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IN THE CROWN COURT OF NORTHERN IRELAND

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THE QUEEN

-v-

HENRY JOSEPH FITZSIMMONS, COLIN FRANCIS DUFFY and ALEX McCRORY

_____

COLTON J

The Indictment

[1] In the first four counts on the indictment each of the defendants is charged with the following offences.

Count 1 - Attempted murder contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law.

Count 2 – Possession of Firearms and Ammunition with Intent, contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004.

Count 3 – Conspiracy to murder contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law.

Count 4 – Preparation of Terrorist Acts contrary to Section 5(1) of the Terrorism Act 2006.

[2] The defendant Henry Joseph Fitzsimmons is charged under counts 5 and 6 as follows –

Count 5 – Directing a Terrorist Organisation, contrary to Section 56(1) of the Terrorism Act 2000.

Count 6 – Belonging to or professing to belong to a proscribed organisation, contrary to Section 11(1) of the Terrorism Act 2000.

[3] The defendant Colin Duffy is charged on the 7th and 8th counts as follows –

Count 7 – Directing a Terrorist Organisation, contrary to Section 56(1) of the Terrorism Act 2000.

Count 8 - Belonging to or Professing to belong to a Proscribed Organisation, contrary to Section 11(1) of the Terrorism Act 2000.

[4] The defendant Alex McCrory is charged on the 9th and 10th counts as follows –

Count 9 – Directing a Terrorist Organisation, contrary to Section 56(1) of the Terrorism Act 2000.

Count 10 – Belonging to or professing to belong to a proscribed organisation, contrary to Section 11(1) of the Terrorism Act 2000.

[5] I have been invited by the defendants under Section 2(c) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 to order an entry of "No Bill" in respect of all counts on the indictment.

[6] I am obliged to counsel for the written and oral submissions received in relation to this issue. Mr Ciaran Murphy QC appeared with Mr David Russell for the prosecution. Ms Eilis McDermott QC appeared with Mr Jon Paul Shiels for the defendant Fitzsimmons. Mr Mark Mulholland QC appeared with Mr Joseph O'Keefe for the defendant Duffy and Mr Barry McDonald QC appeared with Mr Desmond Hutton for the defendant McCrory.

The Legal Test

[7] There was no dispute as to the appropriate legal test and the principles to be applied. These are to be derived from *R v Adams* and *Re Macklin's Application* [1999] NI 106 which were summarised by Hart J in *R v McCartan and Skinner* [2005] NICC in the following way –

(i) The trial ought to proceed unless the Judge is satisfied that the evidence does *not* disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed *could* find the defendant guilty, and in doing so should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in *Practice Note 1962 1 All ER 448.*

Background

[8] The evidence relied upon by the prosecution is derived from material obtained by way of covert surveillance. On or before 6 December 2013 a video camera was installed by surveillance operators at the junction of Forest Glade and the Antrim Road, Lurgan. Another camera had been deployed covering a laneway into Lurgan Park from the Antrim Road. Lurgan Park has been referred to in this case as "Demesne House/Park". It is a large public park bounded by the Antrim and Kilmore Roads and Lurgan Golf Club. There is an entrance into the grounds on the Antrim Road. Audio devices were also deployed along the Demesne House laneway. Between 13.55 hours and 15.00 hours on 6 December 2013 one of the cameras records three males emerging from Forest Glade and crossing the road together before going out of view. The three males are then captured by the camera at the laneway in Demesne House. At 15.00 hours the camera shows three men walking back down Forest Glade and turning off in the direction from which the three men previously described had originally emerged. From approximately 13.58 hours until 15.00 hours the audio devices pick up a conversation which the prosecution submit is a conversation amongst the three men identified in the video cameras. The recordings have been analysed by speech experts retained by the prosecution who have provided a transcription of the conversation.

[9] The prosecution say that the three men identified in the video recording and who took part in the conversation were the defendants. They say that arising from the contents of that conversation, supported by some additional material, there is sufficient evidence to permit the trial to proceed against each of the defendants on each count.

[10] Broadly there are two questions for the court to consider.

[11] Firstly, applying the relevant legal principles in respect of each defendant, is he one of the persons identified in the video and audio recordings? Secondly, if the answer is "yes", in respect of each defendant so identified is the material contained in the recordings sufficient to justify him being put on trial in respect of each count he faces on the indictment?

The first question: Are the defendants the person identified in the recordings?

[12] In the course of this ruling I will regularly refer to the defendants collectively but I bear in mind that each individual defendant needs to be considered separately.

[13] At the outset I make it clear that I am satisfied to the requisite standard for a "no bill" consideration that the persons shown in the video recordings are the same persons whose conversation has been recorded.

[14] In relation to the defendant Duffy the evidence is that at the relevant time he resided at 30 Forest Glade. He has been identified as one of the males shown in the CCTV evidence by Constables Cardwell and Smith. Taking this evidence at its best there is sufficient to support the contention that Duffy was one of the persons who participated in the conversation which was recorded.

[15] In relation to the identification of the participants in the conversation a fundamental plank of the prosecution case is the expert evidence of Professor French (a forensic speech and acoustics expert) and his assistant Philip Harrison. According to the prosecution they were asked to "(i) transcribe the conversation on the recordings, (ii) attribute the transcribed 'utterances' to different speakers, and (iii) compare the voices in the conversation with reference samples from Fitzsimmons, Duffy and McCrory, the purpose being to assess the possibility of the participants in the conversation being Fitzsimmons, Duffy and McCrory".

[16] Professor French's reports are part of the depositions in the case and he and his assistant Dr Richard Rhodes gave evidence which was transcribed at committal stage. Professor French adopted his opinions as his evidence-in-chief. I do not propose to set out the detail of his report. His conclusions were that his analysis of the recordings provided **moderately strong support** identifying Fitzsimmons as one of the speakers, **moderately strong support** as identifying Duffy as one of the speakers and **very strong support** for identifying Alex McCrory as one of the speakers.

