that they had received a complaint about a report of Mr Buxton in a case in Ipswich Crown Court which had not declared non-compliance with the FSR Code of Practice, namely his lack of accreditation to ISO17025. The regulator further commented that, having seen the report, Mr Buxton's use of the FIAD scale as a means did not comply with the Regulator's requirements on the formulation of evaluative opinions.

[138] Following from the above the applicant makes the claim that Mr Stephens should have disclosed the issues raised about Mr Buxton in the instant proceedings. The applicant also contends that Mr Stephens wrongly presented the absence of differences between the respective images as providing support for them being the same. Therefore, the applicant submits, had the judge been aware of these matters he may have not permitted the scale of support to be used or may have declined to admit the evidence at all.

[139] This ground of appeal is plainly predicated on the basis that Mr Stephens "should have disclosed concerns with his approach and methodology expressed by the Forensic Science Regulator in England and Wales." It is said that this failure could have impacted the admissibility or weight of his evidence. A related claim is that the court should be left with a "significant sense of unease where relevant material was not disclosed to the defence."

[140] In reply to the defence arguments the prosecution accepts that an expert is under a duty to disclose any disciplinary finding or criticism by a professional body or regulator. However, the prosecution understandably makes the point that the criticism by the FSR did not concern Mr Stephens personally, nor was Mr Stephens under any duty to disclose something of which he was unaware. The prosecution places stress upon the fact that the FSR brought the issue to Mr Buxton's attention by letter of September 2021, almost two years after Mr Stephens had left Diligence. Thus, it is submitted that there is nothing to suggest that Mr Stephens was aware of the concerns raised by the FSR in advance of giving evidence.

[141] For the purpose of this appeal Mr Stephens was asked to comment on this alleged lack of disclosure on his part and replied as follows:

> "In general, I am aware that there was correspondence between the FSR and Diligence (Jon Walklin and Mark Buxton) relating to a complaint. I left Diligence in January 2020. I did not have first-hand knowledge of the nature of the complaint and I don't recall ever being shown any documentation regarding the issue. I wasn't involved in Diligence's response to the FSR.
>
> As for when I learned about this issue, even whether it was pre/post my oral evidence at Laganside in 2022, I cannot be certain. I've checked emails between myself, John Walklin (my former manager) and Mark Buxton (my replacement at Diligence) and the first email historically that alludes to Mark/FSR is dated 12/03/2024. Any personal WhatsApp correspondence with John Walklin only dates back as far as February 2023; there are no historical messages prior to 2023 even though we would have sent very occasional messages using WhatsApp in the past. There is a brief chain in September 2024 where we discuss the uncertainty around my attendance in the Lyra McKee matter; I show some confusion about Mark's involvement and attendance, and Jon responds to say that 'it was a different case Mark had issues with … it wouldn't effect you.'
>
> In summary, I think that it is unlikely I'd have known about the complaint about Mark Buxton when I gave evidence in the trial of Raymond O'Neill."

[142] We can identify no basis for looking behind what Mr Stephens has stated above. Hence, we are not satisfied that a valid case has been made that he failed in

his duties to disclose relevant information to the court or misled the court in some way.

[143] In addition, we note the prosecution submission that Mr Stephens' report, which included an "expert's statement" created for the purposes of proceedings in Northern Ireland, was not technically required to declare non-compliance with the FSR Code either because of the absence of accreditation to ISO17025 or in its use of the FIAD scale. The prosecution goes on to say that if the applicant's complaint is that he was unaware that the FSR had recommended a different scale to that used by Mr Stephens, this information was publicly available in the Appendix to the FSR Code of Practice and Conduct: Development of Evaluative Opinions FSR-C-118, published in February 2021: see 8.5.13 to 8.5.15 and the scale suggested at 8.5.12.

[144] It may be said that the prosecution stance outlined above is overly procedural and deflects somewhat from the point. It is undoubtedly preferable for every expert witness to be fully candid with the court about prevailing scientific norms. Against that, we should not be over critical of Mr Stephens, as this does not appear to have been the usual practice at least in the Northern Ireland courts at the time of this trial.

