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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **26/02/2026**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT OF NORTHERN IRELAND SITTING AT BELFAST

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THE KING

v

GLENN RAINEY, WALTER ALAN ERVINE, ROBERT SPIERS, JONATHAN BROWN, MARK SEWELL

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Mr D McDowell KC with Ms R Walsh KC and Ms L Cheshire (instructed by the Public Prosecution Service) for the Crown
Ms B Campbell KC with Mr Faulkner (instructed by Phoenix Law) for Brown
Mr S Toal KC with Mr S Mullan (instructed by Donnelly & Wall Solicitors) for Sewell
Mr G Berry KC with Mr S Devine (instructed by McConnell Kelly Solicitors) for Rainey
Mr R Weir KC with Ms S Gallagher (instructed by Andrew Russell & Co Solicitors) for Ervine
Mr K Mallon KC with Mr A Thompson (instructed by McCann & McCann Solicitors) for Spiers

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Before: Keegan LCJ, Colton LJ and Kinney J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This appeal concerns the murder of Ian Ogle on 27 January 2019. Jonathan Brown, Mark Sewell, Glenn Rainey, Walter Alan Ervine and Robert Spiers were all charged with murder. Brown and Sewell pleaded guilty. Rainey, Ervine and Spiers were all convicted on 22 November 2024 after a trial before Mr Justice McFarland ("the judge") sitting as a Crown Court judge pursuant to the Justice and Security (Northern Ireland) Act 2007.

[2] Those who were convicted at trial all appeal their convictions. In these appeals the primary facts are not in dispute. This means that the appeals relate to the inferences that the judge drew from the primary facts and some other matters, namely his failure to recuse himself and his drawing of adverse inferences from the fact that none of the appellants gave evidence. An appeal is also raised against the decision of Fowler J, to admit background evidence.

[3] Ervine and Rainey appeal the tariff of 20 years which was imposed after their convictions. Brown and Sewell also appeal their tariff of 17½ years imposed after pleas of guilty.

Background facts

[4] We summarise the salient facts given that the judge has comprehensively recorded them in his judgment reported at *R v Rainey, Ervine and Spiers* [2024] NICC 32. This judgment explains the background of hostility between factions associated with the appellants and the Ogle family. Ian Ogle's son is Ryan Johnston. He was assaulted prior to the murder of his father which caused tension with Neil Ogle his cousin. Toni Johnston is Ian Ogle's daughter; her mother is Vera Johnston.

[5] Tensions began in 2017 when there were interactions between Ian Ogle and some of the appellants in the Albertbridge Road/Newtownards Road area of Belfast. An incident occurred at the Prince Albert bar on 1 July 2017 spanning into 2 July 2017 which was relevant to these proceedings. In summary, Ryan Johnston, the son of the deceased described being in the Prince Albert bar around 22:30hrs on 1 July after a Battle of the Somme commemoration parade earlier that day. The mood was initially good. For a time, Ryan Johnston was in the company of his second cousin, Neil Ogle, and Ervine.

[6] Sometime later Rainey and Brown entered the bar and Ryan Johnston said that the tension in the bar started to rise. Matters seemed to reach a crescendo in and around 01:00hrs when Rainey was trying to collect money for a lock-in. There appears to have been some issue with the DJ who wanted to go home which annoyed Rainey. Rainey then approached Ryan Johnston and was verbally abusive to him. Ryan Johnston stood up and Brown carried out a sustained assault on him which he said lasted for 15 minutes. During this period Ryan Johnston said that Neil Ogle had been watching but did not intervene to protect him or stop Brown.

[7] Further accounts of this incident from other witnesses are recorded by the judge. A Mr Gunning described this as a "mini riot" lasting for up to 12 minutes. Toni Johnston described observing a fight with a lot of people in the bar. She was punched by two different unidentified men and bottles were thrown in the direction of her brother and father. There were people outside the bar who had assembled including Ian Ogle and Vera Johnston. Vera Johnston described entering the bar and seeing broken bottles and overturned stools. Ryan Johnston had a black eye and an injury to his head. As she left the bar Lisa Duffield met up with Rainey, Ervine and

Brown. She described a lot of "slabbering and shouting" and one of the men went to take on Ian Ogle with a brick.

[8] A further incident occurred at East Belfast Taxis on 2 September 2017. This involved the same cohort of people. In brief, Vera Johnston said that she was outside the Iceland shop on the Newtownards Road with her daughter, Toni, and others when they were approached by Ervine who was with his girlfriend. Some exchanges have assumed relevance in these proceedings namely - Ervine said that "I'm going to leave your son for dead", although she did not say to whom this threat was directed. Later when addressing Toni Johnston he said, "Your da will never walk the Newtownards Road again."

[9] Toni Johnston also said that Ervine was shouting at her "Youse don't have a clue what is coming, I'm going to leave your brother for dead. What happened to your brother in the bar, this will be 10 times worse." Ms Miskimmon then described Ervine shouting into Toni Johnston's face saying, "I'm going to kill your brother when I get him." Ervine also said that Ian Ogle would never be able to walk the road. There is further reference by Jodie-Lee Currie to Ervine's behaviour that he was ultimately dragged away shouting, "If you think it's bad what your brother got that night, wait to see when I get him." Her sister, Tammie Currie, described seeing Ervine as angry and very aggressive when confronting Vera Johnston and Toni Johnston. She thought Ervine said, "Your brother thinks this is bad, when I get him, I will kill him" or words to that effect.

[10] Following these two incidents the evidence was that there was an ongoing campaign of threats and violence against Vera Johnston and her family. Reference was made to some incidents in the local community. In addition, Ryan Johnston said that he had words with Rainey outside the City Hall. On a day after those exchanges Facebook messages were sent between Ryan Johnston and Rainey. The judge describes these incidents as abusive in nature but "in a jocular style" reflecting an underlying animosity between the two men.

[11] On the afternoon 27 January 2019, Ryan Johnston, Lisa McAreavey, Toni Johnston and Vera Johnston went to Toni Johnston's home in Ballyhackamore for a meal and to watch a Glasgow Rangers football match on the television. Ian Ogle was also present. Toni Johnston said that the others left her home between 20:00hrs and 21:00hrs. As they were driving back to Ian Ogle's address at Cluan Place, they travelled along the Beersbridge Road. They saw Neil Ogle walking along the road. Ryan Johnston said he appeared to be texting on his telephone. Ryan Johnston told McAreavey to stop the car, he got out of the car and ran towards Neil Ogle. He started punching him. He described how Ian Ogle got out of the car and although he did not appear to punch Neil Ogle, he grabbed and held him saying to Neil Ogle that he hurt the family.

[12] There was a fight at this stage which lasted a few minutes. Neil Ogle was bleeding from that. Vera Johnston heard her son shout at Neil Ogle "you could have

stopped this" and further references were made by witnesses to the interaction between the two parties. One witness after the fight said she saw Neil Ogle on the telephone, and she shouted to Neil Ogle "go and get your f***ing cronies."

[13] Following the above incident there was further activity in the area which was captured through a mixture of CCTV and phone evidence and the movement of cars close to the scene. The CCTV cameras at the Glider bus stops on the Albertbridge Road captured five people passing at 21:18:50. From their appearance and gait, they all had the appearance of being male. The men appeared coming along Templemore Avenue towards the junction and then turning into Albertbridge Road walking along the footpath in the direction of the city centre and Cluan Place. They walked briskly. The CCTV images show the men passing under the bus stop in a sequence which is ascribed to each of the appellants and set out in the judgment.

[14] Descriptors were given to these males as Males 1-5 as follows at para [83] of the judgment:

> "(a) Male 4 (who the prosecution assert is Ervine). He appeared to be carrying something in his left hand and was wearing a blue coloured zipped up jacket with the hood up and wearing dark tracksuit bottoms, with white stripes down the legs similar to the Adidas brand. He was wearing grey trainers and was walking slightly ahead and on the road.
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> (b) Male 2 (who the prosecution assert is Sewell). He was wearing a dark hoodie type top with a distinct golden yellow pattern across the chest and on both the right front shoulder and back left shoulder and dark trousers. His trainers were similar to Adidas branded trainers with stripes. He had a dark 'beanie' type hat and as he passed the bus-stop he was tightening up the drawstrings of his hood. In doing so he turned round in a clockwise direction. The next male (Male 5) then passed him, and he followed.
>
> (c) Male 5 (who the prosecution assert is Spiers). He had a greenish jacket with a solid line down both arms. His hood was up, and he has a light-coloured scarf over his face. He may also have been wearing a 'beanie' hat and his hood was up. He was wearing dark tracksuit bottoms or trousers and grey trainers. There appeared to be a long object sticking out of the right rear pocket. It had the appearance of a knife as a blade appeared to be

protruding out of the pocket with the handle inside the pocket. He appeared to be wearing gloves.

(d) Male 3 (who the prosecution assert is Rainey). He was wearing very distinctive Napapijri headgear with a motive incorporating the Norwegian flag. He also was wearing a red scarf covering his lower face. He had a dark jacket with a small circle motif on the upper right chest. He wore grey tracksuit bottoms possibly incorporating the Adidas stripes down the side.

(e) Male 1 (who the prosecution assert is Brown). He had a navy-coloured hooded top which was probably the Adidas brand. There was a broad horizontal stripe across his chest and stripes down the arms. He was wearing a 'beanie' hat, light grey tracksuit bottoms and light trainers."

[15] Witnesses gave evidence at the trial about these men including Mr Gannon. He said when he was in a telephone box, he saw five or six men he thought were wearing hoodies. None of the men was more than 5'8" in height. They approached the box at pace and then picked up pace after they passed him. He described one of the males as carrying a knife in his back pocket. The handle was in the pocket, and he saw the blade. Being a chef, the blade attracted his attention. He thought it was a global make with a 7-9" blade. This witness describes the men then running and approaching a man who he saw being kicked and punched and hit with batons on the street.

[16] Another witness was Mr Kevin Senbrook who was the pastor of the local Covenant Love Church. This church is on the Albertbridge Road just beside Cluan Place. He said that he had been speaking to Ian Ogle at about 21:00hrs at the entrance of Cluan Place. Mr Ogle was in an agitated state at that time and said, "they were on their way." Senbrook had a sense of foreboding and started to pray with Ogle. Senbrook said he then saw a group of about five men approach him from the Templemore Avenue direction. All but one had hoods up or had scarves. The other had a partial beard. When they got to about 15 yards away, they started to move quickly. Ian Ogle moved towards the group of men. The men then attacked Ian Ogle with such a ferocity that Senbrook describes their conduct as being "like a pack of hyenas." The scarves were well up over their faces and he could not see their faces. The man with the beard appeared to be older and in charge. Senbrook described the use of a bat which looked like a baseball bat and was used to strike Ian Ogle. He said that the group stamped on his head four or five times and went away.