[17] Professor French has produced a transcript of the recordings adopting the following code namely:

HF- Speaker found to be consistent with Harry Fitzsimmons.

CD – Speaker found to be consistent with Colin Duffy.

AM – Speaker to be consistent with Alex McCrory.

?H – Question mark denotes lower confidence and attribution.

M – Unidentified male speaker.

(Yes) lower level of confidence in words transcribed

(YES/NO) alternatives within lower confidence section.

… Unintelligible speech.

[18] The defendants argue that the courts should have regard to the inherent limitations of this type of evidence.

[19] Professor French himself records in his report:

> "Forensic speaker comparison tests does not provide strength of evidence comparable to fingerprints or DNA and it is recognised that there would be people in the population who are indistinguishable in respect of voice and speech patterns. However the methods allow one to arrive at an opinion, which can be supported by reference to phonetic and acoustic features of the material examined. Where such evidence is relied on in a criminal prosecution it should be used in conjunction with other evidence."

[20] Mr MacDonald referred me to passages from Professor French's evidence at committal stage which were consistent with his report. He agreed with the following propositions:

(a) That in an "open" scenario, such as the present, "you could never be sure".

(b) That forensic speaker analysis is not an "exact science".

(c) That there may be people within the population who are indistinguishable in terms of voice and speech patterns.

(d) That you could not achieve the criminal standard of proof only on the basic of forensic voice comparators as evidence.

(e) The proposition that another speaker other than the defendant Alex McCrory, could share the combination of features shown on the questions recording is "not remote"

[21] In a similar vein Mr Mulholland referred me to the following passage arising from his cross-examination at committal stage:

> "Q. Just take it from other documents you have been furnished, again you are being pressed is it Colin Duffy and can the court assume that your response given to Detective Constable Posner as Mr MacDonald has brought you through, was not changing? There is nothing in the interim period that would have changed your view, I cannot definitely say this is Colin Duffy?
>
> A. Nothing would change my view, it still hasn't.

Q. Still hasn't?
A. No, no."

[22] In addition to the inherent limitation highlighted by the defendants Mr Macdonald also relies on potential flaws in the manner in which the voice analysis exercise was conducted and in relation to the processes which were adopted in transcribing the recording.

[23] For the purposes of this application (as Professor French always accepted) the voice analysis evidence is insufficient on its own to justify a finding that the defendants are the persons in the recording to the criminal standard. It must be used in conjunction with other evidence.

[24] Insofar as the criticisms of the methods adopted by Professor French are concerned, these are classic examples of matters to be considered at the trial stage. I also accept for the purposes of this application that what each of the speakers identified said is accurately represented in the transcript provided by Professor French. At this stage I must take the prosecution case at its best which is to the effect that there is evidence in the recording which provides moderately strong support that Fitzsimmons and Duffy participated as speakers and very strong support that McCrory participated as a speaker.

Where is the other evidence required in support of Professor French's evidence to justify an identification of the defendants?

[25] In this regard I have already referred to the identification of Colin Duffy in the CCTV recordings by two police officers.

[26] In respect of each of the defendants the prosecution rely on a report from a Matthew Stephens of Diligent Forensic Services who was instructed to analyse the video imagery of the defendants approach and withdrawal from the scene and compare that with clothing seized from the each of the defendants by the PSNI following their arrest.

[27] In his report he identified the three men in the footage as man A, man B and man C.

[28] In relation to man A he examined a dark leather jacket which was seized from McCrory's property when his clothing was taken from him following arrest at Antrim Custody Suite. His opinion was that the video imagery provided no evidence to discount the contention that the jacket worn by man A and the leather jacket seized from McCrory were the same. He describes the exhibit as generally being consistent in its size, shape and style. He comes to the conclusion that "there is moderate support that the jacket seized from McCrory is the same jacket worn by man A.

[29] In relation to man B he refers to four exhibits namely a dark coat, a grey hooded top, a hat and grey peaked cap and a pair of navy brown shoes all of which were attributed to Fitzsimmons. The hat and shoes were seized from him at the time of his arrest and the remaining items were linked by way of DNA profiles. His conclusion was that the imagery provided no evidence to discount the contention that the exhibits were the same as worn by man B. His opinion was that the exhibits are generally consistent in their size, shape and style. His conclusion was that there was moderate support that the jacket and hooded top worn by man B were the same as in the exhibits. In addition it was his opinion that there was limited support that the shoes worn by man B were the same as those contained in the exhibits.

[30] In relation to man C again his analysis of the available imagery provided no evidence to discount the contention that the blue jacket, brown fleece and blue jeans worn by him were the same as exhibits seized from the defendant Duffy when he was arrested. His opinion was that the exhibits were generally consistent in their size, shape and style. His conclusion was that there was strong support that the blue jacket seized from Duffy was the same as that worn by man C. There was moderate support that the brown fleece seized from Duffy was the fleece worn by man C and moderate support that the blue jeans seized from the defendant Duffy were the same pair of trousers worn by man C.

[31] The prosecution say that this evidence supports other evidence in the case identifying the defendants as the persons involved in the conversation.

[32] This report was the subject matter of a detailed forensic attack by Mr MacDonald on behalf of the defendant McCrory. In short he submitted that the evidence was not "expert evidence" at all and that Mr Stephens opinions or conclusions were not admissible as expert evidence. In his report Mr Stephens says that he is an audio/video consultant. He refers to his previous employment in the military in various technical roles. He avers that he has provided expertise and forensic support in over 1,000 civil and criminal cases for the prosecution and defence and that he has given expert evidence at various courts.

