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

—
THE KING

v

**JAKE O'BRIEN, ANDREW THOMAS KENNETH MARTIN,
STEVIE LEE WATSON and SIMON APSLEY SMYTH**

Mr Michael Ivers KC with Ms Aileen Smyth (instructed by Phoenix Law, Solicitors) for
O'Brien

Mr Gavan Duffy KC with Mr Damien O'Halleron (instructed by KRW Law, Solicitors)
for Martin

Mr Charles MacCreanor KC with Mr Aaron Thompson (instructed by Madden and
Finucane, Solicitors) for Watson

Mr Gregory Berry KC and Mr Patrick Taggart (instructed by Madden and Finucane,
Solicitors) for Smyth

Mr Ciaran Murphy KC, Mr David Russell KC with Ms Natalie Pinkerton (instructed by
the PPS) for the Prosecution

FOWLER J

Introduction

[1] This case arises out of the murder of Malcom McKeown ("the deceased") who died on 19 August 2019 as a result of multiple gunshot wounds to his head and body. The deceased was 54 years old and had just recently been released from prison. The murder occurred at approximately 19:20 and the deceased was found dead inside his car parked at the rear of Dewart's Service Station at 10 Main Street, Waringstown.

[2] The defendants O'Brien, Martin, Watson and Smyth are indicted for the murder of the deceased and possession with intent of firearms and ammunition associated with the murder.

[3] The defendants are each charged on count 1 with murder, contrary to

common law, the particulars being that on 19 August 2019 they murdered Malcom McKeown.

[4] On count 2 they are each charged with possession of firearms and ammunition with intent contrary to Article 58(1) of the Firearms (Northern Ireland) 2004. The particulars are that that on 19 August 2019 they had in their possession two firearms, .32 Calibre bullets and 9 x 19mm cartridges, with intent to endanger life or to enable another to do so. The evidence establishes that the deceased was shot with bullets fired from two guns of .32 and 9mm calibre. At least 16 bullets, from two guns, were fired at the deceased from a relatively short distance. The killing had all the hallmarks of a carefully planned and brutal assassination.

[5] On 13 May 2024, just prior the trial commencing, Martin pleaded guilty to the offence of aiding and abetting murder. This basis of plea was not accepted by the prosecution and the trial proceeded in respect of Martin as a Newtown hearing in parallel with the trial of the other defendants and on the remaining count of possession of firearms with intent. The remaining defendants all pleaded not guilty.

Legal Issues

[6] At the outset and before moving on to a consideration of the evidence I must remind myself of the principles and relevant law I must adhere to when determining whether the prosecution has proved its case against the defendants.

[7] Clearly the onus to prove the case is on the prosecution and that onus can only be discharged by satisfying the tribunal of fact that the defendants are guilty beyond reasonable doubt. The defendants do not have to prove their innocence. Where I refer to being satisfied of any given fact or matter this is to be regarded as satisfied to the criminal standard of beyond all reasonable doubt.

[8] There must be a separate consideration of each case against each defendant before a conviction can be safely entered. The court must decide the case only according to the evidence produced before the court. I must look at the whole of the evidence and the case against and for each defendant separately. I can draw inferences based on evidence I consider to be reliable.

[9] The prosecution case in the present trial is based on circumstantial evidence. I remind myself of the standard direction to juries in relation to circumstantial evidence. As described in *DPP v Kilbourne* [1973] 1 All ER 440, circumstantial evidence is evidence of relevant facts from which the existence or non-existence of facts in issue may be inferred when taken in context with all the other evidence. It works by cumulatively, in geometric progression, eliminating other possibilities. It is evidence of various circumstances relating to the crime which, when taken together, establish the guilt of the defendant. It is not necessary for the evidence to provide an answer to all of the questions raised in a case. It would be an unusual

case in which a court could say that it knew everything there was to know about the case. It is not necessary that each fact upon which the prosecution relies taken individually proves the defendant is guilty.

[10] The court must decide whether all of the evidence has proved the case against the defendant. In *R v Exall* [1866] 4 F & F 922 at 929 Pollock CB observed:

“What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

[11] I further remind myself that it is essential that circumstantial evidence is examined narrowly and with great care for a number of reasons (see *Tepper v The Queen* [1952] UKPC 15). First of all, such evidence can be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant. As Lowry LCJ stated in *R v McGreevy* [1972] NI 125 at 134:

“... a judge ought to point out the circumstances which tend to establish innocence and more especially circumstances which are inconsistent with guilt ... doubt as to one circumstance would have to be set against a possibly strong adverse view of the other circumstances in order to assess its ultimate effect on the case.”

[12] The questions a court should have at the forefront of its mind in a circumstantial case are set out by Higgins LJ in *R v Jones* [2007] NICA 28 para [33]. First, I must consider all the evidence; secondly, I must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, I must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances; and fourthly, I must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together. That if there is evidence proved which undermines the prosecution case that the perpetrator was the accused then that is more potent than all the other circumstances.

[13] The risks in a circumstantial case as set out in *R v Kelly* [2015] by Pitchford LJ is that speculation might become a substitute for the drawing of sure inferences of guilt and the danger of failing to take account of evidence that, if accepted may diminish or even exclude the inference of guilt.

[14] I remind myself of the importance of ensuring that circumstantial evidence is examined as a whole rather than piecemeal. This was highlighted in *R v Hillier* [2007] 233 ALR 63 and cited with approval in *R v Wotton and McConville* [2014] NICA 41. Hillier at para [48] observes that:

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

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

consider the accumulation of evidence; cf
Weeder v The Queen.”

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

The evidence at trial

Circumstances leading up to the killing

[16] The deceased was well known to police in the Craigavon area and had just been released from prison on 7 August 2019. He had previously been shot and seriously wounded and received warnings from police that he was under threat from other organised criminals in the locality. He was living close to Dewart’s Service Station in Waringstown in the home of a friend. A few days prior to his murder he had purchased a silver BMW 5 series registration number XEZ 5518 which he parked to the rear and side of Dewart’s out of sight of the main forecourt.

[17] On 19 August 2019, CCTV in the vicinity of Dewart’s records a dark blue Passat turning into the rear carpark of the filling station at 18:26. At 19:19:04 the last sighting of Mr McKeown alive is captured on CCTV at the garage where he is seen walking past an ATM located a very short distance from where his car was parked. The time at which the shooting occurred is identified on this CCTV by two female customers who appear to react to what I infer are gunshots. This was recorded at 19:19:28 (real time) and is confirmed by a sales assistant in the garage shop reporting several loud sharp bangs at this time. The Passat is recorded leaving the rear car park of Dewart’s at approximately 19:19:56. At 19:25:00 a 999 call is made to police stating that two people had just set a car on fire at Glenavon Lane and ran into the bushes. This was the blue Passat involved in the shooting and was bearing a false number plate RK62PLX. This vehicle had been stolen in the Republic of Ireland six months previously. The vehicle was extensively damaged by fire, and a fire damaged petrol can was found in the rear passenger footwell.

[18] A murder investigation was commenced into the circumstances surrounding the murder. This encompassed forensic examination of available CCTV, examination of crime scenes, follow-up autopsy of the deceased, telephony material,

searches of relevant addresses and subsequent arrest, interview and charging of the defendants.

[19] The forensic evidence was generally uncontentious in relation to the CCTV, pathology, firearms and ammunition, gunshot residue and DNA evidence.

CCTV evidence

[20] All relevant CCTV footage seized by police in connection with this murder was admitted into evidence by agreement. The important aspects of this CCTV evidence were played in court and by agreement of all counsel I have received and viewed a compilation disc of this material containing video clips numbered 1-110 together with attached exhibit numbers. As is common not all the CCTV recorded times are displaying an accurate time and the timings I refer to have been adjusted to show real time.

[21] From the CCTV recovered from Dewart's a dark Passat can be seen approaching the junction of Waringstown Road and Cambrai Heights. It turns right into Cambrai Heights at 18:23 (clip 57). It drives parallel to the side of Dewarts, then appears to travel back on itself and then turns left into the rear car park of the filling station at 18:26:04 (clip 58).

[22] The sighting of this vehicle and its movements were the subject of reports by Mr Manning and Mr Stephens. Mr Manning was tendered by the prosecution for cross-examination by the defence on the content of his reports. In his report of 16 May 2024, he indicated that he had viewed two pieces of footage referred to as Sighting 6 and Sighting 7. In both the sun visors on the offside and nearside of the vehicle were light in tone and in the deployed (down) position. He noted two light toned areas on the nearside of the vehicle, forward or level with the nearside B pillar. He was of opinion that these were an area where it would be expected for the head rest poles of the front nearside seat to be located and the area between the top of the seat back and the bottom of the head rest. The light tone was in his opinion likely to be due to the chrome-effect finish to the head rest poles.

[23] In Sighting 6, as the vehicle entered the yard, there was a light toned area on the upper section of the interior of the B pillar. Mr Manning believed that was a light tone section of the interior trim. At para 2.1.5 of his report, he considered it only possible to identify an occupant on the front offside of the vehicle, the driver, but was unable to rule out if an occupant was on the front nearside of the vehicle, that it is aligned with the driver and the camera and thus a front seat passenger would not be visible in the recording. He concluded at para 2.4 that the headrest tubes are visible in the recording on the front nearside of the vehicle as the vehicle travels towards the camera and as it turns to its left (nearside). Whilst it would appear that there is no occupant in the front nearside seat of the vehicle, he was unable to rule out that there was an occupant leaning forwards and thus is below the

level of the top of the front nearside seat, as it travels towards and across the field of view of the camera.

[24] In relation to Sighting 7, at para 3.3 of Mr Manning's report he indicated that the head rest tubes are visible in the recording on the front nearside of the vehicle as it travels right to left across the frame and as it turns to its left out of the yard. He could not be conclusive as to whether there was an occupant in the front nearside seat of the vehicle and was unable to rule out that there was an occupant leaning forwards and thus below the level of the top of the front nearside seat. He concluded by stating that due to the tinted rear side windows, he was unable to comment or determine whether there were any occupants in the rear of the vehicle.

[25] The same footage was examined by Mr Stephens and made the subject of his agreed report dated 19 December 2019. He noted that the driver of the VW Passat seen in the car park off Cambrai Heights between 18:26:00 and 18:26:14 appears to be an IC1 male wearing dark toned clothing on the upper body and a light toned peaked cap. The darkened rear windows of the VW Passat were such that he could not determine if there were any other occupants in the vehicle.

[26] On 20 May 2024, Mr Manning was asked by police to carry out a further review of CCTV video recording from exhibit REB2 which was a video sighting of the Passat involved in the murder driving past Windsor Close, a very short distance from Cambrai Heights and the side entrance to Dewart's rear carpark. The viewing was from a camera on an elevated position covering the Waringstown Road on approach to Dewart's. The Passat passed across from right to left in front of the camera and from his viewing he concluded that there is a passenger in the car. At para 2.5 of his report of 20 May 2024 he stated that there is an area on the front nearside passenger position of the vehicle, seen through the front nearside window, which moves with the vehicle and thus is likely to be the head of a front seat occupant. Whilst there are reflections on the nearside window, he concludes that the area of the occupant is considered to be above and below the area of the reflection. This being consistent with two persons in the front of the vehicle on its approach to Dewart's before turning into Cambrai Heights.