[17] Mr Gunning, was out walking with his dog and also witnessed events in a similar way. He referred to a man carrying a telescopic flick bat which he used to strike Ian Ogle on the face, head and shoulders. He reported that on saying "f*** sake lads that's enough" the man approached him and said "it's a f***ing 'nough" before turning to hit Ian Ogle. On Mr Gunning's account, the man with the flick bat said to him "if you f***ing say anything you will get the f***ing same."

[18] The fatal attack on Ian Ogle was also captured on CCTV. An ambulance was at the scene rapidly; however, it was apparent to paramedics that Ian Ogle was dead. He was formally declared dead at the Royal Victoria Hospital at 22:12hrs. An autopsy carried out on 23 January 2019, found that Ian Ogle had been stabbed a total of 11 times. Eight of the stab wounds were clustered together in an area centred around the left side at the top of his back. One of the wounds that penetrated the body sufficiently deeply to have caused a life-threatening internal injury was situated on the left side of the upper back close to the midline. This resulted in internal bleeding which caused his rapid death. The cause of death was certified as a stab wound to the chest. In addition to the stab wounds numerous other injuries were noted including a fracture of the skull involving the roof of the eye socket, and extensive bruising at 37 bruise sites, also seven abrasion sites, one laceration and one puncture wound.

[19] The aftermath of the murder was also captured on CCTV. In addition, the police collected evidence of activity and movement of cars and people in the area. We were taken though the sequence of events which frame this murder with the assistance of maps, telephone records, and CCTV clips contained in a schedule produced by the prosecution and variously referenced throughout the judge's ruling.

[20] Of relevance is activity at the Prince Albert bar before the murder which was captured on CCTV. This showed several men coming and going from the bar. The witness evidence is as follows. Lisa Duffield had been working earlier on 27 January 2019 and when she finished, she went to the bar to meet up with her mother Hetty Duffield who was working there. She arrived around 19:00hrs and remained there. She described how the door then burst open. Sewell entered and went straight up to her issuing a threat in the following terms, "You're f***ing getting put out of the country. You and your family." He may have mentioned the words "24 hours." She said she asked him what was going on and he replied "Neil Ogle is lying in a pool of blood, and you got him set up" or words to that effect. He then left shouting "Get out of the bar now."

[21] Hetty Duffield's evidence was that when she went outside the bar, she saw a biggish black car. She asked Sewell what was going on and he replied, "I've been a friend of yours for years but you're out too" and pointed his finger at her. She said Brown was standing at the far side of the car at the driver's door. Sewell and Brown got into the car and with Brown driving they went towards the Newtownards Road

turning cityward. There is further evidence from CCTV about the movements of the car recorded by the judge.

[22] In relation to the activity just described, witnesses variously described men on Templemore Avenue including a man with a knife. Reports were also made of car in the area namely a black Seat Leon registration number JGZ 7406.

[23] In addition there was cell site analysis which links the mobile telephones of the appellants to specific locations around the time of the murder and subsequently at the vicinity of Wolff Close, Pitt Place, Wye Street and Frome Street.

[24] At paras [41]– [66] of his judgment, the judge summarises, in impressive detail, all of the telephony evidence between the Beersbridge Road incident and activity at the Prince Albert bar on 29 January 2019 which we will not repeat. Suffice to say that all of the telephony recovered by the police relating to the relevant periods surrounding the murder reference mobile telephones associated with various people including the appellants. The mobile telephones associated with the appellants have not been recovered. Therefore, the evidence which we have seen in tabular form simply highlights whether a telephone call was made from a number to another number and, if so, the duration of the call but not the content. There is also evidence that text messages were sent between the same group of people over the relevant period. Other evidence was obtained from cell sites in the area.

[25] The judge summarises the relevant telephone calls between the appellants at para [65] of his judgment. The start time is 20:45hrs, which is the time of the 999-call made by a witness describing a fight on the Beersbridge Road. At 21:14hrs, a car arrives outside the Prince Albert bar. Of significance are the calls which ensued as follows:

20:45:42 Neil Ogle telephoned Brown with the call lasting one minute 37 seconds

20:46:30 Spiers sent an SMS text message to Brown

20:48:11 Brown telephoned Neil Ogle with the call lasting 43 seconds

20:49:10 Brown to McMurray call lasting 17 seconds

20:51:59 Kirkwood to Ervine call lasting 58 seconds

20:51:59 Ervine to Edgar call lasting four seconds

20:52:04 Brown to Spiers call lasting 37 seconds

20:52:17 Ervine to Kirkwood call lasting two minutes 58 seconds

20:54:09 Brown to Sewell call lasting two seconds

20:55:11 Brown to Sewell call lasting two seconds

20:55:23 Ervine to Edgar call lasting one second

20:55:45 Brown to Rainey call lasting 19 seconds

20:56:06 Sewell to Brown call lasting 31 seconds

21:00:26 Kirkwood to Ervine call lasting 53 seconds

21:02:24 Ervine to Kirkwood SMS (text) message

21:02:29 Spiers to Brown SMS (text) message

21:03:00 Kirkwood to Rainey call lasting one minute five seconds

21:04:30 Brown to Spiers call lasting 14 seconds

21:04:47 Kirkwood to Ervine call lasting 30 seconds

21:04:53 Brown to Rainey call lasting seven seconds

21:05:02 Ervine to Neil Ogle call lasting two seconds

21:05:49 Ervine to Brown call lasting seven seconds

21:08:01 Brown to Rainey call lasting 14 seconds

21:08:47 Ervine to Kirkwood call forwarded two seconds

21:09:29 Ervine to Kirkwood call forwarded two seconds

21:09:52 Kirkwood to Ervine call lasting 14 seconds

21:12:35 Kirkwood to Ervine SMS (text) message.

[26] As is apparent from the above sequence of calls, after 21:09:29 no further calls were made from the mobile telephones associated with Brown, Sewell, Rainey, Ervine or Spiers until 21:24:08.

[27] The movement of vehicles and individuals in East Belfast during the evening of 27 January 2019 is also relevant. All five of the appellants accused of the murder had houses close to each other on the north side of the Newtownards Road. Brown lived at 3 Wolff Place which is adjacent to Pitt Place off the Newtownards Road. Sewell lived at 14 Wye Street off Dee Street. Rainey lived at 10 McArthur Court off

Island Street. Ervine lived at 5 Newcastle Street off Island Street. Spiers lived at 20 Mersey Street. A map was provided which marks the locations of these properties and the commercial and public CCTV cameras in the area.

[28] Of note is that at 20:47:30 a dark coloured car was parked on Pitt Place near Brown's home. After this at 21:08:27 a man can be seen running along Frome Street. At 21:09:21 a dark toned car pulls out of Wye Street, turns onto Frome Street and left onto Ina Street.

[29] The last contact before the killing of Ian Ogle (which occurred between 21:19:31 and 21:20:01) made between the mobile telephones associated with Brown, Sewell, Rainey, Ervine and Spiers was at 21:08:01. There were then some further telephone exchanges between these men and various other people which the judge sets out in his judgment up to the early hours of the morning.

[30] The Seat Leon that we have referred to above belonged to Jill Morrison who is the partner of Brown. The vehicle was seized by police. On 29 January 2019, it was searched and subject to sampling for DNA. A white JD Sports plastic bag was found in the rear nearside footwell. It contained a pair of Nike branded training shoes, a Diesel branded hat, and bank notes totalling £1,680 in an Ulster Bank fast lodgement envelope. The laces of the right training shoe had a predominant DNA profile matching that of Brown. A blood sample was recovered from the toe area with a predominant DNA profile matching Ian Ogle. The laces and inner heel of the left training shoe had a predominant partial DNA profile matching Brown. A blood stain on the sole had a profile matching Ian Ogle. A mixed DNA profile from two individuals was obtained from the hat and Sewell's DNA characteristics were present in the mixture.

[31] Swabs were taken from the interior of the car. One swab from the inner rear near side door contained a predominant DNA profile which matched Rainey. There were additional DNA components present at a low level. The calculation made with reference to the Northern Ireland population survey data shows that this finding is at least one billion times more likely to arise if the DNA profile originated from Rainey rather than an unidentified man.

[32] Another mixed DNA profile was obtained from the rear near side seat belt release mechanism of the car. Ervine's DNA characteristics were present in the mixture, and he could have been a low-level contributor. A calculation made with reference to the Northern Ireland population survey data shows this finding is at least 36 million times more likely to arise if the DNA profile originated from Ervine rather than from an unknown individual.

[33] On 14 February 2019, police officers also recovered an extendable baton and a knife submerged in water lying beside each other at the Connswater river 25 metres to the south of the Mersey Bridge. The baton was extended and had an orange handle and chrome coloured extension. The knife was 33cm in length with a blade

20cm long and was 4.2cm wide at its hilt. Dr Ingram, the pathologist, confirmed that it was a knife that was capable of causing the fatal wound. The knife was branded on its blade with the product name Ernesto. There was no DNA recoverable from the knife given that it had been in the water. However, Spiers lived at Flat 1, 20 Mersey Street, approximately 350 metres from the Mersey Street bridge over the Connswater river. Constable Kerr had arrested Spiers at his home on 31 January 2019 and seized an Ernesto branded knife with the same product code. On 3 April 2019, police returned to the home and seized three remaining Ernesto branded knives with the same product code and a sharpening tool. The knives recovered were part of a set, one of which was missing. The knife found in the water was of the same size and dimensions as the one missing from the set.

[34] Brown, Ervine and Rainey departed from Northern Ireland shortly after this murder. In relation to this, there was CCTV imagery from Dublin Airport the day after of Brown and Rainey entering the terminal building. Aeroflot records indicate that both purchased tickets using cash and boarded a flight to Moscow for an onward flight to Bangkok in Thailand. On 6 February 2019, Brown arrived at London Heathrow airport on a flight from Bangkok and was arrested by police.

[35] On 3 March 2019, Rainey arrived at Manchester airport from Bangkok. He was arrested and cautioned.