[145] In any event, even if there has been material non-disclosure, it does not follow that a conviction is unsafe on that basis. Dealing specifically with this issue in *R v A* [2017] NICA 68, at [26] the Court adopted the two-question test as articulated in *R v Hadley and others* [2006] EWCA Crim 2544:

> "The first question is whether the material ought to have been disclosed as being material that would have undermined the case for the prosecution or assisted the case for the defence. The second question is whether the failure to disclose renders the convictions unsafe."

[146] Ordinarily, the remedy for material non-disclosure is that the disclosure test is applied once the information has come to light. If disclosure should have been made, it can be ordered on appeal and the fairness of the trial process ensured: *R v Asiedu* [2015] 2 Cr App R 8, per Lord Hughes, at para [27]. In *Asiedu*, at [55], the court concluded that, while the material ought to have been disclosed at trial, it did not, in fact, undermine the expert's conclusions on the topics on which there was an issue at trial.

[147] In its consideration of the effect of any non-disclosure in the instant case, the prosecution has postulated three matters that fall for examination as follows:

(a) The status of the FSR;

(b) The use of levels of support; and

(c) The impact of the absence of accreditation to ISO17025.

[148] As to the first matter in para [152](a), we note that the role of Forensic Science Regulator came into existence in 2008. The Regulator is entrusted by the Home Office with ensuring that quality standards are developed, implemented and used effectively in criminal justice. They are responsible for issuing Codes of Practice, Regulatory Notices and other guidance. The Regulator was put on a statutory footing by the Forensic Science Regulator Act 2021, which came into force in England and Wales on 2 October 2023. The Act creates a duty to publish a Code of Practice and empowers the Regulator to conduct investigations and issue compliance notices. However, the jurisdiction of the FSR is confined to the investigation of crime and criminal proceedings in England and Wales, irrespective of where the 'forensic science activity' takes place: sections 2 and 11 of the Act. It has no application in Northern Ireland so the Code of Practice and other guidance is of persuasive value only.

[149] On the second issue identified in para [152](b) it is accurate to state that the views of the Regulator and other forensic science bodies do not bind the court. In *R v T* [2011] Cr App R 9, Thomas LJ rejected the endorsement by the Regulator of the approach taken by a number of forensic scientists and examiners within the UK who employed a likelihood ratio in the interpretation of footwear mark evidence, despite the lack of a statistical database: see [52]–[53] and [60]–[61]. He went on at [92]–[96], to reiterate the admissibility of an evaluative opinion and scale as approved in the judgment of Hughes LJ in *R v Atkins and Atkins*[2010] 1 Cr App R 8.

[150] In *R v Atkins and Atkins*, the Court of Appeal considered the admissibility of evidence of photographic comparison and the use of expressions of levels of support in the absence of a statistical database. Hughes LJ said at para [23]:

> "… we do not agree that the absence of such a database means that no opinion can be expressed by the witness beyond rehearsing his examination of the photographs. An expert who spends years studying this kind of comparison can properly form a judgment as to the significance of what he has found in any particular case. It is a judgment based on his experience. A jury is entitled to be informed of his assessment. The alternative, of simply leaving the jury to make up its own mind about the similarities and dissimilarities, with no assistance at all about their significance, would be to give the jury raw material with no means of evaluating it. It would be as likely to result in over-valuation of the evidence as under-valuation. It would be more, not less, likely to result in an unsafe conclusion than providing the jury with the expert's opinion, properly debated through cross-examination and, if not shared by another expert, countered by contrary evidence." [emphasis added]

[151] Hughes LJ noted at para [25], that, if such evidence were inadmissible, it would also not available to the defence before noting at para [26], that scales of expression of opinion were common in a number of fields of comparison, such as fibre comparison evidence, glass fragments and footwear patterns. He went on to offer guidance as to how the evidence should be assessed by the tribunal of fact. He said, at para [29]:

> "The absence of a statistical database is something which will undoubtedly be exposed in cross-examination. The witness may expect to be asked to explain how, if no-one knows how often ears or noses of the shape relied upon appear in the population at large, it is possible to say anything at all about the significance of the match; his answers may be satisfactory or unsatisfactory but will be there to be evaluated by the jury, which will have been reminded by the judge that any expert's expression of opinion is that and no more and does not mean that he is necessarily right. Similarly, the expert may be expected to be tested upon the extent to which he has not only looked for similarities but has actively sought out dissimilarities. Those are but the simplest of the questions which plainly need to be asked of anyone offering evidence of this kind. Cross-examination will also be informed by the fullest disclosure of his method, generally, and of his working notes in the particular case being tried." [emphasis added]