[27] Mr Ivers KC cross-examined Mr Manning in relation to what could be seen on CCTV as the Passat entered the car park area of Dewart's (Clip 58). It was put to Mr Manning that the Crown case had been opened by the prosecution that "... as both the front sun visors were down it was not possible to see who is in the car, but it appears there is a passenger in the front seat beside the driver." He was asked if he agreed with this prosecution opening remark. Mr Manning agreed that the silver tubes of the headrest could be seen on the passenger side of the vehicle. It was also accepted the line at the top of the interior passenger door could be seen. It was put that this was suggestive of no passenger being present and he was pressed to answer counsel's question. While Mr Manning did not answer the question as posed, he was clear in his evidence that if there was a passenger in the front seat, he would

have to be bent over in such a way as to be below the level of the head rest tubes and the line of the door. He was pressed on the opening by prosecution counsel suggesting there appeared to be a passenger in the front seat. While he again did not answer the question posed, he did explain that there was no evidence he could see of a passenger in the front seat when the Passat entered or exited Dewart's car park.

[28] Mr Ivers KC cross-examined Mr Manning in relation to his further work on the sighting of the Passat car as it passed Windsor Close. It was put to Mr Manning that context is important when assessing observations. He agreed with that proposition. The context suggested to Mr Manning was that within seconds from this viewing at Windsor Close to the Passat entering the car park at Dewart's it was only a matter of seconds and there is no evidence of a passenger at that point. Again, this was agreed by Mr Manning. That the video of the Passat car entering Dewart's was much clearer, close-up and with the car at a much slower speed. That there was no evidence of a front seat passenger under these much more favourable conditions. It was put to Mr Manning that there was a considerable amount of reflection on the windows of the Passat as it approached Windsor Close and he agreed with these observations. It was accepted that this Passat was captured on CCTV on at least 13 occasions which have been viewed many times without previous suggestion of a person being observed in the front passenger seat.

[29] Mr Manning was taken through the passage of the Passat from it first comes into view until the point it is claimed a passenger is in the front of the vehicle. Mr Manning agrees that he cannot say at this point in the Passat's journey that there is any evidence of a passenger. He goes further than that and says it is not possible to see the driver, yet it is obvious that there must be a driver. He indicated the point where he says he identifies what he "believes" to be an occupant in the front passenger seat. He further described what he observed as being "most likely to be a person" in the passenger seat from the lighter tone observed in that area. He accepted there were reflections on the windows from the sun and also the wall the Passat was driving close alongside. The height of the wall also made viewing problematic.

[30] Mr Manning was cross-examined by Mr Duffy KC and he accepted that there was no evidence of a front seat passenger as the Passat entered Dewart's and passed the car wash CCTV camera.

Pathology

[31] The deceased was discovered slumped over the driver's seat of his car. He had gunshot wounds to his head and body. Evidence of postmortem examination was given by Dr Ingram who concluded that death was due to bullet wounds of the head and trunk. The deceased was struck by at least six bullets as follows:

"(a) One bullet struck the right side of the head

towards the top and had passed downwards, forwards and to the left lacerating the right side of the brain and fracturing the vault and base of the skull. The bullet fragmented. This wound would have been very rapidly fatal.

- (b) Two bullets and a fragment of copper jacketing from a bullet had struck the right side of the abdomen. One of the bullets had travelled from right to left, passing through the stomach, spleen and the diaphragm before nicking the ninth left rib and exiting through the left side of the chest. The other bullet passed to the left lacerating the left kidney and the attachments to the bowel. In the absence of prompt surgical intervention both of those wounds would have been rapidly fatal.
- (c) Another bullet struck the back of the right forearm and extensively fractured the elbow joint.
- (d) A bullet had also caused a glancing wound to the right forearm. It may have continued to enter the body. The arm wounds were not life threatening.
- (e) Two bullets also struck the right thigh, one passing upwards into the right buttock from where it was recovered. The other passed from right to left exiting the body before re-entering close to the fold of the right groin and continuing across the body into the left thigh from where it was recovered. These wounds would have posed an immediate risk to life.

All the bullets had been fired from the deceased's right-hand side. Only the wound on the head gave any evidence of range, although the clothing elsewhere could have concealed such evidence. The pathologist notes, "There were some flecks of powder residue at the margin of the head wound, the edges of which were lacerated, indicating a close-range discharge, quite possibly a contact wound."

Forensic evidence

Murder scene examination

[32] Mr Jonathan Greer, Senior Scientific Officer, gave evidence of his detailed examination of the scene of the shooting, the spent casings/bullet fragments observed and recovered and strike marks on the BMW car. He concluded that at least ten 9x19mm cartridges were fired. Ten spent 9mm casings were recovered in close proximity to the car. It was his opinion that four perforating holes in the car body work were likely caused by 9mm rounds and the four strike marks on the body work caused by the less powerful .32 rounds. Fragments of .32 bullets were discovered close to the car indicative of not penetrating the bodywork. There were no .32 casings recovered from the scene suggestive of the gun being a revolver which is not designed to eject spent casings. Given the four strike marks on the body of the car and the two .32 bullets recovered from the deceased's body established that at least six x .32 and ten x 9mm bullets were fired. He concluded that at least 16 bullets were fired from a minimum of two guns. The driver's door of the silver BMW was open when the shots were fired. The shots were fired from a range of 1-3m, with at least 8 hitting the car rather than the deceased. He was of the opinion that the shots were fired towards the right side of the deceased's body at an acute angle as demonstrated in the photographs taken of the four perforated holes and trajectory rods in the bodywork of the car.

[33] In cross-examination by Mr Duffy KC it was conceded that all the shots were fired from the area within photograph 18 of the scene photographs. The general area of these recovered cartridges tends to suggest that each of these 9mm rounds was fired from the same general area establishing an identified firing point marked on the scene map. There were no ejected cartridges closer to the deceased's vehicle such as would be consistent with a shot close to the head of the deceased as indicated in the pathology evidence. The space to fire through the aperture of the door was confined. It was agreed that it is possible for one person to fire two weapons at the same person at the same time but that aim will be less accurate. However, generally, recoil from a 9mm weapon requires a person to use two hands to keep it accurate.

Examination of the burnt-out Passat RK62PLX and surrounding area

[34] A forensic examination was carried out of the burnt-out VW Passat RK62PLX which it is agreed was used in the killing. The car interior was extensively damaged and on close inspection a melted red petrol can was discovered in the rear passenger footwell. The vehicle identification number matched that of a Passat registered in Dublin 171D37563. This vehicle had been stolen in the Republic of Ireland six months previously. There was no automatic number plate recognition or other recorded sighting of this vehicle in the six months after it had been stolen and before being used in the murder.

[35] A statement of evidence obtained from the witness reporting the Passat on fire was read into evidence by agreement. In this statement the witness records that on looking towards the vehicle on fire:

“I then saw a person’s head coming from what would be the driver side of the burning car. The person was running towards the area of the Bush at the other side of the road, directly across from where the driver door would have been, although I wasn’t able to see the person’s body area or any clothing being worn. I could just see a head and notice the person’s hands going up to the back of the head and pulling off what I believe to be a dark coloured balaclava ... I only saw one person in the blink of an eye ...”

[36] The burnt-out Passat RK62PLX on arrival of fire services and police was located on Glenavon Lane, adjacent to an area of waste ground through which a well-worn track led to a formal footpath leading to Greenhill Park. Michael Campbell, a crime scene investigator attended this scene on the evening of 18 August 2019. He gave evidence that as he was making his way through this area of interest, as a possible escape route from the Passat, he located a pair of discarded black latex gloves. These gloves were approximately 17 metres from the burnt-out Passat. They were photographed in situ and recovered the following morning as, ‘MC4’ latex glove; and ‘MC5’ latex glove. These gloves had been exposed to the elements from the evening of 19 August at approximately 19:30 until 10:00 the following morning. These gloves being subsequently linked to the defendant O’Brien.

DNA findings on the discarded gloves

[37] The evidence of Lesley Ann Beck, a forensic scientist with FSNi was agreed and her statements read in court. Her expertise includes examination for evidence of DNA on items connected with crime scenes. She examined several items in this case and in particular ‘MC4’ and ‘MC5’ black latex gloves. As described above, these gloves had been recovered by M Campbell CSI following examination of the burnt-out Passat and located some 17 metres from the vehicle.

[38] ‘MC4’ was a black disposable glove which was recovered and received into the laboratory inside out. There was mud staining on the inside and outside. The palm area and finger webbing were swabbed to recover DNA. The inside of the glove was preserved for fingerprint examination. The swabs were submitted for DNA analysis. A DNA profile was obtained from the swabs which matched that of Jake O’Brien. There was a low-level contribution from a second person.

[39] ‘MC5’ was a second black disposable glove received inside out. The palm

area and finger webbing were swabbed for DNA. The inside was preserved. The swabs were submitted for DNA analysis. A DNA profile was obtained from the swabs. The expert concluded that Jake O'Brien could not be excluded as being a contributor to the mixed DNA profile obtained from this black latex glove.

[40] Ms Beck evaluated the findings by considering two propositions in respect of the DNA from MC5, namely that it related to (1) Jake O'Brien and one unknown individual and (2) two unknown individuals unrelated to Jake O'Brien. The calculation made with reference to the Northern Ireland population survey data shows that this finding is at least 1 billion times more likely to arise under the first proposition, ie Jake O'Brien and one unknown individual.

[41] The major profile obtained from 'MC4', the inside cuffs from a boiler suit, 'OF2' and the inside collar and cuffs of a black hooded jacket, 'TC7' matched the profile attributed to Jake O'Brien.

[42] O'Brien could not be excluded as being a contributor to the complex mixed profiles obtained from one of the blood samples from the boiler suit 'PB12' and the blood sample from the inside waist band of the black track suit bottoms 'PB17.' However, Malcolm McKeown was excluded as being a contributor to these complex mixed profiles.

Examination of bullet casings and other items for CDR

[43] The evidence of Paul Webster, Senior Forensic Scientist, was not in dispute. He dealt with cartridge discharge residue (CDR) recovered from cartridge casings from the scene of the shooting, the recovered black latex gloves, and a black hoodie and boiler suit attributed to the defendant O'Brien and recovered from his address.

[44] His examination of spent cartridge casing 'SF3' from the scene of the shooting showed that the CDR contained a number of characteristic particles with the composition antimony/barium/lead and a number of indicative particles with the composition barium/aluminium, aluminium/barium, antimony/lead and barium/lead. Nitroglycerine was also detected.

[45] Examination of spent cartridge casing 'TMR4' from the scene of the murder showed a number of characteristic particles with the composition antimony/barium/lead and a number of indicative particles with the composition antimony/barium, antimony/lead, barium/lead.