[36] Ervine travelled by way of ferry on 28 January 2019 to Scotland. On 4 February 2019 he voluntarily presented himself to police when he was arrested.

[37] Police interviews took place thereafter. In the main all of the appellants provided no comment. Spiers did offer some replies to police about his mobile telephone which assume some relevance in this appeal and which we discuss later. None of the appellants gave evidence at the trial.

[38] It is within the above factual context that the judge, reached the following conclusions at para [339]:

> "[339] I have considered all the evidence in this case. This is a circumstantial case and involves different strands of evidence. Some strands of evidence I give no weight to and others I give very little weight to. I refer specifically to the identification evidence based on clothing comparisons and use of a bicycle, the cell-site analysis and the DNA evidence from the rear of the Seat Leon.
>
> [340] However, the other strands of evidence are of much greater significance and weight. In the cases of Rainey and Ervine, I refer to the evidence of motive and the nature of their respective departures from

> Northern Ireland the day after the murder. In the case of Spiers, I refer to the Ernesto knife and the lies he told the police.
>
> [341] In relation to all of the defendants, I regard the telephony evidence to be highly significant and probative. It is a very weighty cord in the rope relied upon by the prosecution.
>
> [342] I cannot identify any evidence that points away from any defendant.
>
> [343] In all the circumstances, I am satisfied beyond all reasonable doubt that Rainey, Ervine and Spiers were part of the group of five men, the others being Brown and Sewell, that murdered Ian Ogle at Cluan Place at 21:19 on 27 January 2019, and I find each guilty of count 1 on the indictment (that is the murder)."

The conviction appeals

[39] Each of the three appellants appealing their conviction have raised individual grounds of appeal which we will deal with during this ruling. There are also grounds of appeal common to all of the appellants which we summarise as follows:

(i) The judge's failure to recuse himself having decided not to admit the evidence of an expert in relation to the CCTV evidence of Mr Buxton.

(ii) The manner in which the judge drew adverse inferences.

(iii) The inferences that the judge drew from the appellants leaving the jurisdiction.

(iv) The admission of the background material in relation to the events in 2017.

(v) The judge's failure to grant a no case to answer application.

Relevant legal principles

[40] The overarching legal consideration in any criminal appeal is whether the court considers the conviction is safe. This test found expression in *R v Pollock* [2004] NICA 34, per Kerr LCJ at para [32] which reads:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe.'

> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[41] This court has stressed in cases such as *R v Duffy* [2024] NICA 33 at para [56] that:

> "Whilst *R v Pollock* expanded on how an appellate court should approach a case, we reiterate the fact that the test is only whether the conviction is safe or not encapsulated at 1 above. That is the simple legal test that we approve which should be applied in cases of this nature."

[42] This court reiterates that simple position that the test is one of safety. Practitioners and courts should not interchangeably use the phrase 'significant sense of unease' with safety because the precise test is whether a conviction is safe or unsafe.

[43] This case arises in the non-jury context, which is unique to Northern Ireland where a case may be scheduled for hearing by judge alone pursuant to the Justice and Security (Northern Ireland) Act 2007. So, rather than trial by jury in Northern Ireland, certain cases proceed by judge alone as this trial did. The result is that a judge sitting alone becomes both the fact finder and the tribunal of law and produces a written judgment explaining the reasoning for the verdict reached. There is an automatic right of appeal. Self-evidently, the Court of Appeal can critically analyse a trial judge's reasoning in a broader way than any jury verdict. In cases of this nature, the Court of Appeal will have the benefit of a trial judge's finding of facts and also the inference that he/she draws from facts and his or her overall conclusions.

[44] The Court of Appeal provided guidance in *R v Murray et al* [2015] NICA 54 at para [25], in the context of a non-jury trial and the appellate function. It states:

> "[25] The appeal by this appellant on the counts of attempted murder involves essentially condemnation of the judge's principal findings of fact. A judge hearing a criminal charge in the absence of a jury has no summing-up to deliver. He is not obliged to state every relevant legal proposition or review every fact or argument on either side. His task is to reach conclusions and to give reasons to support [them] view and to notice any difficult or unusual points of law. In general terms his obligation is to demonstrate how his view of the law informed his approach to the facts (*R v Thompson* [1977] NI 74). The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury were summarised in four points by Lord Lowry LCJ in *R v Thain* [1985] NI Reports 457 at 474, based on earlier observations by Lord Lowry in the Court of Appeal in *Northern Ireland Railways v Tweed* [1982] 15 NIJB."

[45] These four principles are as follows:

> "1. The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.
>
> 2. The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusion.
>
> 3. The trial judge can be more readily reversed if he had misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose his judgement may be analysed in a way which is not possible with a jury's verdict.
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> 4. The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusion."

[46] In *R v Young* [2006] NICA 30, the court noted at para [20]:

"[20] In *R v Gibson and Lewis* [1986] 17 NIJB 1 it was stated:

> 'Where the judgment of a trial judge in a Diplock Court convicting the accused contains defective and erroneous findings, the test in determining whether the conviction is safe and satisfactory is whether the judge would inevitably have convicted the accused if his judgment had not contained the erroneous findings.' See also *R v William Joseph McManus* [1993] NIJB 11."

[47] We have also referred to *R v Gamble* [1980] NIJB 1, where it was stated:

> "The appellate court has to decide if such a misdirection of itself undermines the judgment and consequent verdict. It often happens that the remainder of the evidence would be quite sufficient to sustain the conviction despite the existence of a misdirection in relation to some particular matter. But this is not enough. The appellate court requires to be satisfied that on the remaining evidence, the tribunal of fact must inevitably have reached a conclusion adverse to the appellant."

[48] We have also been referred to more recent non-jury decisions in this jurisdiction which set out the approach taken by our courts, *R v Shivers* [2013] NICA 4 and *R v McLaughlin* [2020] NICA 58.

[49] In *R v Robinson* [2021] NICA 65 this court considered the nature of a case involving circumstantial evidence case applying *McGreevy v DPP* [1973] 57 Cr App R 424 at page 436, as follows:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand about clear exposition can readily be made to understand. So also can a jury readily understand that from one of piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary commonsense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond reasonable doubt unless they wholly rejected and excluded the latter suggestion.

> Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally, a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so that they could not say that they were satisfied of guilt beyond all reasonable doubt.
>
> In my view, it would undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied with guilt beyond all reasonable doubt."

[50] *Robinson* also applied well known principles from older cases such as *R v Meehan and others* [1991] 6 NIJB where Hutton LCJ said:

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

[51] Furthermore, the dicta of Pollock CB in *R v Exall* [1866] 4 F&F remains applicable:

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of

> several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

[52] This court also reviewed the application of the *Galbraith* test in a circumstantial case in *R v Miller* [2023] NICA 81 at para [29], as follows:

> "(1) In all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the 'classic' or 'traditional' test set out by Lord Lane CJ in *Galbraith*.
>
> (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.
>
> (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

[53] As no issue is taken with the primary facts in this case, we are only concerned with the inferences drawn by the judge from those primary facts. Albeit in a very different context, the case of *Singh v Persad* [2026] UKPC 1 at paras [35]-[37] discusses appellate flexibility when adjudicating upon inferences drawn by a first instance court. In that circumstance an appellate court has greater scope to determine that inferences drawn by a first instance judge are wrong.

[54] As all of the appellants declined to give evidence the judge had to consider whether he would draw any adverse inferences pursuant to Article 4(4) of the Criminal Evidence (Northern Ireland) Order 1988:

> "(4) Where this paragraph applies, the court or jury, in determining whether the accused is guilty of the offence charged, may—
>
> (a) draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question;"

[55] An application was also made that the judge should recuse himself. There is no dispute as to the law which is of long pedigree. Summarising this, in *R v Winsor* [1866] LR 1 QB 390 Earl CJ decided that a jury should not be discharged unless a high degree of need for it arose. In *R v Meenan and Kelly* [2010] NICC 37, Hart J refused to recuse himself when exposed to potentially prejudicial material before the trial. In doing so, he referred to the words of Lowry LCJ in *R v Fletcher* [1983] 1 NIJB 1, that a judge "is both trained and accustomed to think dispassionately and to separate the essential from the incidental and the probative from the merely prejudicial ... The best antidote to subconscious influence is awareness of the danger and a conscious decision, by a trained mind, not to succumb to that influence."

[56] *Blackstone's Criminal Practice 2025* at D13.63 under the heading "Accidental Prejudice" states that a consideration of this nature in relation to prejudicial material involves an analysis of the circumstances in which it was revealed, the strength of the respective cases and the extent to which the harm is otherwise remediable.

[57] In his written ruling on the recusal issue the judge also refers to *R v BD* [2024] NICA 46, which approved the approach set out in *R v Ghadghidi* [2016] NICA 43, which followed the Privy Council in *Arthurton v The Queen* [2004] UKPC 25. This line of authority is to the effect that when a jury or tribunal of fact has been exposed to prejudicial material, the discretion to discharge is based in the context of the issues at trial and the significance of the material to the issues. Added to that is the simple question whether a tribunal of fact or a judge in this case is so prejudiced that his or her ability to continue is compromised.

[58] One other legal issue arises from the fact that Fowler J, when dealing with pre-trial applications decided that bad character evidence should be admitted as relevant background information. The appeal against this decision was not advanced orally by any appellant which is a tacit recognition of its shortcomings. However, for completeness' sake we address the relevant law as follows drawing from the written decision that was provided by Fowler J.

[59] Article 3 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") provides that in relation to bad character:

> "3. References in this Part to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—
>
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
>
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

[60] The law in this area is explained in *R v Myers* [2016] AC 314 by Lord Hughes JSC when dealing with cases involving gang violence and motive. Paras [43] and [44] refer as follows:

> "[43] In a case of murder or attempted murder, as in most criminal cases, evidence of motive is relevant but not necessary. Often the Crown may be able to prove what happened, and who did it, without knowing why. But where there is evidence that the defendant had a motive to kill the victim, that goes to support the case that it was him, rather than someone else, and/or that he did it with murderous intent, rather than accidentally or without intent to do at least grievous bodily harm. It may equally be relevant to rebut asserted self-defence or provocation. Admissible evidence of motive may sometimes necessarily involve showing bad behaviour by the defendant on occasions other than that charged. If that is the case, this is an example of the second sentence of Lord Herschell's principle in *Makin*; that the evidence relevantly proves motive may be a justification for its admission notwithstanding that it also shows bad behaviour.
>
> [44] In the cases of *Myers* and of *Cox*, the murderous intention of the gunmen could not be, and was not, in dispute, so the evidence of motive did not go to that issue. But the evidence that there existed a feud between gangs was relevant to identity, which was the core issue in dispute. It went to show that those two defendants had a motive to kill the victims. It showed that they were members of a group which was likely to have felt aggrieved and, moreover, to have reacted by targeting the

> deceased on grounds of his membership of the opposing association. In each case, the evidence contributed to the proposition that it was the defendant who had done it, by supporting the other evidence that it was he who was responsible."