[33] In considering this matter it is important to identify exactly what work was carried out by Mr Stephens. In simple terms he was provided with items of clothing which could be traced to each of the defendants and was asked to examine those items in conjunction with the video evidence and give an opinion as to whether they can be linked in some way to the clothing shown in the video imagery.

[34] To carry out his task he carries out a detailed examination of the items of clothing in comparison with the clothing shown in the video imagery. Other than "crop" the images, he effects no repair, recovery, transformation, adaption or enhancement in relation to the images upon which he relies.

[35] Having carried out this exercise he then comes to the conclusions which I have set out above.

[36] In terms of whether the evidence of Mr Stephens is "expert evidence" Mr MacDonald referred me to the case of *R v Turner* [1974] 60 Cr. App. R. 80 where Lawton LJ stated:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is given dressed up in scientific jargon, it may make judgment more difficult."

[37] In *R v Bonython* [1984] 38 SASR 45 King CJ stated inter alia:

> "The general rule is that a witness may give evidence only as to matters observed by him. His opinion is not admissible. One of the recognised exceptions to this rule is that which relates to the opinions of an expert. This exception is confined to subjects which are not, or not wholly, within the knowledge and experience of ordinary persons; *Clarke v Ryan*. On such subjects a witness may be allowed to express opinions that the witness has shown to possess sufficient knowledge or experience in relation to the subject on which the opinion is sought to render his opinion of assistance to the court. Before allowing a witness to express such opinions, the judge must be satisfied that the witness possesses the necessary qualifications, whether those qualifications be acquired by study or experience or both.
>
> …
>
> Before admitting the opinion of a witness into evidence in his expert testimony the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls on the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:

(a) Where the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

(b) Where the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

[38] The opinion evidence of an expert is only admissible on a matter calling for expertise. Where the triers of fact can form their own opinion without the assistance of an expert the matter in question being within their own experience and knowledge, the opinion evidence of an expert is inadmissible because it is unnecessary. There is no doubt that the field of expertise is large and ever expanding. However looking at the circumstances of this case I do not see that Mr Stephens has applied any particular expertise to the task he has performed. This is not a case involving facial mapping or facial identification by video superimposition. It is different from DNA identification, fingerprint identification or voice identification. In simple terms Mr Stephens has simply examined clothing and compared them with video images.

[39] In my view if the trier of fact in this case is provided with the relevant material it can come to its own opinion on any linkages. It does not require any opinion of Mr Stephens in this regard. I accept of course that the video imagery, together with the stills prepared by Mr Stephens and the items of clothing seized by the police is all relevant evidence in this case. Thus in a trial of this case Mr Stephens would be entitled to present the factual evidence contained in his report in terms of the imagery and the clothing but in my view should not be permitted to give his opinion as to what conclusions should be drawn from that material. This is a matter for the trier of fact.

[40] For the purposes of this ruling I have considered the stills prepared by Mr Stephens and the descriptions and photographs of the clothing seized from the defendants. Having done so I agree with Mr Stephens' conclusion that the imagery

provides no significant dissimilarities between the various items described by him and the video images. As to whether or not the material provides support that the exhibits are the same as the items identified in the video stills the major difficulty I have is the lack of evidence concerning the scale of manufacture of the items of clothing identified. There are no individual or single features of the clothing which point to the items being the same. The similarity is based on colour, design and manufacture.

[41] In relation to this evidence for the purposes of this application I have come to the conclusion that the material should be put before the trier of fact for an assessment as to whether or not it provides support for identifying each of the defendants as being the person shown in the video. Any notional jury would need to be warned about the dangers of relying on such evidence and the limitations of such evidence. In my view a judge or properly directed jury could come to the conclusion that the items of clothing seized are capable of providing limited support for the contention that each of the defendants are the persons shown in the video imagery.

What other evidence is there to support the identity of the defendants in the video and tape recordings?

[42] There is evidence that from 23 September 2013 until 9 December 2013 the defendant Fitzsimmons was the owner of a silver Lexus IS 200D SE with a number plate PFZ 4638.

[43] Evidence from the video camera installed at the junction of Forest Glade and the Antrim Road, Lurgan shows a silver Lexus IS 200D SE entering Forest Glade at 13.47.56 hours on 6 December 2013. Following the application of enhancement programmes it has been possible to identify the second and third letters and first and third numbers from the VRM of this vehicle as *FZ 4*3*. Possible matches to this number plate have been identified as the defendant Fitzsimmons and three other persons, one of whom has made a statement saying he was not in Lurgan on the day in question. The prosecution say this provides support for the contention that Fitzsimmons was one of the three persons involved.

[44] In the course of the transcript it appears that the speakers refer to each other by their first names at some stages during the conversation. There are references to "Collie", "Harry" and "Alec". In relation to the latter Mr MacDonald says that the reference to Alec as opposed to Alex in fact points away from the defendant McCrory being the person to whom the speaker refers.

[45] When the police went to arrest the defendant Fitzsimmons the defendant McCrory's Audi car was parked at Fitzsimmons address. During a search of the Audi police recovered a phone with an identified number. The prosecution can attribute this phone to Fitzsimmons from contacts stored and texts referring to a PM1 notice which had recently been served on him. An analysis of the call data

obtained by the prosecution supports the contention that the defendant Fitzsimmons travelled to Lurgan and back to Belfast between 13.15 hours and 16.23 hours on the day of the recordings. The data also suggests that the phone was not in use during the conversation which is the subject matter of the tape recording.

[46] In the course of the transcript AM is recorded as discussing the specifics of a case which was heard before Belfast Crown Court. The fact that Mr McCrory is reported as being in attendance at Laganside Court on the morning of the relevant hearing supports an identification of him as being a speaker in the conversation recorded when the events in the court are discussed.