[46] Mr Webster explained some of those residues are described as being *characteristic* particles and some *indicative*. He uses the term *characteristic* as referring to the particles containing the full complement of key elements in types of CDR. Where particles do not contain all or only a combination of some of the key elements, he referred to these particles as *indicative* of CDR. A particle which is

indicative is obviously of considerably less probative value than a particle which is characteristic.

[47] Mr Webster was of the opinion that the presence of a single indicative particle with the composition antimony/lead on 'MC5' - black latex glove provides very weak support for contact with a source of the residues from spent casings 'SF3' and/or 'TMR4.' That the presence of a low number of indicative particles with the composition barium/lead on 'OF2' a boiler suit recovered from Jake O'Brien's address provides very weak support for contact with residue from spent cases 'SF3' and/or 'TMR4.'

[48] He found that the presence of a single indicative particle with the composition antimony/lead on 'TC7', a black hoodie, attributed to Jake O'Brien, provided weak support for contact with a source of the residues from the spent casings. However, he indicated that 'SF3', a spent cartridge case from the murder scene, could be the source, but not exclusively, of the antimony/lead, barium/lead indicative particles on 'TC7' the black hoodie.

[49] He explained the deposition and distribution of CDR is a random process and depends on variable factors including environmental conditions, the type of firearm, ammunition and number of shots fired. The presence of CDR depends on variable factors including environmental conditions, type of surface and activity after firing. Due to their nature transfer can occur from surface to surface quite readily. CDR would not be expected to remain after hair washing, showering or washing of clothing.

[50] Handguns will invariably deposit CDR on the firer more than long arms because of the proximity of their open parts to the firer and CDRs are expected to be lost within hours off the hands, face and hair but can remain longer on clothing, the persistence depending on the fabric and the activity after firing. However, absence of CDRs cannot exclude someone from involvement with a firearm related incident, likewise the presence of CDRs must be interpreted in conjunction with all other available information.

[51] The court was reminded that while nitro-glycerine is a commercially produced explosive compound and has various uses including use in ammunition cartridges containing nitro-glycerine. It may also be found in items entirely lawful such as starter/firing pistols and nail guns.

Getaway route from the burning Passat

[52] As described above the vehicle involved in the murder was located in flames on Glenavon Lane, adjacent to an area of waste ground through which a track led to a formal footpath leading to Greenhill Park. This footpath opened up into a cul-de-sac at the bottom of Greenhill Park approximately 180 metres from where the

Passat was set on fire. One of the properties at the bottom of Greenhill Park had CCTV in place, which captured two young males running from the direction of Glenavon Lane. They were one following the other in relatively close proximity. Controlled footage of the CCTV by police officers identified them as Martin and O'Brien. It was only at the commencement of the trial was it accepted by these defendants that they were the two individuals recorded on this CCTV footage. It was agreed as a fact that the first to enter Greenhill Park is Martin and second, a short distance behind, is O'Brien. Martin runs towards a parked car which he accepted to be his blue VW Golf. He had parked it there earlier that day. He opened the door and got into the driver's seat. O'Brien enters the vehicle by the passenger door and gets in just before Martin drives off.

[53] Both men are running when they come into view and Martin is to the front. Something may have been dropped, and O'Brien stops and appears to pick something up and both continue to the VW Golf. They are both running with purpose and certainly acting as if they knew where they were going. They were wearing what the prosecution says appeared to be boiler suits. Certainly, they were each wearing similar dark coverings. They were not recorded wearing this type of clothing earlier in the day or later after they are caught on this camera. The prosecution case is that this clothing provided a cover for other underclothing and was something that could be easily removed and discarded or destroyed, thus, potentially showing forensic awareness. Martin is wearing coloured trainers with a possible dark upper or stripe and O'Brien is wearing trainers with a dark upper white trim and blacked out area to the arch of the foot. O'Brien at Greenhill Park is seen on CCTV to be carrying a light toned flexible object, consistent with a peaked hat in his left hand on approach to the VW Golf. The prosecution case is that this conforms with the observations that the driver of the Passat at Dewart's at 18:26 was wearing a light toned peaked hat.

Putting in place the VW Golf as a getaway car

[54] As part of the relevant events leading up to the shooting it is now accepted that Andrew Martin placed his VW Golf car in Greenhill Park at just before 17:00. This is captured on CCTV which records that at 16:59 Martin's VW Golf travels down Greenhill Park towards the end of a cul-de-sac and reverses into a parking bay. Martin can be seen wearing a tee shirt with dark sleeves and dark bottoms. He exits the driver's door and walks towards the top of Greenhill Park. He put on a dark top and turns around and walks back towards the Golf at 17:00 and gets into the driver's seat. At 17:02 he exits the car and goes to the boot.

[55] A dark VW Passat registration YLZ 5183 (not the Passat used in the killing) which it is agreed belongs to Smyth appears at the top of Greenhill Park traveling from right to left. Martin is seen to again return to the VW Golf, get back into the driver's seat, exit once more and lock up the car before walking towards the top of Greenhill Park. The VW Passat which it is agreed was being driving by Smyth

returns back to the Greenhill Park area, this time driving from left to right. It stops and Martin goes around the back of the car and gets into the rear passenger side of the vehicle. The rear driver's window appears to be partially down and Martin's actions walking to and in sitting in the rear passenger side is suggestive of all other seats being occupied/or kept free. He enters the Passat at 17:02:54.

[56] Before these movements of Andrew Martin took place there was a telephone call at 16:52:24 lasting 22 seconds from Watson to Martin. Martin leaves Trasna Way at 16:52:43. He is either still on that call or it has just concluded when he leaves his house, gets into his car and drives it to the getaway location at Greenhill. Neither have explained what that call was about, and Martin has not explained why he immediately left and put the getaway car in place – passing Watson's home address at the time. The calls from Watson to both Martin and Smyth, at this time, are the prosecution say, potentially consistent with Watson giving direction to Martin and Smyth. At 16:57:34 there is also a call from Watson to Smyth indicative of them not being together at this point.

[57] Martin gets into the dark Passat YLZ 5183 at 17:02:55. The car then moves off at 17:02:56 and is out of CCTV view at 17:03:01. Martin's phone switches off at 17:03:23. The route that the vehicle takes out of Greenhill Park causes it to pass 2 Princeton Avenue, Watson's address at this time.

Sighting of Passat YLZ 5183 at Vivo garage on Mourne Road

[58] At 17.15.24 Smyth's Passat, YLZ 5183, turns off Russell Drive and onto Mourne Road and enters a Vivo Garage. It is an agreed fact that Smyth is driving the car and gets out of the driver's seat of the car while O'Brien gets out of the rear driver's side of the vehicle. O'Brien's phone (9760), just before turning into the garage, is turned off at 17.13.10, just 10 minutes after Martin's phone is switched off.

[59] Smyth's car on leaving the Vivo Garage at approximately 17:15 is next captured entering Trasna Way from the direction of Malcolm Road at 17:52:32. At 17:58 the car is captured on CCTV in Rectory Road where Watson is seen getting out of the Passat and going to the front of door of 15 Rectory Road. It was agreed evidence at trial that Watson was with Smyth at this point in time. It was accepted in evidence that the Passat driven by Smyth is not captured on CCTV, ANPR or otherwise positively identified between 17:15 and 17:52. It is during this 38 minute window that Martin and O'Brien have exited the vehicle. The prosecution case is that it is reasonable to infer that they were dropped off at a location for the purpose of the murder and afforded access to the blue Passat to be used in the killing. The prosecution argue that this is key evidence against Martin, O'Brien and Smyth, as being the persons in the vehicle that carried out the pickup of Martin at Greenhill Park. That between Watson's call to Martin and Watson's call to Smyth it is to be inferred that Watson was collected by them and became the front seat passenger in that car before it arrived at the Vivo Garage at around 17:15.

[60] The prosecution accept that it is fundamental to their case that all parties in the vehicle at this point in time, between 17:02 and 17:15, knew exactly what they were doing and what was going to happen. That this contention is supported by the turning off of Martin and O'Brien's phones in and around this time to ensure there was no communication or trace of the location and movement of their phones. This was an essential forensic precaution for their involvement in the murder. These events, the prosecution say, were the commencement of the execution phase of the plan to murder Malcolm McKeown. It was to be carried out that evening, the gunmen were in place and all necessary arrangements in order, including the guns, ammunition, car, petrol, boiler suits, Martin's Golf, planned escape route, and arrangements for the disposal of the weapons after the killing. These are matters of inference that the prosecution is inviting the court to accept in relation to the accused.

[61] The prosecution argue that once the execution of the plan began to take effect, that Smyth and Watson, deliberately removed themselves to Ballynahinch to be a distance removed from events and manufacture a false alibi. Evidence of their presence in Ballynahinch, a considerable distance from Waringstown, at a time proximate to the murder can be seen on CCTV at 19:08 when diesel is put into the Passat by Smyth and Watson is recorded entering the shop attached to the filling station. The murder of the deceased taking place at approximately 19:20 means these defendants could not have been near the murder scene.

Events subsequent to O'Brien and Martin leaving Greenhill

[62] O'Brien and Martin leave Greenhill Park at 19:26 in Martin's Golf which notably has no wheel trims. This Golf is next caught on CCTV at 19:43 entering Trasna Way (where Martin was living at the time) from the direction of Malcolm Road with two persons on board. At this time a person in a grey top enters a house on Trasna Way at 19:44. Two minutes later a person in dark clothing exits this house and within one minute a person in dark clothing returns back into the same house. At 19:48 a person in dark clothing again exits this house running. Less than 30 seconds later Martin's Grey Golf is caught on CCTV on Trasna Way heading back in the direction of Malcolm Road. Martin's vehicle is recorded on CCTV on Flush Street, Brownlow Terrace, William Street and Charles Street between 19:54 and 20:12. Charles Street leads onto Rectory Road where O'Brien was living at the time. The Golf is then recorded on CCTV coming from Charles Street into William Street and then from Avenue Street heading towards Dollingstown at 20:16.

[63] At 20:27 a male person in dark clothing is captured on CCTV and enters the garden at 26 Rectory Road giving the appearance of carrying something in his left hand.

[64] At 20:30 Smyth's Passat YLZ 5138 is recorded on CCTV arriving at 26 Rectory

Road. It is agreed that Watson is first to leave the car from the passenger side and engages in conversation with O'Brien. When O'Brien approaches the car, he places his mobile phone on the top of the Passat and moves away from the car to engage in conversation with Watson. It is further accepted that Smyth joins Watson and O'Brien however, as evidenced from the CCTV this was only from a distance and momentary before he returned to the driver's side of the car. At 20:23 Watson returns to the passenger front seat of the car and O'Brien gets into the rear passenger side and the car drive off. This is the same vehicle which picked Martin up after leaving his Golf in Greenhill Park approximately an hour and a half before the deceased's murder and now just slightly over an hour after the murder. Leaving the area of Rectory Road with Smyth driving, Watson is in the front passenger seat and O'Brien in the rear passenger seat.