[61] The approach in *Myers* is consistent with that adopted in two earlier decisions of the Court of Appeal in England & Wales, namely *R v Sule* [2012] EWCA Crim 1130 and *R v Lunkulu and others* [2015] EWCA Crim 1350. Both of these cases involved evidence of gang violence admitted, establishing motive. In *Sule*, the court reaffirmed the proposition that previous incidents of gang violence were admissible as evidence of motive and that it would be irrational to introduce a temporal requirement.

[62] In *R v Lunkulu*, the court determined that incidents of violence leading up to a fatal shooting were admissible in circumstances where "although the prosecution could prove the charges without introducing this material, it fell within section 98(a) of the Criminal Justice Act 2003 (our Article 3A of the 2004 Order) because the evidence of misconduct was directly relevant to it. The court went on to say "We agree with Stanley Burnton that section 98(a) includes no necessary temporal qualification, and it applies to evidence of incidents whenever they occur so long as they are to do with the alleged facts of the offence with which the defendant is charged. That would involve a highly fact specific question." The decision of *R v Heslop and others* [2022] EWCA Crim 897, also applies this line in relation to motive, identity and whether a shared purpose or common intention is apparent.

Consideration

[63] Having set out the facts and relevant law above we begin with some overarching considerations and then turn to the specific arguments made by each appellant before stating our overall conclusions.

[64] The fact that this is a circumstantial case with various strands frames our analysis and outcome. We summarise the position as to each of the stands of evidence as follows. The telephony evidence is said to be uncertain as to attribution and consistent with innocent activity. Yet the judge used it only as a chronological and relational indicator, not as a standalone pillar. This is consistent with authority in that courts have long accepted that while telephony cannot by itself establish guilt, it may legitimately illuminate patterns of contact, co-location or co-ordination when placed alongside other strands. The judge's restrained treatment of telephony sits comfortably within the jurisprudence of *R v Harte* [2006] NICC 2 and *R v Bassett (Jordan James)* [2020] EWCA Crim 1376, where similar data was deployed to clarify sequence and association rather than to prove participation unaided.

[65] The CCTV material attracted significant attack by all appellants, particularly the argument that the judge permitted improper inference from indistinct imagery.

However, the judge rejected any positive identification and confined the CCTV to matters of timing, opportunity and movement flow. We consider that the judge's circumscribed use of this evidence reflects best practice and avoids the pitfalls identified in the authorities concerning over-interpretation of visual material.

[66] Similar reasoning applies to the evidence concerning the movements of the Seat Leon. The appellants submit that the vehicle-movement material was incomplete, potentially coincidental, and incapable of establishing participation on any reliable basis. The judge expressly accepted the limitations of this strand, treating the Leon, and the references to a vehicle whose silhouette broadly matched it, as no more than a means of mapping general movement patterns. His approach was to consider these movements only insofar as they aligned with the telephony sequences, the timing of events, and the associational context, thereby contributing additively, rather than decisively, to the overall sequence of joint activity.

[67] The general circumstantial evidence principles affirmed at para [7] of *R v McKinney* [2023] NICA 84 require that such strands of evidence like any other inferential material, be assessed holistically and in combination with other evidence rather than in isolation. Likewise, in *R v Masih* [2015] EWCA Crim 477, the Court of Appeal confirmed that sequencing, movement and opportunity evidence may legitimately form part of a cumulative inferential structure where the question is whether a reasonable tribunal of fact could exclude realistic innocent explanations.

[68] *R v Shivers* [2013] NICC 10, is an authority from the Crown Court which demonstrates that vehicle movements, when integrated with timing, association and opportunity, can function as a corroborative contextual strand within a circumstantial case. The judge's reliance on the movements of the Seat Leon car in the present case mirrored that approach in that it was modest, proportionate, and carefully confined to its proper evidential footprint. We consider that its use accordingly fell well within the boundaries of orthodox evaluative reasoning.

[69] The forensic evidence, particularly the low-template DNA attributed to one appellant, was also criticised as weak. However, the judge described it as such. He explicitly treated the DNA as a minor corroborative point, incapable of supporting any inference in isolation. That is precisely the cautious footing mandated by *Heslop*, and we consider that nothing in the judge's reasoning suggests that he afforded this strand more weight than it could bear.

[70] The association evidence is another strand the appellants seek to collapse into insignificance. Yet the judge used it only to illuminate group movements and opportunity, not to infer guilt by mere presence or friendship. Association is frequently relevant in multi-defendant trials, and appellate authority recognises its role in authenticating the coherence of circumstantial strands. We consider that the judge's restrained reliance on association evidence was never presented as conclusive and fits squarely within orthodox reasoning.

[71] Finally, the appellants challenge the judge's assessment of post-incident conduct, arguing that such behaviour is inherently ambiguous and incapable of proving guilt. This is an unsustainable argument as the judge acknowledged that post-incident conduct could bear innocent explanations. He used it simply as one strand among many. *McKinney* similarly endorsed the limited probative use of post-incident behaviour as part of the cumulative assessment rather than a determinative foundation. We consider that the judge's treatment of this strand as being supportive, not conclusive was both principled and measured.

Spiers

[72] Mr Mallon KC helpfully focussed his submissions on the following core points:

(i) Spiers was not involved in the background events in 2017 and so motive could not be ascribed to him.

(ii) The judge should have granted a no case to answer application against him as the cell site analysis was not as stated at para [17](e) of his judgment given that Spiers was only connected to the Glentoran mast at 210°.

(iii) There was no evidence that he left Mersey Street or was Male 5.

(iv) There was no cell phone link to Spiers.

(v) The judge did not reflect the fact that rather than leave the jurisdiction like other of the appellants, he stayed in the jurisdiction.

(vi) There was an explanation for him lying to police about his mobile which was that he wanted to distance himself from events.

(vii) Any phone traffic ascribed to Spiers was an attempt to recruit him by others.

(viii) The judge paid too much weight to the knife evidence, and it could not be said that this was the murder weapon.

[73] Mr Mallon maintained that this was a weak circumstantial case and, so the judge was wrong to convict his client on the basis of the various strands relied on by him ie the telephony evidence, his lies and the knife evidence and that the judge was wrong to draw an adverse inference from Spiers' failure to give evidence. However, Mr Mallon did accept that the judge had made an adverse credibility finding against Spiers and that he could take no issue with that.

[74] In reply, Mr McDowell KC took us through the telephone traffic between Spiers and the other appellants. In particular, he referred to the fact that Spiers was phoned by Brown amidst the flurry of telephone activity. Mr McDowell argued that

as Brown and Sewell had pleaded guilty to this murder this activity was obviously of significance in that they connected themselves to Spiers. He made the point that everyone who was called by Brown before and after the murder was involved, with two exceptions Richard Murray and Gareth Roberts. He contended that the telephone contact was no coincidence but rather aligns with a rallying of the troops, alerting others to the presence of the police Landrover and instruction to others to turn their phones off.

[75] Mr McDowell stressed that Spiers was the first of the five appellants called by Brown in that Brown had texted him at 21:54hrs and he texted back at 22:00hrs. Brown also called Neil Ogle at 20:48 and called Spiers at 20.52. He also relied on the fact that there was no activity on the phone between 21:04hrs and 21:52hrs. In addition, Mr McDowell relied on the fact that Spiers had lied to police in interview about not having a phone and not knowing about the assault on Neil Ogle and that like the four other appellants, the phone was never recovered.

[76] Mr McDowell also maintained that the male running up Frome Street from the general direction of his home at Mersey Street had the respective tone of upper and lower clothing which matched that of Male 5. That submission was made on the basis that a stripe on the arm of a top similar to that of Male 5 and a lack of tone scarf similar to that of Male 5. He maintained the lack of DNA evidence is not exculpatory as Male 5 is seen to be wearing gloves.

[77] As regards the Ernesto knife, Mr McDowell reminded the court that eyewitness evidence described one of the murderers having a long kitchen knife in the back pocket of his jeans. Male 5 was seen on the Glider CCTV heading towards the murder scene with what appeared to be a long metal item in his back pocket. Male 5 is seen on the Glider CCTV running away from the murder with a knife in his hand. However, the point was made that more critically an Ernesto knife was recovered from the Connswater river on 14 February 2019 along with a baton. The baton and knife were found 25 metres from the Mersey Street Bridge which is at the end of the street where Spiers resided.

[78] Mr McDowell accepted that Dr Ingram's evidence was simply that the knife could have caused the fatal injury. However, the knife recovered also matched the missing knife from the set found in Spiers' kitchen. Thus, he argued that the remarkable coincidence in these facts coupled with the unlikely explanation that the knife was taken by one of Spiers' numerous girlfriends or attendees at his party house was incredible. Mr McDowell maintained that on an overall view the judge was correct to refuse a no case to answer application in relation to Spiers as this was an appellant who faced a credibility issue in the light of the evidence against him, which included his lies at interview. Therefore, the judge was entitled to draw adverse inferences from his failure to give evidence and conclude that there was a strong circumstantial case against Spiers.

[79] Regarding the CCTV evidence, Mr McDowell pointed out that whilst there was not specific identification of Spiers in the area, the CCTV did not have full coverage in the entire area and so that was not definitive.

[80] Having considered the competing arguments, we return to what the judge found in relation to this appellant. This exercise is most instructive because when broken down it is clear that on some points the judge made findings which were against the prosecution and in favour of Spiers and on other points he made findings against Spiers. This demonstrates a balanced approach.

[81] In fact, when Mr Mallon's submissions are broken down and cross-referenced to the judge's ruling, they are answered definitively against him. To illustrate the point, we turn to the core paragraphs of the judge's ruling in relation to Spiers.