[47] The prosecution point to a range of incidents which demonstrate that each of the defendants are close associates. In summary these are as follows:

- On 17 July 2012 McCrory and Duffy were seen together in a car at the Ardoyne shop fronts/Crumlin Road.

- On 1 April 2013 Duffy and McCrory were seen together walking to the rear of a parade taking place on the Falls Road.

- On 13 September 2013 a silver Audi A4 ERZ 5853 was observed parked in the driveway of 30 Forest Glade, Lurgan. Two males got into the vehicle which was subsequently stopped on Lough Road, Lurgan. One of the passengers was identified as the defendant Fitzsimmons.

- On 22 October 2013 the defendants Duffy and Fitzsimmons were seen getting into a vehicle in William Street, Lurgan.

- On 3 November 2013 a Silver Lexus IS 220D SE was seen driving along the Grosvenor Road and Alex McCrory was identified as being the front seat passenger.

- On 2 December 2013 the same Lexus car was noted outside the house of Alex McCrory. At that time McCrory was exiting a silver Audi A4 PFZ 7694 which was parked in the driveway of his house.

- On Sunday 8 December 2013 a silver Audi A4 PFZ 7694 was stopped on the A1 carriageway Newry. The driver identified himself as Alex McCrory and the passenger identified himself as Harry Fitzsimmons.

- When the police went to arrest Fitzsimmons McCrory's Audi was parked at Fitzsimmons address.

- Duffy and Fitzsimmons were incarcerated at the same time (7 May 2011) and on the same wing (Roe 3 at HMP Maghaberry). During this time they both

took part in a protest by a number of prisoners which led to damage to their wing.

[48] Thus the prosecution say that each of the defendants are close associates who are well known to each other. They argued this supports the other evidence in the case that the defendants are indeed the persons involved in the recordings. Of course the other side of the coin is that this could lead to a form of confirmation bias or guilt by association. In any event the fact that they are friends and associates could only be of extremely limited value by way of supporting evidence.

[49] The prosecution also rely on the fact that all three defendants remained silent throughout interview despite the fact that the audio and video recordings were shown to each of them and none provided any explanation or account of their movements on 6 December.

[50] Having regard to all of these matters, taken cumulatively I am satisfied that for the purposes of a no bill application there is sufficient evidence to support a finding that the defendants are the persons shown on the CCTV evidence and recorded in the tape recordings. In addition taking the evidence at its best I accept the attributions made by Professor French in respect of the comments recorded in the transcripts.

Evidence in relation to each of the counts

Counts 1 and 2

[51] Each of the defendants are charged with Counts 1 and 2.

[52] These counts relate to a gun attack which occurred on 5 December 2013 in the vicinity of the Crumlin Road, Belfast. Prior to the shooting a taxi was lured to an address where it was approached by three masked men. The men entered the taxi indicating that they were acting on behalf of the Real IRA and compelled the driver to hand over his vehicle to one of the men who drove it away. The other two men remained with him until after the shooting.

[53] At approximately 7.00 pm on this date a convoy of three police vehicles was driving along the Crumlin Road, Belfast in the direction of Twaddell Avenue when it came under gun attack. The police vehicles did not stop but continued on their route before turning into Woodvale Avenue where they stopped to inspect their vehicles. The examination revealed bullet holes and bullet fragments in the vehicles. At or around the same time another police vehicle in the area come into the path of the vehicle that was driven by the gunmen. This vehicle was the taxi which had been hijacked earlier. The vehicle was abandoned and the gunmen made their escape, after setting the vehicle on fire. An AK47 rifle was found in the front passenger seat of the vehicle. A second AK47 rifle was recovered the following morning at the crime scene in the area of Elmfield Street. A forensic examination of

cartridges located at the point of fire indicated that these had been fired in and ejected from the AK47 found at the scene. A forensic examination of the weapon found in the burnt out car established that 27 cartridges had been "cooked off" and exploded due to the heat of the fire. The gun was mechanically able to fire and an attempt had been made to fire a round from it. It is likely the first cartridge loaded into this rifle was defective and misfired and had not been cleared before the gun was left in the vehicle.

[54] After considering the conversations which were recorded on 6 December 2013 the police returned to the scene of the shooting to make house to house enquiries on 16 January 2014. As a result of those enquiries it was established that a member of the public was having decoration works carried out to her house on the evening of the shooting. On the day following the shooting she returned home to find two men claiming to be from the IRA searching her house. They were looking for certain items of clothing. She was escorted upstairs and various items of clothing were removed. The men searched the house for a pair of gloves but could not find what they were looking for. They instructed the occupier that if she located the gloves she was to put them in a bag, pour bleach into the bag and dispose of them. She and her family were threatened. She subsequently did discover a pair of gloves within the house and disposed of them exactly as directed.

[55] It is the prosecution case that the contents of the conversations which were recorded demonstrate that the participants had a detailed and intimate knowledge of the attack sufficient to suggest that they were directly involved in the planning of the attack. It is not suggested that any of the participants in the conversation were primary participants in the shooting rather it is suggested that they planned and authorised the shooting. That being so it is submitted that there is sufficient to put each of the defendants on trial in respect of Counts 1 and 2.

[56] I have considered the copy of the transcript of the recorded conversation in full.

[57] In general terms it is clear that the three men specifically discuss the attack on the previous night. The conversation has the feel of a "debrief" or "post mortem" as to what went wrong from their point of view.