Martin's arrest on the evening of 19 August 2019

[65] At approximately 20:45 on the evening of the murder Martin was stopped in his VW Golf on Eastway, Lurgan travelling in the direction of Craigavon. Police carried out a search of his car and discovered a substantial quantity of herbal cannabis contained in a large vacuum sealed bag. He was arrested and after interview, bailed pending forensic investigations. His VW Golf was seized but returned subsequently. Since its return to the defendant the VW Golf has disappeared.

Phone attribution, cell site analysis and contact between defendants

[66] The mobile call data and cell site analysis evidence in the trial was agreed. In summary it is as follows:

Andrew Martin - phone number ending 2732

[67] When the defendant Martin was arrest by police at Eastway in Lurgan on 19 August 2019 at 20:45 police seized a Samsung phone from him. On 24 August 2019 at 08:59 police carried out a search of this defendant's home at 66 Trasna Way, he was not at home. However, he subsequently arrived back at his home and was arrested for the murder of the deceased. A further phone, an iPhone, was discovered and seized in his home. The telephone number associated with the primary mobile phones attributed to him ended in 2732. The full number has been referred to in court, however, only the last four digits are used for the purposes of this judgment. This will be the same approach for the other defendants' phone numbers. Applications were made in respect of the subscriber details and call data for this phone number and were received. Cell site information for calls from this number were also examined. Further, data in terms of messages and internet searches/usage from the mobile phones was extracted.

[68] Cell site data from calls made from 2732 are consistent with his phone being at home in the area of Trasna Way on the morning of 19 August 2019 and travelling

to Newry consistent with attending the Canal Court before leaving Newry at approximately 10:30 and returning to Lurgan. At 15:56 and 16:05 Martin's phone receives calls from the phone attributed to Watson. At these times Watson is in his home at Bleary. At points between 16:21 and 16:52 Martin's phone is located in an area that includes Trasna Way and just North of Greenhill Park. Cell site data supports the video evidence that Martin was in the area of Greenhill Park, Lurgan just after 17:00. GPRS (General Packet Radio Service) data for 2732 indicated that between 17:03:23 – 19:29:30 Martin's phone was switched off. When it was switched on again it was located in the area of Trasna Way. There is then no recorded call data for his phone between 19:35 and 20:32.

[69] In terms of internet usage, the history of search items on his phone between 8 August (date of the deceased's release from prison) to 18 August 2019 referred to searches concerning shooting, Craigavon and Malcolm McKeown. His web page history between 31 July to 18 August 2019 included "the act of killing aftermath", "Can't sleep after murder", "Scared to sleep after someone dies", "Loyalist Feud", "Malcolm McKeown" and "couple fatally shot in Armagh." Searches continue after the murder on 19 August 2019 and include "Malcolm McKeown murder" "Go America on bail", "latest on murder in Lurgan" and "what to do if your phone is seized by police." Similar titles were included in sites visited as revealed in his web history. On the iPhone seized from his home similar search terms and web history are recorded between late January and early February 2019, including "Buy handguns online" and "handguns for sale: pistols, revolvers, 9mm – Cheaper than dirt!"

[70] While there was contact between Martin and Smyth/Watson, there was a marked increase in the contact between the defendants after the deceased's release from custody. Call data between the defendants from 31 July 2019 to the day before the murder 18 August 2019, was agreed and this shows an increase in contacts between the defendants after the deceased's release from prison. Contacts increased on 8 August to 64, on 9 August to 28 and on 19 August to 44.

[71] On the day of the murder Martin contacted Watson or Watson contacted Martin by text or voice call on 17 occasions at 11:00:40, 11:02:54, 11:03:30, 11:04:18, 11:16:09, 11:37:12, 11:38:46, 11:40:21, 14:45:25, 15:20:00, 15:33:28, 15:56:34, 16:00:26, 16:05:52, 16:09:08, 16:42:35, and 16:52:24 for 22 seconds.

O'Brien – phone number ending 9760

[72] On 24 August O'Brien was arrested for murder and his address at 26 Rectory Road, Lurgan was searched. A mobile phone was located and seized from under a pillow in one of the bedrooms. The mobile number attached to this phone ended in 9760 and is accepted as being attributed to O'Brien. Call and subscriber data was requested and provided by the phone company. It appears from the records and phone data that neither this phone nor number had either Martin or Smyth stored as

a contact.

[73] Cell site data established that the phone attributed to O'Brien on 19 August 2019 was located in the general area of his home in Rectory Road between 11:29 and 12:15. Between 12:15 it moves to an area which includes the junction of Lough Road and the M1. It then returns at 12:54 to the Rectory Road area. Data obtained confirmed that this phone was detached from the phone network at 17:13 and did not reconnect until 19:45 after the murder. When the phone detached from the network, cell site analysis established that the last cell it was connected to would cover the Greenhill Park area. When it reconnected the relevant cell site it connected to covered the areas of Trasna Way and then moves between 19:50 and 20:20 to an area that includes 26 Rectory Road, Lurgan, his home address. Between 20:25 and 20:31 the phones attributed to both O'Brien and Smyth are located in an area which includes O'Brien's address at Rectory Road.

[74] O'Brien and Watson or Watson and O'Brien were in contact on the day of the murder at 11:16:09, 11:37:12, 11:50:26, 11:51:10, 13:18:04, 13:18:45, and 13:25:53.

[75] Smyth and O'Brien were in contact with each other on the day of the murder at 1:05:09; 1:06:44, 20:20:42, 20:24:19, 20:30:59, 20:31:06, 22:03:53, 22:07:31, 22:16:26, 23:25:05, 23:28:11, 23:36:10, 23:38:46, and 23:42:07.

Watson – phone number ending 4039

[76] On 9 August, police attended 15 Orient Circle, Lurgan the home of the defendant Watson and carried out a search. No mobile was found. On 9 January 2020, police again attended this address and, on this occasion, discovered a mobile phone in the hallway. In interview the defendant refused to give police the passcode for the mobile phone. He indicated that he obtained the phone six weeks – two months before the search. Subsequently, it was confirmed that the phone had been purchased on 26 June 2019. Applications were made to the telephone service provider for subscriber information and call data. The number ending in 4039 was attached to the defendant Watson and the phone seized attributed to him. This was agreed during trial.

[77] Cell site analysis and data records show that Watson's phone made a voice call to Martin's phone at 16:05 on the day of the murder. Then at 16:09 Martin's phone calls Watson's phone at a time when cell site analysis put Martin in the area of Slurrykat, Lowtown Road. Martin appears to be moving at this time in the general direction of Lurgan. Martin's phone again calls Watson at 16:42.

[78] At points between 16:57 and 17:02 Watson's phone utilised a cell site orientated to provide coverage to an area of Lurgan which would be expected to include the vicinity of Greenhill Park. However, this area also included the home address of Watson at this time – 2 Princeton Avenue. It was conceded by

Mr Paul Hope, the cell site expert witness, on behalf of the prosecution, that Watson's phone could also be located at any point within this area of coverage of the cell ID utilised. Between 17:09 and 17:15 Watson's phone is located in an area which includes the junction of Russell Drive and Mourne Road. Between 17:54 and 17:58 Watson's phone is located in an area of Lurgan which includes Rectory Road. From 17:28 the phone attributed to Watson moves around Lurgan and is consistent with it heading towards the M1 and heading onto the A1 towards Hillsborough/ Annahilt and towards Ballynahinch before returning towards Sprucefield and heading south towards Lurgan/Craigavon.

[79] Cell site analysis also established that for periods of time during 19 August 2019 the data would suggest that the telephone attributed to Smyth and that attributed to Watson were potentially co-located.

[80] While travelling between Lisburn and Craigavon the phone attributed to Watson made an outgoing voice call at 19:37. This is the last outgoing call event for this phone. At 19:48 Watson's phone records a detach notification which indicates that the phone is being removed from the network and potentially turned off. There are then no further recorded call events for Watson's phone. At the time the phone is detached it is recorded as being located in the Craigavon area.

[81] Watson's phone also has contact with an otherwise unknown phone ending in 8080 at potentially significant times on the day of the killing. When the blue Passat is on the Dunkirk Road on its way to Dewart's at 18:22:37 a call is made at 18:21 from 8080 to Watson for two minutes. The blue Passat arrives at Dewart's at 18:26:35 and there is a call from 8080 to Watson at 18:34 lasting one minute 25 seconds, while the Passat is sitting in wait. The next call to 8080 from Watson is at 19:29 after the murder. This unknown phone 8080 contacts Watson's phone a number of times, at 17:30, 18:21, 18:34, 19:29 and 19:37. Watson contacts this unknown phone at 19:29 and 19:37. Watson's phone made its last call at 19:37 hours. It detached from the network at 19:48. Neither this unknown phone nor Watson's have ever been recovered.

[82] On the day of the murder there is communication between Smyth and Watson and Watson and Smyth at 1:03:33, 11:38:46, 11:40:21, 12:37:47, 12:53:35, 14:18:27, 16:57:34.

Smyth - phone number ending 9449

[83] A mobile phone was seized from Smyth on 16 September 2019. It is agreed that this phone is attributed to Smyth and had a phone number ending in 9449. The device itself was examined for stored data and requests for subscriber and call data were made to the relevant provider to include cell site information.

[84] GPRS data for 19 August 2019 places this phone attributed to Smyth in the

Portadown area until 13:10. It then moves towards Lurgan and the cell site which covers Trasna Way. The phone then travels towards Aghalee returning to Lurgan and the Ashgrove area before heading north towards Lisburn at approximately 14:10. The mobile phone then connects with cell sites consistent with the mobile phone moving south on the A1 towards Moira and back to Lurgan around 14:42.

[85] Between 16:36 and 16:57 Smyth's telephone utilised a cell site which is located and orientated to provide coverage to an area in Lurgan which would be expected to include the vicinity of Greenhill Park. This area also includes the area of Princeton Avenue, the location of the defendant Watson's address.

[86] At 16:57, this 9449 phone attributed to Smyth is in the area covered by the cell site that services Greenhill Park. There is no location data for a 45 minute period after leaving Greenhill Park before being located in the area of Gracey Drive, Lurgan at 17:46. It then heads north towards Moira, Lisburn and onto Ballynahinch around 18:48. At 20:30 GPRS data puts 9449 in the area of Lurgan, it remains here before moving north just prior to midnight when it travels to the Coleraine area and moves to the Portrush area in the early hours of 20 August 2019.

[87] On the day of the murder there is communication between Smyth and Watson and Watson and Smyth at 1.03.33, 11.38.46, 11.40.21, 12.37.47, 12.53.35, 14.18.27, 16.57.34. There was contact between Watson and Martin at 16:52 immediately prior to the collection of Martin by Smyth at Greenhill Park. After 16.57.34 when Watson has called Martin, Watson then calls Smyth. There are no calls directly from Watson to Smyth after that time suggesting they are potentially together.

[88] Smyth is also in contact with O'Brien on the day of the murder at 1:05:09 and O'Brien with Smyth at 1:06:44. Smyth is with Watson on his account when calls are made in relation to the 8080 phone at 19:30, 18:21, 18:34, 19:29, 19:37. Watson contacts 8080 at 19:29 and 19:37. Watson's phone and 8080 are never recovered and both disappear at around the same time.