[82] First, in relation to identification, the judge was against the evidence of the prosecution. This is plain from three core paragraphs of his judgment as follows:

> "[227] I now turn to Male 5, the third man to arrive at the bus shelter on the way to Cluan Place. The prosecution say that this man is Spiers. The prosecution have presented no evidence about clothing worn by Male 5 and comparisons with clothing worn previously by Spiers. They have attempted to suggest that the clothing has similarities to clothing worn by a person captured running along Frome Street towards Wye Street at 21:08 that evening. The suggested similarities are trousers darker in tone to the jacket with a dark stripe down the arm of the jacket, with the person wearing a scarf-type covering over the lower face.
>
> [228] This evidence has no probative value, and I reject it in its entirety. The relevance of the time of 21:08 and Wye Street is that it may well have coincided with the group assembling at Sewell's home. However, Frome Street is one of several routes that could be taken by Spiers to get to Wye Street (even if it could be shown that he commenced his journey from his home on Mersey Street). There is no evidence that the person actually went into 14 Wye Street. The clothing comparison is of the vaguest type. This evidence is entirely speculative and is of no value.
>
> [229] I have also concluded that based on my observations of Spiers in the court room, I consider that he is not dissimilar in height or build to Male 5. This cannot assist in any form of positive identification, but it

> is not evidence that points away from Spiers's involvement."

[83] In relation to the cell site analysis, para [246] of the judgment is material:

> "[246] Spiers's telephone (502) does not feature in Paul Hope's analysis. The masts utilised by 502 are shown on exhibits LMCC1a and 2a and 502 is only using Glentoran (azimuth 210) at 20:36, 20:46, 20:51, 20:55, 21:02, 21:14, 21:52, 21:54, 22:00, 22:02, 22:18 and 22:35. These times reflect telephone usage for calls and SMS messages and also DDR events. It uses no other mast. I consider this evidence to be also neutral in nature. Spiers's home is adjacent to this mast, and I consider that this evidence strongly suggests that the telephone 502 remained located in an area either in, or adjacent to, his home. Spiers may have been at home with his telephone, although it was not used between 21:02 and 21:52, or he may have left his home and left his telephone at his home."

[84] Again, the assessment by the judge on this aspect of the prosecution case is in favour of Spiers. Properly analysed the judgment is a balanced consideration of the telephone evidence and the fact that Spiers' phone was only picked up by the Glentoran mast. In addition, the judge clarifies the mistake that he made in his earlier judgment at para [247] when he says:

> "[247] In my judgment in relation to Spiers's application that he had no case to answer, I erroneously made reference at [17](e)] to 502 being located at various locations. This error was highlighted during final submissions in this case, and I wish now to correct that error."

[85] This is a very fair assessment by the judge. In his conclusion at [248] he clearly stated that the cell site evidence was neutral in character in respect of each of the appellants. Therefore, the appeal to us that the judge has in some way made an improper assessment against Spiers is unsustainable.

[86] The same applies to the issue of placement of Spiers at Wye Street which was part of the prosecution case. The outcome reached by the judge in relation to this is at para [251] where he says:

> "[251] A similar attempt was made to suggest that another male walking along Frome Street in the direction of Wye Street could be Spiers. For the reasons that I set

> out above at paras [227] and [228], I also consider that this evidence has no probative value."

[87] Moving on, the judge is quite clear at para [264] of his judgment that Spiers is not embraced by the background material which provided a clear motive for others. That is because as he records at para [264] there was no evidence that either Sewell or Spiers were involved in any of these confrontations. However, the judge still had to deal with association or common purpose. The judge considers this broader picture in para [270] where he says:

> "[270] There is no evidence to suggest that Spiers was involved in any way in relation to the internecine dispute, and therefore this aspect of the evidence does not impact on him."

However, he goes on to say:

> "I do not consider that his non-involvement in the earlier physical confrontations points away from his guilt, given his association with Brown and others, in the telephony evidence, which I will now deal with."

[88] Turning to the telephony evidence the core findings of the judge are set out in relation to Spiers from para [281] of his judgment. There he records the fact that Spiers sent Brown an SMS text at 21:52 with Brown responding by SMS text at 21:54. Spiers replied by SMS texts at 22:00 and 22:02. This is after the murder. However, before the murder after Brown phoned Neil Ogle at 20:48 for 43 seconds, Neil Ogle having been assaulted, he phoned Spiers at 20:52 for 37 seconds. The judge rightly places an emphasis on this, but he also at para [280] states as follows:

> "[280] I am satisfied that a strong inference can be drawn from the telephony activity and lack of activity, and then the renewed activity within the group which re-commenced at 21:52 (details of which I set out below). That inference is that the group did not need to communicate with each other as they were either in each other's company or had hatched a plan about which they did not need to communicate. Given the other evidence with regard to the movements of the vehicle, and the movements around Sewell's house on Wye Street, the most likely explanation is that they were together in that house and then in the Seat Leon vehicle."

[89] Concluding this aspect of the case at para [289] the judge states that:

> "I am satisfied that a strong inference can be drawn that the purpose of the calls to Rainey, Ervine and Spiers was to alert them as to the problems each now faced, and to plan their next moves. I have considered whether or not there could be an innocent explanation for these calls, or at least one which might not be related to the non-involvement of Rainey, Ervine or Spiers in the murder of Ian Ogle. No such explanation has been suggested. I have heard no evidence about this, and I cannot see any that could be inferred from the surrounding evidence."

[90] Para [290] contains the final inference that the judge draws is:

> "… from the telephones falling into dis-use at this time – 22:10 (Ervine's), 22:21 (Rainey's save for occasional limited use thereafter), 22:40 (Spier's), 22:53 (Sewell's), 00:08 on 28 January 2019 (Brown's).

[91] The judge then specifically rejects the argument that this could happen as a coincidence, that is because:

> "These were telephones which were used regularly up to 21:08 and were taken off the network at or about the same time, which coincides with first the death of Ian Ogle and then the immediate aftermath."

[92] Ultimately, at [291] the judge finds as follows:

> "The overwhelming inference that can be drawn from all the telephony evidence is that Brown, Sewell, Rainey, Ervine and Spiers made up the group that murdered Ian Ogle. The constituent parts of the telephony evidence comprise a very strong cord on which the prosecution case relies."

[93] Thereafter, in a passage from paras [301]-[312] the judge deals with the knife which was found in the river. At para [310] he states that he has considered the results of searches of Spiers' home address and refers to facts as follows. Spiers had such an Ernesto knife set. However, he had six pieces from the set with the 33cm knife missing. The judge rejected the suggestion made by Spiers that his house was treated as an 'open' house or 'party' house with people coming and going and taking things with them. He regarded his credibility as poor and little reliance could be placed on this explanation for the missing knife.

[94] The core of the judge's analysis on the knife is at para [311] where he accepts it is highly likely that there are numerous houses in the East Belfast area with this Ernesto knife set. However, the judge states that the issue in this case is not so much how many of those houses have such sets, but rather how many have a 33cm knife missing, are adjacent to the Connswater river and have occupants who spoke to Brown just prior to the murder when Brown was organising the assembly of a group to attack Ian Ogle. We agree.

[95] The judge found the Ernesto knife a very supportive piece of evidence in the prosecution case that Spiers carried out and used that knife in the murder of Ian Ogle. In a detailed section of his judgment, he also referred to the lies told by Spiers at police interview. He records that Spiers has not admitted that he did lie so he has no explanation from him as to why he lied. Therefore, the judge found that there was a need for an explanation on two crucial matters, his knowledge about the precipitating incident that resulted in the murder of Ian Ogle and his ownership of a mobile phone which he lied to police about at interview. Ultimately, he decided that he could take his lies into account as further evidence of the prosecution case.

[96] Bearing in mind the context discussed above this appeal centres on the question whether there was sufficient evidence upon which the judge could reasonably draw inferences and/or establish strands of circumstantial evidence against Spiers. In our view, he was more than entitled to find as he did. In particular, the common sense view of this case when a holistic view is taken of it, is that Spiers was intimately connected with Brown by virtue of the telephony evidence, in that Brown was the first person he rang, he knew about the assault on Neil Ogle, thereafter he was connected again to Brown through telephone evidence, his phone was silent during a highly relevant period and never recovered. He lied to police about all of this and so is a witness of no credibility. It is not tenable that the judge did not highlight other matters in his favour, namely that he did not leave the jurisdiction as a failing. That is because the judicial exercise requires a focus on the evidence against him.

[97] Perhaps most crucially in Spiers' case, the evidence of the knife found in the river close to his house when an identical type of knife was missing from his house is logically evidence that a judge can consider more than coincidental in linking him to this murder. This judge has applied meticulous care to a case which involved many strands of evidence to find Spiers guilty of murder. As Mr Mallon had to accept, at various points through his submissions, his complaint distils into the amount of weight placed on various strands of evidence by the judge. This argument was ambitious to start with but cannot succeed on a proper analysis of the judge's findings. We agree with the judge's finding that there were three strong strands of evidence against Spiers. We therefore dismiss this appeal on all grounds presented orally or in writing.

Ervine

[98] Mr Weir KC marshalled his appeal points into the following:

(i) Regarding clothing, the judge was wrong to apply the weight he did to implicate Ervine on this basis.

(ii) There were factors the judge did not find probative in terms of strength, ie cell site analysis and DNA.

(iii) Whilst it was hard to sustain a case that the background evidence of a dispute in 2017 could not be admitted, the judge placed too much weight on it because of a temporal gap between this evidence and the murder in 2019.

(iv) The judge placed too much weight on the telephony evidence against Ervine.

(v) Ervine's removal from Northern Ireland to Scotland was planned and so the judge placed too much weight on that and, in particular, this was important given that Ervine voluntarily returned to the jurisdiction.

(vi) Whilst the judge could draw an inference from Ervine's failure to give evidence, this should be viewed in context of the case and as such he could not realistically say any more.

[99] Overall, Mr Weir maintained that the judge did not properly analyse the evidence particularly the telephony evidence and should therefore have granted an application for no case to answer and/or rejected the circumstantial case made by the prosecution against Ervine.

[100] Replying, Mr McDowell relied upon the fact that Ervine was involved in the altercation at the Prince Albert bar on 1 July 2017 and, therefore, that motive can be ascribed in this case. He also pointed out that there was direct evidence against Ervine of the continuation of the feud and Ervine issuing a threat against both Ryan Johnston and Ian Ogle threatening to kill Ryan Johnston and telling him, "your da will never walk the Newtownards Road again." As regards the telephone traffic, Mr McDowell relied upon the connections with this appellant and Brown, the flurry of activity, the timing of activity, what this activity was naturally going to be about and the fact that there was no activity on Ervine's phone between 21:10 and 21:24 and that the phone was never recovered. He also highlighted the fact that there was contact with Kirkwood throughout the night and contact with Edgar.