[58] The transcript clearly demonstrates that HF had a detailed knowledge of what took place. Thus he refers to the timing of the attack, he refers to the order in which the vehicles under attack proceeded, he refers to them being caught in the cul-de-sac and burning the car and legging it, with one of the men grabbing the AK and moving in different directions. He describes one of the men running through a door, pushing it open where workers were painting it at one stage. He refers to taking clothes that were there and leaving his at that house. Another man is described as hiding the AK a couple of hundred yards away in the bushes down by the fence. This of course is what led to the subsequent house to house searches and the

interviewing of the member of the public to which I have referred above. The finding of the AK in the bushes down by the fence is exactly where the second weapon was found. There is specific reference to the car being burnt "whilst the cops were there" and that the men had "full balaclavas" on. He refers to the mesh burning and the door handles on the car. HF goes on say in response to a query from AM namely: "Why did they fucking fire?" "But if they – know, but they – they – they had – they had it in their sight for about maybe 150 yards … was coming up (underneath them) so they were - … The one who was firing first was .. he was going to fire a number of shots first before the other ones came back .. he fired off two shots". CD is then recorded as asking "Did he clear – did he clear the weapon or what .. fire (no)? To which the reply from HF was "no, no". It is quite clear that HF is reporting in detail the circumstances of the shooting. HF is recorded as saying "He was going to fire a number of shots first before the other ones came back - … He fired off two shots."

[59] In the transcript AM makes specific reference to "I was pulling the fucking job yesterday to clear a fucking breathing space". He refers to persons being on the street five times "armed on five occasions". This is consistent with evidence in the papers in relation to calls to taxi companies on previous occasions similar to the one prior to this particular attack. AM refers to Sean being told to "clean the weapons for DNA forensics". He refers to this being six, seven months ago. After the incident it is clear from the recordings that HF indicated he had direct contact with the gunman known as Sean. He is recorded as saying "See the first thing I said to Sean was – why was the weapon not … I told Sean to clean it. Now see all the weapons he had I told him I said that all the weapons he had and to fucking take the time to test fire them, all the time in the world". AM is recorded as saying in relation to the operation that "the fault was fucking mine". He goes on to sympathise with the gunmen whom Fitzsimmons described as being "gutted". Using the term "we" AM says "We – we passed the job we passed the job we let the fucking thing (go)". AM is recorded as saying "I knew my gut told me that the job was fucking wrong".

[60] AM is recorded as saying "I have – I've absolutely no criticism of the – they have done what they were fucking told, right and – it wasn't their fault that – that a fucking weapon malfunctioned, it wasn't their fault that a jeep came in, it wasn't their fault the two (weapons … right it was a high risk job no matter what way you look at it it was a high risk job without any – any fucking and degree of certainty that – that … (in fact probably the complete opposite) just think .." When AM is asked by "a colleague" did he clear the weapon or what? AM replies "why was the – why was the weapon not … I told Sean to clean it. Now, see all the weapons he had, I told him, I said all the weapons he had and to fucking take the time to test fire them, all the time in the world ... Collie and when you tell him to do these things you take it for granted they will do …"

[61] Of course it is well established that mere knowledge of a crime or the provision of assistance after its commission does not make that party guilty of a

crime. Ms McDermott on behalf of Mr Fitzsimmons referred me to the Court of Appeal judgment in *Shivers* [2013] NICA 4 in which the Court of Appeal held:

> "We do not accept that a person who provides assistance after a murder with full knowledge of what has happened thereby becomes guilty of murder. There is no authority to support such a proposition. … Abetting and counselling are by origin common law offences and a guilty mind is a necessary ingredient. The Crown must prove that an accused participated before or during the commission of the crime, assisted the principal and intended to assist him."

[62] Do the contents of the transcript taken at their height or at their best from the prosecution point of view point to prior participation, planning, assistance or involvement by each of the defendants in relation to this attack?

[63] In my view there is sufficient evidence at this stage to justify putting the defendants McCrory and Fitzsimmons on trial on these counts on the basis that they were aware of the impending attack and were involved in its planning. I accept that the evidence of prior involvement is stronger against McCrory but taking the evidence at its best I am satisfied that it suggests Fitzsimmons was sufficiently proximate and involved in the commission of the offence to justify putting him on trial also. At its best the evidence discloses an intimate knowledge and involvement in the commission of the offences by both of these defendants. **I therefore refuse to enter a No Bill application in respect of McCrory and Fitzsimmons in relation to Counts 1 and 2.**

[64] In relation to the defendant Duffy the matter is less clear. The prosecution say that in considering this matter I must look at the transcript as a whole. In relation to the shooting incident it is suggested that each of the defendants is discussing something they were involved in prior to the meeting. In particular the prosecution focus on the frequent use of the word "we". It is suggested that the conversation as recorded indicates that each of the participants were involved in a joint enterprise with others to commit the gun attack on 5 December.

[65] In approaching this matter I should not simply take the defendants as a "job lot". It is essential to analyse what each is alleged to have said. In relation to the attack on 5 December 2013 CD is recorded as saying "listen, the fucking – the main thing is Alec, that there is nobody fucking caught of it. – That's the fucking plus out of it". He asked questions about whether or not Sean cleared the weapon. In response to AM's comments that "we passed the job, we let the fucking thing go", he responds "exactly, hindsight is a fucking wondering thing you know, if for example the weapon had … and if, for example, the fucking weapon stuck, … the weapon was going the thing was going fucking slower, you know what I mean, you (could

have had/couldn't get) a – a result out of it and … got away .. You know and it was alright fucking crying about it now, you know and we understand you know the issue with the weapons and blah blah blah ... you're going to fucking lose weapons …" AM then goes on to say "I think we need to have the balls to sit down and fucking criticise ourselves", to which CD replied "Well that's (never_ been a problem whatsoever, for sure, I mean no problem whatsoever. He then states "No we're not saying that either (Alec), you know because at the end of the day, you know you're – you're so – so, it's about percentage chances, it's about getting a result, because I'm – I'm not …. sticking people out and … and you … and you know where you're not going to get a good result out of it, you know what I mean …"