Police interviews of the defendants

[89] Subsequent to being arrested all four defendants were interviewed after caution by police. No issue is taken with the fact that they were properly informed of their right to remain silent and in what circumstances inferences could be drawn if they failed to mention something which they later relied upon in their defence in court. Each defendant had a solicitor representing them while being interviewed. No issue of procedure, conduct or content was taken with the interviews. An agreed synopsis of the interviews was prepared and agreed between the prosecution and defence. The body of the interviews was admitted as exhibits.

Martin

[90] In relation to Martin, he was interviewed on five occasions over two days and largely made no comment in all interviews. It is unnecessary to deal in detail with his interviews as guilt is admitted and Article 4 of the Criminal Evidence (NI) Order 1988 is not in issue.

O'Brien

[91] After arrest O'Brien was interviewed on seven occasions over the course of the afternoon of 24 August 2019. In the first two interviews he largely made no comment to all questions asked of him. In his third interview, which was relatively short he was shown a still from the CCTV at Greenhill Park of himself and he denied it was him. In interview four he continued to deny the person in the still from Greenhill was him. He pointed out differences between himself and the person in the image. Police asked him what was in his hand as he approached the VW Golf and put to him that they believed it was connected to the murder. In reply he told police, "I'm telling you the truth as far as knowledge is here at the minute, that's being honest. I can't answer something that I don't know about, know what I mean." He told police that if he knew anything he would tell them saying, "I'd love to help youse with your line of enquiry."

[92] In interview five, another relatively short interview, he was shown the CCTV footage of Greenhill Park showing the two persons running to Martin's car. He denied knowing Martin and being one of the persons running. Interview six started as no comment, however, he denied being on Glenavon Lane and denied recognising the burnt-out Passat. When shown a photograph of one of the black latex gloves recovered from Glenavon Lane he stated that he wore black and orange latex gloves for work. His work involved travelling in a van with a driver to change tyres outside people's homes. He needed to use gloves in this work as he had dermatitis. When asked if his DNA would be on the gloves and link him to the Passat, he stated that he worked in the Lurgan area and would take gloves off and put them on the sidestep of the van which he would use as a bin and that the gloves could be removed or blown out from there. He told police he had nothing to do with the shooting and he had nothing to do with the burnt-out car. He stated to police that, "I've sat all day and from this morning staring you in the eye telling you the truth ..."

[93] In his seventh and final interview, his solicitor read a prepared statement denying involvement in the murder and seeking to provide an innocent explanation for the gloves found close to the burnt-out Passat. He emphasised that he was not one of the persons shown in the CCTV nor did he believe that it identified him. He denied any role in the aftermath of the shooting or ever having been in Martin's VW Golf.

Watson

[94] On being arrested, Watson was interviewed on 11 occasions over two days, 21 August 2019 and 22 January 2020. In interview one his solicitor read into the record a written prepared statement in which the defendant denied involvement in the murder. In this statement he denied being in Waringstown the day of the murder and stated that from around 19:00–19:30 on 19 August 2019 he had been in Annahilt, Ballynahinch and Lisburn before heading back to Portadown and going home for 22:30. He said he was with a friend in his car. In his second interview he was asked who his friend was, and he refused to give his friend's name. In interview three Watson confirmed the person he was referring to in his first two interviews was Simon Smyth and provided Smyth's mobile telephone number. Following that he answered no comment or made no response to police questioning in relation to his actions, movements and contacts on 19 August 2021.

[95] Watson in interview four made no comment in relation to his knowledge of the area of Waringstown, Dewart's Garage and Glenavon Lane and whether he had been there on 19 August 2019. In interview five he made no comment in relation to his knowledge of or contact with Malcolm McKeown. Interview six continued with Watson making no response to questions including questions in relation to his access to cars or any knowledge or information he had in respect of Malcolm McKeown's car. He made no response when questioned about his own mobile phone details. It was put to him by police that Smyth's car registration number was YLZ 5183. He indicated that he believed that was correct that it was YLZ or something like that. Watson was then appraised of the account that Smyth had already given to police.

[96] In interview seven, Watson made no response when asked to account for his movements on 19 August 2019 and when asked to give an account of who he had contact with that day. When asked "did you make contact with any other people involved in the offence of killing Malcolm McKeown?", he replied "no." He made no response when asked if he still had the mobile phone he had on 19 August 2019. He also had no response when asked about his knowledge of Malcolm McKeown. During interview eight, Watson made no response to questioning about his prepared statement of 21 August and about his knowledge of Simon Smyth. He made no response when the contents of Smyth's statement were put to him. He made no reply when asked about his knowledge of Andrew Martin and whether he was in touch with him in August 2019. He failed to respond when asked about his knowledge of Jake O'Brien and whether he had phoned O'Brien on 19 August 2019 and whether he saw O'Brien in person on that date. He sought to explain why he had not given full details of his movements on 19 August in his prepared statement because he had been drinking and was subject to a curfew. He failed to take the opportunity of telling police that he had omitted to inform police in his prepared statement about his meeting with O'Brien after the murder had occurred.

[97] During interview nine, Watson was asked about telephone contact he made

with Martin on 19 August. He was also asked about contact which O'Brien and Smyth made with him on the day of the murder. It was explained to him the contact that had taken place between Smyth and Martin and O'Brien on that day. In relation to all these issues concerning communication between the parties on the day of the murder he made no reply. Towards the end of the interview, he was asked if he had destroyed or disposed of the mobile phone he was using on the day of the murder and again made no response.

[98] In interview 10, Watson was shown CCTV footage from Rectory Road and asked if he recognised O'Brien and made no reply. Similarly, he was shown footage of Martin depositing his car and Greenhill Park and when asked whether he recognised Martin he did not respond. When shown the footage of the two men running across Greenhill Park to Martin's VW Golf he failed to respond. He was shown footage of Martin getting into the rear passenger side of Smyth's Passat at Greenhill Park and asked if he could see the windows down in the car and he replied that he could not see that. When he was shown footage of Smyth's Passat at the Vivo Garage on the Mourne Road and asked was he the front seat passenger he failed to respond. When shown footage of Rectory Road and that he exited the car Smyth was driving and had a meeting with O'Brien he made no reply. However, he did ask "is there sound (inaudible) anything like that." He was asked was O'Brien talking about what happened earlier in the evening and he replied, "no chance."

[99] At the commencement of interview 11, his final interview, he provided an account as to how and why he might have been in contact with his co-accused and stated, "I might have been in contact with them fellas or mostly trying to, but it's because I was drinking or partying or whatever you call it, ahm I had been in their company but there was nothing mentioned at all about a murder ...". He then provides an explanation for the meeting with O'Brien at Rectory Road towards the end of this interview suggesting that he had gone to meet Jake O'Brien because he needed some cash, and he didn't have his bank card on him.

Smyth

[100] Smyth provided a witness statement on 21 August 2019 in which he gave an account of his movements and those of Watson on 19 and 20 August 2019. In this statement he records that:

"I know we were in the garage on the Airport Road out of Moira at around 4/5pm we went back onto the motorway and turned then across country and ended up in Ballynahinch where I got fuel, Stevie Lee paid for it, but I can't remember where the petrol station was but I think it was around 6:30 to 7pm."

Within the body of the witness statement, he continued that:

“after we got fuel in Ballynahinch we headed back to Lurgan and called into my fiancé’s house at 45 Trasna Way ... I think we were there around 7:30 – 8:00 PM and I think we travelled up the motorway from Lisburn to Lurgan. We then left Trasna Way and went to Portrush, I can’t remember what time we left but it was late on.”

[101] He is then interviewed under caution five months later on 22 January 2020. Smyth is shown the footage of his Passat picking up Martin at Greenhill Park at 17:00. He states he could not be sure it was his Passat and that he could not remember being in Greenhill Park on 19 August or any pick-up of Martin or being at the Vivo on Mourne Road. He suggests they may have been partying. He denies any recall of the meeting with O’Brien at Rectory Road however when shown the CCTV footage he accepts that the meeting took place. He suggests that illegal drug use has caused problems with his memory from time to time.

The failure of each of the defendants O’Brien, Watson and Smyth to give evidence

[102] At the conclusion of the prosecution case and after I had refused the applications on behalf of the defendants Watson and Smyth, that they had no case to answer, I addressed counsel for each of the defendants, O’Brien Watson and Smyth, in the following terms:

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

[103] Mr Ivers KC for O’Brien indicated that he had advised his client. O’Brien declined to give evidence and did not call any evidence. Mr MacCreanor KC for Watson also said that he had advised his client. Watson declined to give evidence and did not call evidence. Mr Berry KC for Smyth indicated that he had advised his client. Smyth declined to give evidence and did not call evidence.

[104] None of these defendants have given evidence. I remind myself that that is their right. They are entitled not to give evidence, to remain silent and to make the prosecution prove their guilt beyond reasonable doubt.

[105] Two matters arise from their not giving evidence. The first is that I try this case against each defendant according to the evidence, and none of the defendants has given evidence to undermine, contradict or explain the prosecution evidence. The second is that I may draw such inferences as appear proper from their failure to

do so. Although each defendant through their counsel invited me not to hold the failure against them, no evidence has been placed before me upon which I can make such decisions.

[106] Should I decide to draw inferences from their failure to give evidence it will be on the basis that given the case against each defendant I would have thought that that defendant should have given evidence to give an explanation for or an answer to the case against him.

[107] I can only draw such inferences if I think it is a fair and proper conclusion and I am satisfied that the prosecution's case is such that it clearly calls for an answer and, further, that the only sensible explanation for a defendant's silence is that he has no answer, or none that would stand up to examination.

[108] Finally, I may take it into account as some additional support for the prosecution's case against that defendant, but I cannot find any of the defendants guilty only, or mainly, because that defendant did not give evidence.

Consideration

[109] A circumstantial case such as this requires the evidence to be considered narrowly and with a high degree of scrutiny. (I remind myself of the direction on circumstantial evidence generally as already set out). Equally, the evidence must also be looked at in the context of the case as a whole. I am acutely mindful of the need to consider the evidence against and for each defendant separately and intend to first critically look at the evidence as it impacts on each of the defendants individually and then to stand back and consider how the evidence interlinks, if at all, as between the defendants. I will deal with Martin and O'Brien before then dealing with Watson and Smyth.

Martin

[110] At the very start of the trial Martin pleaded guilty to aiding and abetting the murder of Malcom McKeown. In his amended defence statement, he makes the case he had heard of the deceased but had never met or seen him in person. He had no history with the deceased and did not know of the intention specifically to kill him. On the day of the murder, he claims he was told that he would be required to collect a man who was going to burn-out a car and who needed a quick getaway. He only met O'Brien for the first time the day of the killing so he would recognise him. Martin accepts he knew that the intended criminal act was something serious and contemplated that it could involve a shooting or a killing. He accepts he intended to assist whatever the act was.