[152] At para [31], Hughes LJ continued:

> "We conclude that where a photographic comparison expert gives evidence, properly based upon study and experience, of similarities and/or dissimilarities between a questioned photograph and a known person (including a applicant) the expert is not disabled either by authority or principle from expressing his conclusion as to the significance of his findings, and that he may do so by use of conventional expressions, arranged in a hierarchy, such as those used by the witness in this case and set out in [8] above …"

[153] *Atkins* was approved by Thomas LJ in *R v T* and, in this jurisdiction was relied upon by the Northern Ireland Court of Appeal, in *R v McDaid* [2014] NICA 1, in the context of facial mapping. The expert in that case used the FIAD scale to express his conclusions: see para. [5]. Coghlin LJ said at para [10]:

> "Such a witness may give evidence of facial similarities without being able to make a positive identification and,

> provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled to make use of the assessment framework employed in this case."

[154] The prosecution rightly recognises that the material produced by the FSR in respect of Mr Buxton reveals a tension between imagery analysts and the Regulator in that guidance was sought from the Regulator who was reluctant to suggest or approve an alternative scale. The correspondence from Mr Buxton also shows that he had indicated to the Regulator:

> "We are completely happy to change this for a more suitable scale and would welcome the opportunity to discuss this with you in detail, face to face." The reply from FSR effectively left it to him as it was expressed in the following terms: "you are free to develop and validate an alternative that does comply with the Regulator's requirements on formulation of evaluative opinions."

[155] Furthermore, the FSR guidance, as indicated above, takes the form of an Appendix to the FSR Code of Practice and Conduct: Development of Evaluative Opinions FSR-C-118, published in February 2021: see 8.5.13 to 8.5.15. The alternative scale compares two propositions with each other, eg the proposition that the coat is of the same of the same tone, make and mass-produced model, against the proposition that it is not. It is detailed at 8.5.12 as follows:

- No more probable (that proposition A rather than B is true).
- Slightly more probable.
- More probable.
- Much more probable.

[156] Standing back and comparing this to the FIAD scale we pause to observe that the differences may, in fact, be of limited significance in the overall scheme of opinion evidence of this nature. Furthermore, it should be noted that section 4.1.2 of the Code states:

> "A staged approach will be taken to compliance, which will be published by a Regulatory Notice and/or Regulator's Codes of Practice and Conduct. The aim, however, will be for all work within the scope of this document to be compliant by October 2026."

[157] Thus, whether the Code strictly applies, either presently or at the time of trial, it is clear that verbal scales continue to be used in the criminal justice system. In *R v Abdi* [2022] EWCA Crim 315, at paras [7] to [15], the use of the FIAD scale was not

the subject of any criticism by the Court of Appeal where an imagery expert concluded that there was strong support for the contention that K was the man on the CCTV. The FIAD scale also finds support in the 2025 update to the Crown Court Compendium. At 15-5, para 9 it states:

> "If E expresses their conclusions in relative terms (eg "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain to them that these terms are no more than labels which E has applied to their opinion of the significance of their findings and that, because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability."

[158] In *Atkins* at [31], Hughes LJ said of the scale of support:

> "… We think it preferable that the expressions should not be allocated numbers, as they were in the boxes used in the written report in this case, lest that run any small risk of leading the jury to think that they represent an established numerical, that is to say measurable, scale. The expressions ought to remain simply what they are, namely forms of words used. They need to be in an ascending order if they are to mean anything at all, and if a relatively firm opinion is to be contrasted with one which is not so firm. They are, however, expressions of subjective opinion, and this must be made crystal clear to the jury charged with evaluating them."

[159] Thus, how a subjective conclusion, such as that arising out of a comparative analysis of imagery, is expressed is of less importance, as long as the meaning of the evidence and its relative strength is conveyed to the jury. As has been the case for many years, this is adequately accomplished by evaluative scales such as the FIAD scale.