[66] On analysis of the words attributed to Duffy there is no express comment by him which suggests specific knowledge of the attack prior to or after its commission. It is clear from the conversation that he has no difficulty about this type of attack or supporting those who participated in it. The comments attributed to him in the transcript are in response to what he is being told by the other defendants who demonstrated a knowledge of the details of the offence which are absent in CD's comments. Indeed it is AM who refers to "passing the job" and "I was pulling the fucking job yesterday". The key passages relied upon by the prosecution are CD's response to AM's comments that "we passed the job, we let the fucking thing go" by saying "exactly hindsight is a fucking wonderful thing you know …". They also say that the comments in relation to not sticking people out is significant in that it suggests in some way that he may have approved these people participating in the attack in advance. The comments attributable to Duffy are consistent with a response to information he is being given by his co-accused. The use of the word "we" by AM is entirely consistent with a reference to the organisation involved in the commission of the offence. It would be wrong to incriminate Duffy on the basis of the use of the word "we" by AM in this context. What he is alleged to have said falls short of the evidence necessary to establish that he had prior knowledge or was involved in the planning or organisation of the attack. At best it gives rise to a suspicion but in my view it falls short of the evidence which could lead to a court being satisfied beyond a reasonable doubt of his involvement in, as opposed to his approval of the attack on 5 December 2013. **Accordingly I enter a No Bill in respect of Counts 1 and 2 against Colin Duffy.**

[67] In dealing with Duffy I bear in mind that there is additional material which relates specifically to him. I shall refer to this as the "Spanish material". This relates to material obtained by way of surveillance undertaken by Spanish police and the contents of evidence obtained by a Covert Human Intelligence Source (CHIS) in August 2013. In summary on that date Duffy and his family were on holiday in Spain when a CHIS posing as a rich businessman befriended Duffy and engaged him in a series of conversations. In short the content of these meetings and conversations indicate a preparedness/propensity on behalf of Duffy to seek to obtain weaponry of the nature referred by each of the defendants in the course of the transcripts. The material supports a contention that Duffy at that time was willingly

engaged in seeking weaponry and explosives. I accept that this material may well be admissible against Duffy and indicates a propensity and willingness on his behalf to engage in terrorist activity. However it is insufficient to provide the necessary support to the evidence provided in the transcripts in relation to Counts 1 and 2 to justify him being put on trial on those counts.

The third count

[68] Each of the defendants are jointly charged with the offence of conspiracy to murder contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common Law. The particulars of offence alleged against each of defendants are that "on a date unknown between 31 day of December 2012 and 16 December 2013, in the County Court Division of Craigavon, or elsewhere within the jurisdiction of the Crown Court, conspired together to murder members of the Police Service of Northern Ireland".

[69] In the course of the hearing I was concerned about what case the prosecution was actually making in respect of this count. On my first reading of the papers I thought that this might relate to the substantive offences referred to in Counts 1 and 2, but it is clear from the wording of the indictment that it also refers to potential dates after 5 December 2013. In the written submissions for the prosecution it was argued that the conversations in the transcript demonstrated a conspiracy between the defendants to murder police officers in the future. Mr Murphy clarified this in his oral submissions by arguing that the contents of the conversation evidence a conspiracy generally to engage in acts to kill police officers. In the alternative, if there was insufficient evidence to support the conclusion that they would carry out such acts themselves then they were guilty of a conspiracy to procure the murder of police officers.

[70] The essence of conspiracy is agreement. In order to make good this charge the prosecution must prove firstly that there was an agreement between the defendants to murder members of the Police Service of Northern Ireland. There is no evidence of any specific agreement between the accused and any other person. There is no evidence that any party to the alleged agreement would actually carry out the murder of members of the PSNI. In relation to agreement to engage in criminal conduct Blackstone's Criminal Practice 2017 at paragraph 5.52 sets out the law as follows:

> "To be the subject of a conspiracy, the course of conduct proposed must be something that will be done by one or more of the parties to the agreement. An agreement to procure the commission of a murder by a third party (e.g. to hire a 'hitman') is not a conspiracy to commit murder, even though anyone hiring such an assassin would become a secondary party to murder if the job is done. A conspiracy to

> aid, abet or procure an offence is not an offence under the Criminal Law Act 1977, Section 1 (which is the equivalent of our Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983)".

[71] Whilst I accept it is a matter for the prosecution to determine what counts to put on the indictment, as the Court of Appeal warned in Shillam [2013] EWCA Crim 160 at [25]:

> "… The prosecution should always think carefully, before making use of the law of conspiracy how to formulate the conspiracy charge or charges and whether a substantive offence or offences would be more appropriate."

Certainly the conversations demonstrate an approval of such attacks and indeed a willingness to carry out such attacks. However the evidence lacks proof of the specific ingredients to make good this charge. In my view it would be wrong to take the additional step to say that that approval or willingness was sufficient to amount to proof of an actual conspiracy to carry out murders of members of the PSNI by any of the defendants. In my view the criminal conduct taking the evidence at its best in this case is properly met by other counts on the indictment. I am satisfied that the evidence does *not* disclose a case sufficient to justify putting the accused on trial on the third count. I do not consider that a jury properly directed could find the defendants guilty on this count. **Accordingly I enter a No Bill in respect of Count 3 on the indictment.**

The fourth count

[72] Each of the defendants is charged under Count 4 on the indictment with the preparation of terrorist acts, contrary to Section 5(1) of the Terrorism Act 2006.

[73] Section 5 of the 2006 Act provides:

> "(1) A person commits an offence if, with the intention of—
>
> (a) committing acts of terrorism, or
>
> (b) assisting another to commit such acts,
>
> he engages in any conduct in preparation for giving effect to his intention.
> (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to

> one or more particular acts of terrorism, acts of terrorism of a particular description, or acts of terrorism generally."

[74] On the basis of the transcript I am satisfied that there is sufficient evidence against each of the defendants to establish an intention of either committing acts of terrorism generally or assisting another to commit such acts.