[101] Mr McDowell also referred to what he described as some evidence that Ervine may have been the cyclist seen with Sewell in Frome Street. He referred to the DNA mixed profile on the rear near seat belt release of the Seat car. Mr McDowell also highlighted the distinctive tracksuit and trainers worn by Ervine and cross-referenced the footage of him whereby he was seen in a Spar shop. In relation

to the tracksuit bottoms, he maintained that they are obviously too long for Ervine and folded at the ankle which showed on a variety of clips including the clips earlier in the day on 27 January 2019 when he withdrew cash. Mr McDowell made the case that the cell site evidence was consistent with movements to and from the scene in relation to Ervine. In terms of him fleeing to Scotland, he said that the judge was entitled to draw inferences from this and overall adverse inferences were correct given that no explanation was given for various matters which were relevant in this case.

[102] In assessing these competing arguments we look to the judgment. Having done so the judge found aspects of the evidence presented by the prosecution to be of probative value against Ervine and others not probative. In Ervine's case it was impermissible of Mr McDowell to try to enhance aspects of the judge's findings against Ervine particularly regarding the cyclist and the DNA evidence. The judge did not rely on these strands to any material respect, and we are not re-running this case. However, there were strands of evidence which convinced the judge, namely the telephony, the ongoing part in the feud, and leaving the jurisdiction. On these aspects of the prosecution case we consider that the judge made various findings which are unimpeachable for the following reasons.

[103] At para [225] in relation to clothing, the judge considered the three parallel stripes on the tracksuit bottoms and said that these clearly enhanced the proposition that they are the same bottoms on the CCTV from the Spar CCTV. He said:

> "… I do not discount the possibility that Ervine changed his clothing during the day in the intervening hours, although there is no evidence presented to the court that he did. There is therefore circumstantial evidence upon which I can rely but give modest weight to."

[104] At para [226] the judge also concluded that based on his own observations of Ervine at 12:15 on 27 January 2019, that is in the Spar shop, and on his observations of Ervine in the courtroom he is not dissimilar in height or build to Male 4. However, he states that this cannot assist in any form of positive identification, but it is not evidence that points away from Ervine's involvement.

[105] It is plain from the above that the judge carefully considered the clothing evidence but applied little weight to it. Similarly, with the cell site analysis at para [245] he found that this evidence in relation to Ervine's telephone has the potential to place him at the murder scene at the relevant time, but also to place him elsewhere. He ultimately concluded:

> "… It is therefore of little probative value in proving the prosecution case against them. It, however, does not exonerate them or point away from their guilt and is merely neutral in character."

[106] The judge discounted the evidence in relation to the bicycle at para [250]. It is interesting what the judge said in relation to the DNA evidence that was found in the Seat Leon car which included that of Ervine. At para [254] he says as follows in relation to this aspect of the prosecution case:

> "I do not consider that the presence of the cellular material from Ervine and Rainey adds much to the prosecution case against either. The cellular material may well have been deposited by both when they were seated in the rear of the vehicle during those journeys. If that could be proved, then it would strengthen the case against both. However, it cannot. Leaving aside consideration of secondary or tertiary transfer (ie the cellular material transferring though other persons or objects), the time of the deposit could not be dated with accuracy. When one also considers the association between Ervine and Rainey and Brown, the presence of their DNA in the vehicle could be explained by a number of other social engagements."

Furthermore, at para [256] the judge concluded that he did not regard this evidence as particularly probative.

[107] When it comes to motive, given the fact that Ervine was involved in the 2017 incident at the Prince Albert bar, the judge had more to say. At para [261] he points out that in the Prince Albert Bar that night, there was a significant pub brawl between two factions. Rainey, Brown and Ervine were present and were fighting with Ryan Johnston. Others were also involved, including Ian Ogle at a later time. During this fight Neil Ogle did not take the side of his family.

[108] The judge goes on at para [262] to state that later in September, Ervine made significant threats to Vera Johnston, threatening to kill her son Ryan, as Mr McDowell has pointed out. The ultimate conclusion of the judge in relation to this is found at para [268] where he says:

> "The fact that Rainey and Ervine were members of a faction which included Brown, Sewell, and Neil Ogle and that faction had a motive to seek and execute revenge against Ian Ogle, is strongly supportive of the proposition that both were members of the group of five men identified in the CCTV images on the Albertbridge Road."

[109] In relation to the telephony evidence, the judge refers to the fact that the evidence in relation to Ervine is comprised of exchanges between him and Kirkwood by way of phone and SMS messaging. The telephone exchanges of the group as a

whole are important because Brown also made an attempted call to Ervine 22:34 and then the telephones of the group detached from the network. At para [289] the judge says, "a strong inference can be drawn that the purpose of the calls to Rainey, Ervine and Spiers was to alert them as to the problems each now faced, and to plan their next moves." He also considered whether there could be an innocent explanation for these calls, or at least one which might not be related to Rainey, Ervine or Spiers but he said that no such explanation has been suggested. The judge then went on to say, "I have heard no evidence about this, and I cannot see any that could be inferred from the surrounding evidence."

[110] In relation to Ervine's departure from Northern Ireland, the judge records what was said at para [298] as follows:

> "[298] Ervine's counsel has suggested that such a journey could not be regarded as unusual or suspicious given the employment, cultural and sporting links between Northern Ireland and Scotland. I accept the existence of those links, but I reject them as a possible explanation for the journey. There is no evidence about why Ervine went to Scotland, or to corroborate his statement and the statement of his girlfriend that he was going to work there. Had the trip been planned, as he and his girlfriend suggested, there is no explanation for the short notice given to Jenkins.
>
> [299] The urgent nature of the travel request and the perception of Jenkins that it was unusual, suggest that this was not a planned trip, but had been arranged in haste, within 12 hours of the murder of Ian Ogle.
>
> [300] As with Rainey, I am satisfied that the method and timing of Ervine's departure is a very strong piece of evidence that makes up the circumstantial case against him."

[111] Drawing all of the above together, we are entirely satisfied that the judge has made permissible inferences from the evidence. In Ervine's case, he was clearly part of an incident in 2017 which forms a highly relevant background to this case. He was one part of the faction that was ultimately the faction that was attacking the Ian Ogle faction. The judge was quite entitled to view this activity as an important strand in the circumstantial case. The judge was also entitled to take into account the telephony evidence which must be read as a whole. We understand Mr Weir's submissions which were forensically advanced during the hearing that there could be other explanations for the telephone traffic particularly given the involvement of Kirkwood, but that is to isolate particular parts of this evidence and underestimate the entirety of the telephony evidence which must be read as a whole.

[112] Plainly the judge did not pay any substantial weight to the DNA evidence or the cycle evidence or the cell site evidence in Ervine's case. We consider that his approach was fair. He was entitled to make some assessment himself as a finder of fact in relation to the tracksuit bottoms. We think an impermissible criticism has been made of him on that issue given the CCTV footage which we have also seen of Ervine in the Spar shop wearing tracksuit bottoms which any observer could compare against the CCTV imagery on the night in question where he is wearing tracksuit bottoms.

[113] Ervine's departure from the jurisdiction is clearly material. The fact of the matter is that this was within a very short time of the murder which has not been explained. We consider that the judge was entitled to draw an adverse inference in the absence of explanation from Ervine on this. This was patently a case where there were matters which Ervine needed to explain as regards his connections and associations with Brown and Sewell who pleaded guilty to murder, his leaving the jurisdiction and his telephone activity with other members of the group. He decided not to give evidence and as such, the judge was entitled to draw an adverse inference from this choice.

[114] Furthermore we consider that the judge was quite entitled to find that the various strands of evidence which he identified established a circumstantial case against Ervine. There can be no valid argument that the judge was right to refuse an application of no case to answer and correct to find to the criminal standard that the circumstantial case was made out. Therefore, we dismiss Ervine's conviction appeal having satisfied ourselves that there is no question of the safety of this conviction.

[115] In his submissions Mr Weir addressed the issue of motive and argued that a temporal gap should dilute the question of motive. However, applying *Myers* a temporal link is not essential. In these cases, the issue of association is an important one. The line of authority relied upon by the prosecution is not simply restricted to established gangs. It also can apply to cases where there are groups or associates who have taken sides as is the situation in this case. Mr Weir was the only counsel who implicitly conceded the point that the judge, Fowler J, was correct in law to admit the bad character evidence. He was right to do so. In addition, we consider that once admitted the judge applied the proper weight to this evidence.

[116] Accordingly, Ervine's conviction appeal is dismissed on all grounds.

Rainey

[117] The final conviction appeal was advanced by Mr Berry KC on behalf of Rainey. We summarise his focussed submissions as follows:

(i) That because the judge used different terms throughout the judgment to describe the weight that he had given to certain strands of evidence, it was

impossible to form a proper overall view. On this Mr Berry took particular issue with the judge's description of "little or no weight" to part of the evidence.

(ii) On motive and the principle in *Myers*, this scenario was very different and that too much weight had been given to the interactions between his client and Ryan Johnston which were at the lower end and irrelevant. It was, therefore, wrong to cast him as part of an ongoing feud.

(iii) There was too much emphasis placed on telephony, car movements, and CCTV where there were contra indicators.

(iv) There should have been no weight on clothing comparisons applied.

(v) Rainey's departure from the jurisdiction could be explained given that he had a girlfriend in Thailand and Brown was in crisis and so that was not properly dealt with by the judge.

(vi) This was a weak circumstantial case hence there was less of a requirement to provide an explanation by way of giving evidence.

[118] In reply, Mr McDowell stressed the fact that Rainey had an involvement in the altercation in the Prince Albert bar on 1 July 2017. He said he persisted in the feud with the Ogle faction by virtue of the Facebook messages sent to Ryan Johnston. He relied on the fact that he was a known associate of Neil Ogle, Brown and Sewell. Following the attack on Neil Ogle, Ian Ogle told Neil Ogle to get Saucy, otherwise known as Rainey. Mr McDowell relied on the telephone traffic in the same way as he did against them all but stressed the particular telephone traffic involving Rainey. He also referred to the DNA in the car. In relation to the distinctive coat, he said that the coat worn by Rainey in the Bank of Ireland CCTV is similar to that of Male 3. It was never recovered and this is in coincidence with the clean up at 14 Wye Street evidenced by the smell of bleach and the removal of the CCTV. He also referred to the cell site evidence being consistent with the movements of Male 3 travelling to and from the scene of the murder.