[111] He now accepts he parked his VW Golf car at Greenhill Park. He suggests he was then picked up at Greenhill in a car and dropped off a short distance away at a house where he sorted cannabis into bags. He was to receive a call on a burner

phone later to tell him when to meet O'Brien. In his defence statement he denies being at the Vivo garage with the other co-accused at 17:15 on the day of the murder. At the time of the shooting, he claims he was still at the property sorting out cannabis. That he does not know of any other person having been involved in the shooting, he does not think there was more than one person involved in the shooting. He did not know about the plan. Martin says he was not in the Passat that was involved in the murder and was not involved in burning out that car. He accepted that he met up with O'Brien on the edge of the Mourneview estate and drove him from the scene in his VW Golf.

[112] The prosecution case against Martin is that he was a principal in the murder of the deceased. He was one of the gunmen at Dewart's Garage, they say there is a compelling circumstantial case against him.

[113] A strong cord in the circumstantial case the prosecution rely on is the call and internet data derived from his mobile phone and call provider data prior to the murder. The internet searches from the day after the deceased is released from prison they say are highly informative. In his Web history from 31 July he is using search terms such as "the act of killing aftermath", "can't sleep after murder", "scared to sleep after someone dies." From 11 August there are multiple searches re McKeown. On 18 August there are searches in relation to Mal McKeown and Hugh McGeough. There are internet searches relating to "shooting Craigavon" and Malcolm McKeown on multiple occasions from 11 August to 18 August 2019.

[114] After the murder there are searches from 20 August in respect of Malcolm McKeown which occur on multiple occasions. On 20 August alone there are recorded 45 searches; on 21 August, 22 searches; on 22 August, 43 searches. His web history from 20 August to the 23 August shows evidence of 151 searches relevant to this case.

[115] In terms of phone calls and texts the prosecution say a key date is 8 August, the day after Malcolm McKeown was released from custody. The prosecution assert from the available evidence that it could not possibly be a coincidence that the level of activity increases after this date. Again, the agreed evidence of phone contact between the defendants from 31 July-18 August 2019 dated 28 May 2019 sets out the increase in contacts on 8 August to 64; on 9 August to 28 and on 19 August to 44.

[116] Attention is drawn to the evidence that of the searches referred to above, the first search Martin carried out in respect of Malcolm McKeown was on 11 August at 00:19:19. That was just under eight minutes after a 49 second call with Watson at 00:11:35 having had no calls since 09:13:05 on 8 August 2019. Martin continued to look up McKeown in the web history until 00:35:33 on 11 August 2019. There was a further call with Watson at 00:36:47.

[117] The prosecution rely on the placing of Martin's VW Golf at Greenhill at

around 17:00 prior to the murder as another substantial piece of circumstantial evidence. It is now accepted that it is Martin who places his car in Greenhill Park and that it is Smyth who picks him up in his car. Before these movements of Martin took place there was again, as I have described earlier, phone contact between Watson and Martin by text or phone between 11:00 and 17:03 (when Martin's phone is switched off). Of significance is a telephone call at 16:52 lasting 22 seconds from Watson to Martin, after which Martin leaves his house, gets into his car and drives to the getaway location at Greenhill. Neither have explained what that call or the prior call traffic was about, and the prosecution say it is to be inferred that Martin is taking instructions and direction from Watson.

[118] Martin turns his phone off within less than a minute of getting into Smyth's car. I consider this is indicative of forensic awareness and the start of the execution phase of the killing of the deceased. The prosecution also rely on the interrelated evidence of O'Brien's phone being switched off a short time later at 17:13 when he is also present in Smyth's car. The prosecution say it can reasonably be inferred that Smyth, Martin, O'Brien and Watson are present in Smyth's car when it calls into the garage on the Mourne Road.

[119] I am satisfied that the phones of Martin and O'Brien being switched off is potentially strong circumstantial evidence of not only forensic awareness but of imminent involvement in a criminal enterprise by both of them.

[120] The additional evidence of Mr Manning of the vehicle travelling past Windsor Close en route to Cambrai Heights is another strand of the circumstantial case which the prosecution say is supportive of the fact there were two gunmen. That this should be looked at in the context of the pathology and CSI evidence that the deceased was shot with two different weapons indicative of two gunmen. That very soon after the shooting the defendants Martin and O'Brien are seen running together, dressed in similar clothing away from the vehicle used in the killing which has been set on fire. That it is significant that Martin's phone switches back on at 19:29 just after the murder has been carried out and is used to contact Smyth shortly before the meeting between Watson and O'Brien.

[121] After Martin made his way from the scene, he was later stopped in his vehicle on his own with a substantial amount of drugs which the prosecution say is not inconsistent with payment for his work.

[122] Martin's Golf disappeared after it was released by police and has never been found.

[123] After Martin was charged and in custody he was visited in prison by Stevie Lee Watson on 16 occasions between 4 October 2019 and 18 February 2020. Martin was visited by Smyth on five occasions, two of which were with Watson. One was with Andrew Watson and the others were on his own. Andrew Watson,

brother of Stevie Lee Watson, visited Martin on 21 occasions between 29 September 2019 and 16 February 2020. The prosecution rely on this association as another strand in the circumstantial case.

[124] The defence in respect of Martin make the case that there is no evidence of anyone seated in the front passenger seat of the Passat used in the murder. That Mr Manning in cross-examination, in fact, conceded that there was “no evidence” that there was a passenger in the front passenger seat based upon the viewing of the relevant evidence. That Mr Manning’s evidence concerning the viewing of the murder vehicle as it passed Windsor Close was of much inferior quality that the Dewart’s car park video for numerous reasons.

[125] Mr Duffy KC took issue with the evidence of the witness who first observed the murder vehicle on fire who claimed he observed two people running from the burning car but in his statement of evidence only makes mention of one person for the blink of an eye. That the benefit of the doubt should be given to the defendant in these circumstances. Following on from this it is asserted on behalf of Martin that the forensic and pathology evidence is such that at the very least the possibility of one gunman cannot be excluded.

[126] As far as Martin’s presence at Greenhill is concerned, he accepts he was aiding and abetting the murder and being aware of the need for a vehicle to be burnt out and an escape but does not accept he dropped anything that is picked up by O’Brien as they run back. The defence makes the point that no weapons can be seen in the CCTV. It is the defence’s concluded position that the evidence is consistent with Martin’s basis of plea.

O’Brien

[127] The prosecution case is that O’Brien, like Martin, was one of two gunmen who murdered the deceased. The strands of circumstantial evidence relied upon by the prosecution are broadly similar to that relied upon against Martin.

[128] There was considerable contact between O’Brien and Watson on the day of the murder. There was also extensive contact between Smyth and O’Brien the day of the murder.

[129] It is the prosecution case that it is reasonable to infer that O’Brien was in Smyth’s black Passat at the time when Martin was picked up. The rear driver’s window appears partially down and Martin did not enter the car on that side of the vehicle. Rather, he went around the back of the car and entered through the rear passenger side door. That both O’Brien and Martin switch their phones off while in the Passat albeit 10 minutes apart.

[130] The driver of the blue Passat when it arrived at Dewart’s appeared to be

wearing a light toned peaked cap and O'Brien when running to Martin's car at Greenhill appears to be carrying a light toned item, potentially a peaked cap as he approached Martin's getaway car.

[131] Two latex gloves with O'Brien's DNA on them were discarded while running from the blue Passat after it was set on fire. O'Brien and Martin ran together across the waste ground from the burning car to Martin's getaway car. Coincidentally, O'Brien was wearing the same type of clothing as Martin, dark overalls or boiler suits. Given the above evidence together with other evidence I will consider later, I may conclude that O'Brien and Martin can reasonably be inferred to not only having been involved in the burn out of the car at Glenavon Lane, but both were also principals who carried out the killing of Malcolm McKeown.

[132] O'Brien in interview denied his identification and presence at Greenhill, denied knowledge of the getaway Passat, denied knowledge of the burn out, denied knowledge of Martin, and was willingly prepared to lie about virtually every aspect of the case during interview.

[133] O'Brien at approximately 20:30 met with Watson at Rectory Road, just over an hour after the murder at which time he was wearing different clothing.

[134] There was CDR found, albeit in small quantities, on a latex glove from the scene and a boiler suit swabbing from O'Brien's address.

[135] It is the prosecution case that O'Brien was clearly involved with Martin in the execution of Malcolm McKeown, and I find that it is to be inferred he was one of the gunmen. His phone went off at 17:13 consistent with him being with Martin and engaging in the execution of the plan and his phone was switched on again at 19:45 when he was being driven into Trasna Way by Martin. It is not long after that that O'Brien is being contacted by Smyth's phone, before their meeting at Rectory Road. All strong circumstantial threads.

[136] The prosecution says, and I accept, that O'Brien was an assertive liar throughout multiple interviews.

[137] The defence case is that there are co-existing circumstances which they say point away from O'Brien being involved in the shooting. They make the same point as Martin, that the possibility of there being two shooters cannot be ruled out given the CSI and pathology evidence. That the evidence of Mr Manning of the murder car entering Dewart's provides no evidence of there being a front seat passenger in the car. That the additional evidence of Mr Manning passing Windsor Close is so fraught with frailties that it cannot be regarded as establishing two people in the vehicle at that time. That the CDR evidence is so weak and tenuous that it cannot establish he was a gunman. In terms of the DNA on the gloves and overalls they are consistent with forensic precautions due to his accepted involvement in burning the

murder vehicle, which as he would say, unbeknown to him had been involved in a murder.

[138] It is rejected that he could be the potential driver of the murder vehicle and makes the case that the CCTV potentially shows the defendant Martin drop a hat and O'Brien pick it up in his left hand and make his way to Martin's car. The defence also make the case that there are no weapons observed being carried by O'Brien or Martin in the CCTV, they say pointing away from them being shooters. The further point made by the defence is that the court will have to be sure that Watson and Smyth are guilty before reliance can be placed on the telephone contact between O'Brien and Smyth and Watson.

[139] The defence also take issue with the significance being placed on the phones of Martin and O'Brien being switched off when in Smyth's car together. The defence say it is unlikely that if O'Brien was in the car when Martin got in and he switched his phone off then O'Brien would have switched his phone off at the same time not ten minutes later.

Watson

[140] The prosecution case against Watson is that he is intimately involved in this murder as evidenced by the nature and level of his communication with others relevant to the offending. The prosecution seeks to make a case of material "association" between him his co-accused. That Watson has contact with Martin, Smyth, O'Brien and an unknown person on phone 8080 at what the prosecution say are key times on the day of the murder. They say Watson's phone and the phone associated with 8080 were never recovered and both disappear at around the same time.

[141] The prosecution identifies that as the Passat arrives at Dewart's at 18:26:35 there is a call from 8080 to Watson at 18:34 lasting one minute 25 seconds, while the prosecution say it is sitting in wait. The next call to 8080 from Watson is at 19:29 after the murder. The prosecution says this cannot be coincidence.