[160] The subject of the complaint to the FSR, raised by the Regulator in his correspondence with Mr Buxton was that his expert report did not declare non-compliance with the Code of Practice. The need for such a declaration is itself contained within the Code. There is no requirement for a report served in proceedings in Northern Ireland to contain such a declaration.

[161] Delving more deeply into this issue and engaging with the third issue identified at para [152](c) of accreditation we find merit in the prosecution analysis for the following reasons. First, non-compliance arises principally from the fact that the Code states that the Regulator 'expects' accreditation to ISO17025. An "expectation" and a mandatory requirement are two different things. Thus, it is wrong for the

applicant to claim that the Regulator took issue with Mr Buxton's "approach or methodology." The same standard applies across the forensic spectrum, including laboratories dealing with such disciplines as DNA extraction, toxicology and firearms discharge residue. It is plainly wide-ranging in its application. We are told that accreditation to ISO17025 is a costly process, beyond the financial capabilities of many of the relatively small firms who provide expert forensic imagery analysis. To the prosecution's knowledge, no imagery analyst in the United Kingdom has yet been accredited to that standard, some years on from the introduction of the requirement in the FSR Codes. That has not prevented the continued reliance on such evidence by the courts.

[162] In any event, whilst we can see that issues arose with Mr Buxton's evidence in the *Rainey* case that does not automatically translate into issues raised in other cases where this species of video analysis evidence is utilised. Within modern criminal justice this type of evidence will likely have value. However, that assessment is ultimately a matter for a trial judge to determine.

[163] The lesson to be taken from the foregoing analysis is that in future we consider that it would be preferable, as a matter of good practice, for experts instructed in Northern Ireland in this area to provide as full as account as possible of the methodology employed, to include use of the FIAD scale or otherwise, the FSR position and the relevance of accreditation.

[164] In the instant case, we consider that the evidence of Mr Stephens was correctly admitted with all the caveats expressed by the judge. He was entitled to give evidence using the FIAD scale. It is unclear how the lack of accreditation impacts, in any way, upon the reliability of the conclusions reached by Mr Stephens. Furthermore, the applicant does not point to any defect in his analysis and did not seek to rely on any other expert evidence in that regard.

[165] In any event, it is critically important not to lose sight of the fact that the evidence of Mr Stephens provided low or limited support to the prosecution case. This was only one aspect of a multi - layered circumstantial case. Added to that is the telling fact that no complaint has been raised as to the judge's charge on this or any other issue. Thus, there is no question of a judicial omission affecting the safety of this conviction. When properly analysed this ground of appeal satisfies the leave threshold but ultimately it must fail on its merits and so is dismissed.

Ground 8: The conviction was against the weight of the evidence

[166] This is a classic makeweight and omnibus ground of appeal. It is entirely non-specific and unparticularised. It adds nothing of substance to the applicant's appeal. Correctly, it was not canvassed at the hearing before this court in oral submissions. While nothing further is required of this court, we would nonetheless add the following.

[167] The case against the applicant was based on many strands of circumstantial evidence which the prosecution helpfully summarises in its written argument as follows:

(a) the applicant had been in Jennifer Dornan's company earlier that evening;

(b) he knew where she lived;

(c) he was again in her company at David Quinn's home at 71 Lagmore Avenue in the early hours of the morning up until she left;

(d) he had obtained a bottle of champagne which she was drinking while he drank beer;

(e) Ms Dornan arrived home at 02:52 hrs so would have left around 02:47 hrs;

(f) he left 71 Lagmore Avenue shortly afterwards, on foot, 5 or 10 minutes after 02:58 hrs;

(g) the murderer arrived at her home at 03:11 hrs;

(h) the applicant was wearing a cream coat with pockets on the front lower part when he left David Quinn's house;

(i) the murderer wore a jacket with a pocket on the front lower part similar to that worn by the applicant that night;

(j) he displayed forensic awareness, pulling the coat up over his face when confronted by cameras, staying close to the fence as he made his way to enter by the back door;

(k) the applicant is a recidivist burglar;

(l) on leaving 19 Hazel View, at 04:18 hrs, the murderer walked off to the left before a figure was seen in that direction walking towards Lagmore View;

(m) a knife with blood on it and bearing a partial DNA profile matching that of the deceased, was found in a garden situated next to Lagmore View;