[119] In relation to fleeing to Thailand, Mr McDowell pointed out that the day after the murder cash was used to pay for the flight at the airport and it is of some significance that the travel was with Brown, who has accepted his guilt in the murder. The phone of Rainey, like the others, was not recovered. It was not recovered, and it was switched off at 22:21hrs after the call from Brown.

[120] As with the other conviction appeals, we have examined the judgment of the judge on the issues as follows. At para [230] he deals with clothing as follows:

> "[230] I turn finally to Male 3, the fourth male to arrive at the bus shelter, the person that the prosecution say is

> Rainey. Male 3 is wearing a dark waist length coat which is blue in colour. He is also wearing grey tracksuit bottoms and white trainers. Stills 1 and 2 of Exhibit CS76 show Male 3 on the outward journey and Still 6 shows him on the return journey. His jacket has a small distinctive motif on the right upper chest. There is also a very small light-coloured spot in the left collar area near to the centre.
>
> [231] On 23 January 2019, at approximately 15:45, a male is captured undertaking a transaction whereby he withdrew £3,000 in cash from Rainey's bank account at the Bank of Ireland branch on High Street, Belfast. … From my observations of Rainey in the courtroom, I am satisfied that he was the man making the cash withdrawal, a fact I can safely find based on an inference that the bank teller is likely to have carried out sufficient checks to satisfy him or herself that the man was Rainey, the account holder."

[121] At para [232] the judge goes on to consider Rainey's jacket. He takes some account of the imagery and then he reaches a conclusion at para [235] as follows:

> "[235] My conclusion about this evidence is that the jacket worn by Rainey on 23 January 2019, was a jacket with a distinctive motif and that jackets with that motif would not be commonly worn. Rainey owned that jacket, or he could readily access it. Male 3 was wearing a similar jacket which may have been a different colour or that the CCTV imagery from the two cameras produced a difference in colour. This is therefore circumstantial evidence upon which I can rely but give very modest weight to."

[122] At para [236] he goes on to say:

> "[236] I have also concluded that based on the recorded images of Rainey at 15:45 on 23 January 2019 and on my own observations of Rainey in the court room, I consider that they are not dissimilar in height or build to Male 3. This cannot assist in any form of positive identification, but it is not evidence that points away from Rainey's involvement."

[123] The judge, considered the cell site evidence as neutral in character. He also considered that the DNA evidence did not add much to the prosecution case or was

particularly probative. As to motive, he finds at para [258] of his judgment this relates to the appellants Rainey and Ervine. He makes the point at para [261] that, similar to Ervine, Rainey was present and fighting with Ryan Johnston in the bar and that he was part of a group. In relation to telephony evidence, he also records Rainey's involvement in that within the body of the exchanges, the fact that the telephones were detached from the network and none of the devices were recovered by police.

[124] In terms of Rainey's departure from Northern Ireland, the judge's conclusion is found at para [295] as follows:

> "[295] The chronology of events does support that contention, but the proposition is flawed for a number of reasons. There is no actual evidence that Rainey had planned ahead for this journey, neither is there any evidence given as to the reason for the travel at such short notice. The apparent foresight of withdrawing cash in advance of, and for the purpose of, foreign travel is rebutted by the evidence of the method by which he arranged his flight and the short notice of the booking. The availability of the internet and travel agents within the Belfast area meant that the paying of cash at an airport desk for last minute flights on Aeroflot and via Moscow was highly unusual and clearly indicative of a last-minute effort to leave the jurisdiction. The evidence from Agnew would indicate that whilst Rainey was a regular traveller, he did not indicate where and for what purpose he was travelling. The issue is not whether Rainey did in fact have a girlfriend in Thailand and he was going to visit her, but rather why would he wish to fly to Thailand at such short notice and in the method that he used in the company of Brown who had murdered Ian Ogle the previous day. The fact that he returned without spare clothing into Manchester airport on 3 March 2019, would support his contention that he was visiting a location where he kept or stored clothing, but such a location could just as easily be regarded as a refuge in a time of trouble as opposed to a visit to a girlfriend."

[125] The judge rejected the explanation proffered by Rainey for his departure and was satisfied that the method and timing of his departure is a very strong piece of evidence that makes up a circumstantial case against him.

[126] Having considered the competing arguments we are not satisfied that the judge has fallen into error in drawing any of the inferences he did. In particular, he was entitled to make an inference in relation to motive and association given

Rainey's involvement in the Prince Albert bar fight and his association with Brown and Sewell. Fairly, the judge did not place particular emphasis on some aspects of the prosecution case including DNA. We consider that he was entitled to reach his own view in relation to the Bank of Ireland footage versus the CCTV footage on the night given the clothing comparisons that could be made. True it is, that he is not an expert on clothing, but he is entitled as a fact finder to apply common sense to what he saw in the various video stills and reach the conclusion that he did on that. He is also entitled to reach the conclusion that he did on the removal from the jurisdiction of Rainey which was highly unusual given that he was with Brown, paid cash at the airport and left so swiftly after the murder.

[127] We understand the point that Mr Berry makes about the judge's use of language. However, when properly analysed this is a transparency point, which does not lead to a conclusion in favour of Rainey. That is because, as we have said, in a circumstantial case, all of the evidence must be looked at holistically. In our view, the narrative provided by the judge is ample to work out why he found a circumstantial case established. As the law states, even if one strand on its own does not establish a circumstantial case to the requisite standard, it can form part of the overall picture.

[128] It would have been better to simply say modest weight or no weight rather than 'little or no weight' when attaching a qualitative assessment on evidence. However, it is a step too far to say that judges must articulate the weight that they give to evidence in these types of cases by some binding and rigid standard. The broad parameters are that something has low weight, modest weight or strong weight. By and large the judge has kept within those categories, although he has used adjectives in relation to what he considers to be very strong pieces of evidence. It would be a counsel of perfection to achieve absolute consistency on this within a lengthy judgment, as we have said. Suffice to say, it is plain from the judgment where the judge placed the most emphasis and where the judge did not find the greatest evidential proof. Thus, on an overall view of the judgment, Mr Berry's argument in relation to the language used fails.

[129] The ultimate question for us is whether on a holistic view, there was sufficient circumstantial evidence to convict Rainey. The judge found that the evidence was sufficient to the requisite standard, and we see no error in relation to that. He was, in our view, perfectly entitled to reject the application for no case to answer and entitled to find the appellant Rainey guilty beyond a reasonable doubt given the evidence which he evaluated and heard. Like the other conviction appeals, we find no basis for a legal argument that the bad character should have been excluded. It was relevant background and was rightly admitted in this case as set out in the judgment of *Myers* by Fowler J who applied the requisite law. In addition, we find no basis for the appeal point not advanced in oral submissions and tepidly made that the judge should have recused himself. This finding on recusal applies to all appellants. Equally we consider that as in the case of the other appellants, the Judge was correct to draw an adverse inference from Rainey's failure to give evidence. We

find no merit in any of the arguments made by Mr Berry. We dismiss this appeal. We are satisfied as to the safety of this conviction.

Overall conclusion on the conviction appeals

[130] Applying *R v Pollock* the legal question is whether the appellate court, examining the entirety of the judge's reasoning, considers that the convictions are safe. Properly analysed the judge worked through each strand of evidence carefully, identified its limits, removed prejudicial and speculative material, and repeatedly stated that the strands were only capable of supporting conviction when considered cumulatively. Nothing on the face of this judge's analysis suggests evaluative excess, logical error, the drawing of inappropriate inference or reliance on any strand of evidence beyond its permissible footprint.

[131] In addition, we find no error in the decision to admit the bad character evidence for the reasons given by Fowler J. He applied the relevant law. The previous incidents that were clearly admissible as relevant background and potential evidence of motive. The appellants argue that background animosity or "feud" material, was prejudicial, unnecessary, or deployed as propensity. However, the judge ("Fowler J") admitted only a tightly circumscribed body of contextual evidence necessary to understand motive, opportunity and the relational dynamics between parties. He excluded the broader or more prejudicial aspects. This careful pruning mirrors the approach in *R v Hanson* [2005] EWCA Crim 824, to bad character and the narrative-integrity principles recognised in *McKinney*. We consider that the judge's decision to admit limited contextual evidence, while excluding more inflammatory material, demonstrates an appropriate balance between probative value and prejudice.

[132] Whilst not advanced in oral submissions, the arguments based on the judge's failure to recuse himself are also bound to fail. The judge in a considered written ruling decided that the evidence that he had been privy to which he ruled inadmissible did not prejudice his ability to hear the case. It is not enough to say that other judges in some non-jury cases have recused themselves because the circumstances of cases vary. In this case, we are entirely satisfied that the judge's judgment on recusal is not one that we should interfere with. The judge referred to the relevant law to the effect that when a jury or tribunal of fact has been exposed to prejudicial material, the discretion to discharge is based in the context of the issues at trial and the significance of the material to the issues. We see no reason to interfere with his exercise of discretion. In addition, we find no error in the judge's decision to refuse applications of no case to answer.

[133] Accordingly, for all of the reasons given the convictions are safe and the appeals are dismissed.

The sentence appeals

[134] There are four sentence appeals which overlap to some extent but also raise different issues given that two appellants pleaded guilty (Brown and Sewell) and two were convicted after trial (Ervine and Rainey). At the outset we record that, insofar as Ervine's appeal was brought out of time, we extend time.

[135] We distil the arguments made on appeal into four core points:

(i) A 20-year tariff is manifestly excessive applying the guidelines set out in *R v Whitla* [2024] NICA 64.

(ii) The judge did not sentence on the agreed factual basis that for these four appellants (unlike Spiers) the intention was to cause really serious harm rather than kill.

(iii) Insufficient allowance was made for personal mitigation and in Brown and Sewell's cases the pleas of guilty.

(iv) No proper allowance was made for delay.

The judge's ruling on sentence

[136] This is reported at *R v Brown and Others* [2025] NICC 6. Having set out the background, the judge refers to victim impact at para [26] of his ruling. No issue is taken with these parts of the judgment. The background was uncontentious just as the judge's findings of primary fact were. The victim impact is also plain and significant as the wife, daughter and son of the deceased were on the scene very soon after and so witnessed their father lying on the road. We also note that they and Ian Ogle's mother have spoken in very personal terms about their acute loss and the impact they have suffered to their mental health and the adverse impact on the community of this brutal crime committed by a group who lived there and who knew the deceased.