[142] The prosecution argues that while not identified, it may reasonably be inferred that Watson is the front seat passenger when the car enters the Vivo Garage at around 17:15 on 19 August 2019. At this time Smyth is the driver, O'Brien is the rear seat driver's side passenger, and Martin the prosecution say should be inferred to be in the passenger side rear seat having got into the vehicle at Greenhill Park in this position. Watson get out of that vehicle from the passenger side in Rectory Road at approximately 17:56. Smyth and Watson are, therefore, together in this vehicle which is associated with O'Brien and Martin.

[143] The prosecution argues that cell site analysis of Watson's phone 4039 appears to establish that it was connected to the cell covering Lurgan South, which covers

Greenhill Park and the Vivo Store on Mourne Road at 16:55 supporting the suggestion Watson was in Smyth's car at the Vivo garage.

[144] Watson and Smyth on their own admissions are together in Ballynahinch at or around the time of the murder and identified on CCTV there. The prosecution does not accept this alibi as genuine and argue they are deliberately there and making sure they are seen and recorded to bolster a false alibi and the phone communication supports this.

[145] Watson's phone made its last call at 19:37 hours. It detached from the network at 19:48. There is, the prosecution say, a consistency between Martin's phone being powered on at 19:29:30 and a call from 8080 to Watson. The prosecution argue it is reasonable to infer that the calls made to the 8080 phone and to Martin at this time were directly connected to the murder.

[146] A further coincidence by association is that Watson is at O'Brien's home in Rectory Road outside talking to him one hour after the murder at 20:30. Having went there in Smyth's car with Smyth driving. Again, a significant association at a relevant juncture which the prosecution says is not coincidence.

[147] Further evidence of close association is Watson visited Martin in prison on 16 occasions between 24 September 2019 and 18 February 2020. Watson, on 7 February 2020, attended Craigavon Magistrates' Court for a bail application in relation to O'Brien.

[148] The account given by Watson in interview is set out above at paras [94]–[101] and his prepared statement read into the interview which the prosecution says was a lying account of his movements on 19 August 2019. Specifically, he stated that on his return from Annahilt/Ballynahinch/Lisburn he went to Portadown and then went home being home for 22:30. That he lied when he omits the meeting with O'Brien at Rectory Road and he omits leaving Lurgan and travelling to Portrush with Smyth.

[149] Watson sought to explain the lie about his movements on 19 August by stating he had been drinking and subject to a curfew. When pressed about his meeting with O'Brien he gives what the prosecution say is an unconvincing account of being there to borrow money.

[150] Watson, the prosecution says, lied about his contact with his co-accused and about his movements. Notably he sought to hide from police the meeting with O'Brien at Rectory Road (as has Smyth). It is only after being confronted with the irrefutable evidence of the CCTV footage that Watson acknowledges this meeting and provides an unconvincing and, the prosecution says, lying account of why it took place. The lies were intended and calculated to distance him from any involvement with others involved in the murder and provide support for the

prosecution case.

[151] The prosecution says there is a circumstantial case against Watson and that his conduct before, in the lead up to and after the murder was part of a joint enterprise to kill McKeown. He has not given evidence to challenge this case, and the court can conclude the only reason for not doing so is that he has no explanation or no explanation that would withstand cross examination. The court is entitled to draw the inferences from his failure to give evidence that he was involved in the planning of the murder with his co-accused and that he was involved with the execution of the plan in bringing Smyth, Martin and O'Brien together at Greenhill Park and the Vivo Garage and the subsequent depositing of O'Brien and Smyth to continue with the execution of the plan.

[152] When considering the issue of lies in interview on the part of Watson, I remind myself that I can only consider a lie as evidence supporting guilt if, the lie is deliberate, relevant to a material issue, told to conceal guilt and is only an additional piece of evidence to be weighed with all the other evidence in the case. I remind myself of the detail of the directions set out in the Northern Ireland Bench Book and the Crown Court Compendium and have regard to them.

[153] I also remind myself of Article 4 of the Criminal Evidence (NI) Order 1988 in respect of inferences from a failure to give evidence which applies in respect of Watson and which I have set out above.

[154] The defence says that while there is telephone communication between the four defendants, it does not show an intimate involvement in murder. What the evidence does show is that the other co-accused were known to Watson, were friends and that he communicated with them on numerous occasions prior to any murder. That Watson did not admit being with Smyth throughout all of the afternoon but is certainly with him on lengthy occasions. Contact and association evidence is of little moment in that it is contact between friends from a very localized area.

[155] The defence says reliance on the 8080 number is flawed and unfair. since Watson also has contact with other numbers over these alleged key times. That the significance of Watson's phone not having been recovered has been over-estimated since the details of its use before and after the murder are available to the police and court. Notably the defence argues that post 17:50 to 19:37 hours there are multiple calls involving other numbers ending 866, 707, 111 and 220.

[156] The defence contend care is needed when any selective narrative is presented. The evidence relied upon in respect of Watson properly analysed asks the court to engage in speculation and to elevate suspicion to equate with reasonable inference and I should consider that is insufficient to ground a conviction.

Smyth

[157] The prosecution case against Smyth is that he had a significant role in the logistics of this murder. He admitted ownership of the vehicle intimately connected with the movements of participants of the murder. He was involved in collecting Martin after the deposit of the getaway car at Greenhill Park during the operative phase of this murder. This was an important and necessary act in the murder and suggests intimate involvement.

[158] He had significant contact with Watson and Martin immediately prior to the collection in Greenhill Park. The prosecution maintains that the combination of the footage from Greenhill Park, the Vivo Store and Rectory Road together with the admissions of the defendant permits the inference that all four defendants were present in Greenhill Park and the Vivo Garage with Watson being the front seat passenger. The prosecution say it is significant that O'Brien is in Smyth's car at the Vivo Garage and that an hour after the murder Smyth is at Rectory Road at the home of O'Brien with Watson. That there is significant telephone communication throughout the day between Smyth and Watson, Martin and O'Brien.

[159] When interviewed Smyth failed to mention in interview that at approximately 20:30 he picked up O'Brien at his home at 26 Rectory Road where he was present with Watson and subsequently driving together. The prosecution consider this is a significant omission. Further he did not make admissions in relation to collecting Martin at Greenhill. He makes no mention of knowing O'Brien. To try and explain these omissions he mentions difficulties with memory. The prosecution say these lies were intended and calculated to distance him from any involvement with others involved in the murder and provides support for the prosecution case.

[160] I remind myself of the *Lucas* direction in relation to lies. I remind again myself of the provisions of Article 4 of the of the Criminal Evidence (NI) Order 1988 in respect of inferences from a failure to give evidence which applies in respect of Smyth.

[161] The court is entitled to draw the inferences from his failure to give evidence that he was involved in the planning of the murder with his co-accused and that he was involved with the execution of the plan in bringing Watson, Martin and O'Brien together at Greenhill Park and the Vivo Garage and the subsequent depositing of O'Brien and Smyth to continue with the execution of the plan.

[162] However, it is correct to say in relation to the placing of Martin's VW Golf in Greenhill, Smyth did not enter Greenhill. He picked Martin up a distance away from where he parked his car and to all intents and purposes could not have known Martin had parked his car there unless he was told. That the sequence of phone calls give the appearance of Watson not being in Smyth's car when he made the call to Martin and simply put are entirely consistent with him simply being asked to do so

and do not mean he was either aware or made aware of any plan to murder Mr McKeown. There is no evidence to satisfy the court that it is sure he knew or was told there was going to be a murder and because this case involves communications from friends who have a history of regular communication, the inferences sought to be drawn are substantially weakened.

[163] When Martin and O'Brien are in his car, they switch their phones off which the prosecution say is indicative of forensic awareness, yet Smyth's phone remains switched on and it is hard to conceive that would be the case if there was discussion of a murder taking place and others were disconnecting their phones.

[164] The prosecution contention is that Smyth was involved in dropping Martin and O'Brien off to pick up the murder car and guns for the killing. Despite the trawl of CCTV and ANPR evidence it has to be accepted that there is no evidence of Smyth being involved in securing the vehicle for the murder or transporting the gunmen to this vehicle. No evidence of him securing the pistols, ammunition, boiler suits or petrol to be used in the killing. No evidence of dry-runs or reconnaissance of the area or the deceased's movements prior to the murder nor disposal of the weapons or clothing afterwards. The defence say this is speculation and conjecture much of which I agree on with the defence.

[165] The post murder meeting between O'Brien, Watson and Smyth at Rectory Road is ambiguous in that Smyth gets out to the car for no more than 17 seconds and is physically distanced and excluded from any discussions between Watson and O'Brien. This is not indicative of someone involved in a murder debrief.

[166] In terms of Smyth's use of his mobile phone on the day in question it is the prosecution case that at some point after 19:48 it is Watson using Smyth's phone. It is the defence case that thereafter if Smyth becomes aware of the killing by overhearing conversations concerning it, that will not make him guilty of murder.

[167] In terms of the defendant's interviews the point is made that Smyth was initially interviewed as a witness and not interviewed under caution until five months later. While it is accepted that the court may draw such inferences as appear proper from his failure to give evidence, I am reminded by counsel for Smyth of the leading authorities of *R v Shivers* [2013] NICC 10 and *R v Duffy* [2012] NICC 1. Both these cases consider circumstantial evidence and the appropriateness of drawing adverse inferences from an accused's silence in connection with the murder of two soldiers and wounding of four other persons outside Massereene army barracks in Antrim.

[168] In *Shivers* Deeny J reaffirmed the accused's fundamental right to remain silent and not give evidence, while that right is qualified by Article 4 of the Criminal Evidence (Northern Ireland) Order 1988, it nevertheless remains a principled and substantial safeguard. However, silence cannot remedy a deficiency in the

prosecution's case and inferences may only be drawn where the prosecution adduces sufficient evidence which calls for an answer from the accused. Even then such evidence must be evaluated and the weight to be attached to silence in the circumstances assessed, always mindful that it is the duty of the prosecution to prove the case beyond reasonable doubt having considered all of the evidence. At para [66] Deeny J observed as follows:

"The prosecution also asked the court to draw an adverse inference pursuant to Article 4 of the Criminal Evidence (NI) Order 1988 because of his failure to give evidence. Having considered, as I have with the Article 3 point, the relevant case law they are entitled to say that some explanation should, in the state of the law as it has been laid down by Parliament, be forthcoming as a qualification of the right to remain silent and the duty on the prosecution to prove the case against the accused. I am therefore minded to draw an adverse inference from his failure to give evidence. Again however, in all the circumstances I conclude that is of slight enough weight in all the circumstances including that he did give evidence before. He is entitled to say that the prosecution must prove his case."

[169] In the circumstances Deeny J when looking at the cumulative weight of the forensic and circumstantial evidence, held that any inference to be drawn from the defendant's failure to give evidence added little weight to the prosecution case.

[170] In *Duffy*, Hart J had to decide whether the accused's failure to mention matters during interview should inform the court's assessment of his credibility in light of his explanations for the presence of DNA. Whether silence could undermine an alibi and explanations of innocent or secondary/tertiary transfer of DNA. The emphasis being on the failure to state in interview relevant matters which undermine the plausibility of the alternative explanations being relied upon at trial.