(n) a man was seen by Megan Cunningham, just after 04:21 hrs, walking into White Glen from Lagmore View, towards Nos. 45 to 60 White Glen;

(o) a man carrying a light-toned item of clothing under his arm walked past a CCTV camera at 56 White Glen, at 04:23 hrs;

(p) no other person passed that camera between 0204hrs and 0504hrs;

(q) the man reached the camera at 56 White Glen 4 mins 50 secs after the murderer left 19 Hazel View; the police walked the same route in 3 mins 38 seconds;

(r) the man at White Glen showed forensic awareness as he neared the camera, bowing his head so that light shone first on his forehead and then on his crown;

(s) the applicant has a receding hairline and bald patch at his crown (although the light could also be explained by saturation);

(t) gait analysis provided limited support for the proposition that the man at Hazel View and White Glen was the applicant;

(u) the applicant arrived at Eileen McIlvenney's home at 109 Laurelbank at 04:46 hrs, approximately 28 minutes after the murderer left 19 Hazel View. Police walked a route from there to 109 Laurelbank via White Glen and Teeling Avenue (where the applicant had earlier told David Quinn he was going) in 28 mins 20 secs;

(v) when he arrived at 109 Laurelbank, he was not in possession of his coat despite:

(i) needing a coat at all other times he was seen on CCTV that day; and

(ii) the fact that it had been raining in the early hours of that morning so that he was soaking wet;

(w) his hand was covered in blood when he arrived

(x) he behaved oddly, giving Ms McIlvenney his scapular medals and talking about God;

(y) he visited his nephew at 12 Devonshire Close, waking his family, at 05:30 hrs, despite having no need to because the taxi was taking him to 'Georges' for drink;

(z) his nephew Shane O'Neill was prepared to help him at that hour and in those circumstances;

(aa) he was heard by Suzanne Hazley admitting killing someone when he arrived at their house. He and Shane O'Neill left, likely to dispose of evidence by burning;

(bb) he behaved oddly with Anne Marie Smith, rocking backward and forward as if he was disturbed. He was talking about having the first drink in ten years and his children;

(cc) on Sunday evening, the day after the murder, he asked his nephew to drive into Lagmore. The explanation for this was implausible. They drove up to the vehicular dead end at the top of White Glen where the suspect had walked;

(dd) he washed and dried his clothes and had packed a towel and underwear; he advised Paul Smith to wash the Barcelona shirt he had borrowed;

(ee) he stayed away from his bedsit at 89 Amcomri Street, staying at two different addresses on Sunday night and Monday night;

(ff) he used false names whenever booking taxis;

(gg) when Ms. Dornan's death was commented upon by Jemma Tierney in his presence, he said nothing despite having been in her company that night;

(hh) he left the jurisdiction on the evening of Monday 3 August, travelling to Donegal by a circuitous route via Dublin;

(ii) he knew the police were looking for him; and

(jj) he gave lying and inconsistent evidence that he had lost his memory which the jury plainly did not accept.

[168] On an overall rational view there was more than sufficient evidence upon which a reasonable jury, properly directed, could properly convict. As the single judge also observed, in refusing leave, at [65]:

> "[65] Whilst the applicant spills much ink in identifying the alleged weaknesses in the Crown case, all of these matters were put to the jury in the course of closing speeches. The defence made the case that key prosecution witnesses ought not to be believed. Moreover, the trial judge summed up the evidence to the jury over the course of three days and, in doing so, he highlighted the various issues and inconsistencies in the evidence. There is no claim that the judge misdirected the jury in any material respect."

[169] Put simply where there is sufficient evidence to go before a jury, as in this case, it follows that the verdict could not be said to be against the weight of the evidence. This purported ground of appeal is unarguable and also fails.

Overall conclusion

[170] Applying the test in *R v Pollock* [2004] NICA 34, the simple question for this court is whether the applicant's conviction is safe. We are not satisfied that any safety

issues arise in relation to the jury's verdict. Leave to appeal is granted only in respect of ground 1, and ground 7 and refused on all other grounds. The appeal is dismissed on its merits for the reasons given.

[171] Finally, we thank counsel (and instructing solicitors) for their considerable assistance in this case. We also wish to commend the judge for providing a series of excellent rulings on complex legal issues at short notice during this trial. His handling of this difficult case was exemplary.