[75] The conversation between the defendants is not confined to a discussion of the attack that took place on 5 December 2013. In general terms the conversation clearly involves each of the defendants analysing the current state of an organisation dedicated to terrorist activity and a discussion as to future activity. The participants assess future strategy and preparations for future activities in terms of personnel, funding and weaponry.

[76] By way of example AM is recorded as saying:

> "I mean, see – see the – see the position that we are – we are in, right, okay, there's a fucking – there's a dynamic tension between – between wanting to carry out operations, right, and – and H and also having the tacticals right, you know, volunteers and fucking – and weapons. We don't have the fucking weapons to give them away the way we're giving them fucking away. We simply don't have them."

He is further recorded as saying:

> "Now I've to go down South here at the weekend to get another two fucking rifles into Belfast and there's not very fucking – there's not very many of them left. Count with two hands what's fucking left in terms of fucking rifles seven we've lost."

Later on he is recorded as saying:

> "You know, what we need to be looking for, Collie, we need to be looking for targets, right, where we're – where's there high percentage chance of (getting … putting two rifles in a soft car somewhere . it's fucking -)."

Later on a CD is referring to the fact that in the context of not "crying" about what went wrong "you're going to fucking lose weapons …" He goes on to refer to "because at the end of the day, you know, you're – you're – you're so – so it's about

percentage chances, it's about getting a result, because I'm – I'm not .. sticking people out .. and you – and you've no way you're not going to get a good result out of it, you know what I mean …"

[77] Further on in the conversation AM is recorded as saying:

> "When you're sitting – when you're sitting on limited amounts of fucking gear, limited amounts of gear, then you have to be very fucking choosy of what you … very choosy. I'm telling you now, I reckon just standing here now, I reckon there will be six rifles left that I know of in this country. You don't get them fucking two men in too close."

The transcript continues as follows:

> "N yeah
> ?CD I mean (but) – that's up to us –
> AM Murph was to lift them.
> ?CD to get more."

Again later on the in conversation AM is recorded as saying the following:

> "I am going to take that fucking – I'm going to take fucking weapon … You're cops lot looking down here, take that fucking AK … tell you something now, see in future, they're not being used, unless it's a – it's a fucking close up with a high percentage chance of a fucking kill."

Again later on AM is recorded as saying:

> "And this … I mean this – this sort of thing has a fall out, much, much further … right, it's now we're perceived, right, by people … right it fucking … and losing Shinners and fucking our competitors, these competitor groups right … because it doesn't look D – it does look … if one of us had a high risk job …"

A further transcript is as follows:

> "M (No), that's – that's where – that's where (I was thinking) … target … you know. But yeah, with a fucking …"

Later AM is recorded as saying "We need something – we something that we can fire at – at jeeps or …" and this later:

> "AM – What I would – what I would like to do is I would like to get two rifles, right, two rifles with me, the arming piercing rounds … just … car … jeep, right and get it in the fucking – get in an ideal fucking spot you know a cul-de-sac -…"

He is also recorded as saying later:

> "I'm just saying – I'm just saying – I think that in future – going into this meeting this week, I am – I will be putting to it to the fucking room that – that in future the only operation that will be fucking cleared are those with a high percentage chance of getting (a fucking kill) or doing – or at least doing significant fucking damage. See letter fucking bombs and proxies … you know the proxy in Derry wasn't (the A) job, the job was a sniper (device on the bus) … fucking … shit – piece of shit, the job was a – a shot from a Barrett blank er power) … having said that the girl taking the fucking bus comes from a staunch Republican family she … that job in Ardoyne right was identical to the one that they done at Holywood …"

AM subsequently refers to … "finance is a big thing – like that's just a big thing here.

CD … see all the other issues, you know, for example if you could – if you could compensate for it … by having (obviously you have a basic supply of …)".

Later in the conversation AM is recorded as saying:

> "Because the way it is now, Collie, see the way we see the way we are now, right, we have a sell by date, we have a shelf life. The minute that we use up the limited amount of material we have, we are finished. If there is not a (line), if there is – if – we are not bringing gear in.
>
> M …
>
> AM - If we are not bringing gear into the fucking country then this thing isn't sustainable.

> M yeah."

Later:

> "AM - Cause once you lose your last rifle or your last **inaudible**, it's over.
>
> M …
>
> AM or your last bit of Semtex.
>
> M …
>
> AM – We have about 12lbs of Semtex there … we worked – working – working long and hard to get that fucking 25lb.

There is a conversation about how difficult it is to operate with a reference to it being 'a hundred times hard now, than it even was in our day'."

[78] AM states "I wouldn't mind – I wouldn't mind doing 15 years if I'm being (done) for a cop, - I – mean, if he's lying half dead at least". He is recorded as referring to doing 15 years for a coffee jar when there is no kill at the end of it. AM is recorded as saying:

> "Where we stand now – now where we stand now, given our current strength, our weakness … given our current circumstances, right, we need to be picking jobs very very (carefully) right … right, the highest percentage (of kills) … that's where we are. We've got limited weapons (we have) limited resources, we're limited in terms of finances. We have to work … and that means carefully picking the jobs that have a chance, a good chance (of getting us a fucking kill) and then in the meantime working away in the organisation (and recruiting) … because every time – here, and nobody can fault us for … but every time we try I – it pulls us back",

to which CD is recorded as replying "Yeah, there I something … something … that pulls down your job".

[79] In my view the contents of the conversation between the parties points towards a collective intention to continue committing acts of terrorism and assisting

others to commit such acts. I say this in the context of the fact that acts of terrorism generally is sufficient in terms of intention.

[80] The real issue in relation to Section 5 in my view relates to whether or not the defendants have engaged in any "conduct in preparation for giving effect to this intention". The prosecution say that the meeting itself is conduct in preparation. The prosecution characterised the meeting as a discussion between members of a terrorist organisation as to how to go forward in light of the attack on the previous day, 5 December.