[171] I again remind myself of the legal direction in relation to inferences which may be drawn from the defendant Smyth's failure to give evidence which I have set out fully at paras [104]–[108] above and use generally as my self-direction in this case. In summary in relation to Smyth he has a qualified legal right to remain silent. I must decide the case solely on the evidence presented recognising Smyth has given no evidence to undermine, contradict or explain the prosecution evidence. I can only draw adverse inferences from his failure as are appropriate. The prosecution case must be such that it clearly calls for an explanation, and it must be fair and proper that the only sensible explanation for Smyth's silence is he has no answer that would hold up to scrutiny or withstand examination. Any inferences drawn can only be used as some additional support for the prosecution case, but Smyth cannot

be convicted only or mainly because he exercised his right to remain silent and not give evidence.

[172] The court must consider that the case against Smyth is based largely on circumstances and upon inferences which are to be drawn however there are plausible alternative explanations to these inferences being sought, including (i) Smyth knew the other defendants and had regular phone and personal contact with them for some considerable time before 19 August 2019. Thus, giving them a lift for a short time that day was not out of the ordinary. (ii) He did not try and hide his identity, switching off his phone or using a vehicle not associated with him. He used his own vehicle. (iii) He was as a matter of fact a considerable distance away from the murder scene when it occurred. (iv) Other than the timing and number of phone calls the prosecution seek to raise as a circumstantial case the possible alternative explanation that cannot be excluded is that he was giving his friends lifts as he appears to have done regularly in the past. He had a history of close connection and telephone contact within this group and his contact by phone with the defendants was not unusual, he was in contact well before August 2019 and unlike Martin there are no incriminating texts, voice messages or internet searches in respect of Smyth.

Martin and O'Brien Consideration

Martin

[173] In relation to Martin, I consider his internet searches as described earlier to be a strong chord in the circumstantial case against him. In relation to the matters concerning his internet searches I consider this to be significant in the context of the case as a whole and displays an interest in the deceased and issues concerning the aftermath of killing in the days and weeks leading up to and after the murder of Malcolm McKeown.

[174] Concerning the phone call evidence in this case in respect of both Martin and O'Brien and the apparent connection between the internet searches and phone calls it has to be remembered the evidence is that all defendants in this case were known to each other and lived in close proximity. The available telephone call and text history that was available to the court recognises that there was regular contact between the defendants. This must have a bearing on the weight that can be attached to the calls made between the defendants. Again, there is a danger in drawing links concerning calls between young men who it has been established are friends, live in close proximity to one another and prior to the murder have been in regular contact via calls and texts. The weight to be attached to the circumstances in this context of Martin and O'Brien also must be reduced. The danger being that there is a temptation to see patterns or try to fit the evidence into a preconceived view of what is believed to be the reasons for their contact. This is one of the reasons why circumstantial evidence must be examined narrowly. I do not consider this evidence to be of significant strength as a strand of circumstantial evidence against

Martin and O'Brien.

[175] The placing of Martin's car in Greenhill is of considerable significance and strength in terms of circumstantial evidence in this case. Particularly when taken in conjunction with what can be seen on the CCTV evidence of the defendants Martin and O'Brien returning to the VW getaway car. What the court is sure of is that Martin placed his VW Golf in Greenhill at a spot convenient to where the Passat to be used in the murder was to stop and be burned out. That is indicative of knowledge of where the car involved in the murder was going to stop before he ever gets into Smyth's Passat.

[176] The fact both Martin and O'Brien turn their phones off when they are in Smyth's Passat is in my view a significant and an important strand in the circumstantial case against them. On its own it is strong circumstantial evidence however when it is both of them turning off their phones within 10 minutes of each other when they are in a car which has picked them up just after the get-away car has been positioned. This in my view is strong evidence of them operating in a coordinated way and together to ensure forensic security regarding their movements.

[177] Martin's subsequent arrest in my view lends little support for the case being made against him. There is no evidence of the value of the drugs seized from him to correlate that with any potential payment for his role in killing.

[178] The fact that his car disappeared after it was released by police from the drugs seizure in my view is of little consequence. We know it was seized and searched by police the night of the murder and returned to him on a date not evidenced in court. It is unlikely, after it having been searched by police and retained in a forensically insecure area that it would render any admissible significant forensic product.

[179] In relation to both Martin and O'Brien the question of whether there were two people observed in the murder car en route to or on entering Dewart's can be addressed reasonably concisely. Mr Manning indicated that there was no evidence that he could see of a passenger in the front passenger seat of the murder car. He would not rule out the possibility of someone being bent over leaning forward below the level of the dash or door line. He did not rule out a passenger being in the rear seat due to the fact the car had blacked out glass to the rear windows. He did postulate that he was of the belief that a CCTV camera on Windsor Close could see a light tone colour in the front passenger seat of the murder car as it passed. This was a belief and phrased that "it was more likely to be a passenger." I have watched the CCTV numerous times and for my part I cannot be sure there is a passenger in the front of the car. There is reflection on the glass from sunlight and also from the wall the car is passing close to. I do not consider this adds to the circumstantial case, however given the inability to see inside the back of the car due to the blacked-out windows I consider this to be a neutral factor and not one pointing away from either

Martin or O'Brien being involved. No one being seen in the passenger seat of the car does not exclude or point away from there being two shooters.

[180] In relation to the visits by the co-accused to Martin in prison and at court again given their friendships I do not consider this to be of any significant weight. In relation to CDR in respect of the glove at the scene due to the low quantity of CDR and that is primarily indicative rather than characteristic in nature I am of the view that this is of little weight.

O'Brien

[181] In dealing with the case in respect of O'Brien - I consider it is important circumstantial evidence that he switched his phone off when in Smyth's car just 10 minutes after Martin. Having considered the video evidence of Martin getting into Smyth's car I find is a reasonable inference that there was someone sitting in the rear driver's side of that vehicle and I am satisfied that it was O'Brien sitting in the rear seat when it picked up Martin. I am also satisfied that it is a reasonable inference O'Brien and Martin are together at this point and O'Brien switched off his phone at a time when he was with Martin in the car.

[182] I find the evidence of Mr Stevens important in that he identified the driver of the murder vehicle was wearing a light tone cap on entering Dewart's garage. I am also satisfied from having considered the CCTV that as Martin approached along the path in the direction of his VW Golf getaway car he is carrying something in his hand, and he stops as if he has dropped something and O'Brien stops and picks something up. On examination of the CCTV of Greenhill, O'Brien has in his hand a light toned object giving the appearance of a cap. On observing the CCTV footage, it is clear that both O'Brien and Martin are wearing similar dark over clothing. Martin is wearing black gloves, and we know O'Brien had discarded black latex gloves on the waste ground from Glenavon Avenue from which it is agreed his DNA was recovered. Both defendants are running with purpose and relatively close together. O'Brien assisted by picking up what appears to be a light toned cap. I am sure both are forensically aware, both are dressed in a similar way and give the appearance of operating as a unit in a coordinated fashion and considering the evidence as a whole they have also acted in a similar way by turning their phones off. I am satisfied that they both were acting together as a unit. I am sure taking these strands together with the fact they meet up together close to where the getaway car is located before the murder and travel in the same car together away from this location and then ended up together running away from a burning car in less than 10 minutes after the killing of the deceased, these are to be regarded as strong circumstantial strands of evidence against both of them.

[183] I consider the pathology and CSI evidence is also important circumstantial evidence and I draw the reasonable inference that there were two shooters, and I am satisfied that there were two shooters. That those two shooters were in fact O'Brien

and Martin. The fact that there is only one person seen in the front of the car given the fact that there are blacked out windows to the rear and it is not possible to determine whether there was someone in the rear of the car that this as a neutral factor and does not point away from the fact of being two shooters. I also note the number of weapons, there were two weapons involved in the killing, in my view these two persons take part in the earlier phase of setting the car as a getaway in Greenhill and both defendants are observed returning from the burning murder car and two guns are used in the killing. Accordingly, I am satisfied that the two gunmen were the defendants O'Brien and Martin.

[184] I am also satisfied that O'Brien lied in police interview. That he did so in order to distance himself from the murder. Where a tribunal of fact is satisfied beyond reasonable doubt that the defendant has lied it must consider why he lied. The mere fact that the defendant tells a lie is not of itself evidence of guilt. The defendant may lie for many reasons for example to bolster a true defence, to protect someone, to conceal other disgraceful conduct or out of panic or confusion. If the tribunal of fact thinks there may be or is some innocent explanation for his lies, then it should take no notice of it but if satisfied beyond reasonable doubt that he did not lie for such one or more innocent reasons then the lie can be evidence supporting the prosecution case. The lies told by O'Brien were not the product of panic or confusion. He was deliberate in his lies in police interview. The lies as set out earlier were audacious and persistent and designed to distance himself from the murder the police were investigating. The lies are in my view supportive of the prosecution case. He also failed to give evidence and again this court is entitled to draw such inferences as are proper from his failure and remind myself of the appropriate direction in this regard.

[185] I also take into account that O'Brien has not given evidence in his trial to contradict or undermine the evidence of the prosecution witnesses and the circumstantial case against him. His counsel was asked whether O'Brien had been advised in relation to giving evidence and the consequences of his failure not to do so and it was confirmed to the court he had been advised. In such circumstances, the court is entitled to draw such inferences as are proper from this failure. In the circumstance of this case against O'Brien, I am satisfied so that I am sure that the prosecution case is so strong that it calls for an answer. I am also sure that the true reason for him not giving evidence is that he has no answers that would stand up to scrutiny. I remind myself of the standard and burden of proof and while his failure to give evidence can provide support for the circumstantial case against him, I must not convict him wholly or mainly because of that failure. I take account of his failure to give evidence and conclude that it provides further support for the already strong circumstantial case against O'Brien.

[186] In light of the evidence above I conclude that there are strong strands of circumstantial evidence which woven together, in my view, establish a case against Martin. For the reasons I have just discussed in relation to the strands of evidence

that are available, I am of the sure that he was one of the gun men who shot and executed Mr McKeown. He had already pleaded guilty to murder as an aider and abettor, however, I find against him on the Newton Hearing and find him guilty of murder as a principle. I am also sure of his guilt on the second count of possession of firearms and ammunition and find him guilty on the second count also. I have already sentenced him to life imprisonment and will later set a date for his tariff hearing in due course.

[187] As far as O'Brien is concerned for the reasons discussed I am sure he was one of the gunmen involved in this brutal assassination of Mr McKeown and that there are strong cords of a substantial nature in this circumstantial case against him, and I accordingly find him guilty of the deceased's murder as a principal. I am also sure he is guilty of the second count of possession of firearms for the same reasons. I sentence O'Brien to life imprisonment for the murder and will fix the date for tariff hearing later.

[188] Concerning Watson, having considered all of the circumstantial evidence against him and that a considerable amount of it is conjecture and speculation and while there may be suspicion, I cannot be sure on the evidence presented that he is guilty of this murder and, accordingly, I find him not guilty on both counts.

[189] Smyth likewise for the same reasons, I cannot be sure of his guilt beyond reasonable doubt as a secondary party to the deceased's murder and I find him not guilty on both counts on the bill of indictment.