[81] The defence argued that this is simply insufficient and that further conduct as acts of preparation are required before this count could be sustained. Mr Mulholland referred to a number of cases demonstrating the type of conduct envisaged under the Act such as, participation in a training camp, preparing to travel to fight in Syria, researching locations of military basis, purchasing flights to Morocco, travelling to Belgium in preparation for committing an act of terrorism, transferring money to another who used part of the monies to purchase chemicals and laboratory type equipment for the purpose of manufacturing explosive substances, preparations over a long period of time including contacts with other extremists which achieved their aims of travelling to Syria, meeting up with like-minded others and receiving firearms training and planning and preparation to fly to Syria and join fighting being carried out by Isis there.

[82] It is clear that Section 5 is an offence which can encompass a wide-range of different levels of criminality. It was enacted in order to extend the ambit of the criminal law and the context of contemplated acts of terrorism.

[83] In dealing with the scope of Section 5 and indeed other new provisions in the Terrorism Act of 2006 the Court of Appeal in England in the case of *R v Ikbal* [2010] EWCA Crim. 3215 said as follows at paragraph [29]:

> "In our view, there is nothing illogical in a degree of overlap in the offences created by the different sections of the Act. It was a point which the Vice-President commented on in *Roddis* at [9] 'some overlap between offences even in the same statute undoubtedly exist.' Section 5 casts the net wide. It is an offence which was intended to add to existing common law offences of conspiracy to carry out terrorists act and attempting to carry out such acts. Conspiracy demands that there be an agreement, and the law of attempts requires something more than acts which are merely preparatory. The offence created by this section goes further and catches acts of

> preparation, when coupled with the relevant intention."

[84] Whilst I accept that there is a triable issue in this regard taking the prosecution case at its height or at its best there is evidence which could justify the court in concluding that this meeting was conduct in preparation for giving effect to the intention of committing acts of terrorism generally or assisting another to commit such acts. **Accordingly I refuse to enter a No Bill on Count 4.**

Counts 5, 7 and 9

[85] Each of the defendants is charged with directing a terrorist organisation, contrary to Section 56(1) of the Terrorism Act 2000; Fitzsimmons – fifth count; Duffy – seventh count and McCrory – ninth count.

[86] The particulars of offence set out in the indictment are that each defendant "on a date unknown between 31 day of December 2012 to 16 December 2013, in the County Court Division of Craigavon, or elsewhere within the jurisdiction of the Crown Court, directed the activities of an organisation which was concerned with the commission of acts of terrorism".

[87] As is the case with the offence of preparation of terrorists acts this offence is broad in scope. Any direction, if proven, comes within the ambit of the offence. The key issue really relates to the question of the meaning of "directing". In this regard I adopt the tests set out by Hart J in *R v William James Fulton and Muriel Gibson* [2006] NICC where he commented:

> "I am satisfied that what is required is proof that an accused was in a position in a terrorist organisation that enabled him to give orders to commit terrorist acts in the expectation that other members of the organisation would carry those orders into effect, whether the order was of a specific or a general nature. The inclusion of the words 'at any level' make it clear that a subordinate who has such a position over others can commit this offence, and that the offence is not confined to those at the head of such organisations."

[88] What is required is proof of a controlling influence on the activities in question.

[89] I have already referred extensively to the transcript of the conversation which forms the basis of the Crown case. Within that transcript I am satisfied taking the case at its best that each of the defendants has demonstrated involvement in acts of directing. I have already referred to the potential role of Fitzsimmons and McCrory

in the gun attack on 5 December 2013. In this regard the conversation demonstrates a degree of directing. They are both recorded as having spoken to a person as Sean who was a primary participant in the attack. There are references to advising him to clean his rifle. The comments attributable to Fitzsimmons are consistent with Sean reporting to him in the aftermath of the attack and account for what took place. In relation to AM it is clear from his own words that he was involved in the sanctioning of this attack and indeed indicated that he should have cancelled the attack in advance. In relation to CD whilst the conversation does not demonstrate prior knowledge in the planning or approval of the Ardoyne attack in my view there is sufficient to put him on trial on this count. In doing so I have to consider the transcript as a whole and for the purposes of a no bill application there is sufficient to support the contention that this was a meeting of three leading members of a terrorist organisation who were analysing the shortcomings from their perspective of the Ardoyne attack and discussing future operations by the organisation. In particular I refer to the part of the transcript where Duffy indicates that he would not "be sticking people out" if there was not going to be a "good result". In addition the Spanish material to which I have already referred is evidence of propensity on his behalf to seek to obtain weaponry for future use by a terrorist organisation. Therefore I am satisfied that there is sufficient evidence which could justify the court in concluding that each of the defendants directed the activities of an organisation which was concerned in the commission of acts of terrorism. **Accordingly I refuse to enter a No Bill in respect of Counts 5, 7 and 9.**

Counts 6, 8 and 10

[90] Each of the defendants is charged with belonging to or professing to belong to a proscribed organisation, contrary to Section 11(1) of the Terrorism Act 2000 namely the Irish Republican Army. I have already referred to parts of the transcript. The conversations suggest that the participants are active members of a dissident Republican terrorist organisation. They discuss in great detail the attack that was carried out on 5 December which according to the evidence was carried out in the name of the Real IRA or IRA. There is evidence of prior knowledge of this attack and discussion about what went wrong with attack, references to previous involvement in terrorist activity and planning for future terrorist activity. The evidence from the CHIS who spoke to the defendant Duffy in Spain provides further evidence on this count in relation to Duffy. **I consider that the evidence discloses a case sufficient to justify putting each of the defendants on trial on Counts 6, 8 and 10.**