[137] When dealing with the sentences for Brown, Sewell, Rainey, Ervine and Spiers, the judge refers to the correct guideline cases, the most recent being *R v Whitla*.

[138] At para [54] of his judgment, he sets out the aggravating features in this case as follows:

> "[54] The aggravating factors, and they apply to each of the defendants are as follows:
>
> (a) This was a pre-planned murder;

(b) It was a revenge vigilante attack;

(c) It involved a group of five masked men and was perpetrated against a single unarmed man;

(d) It was a sustained attack with the use of weapons, including shod feet, with multiple injury sites on Ian Ogle's body;

(e) The murder was committed on the public street;

(f) Threats were made to a by-stander that he remain silent about the incident;

(g) There was a successful effort to dispose of incriminating evidence such as clothing and mobile phones;

(h) The underlying purpose of the attack was to intimidate a group of people and to force them to leave the area."

[139] No substantive issue was taken with the above list save the wording of (a) given that the intention ascribed to the appellants, save Spiers, was not an intent to kill but rather cause really serious injury.

[140] The judge then deals with personal mitigation and faithfully records that in relation to each appellant. It is not suggested that he left anything out of account. He knew, in particular, that the appellants had limited criminal records, had families and, in some cases, jobs and were arguing that they had remorse for what had happened. In relation to Brown and Sewell who pleaded guilty, he records at para [65] of his judgment that "they did so at a late stage just before the commencement of the trial, but it is recognised that their admissions would have assisted the prosecution in the presentation of its overall case, but only to a limited extent."

[141] The core of the ruling is found from paras [66]-[69] as follows:

> "[66] I have referred to the case of *Whitla* and the various starting points. Whilst there will be murders which fall into certain broad categories such as those arising from domestic incidents or from street fights, this murder has certain unique qualities. I have already identified the features of this murder when setting out the aggravating factors. One aspect, which is a compelling factor, was the overall purpose of the attack and the attempt to intimidate the wider family of Ian Ogle and those who

> associate with them. To that extent this murder has certain parallels with paramilitary punishment attacks which have been all too common in our community.
>
> [67] I therefore consider, given this background and the multiplicity of the aggravating factors that I have identified, that this murder falls within the category with the higher starting point of 20 years. In the event that I am wrong about the category of the starting point, I am satisfied that even if the normal starting point is the correct approach, a substantial upward adjustment (a course suggested at para [38] in *R v Hutchinson* [2023] NICA 3) would follow as there are several additional and significant aggravating factors that would elevate the tariff to one of 20 years.
>
> [68] In the cases of Brown and Sewell their guilty pleas will be recognised by a reduction of two and a half years. The guidance in *R v Turner* [2017] NICA 52 suggests a reduction of one sixth should a plea be entered on arraignment. In this case the pleas were entered much later and on the eve of trial, and therefore a lesser reduction is justified.
>
> [69] The sentence already imposed on each of Brown, Sewell, Rainey, Ervine and Spiers is one of life imprisonment, and the tariffs that Rainey, Ervine and Spiers will serve before consideration for release will be 20 years and the tariffs Brown and Sewell will serve before consideration for release will be 17½ years."

Relevant legal principles

[142] As the judge recorded, *Whitla* is now the guideline case in Northern Ireland dealing with murder tariffs. This case recalibrated the case of *R v McCandless* [2004] NICA 1. It also reiterated the fact that sentencing in this area must reflect modern society, and that the case provides guidance. It does not require the application of a rigid arithmetical formula. That is because each case will have different characteristics and, as the judge articulated it, this case had unique characteristics.

[143] As para [41] of *Whitla* provides, most murder cases in Northern Ireland will fall into what has previously been termed the higher starting point category, namely 15/16 years which involves high culpability. *Whitla* decided that this should now be viewed as the normal starting point. However, the type of factors that place a case within this category remain unchanged. These are taken from the Practice Statement at para [12] which is set out in *McCandless* as follows:

> "12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders."

[144] The Practice Statement at para [18] refers to very serious cases as follows:

> "18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.
>
> 19. Among the categories of case referred to in para 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime, or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate."

[145] We stress that these are guidelines which do not provide exhaustive categories and each that case will depend on its own facts.

[146] The Practice Statement specifically addresses the variation of the starting point by reference to aggravating and mitigating factors as follows:

> "14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.
>
> 15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.
>
> 16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.
>
> 17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty."

[147] The primary argument advanced by the appellants was that an intention to cause grievous bodily harm rather than kill should be a mitigating factor. Some support for this argument is found in the wording of the Practice Statement. However, that is not the end of the matter given subsequent guidance given by our courts on the Practice Statement over the years since its inception. For example, in *R v McCarney* [2013] NICC 1 at para [31], the court noted that the Practice Statement refers to mitigating factors including an intention to cause grievous bodily harm, rather than an intention to kill but that was not determinative. Similarly, in England & Wales it is not assumed that the absence of an intention to kill necessarily amounts to any or very much mitigation. Lord Justice Judge made the point in *R v Peters* [2005] 2 Cr App R(S) 101, as follows:

> "We have sufficiently demonstrated that it cannot be assumed that the absence of an intention to kill necessarily provides any or very much mitigation. It does not automatically do so. That said, in many cases, particularly in cases where the violence resulting in death has erupted suddenly and unexpectedly, it will probably do so, and it is more likely to do so, and the level of

> mitigation may be greater, if the injuries causing death were not inflicted with a weapon."

[148] Put simply, as each case is fact specific sentencers should have the flexibility to apply the principles to facts without mechanistically following the Practice Statement. There is a discretion invested in any sentencing court in this jurisdiction, as to whether an intent to cause grievous bodily harm as opposed to kill is mitigation or reduces culpability.

[149] The point is already made in our criminal jurisprudence in *R v Turner and Turner* [2017] NICA 52 at para [42], as follows:

> "The judge noted the nature of the attack upon the deceased including the use of the guitar as a weapon and the stamp with a clod foot on his face by a shoe associated with William Turner. Such a frenzied and vicious attack clearly indicated at the very least indifference as to whether or not the deceased lived. Leaving the deceased after this vicious assault with no means of obtaining assistance was considerable evidence that each was content that the victim should be left to die. As *R v Peters and others* [2005] 2 Cr App R (S) 101 made clear whether or not the intention only to cause GBH constituted a mitigating circumstance would depend upon the facts of each case. In a case of this sort where gratuitous and extensive violence was used in the course of the attack, including the use of a weapon, the mitigation is unlikely to be material."

[150] In *Turner*, the Court of Appeal also provided guidance in relation to the reduction for a plea in murder cases which needs no alteration. Specifically, at para [28] the court said:

> "Where it is appropriate to reduce the minimum term having regard to a plea of guilty the reduction will not exceed one-sixth and will never exceed five years. The maximum reduction should only be given when a guilty plea has been indicated at the first stage of proceedings, in other words at first arraignment. When a guilty plea is given on the day of the trial a maximum of one-twentieth should be allowed."

C***onclusions on sentence***

[151] Having considered the judge's ruling and the relevant law, we now turn to deal with the arguments made by each appellant. As we have said, there is common

case among the appellants on some points but also individual arguments which we have considered.

[152] The first point of commonality is that of intent in relation to the four appellants. This argument does not apply to Spiers who is connected to the knife. Sensibly his counsel decided not to appeal his sentence. However, the other appellants make the case that there was an agreed basis of plea which referred to their lesser intention and that the judge was obliged to sentence on that basis. It is clear from the judge's ruling that he was aware of the issue but decided, given the particular facts of this case which he described as unique and the commonality of purpose which he found, that no allowance should be made for the lesser intent. The question arises whether he was correct to do so?

[153] We have considered the competing arguments and having done so we find that the judge was justified in the approach to intent that he adopted. He took a view on the facts and was well equipped to do so having heard the evidence in this trial. While Spiers was the only appellant implicated by the knife and it caused the fatal wound, a baton was also used in the attack and there was kicking to the head of the deceased. This was plainly a group attack involving gratuitous violence. The prosecution does not accept that Spiers was the only member of the group who knew about the knife given that it was seen by witnesses in public view. Be that as it may on the basis of the factual matrix the judge was, entitled not to ascribe any material difference in culpability to the appellants based on lesser intention. That is because this was a group vigilante revenge attack with a clear commonality of purpose.

[154] Even if there is an error in principle in relation to how the judge dealt with culpability or mitigation flowing from lesser intent it does not affect the outcome in this case. That is because on an overall view we consider the 20-year starting point appropriate for each of the appellants. If anything, given that Spiers had the knife which was used multiple times his starting point could justifiably have been raised above 20 years However, the fact that one co-accused has arguably obtained a benefit does not mean that the other related sentences should be reduced. Therefore, we are not with any of the appellants on their primary ground of appeal based upon lesser intention.

[155] A related point is made that the starting point was too high. We find no merit in this argument. In our view, this was also a very serious case of exceptionally high culpability which put it into the 20-year category for murder. That is because this was a pre-planned revenge attack by five people on a vulnerable man with multiple weapons (knife, baton, shod foot) causing multiple injuries in a public street. If the point is that the Practice Statement does not expressly cover this type of crime that argument only goes so far. The guidelines in murder cases in this jurisdiction have adapted to reflect the complexion of modern crimes as this court has said most recently in *Whitla*.

[156] Lest there be any doubt we take this opportunity to state that gang violence of the nature found in this case falls into the very serious category of murder cases. The arguments made by the appellants that this murder could have attracted the lower culpability starting point are totally without merit and were sensibly not advanced with any enthusiasm by any of the experienced criminal practitioners involved in this case.

[157] Furthermore, given the serious and sinister features of this case, this was not a normal starting point case. We found Ms Walsh KC's submissions to be compelling on this aspect of the appeal. Plainly, this was a very serious case which required application of the highest bracket of sentence. Hence, grounds (i) and (ii) of the sentence appeals are without merit.

[158] The third ground of appeal raises a different point that personal mitigation should have reduced the sentences. This argument is unconvincing. We repeat the point made by numerous courts previously that personal mitigation will be of extremely limited value in any murder case. In this murder case, with all of the features that it had including non-co-operation and the destruction of evidence there could be no room for personal mitigation, meriting a reduction in the sentence as suggested by counsel. We recognise that family difficulties will arise from the prison sentences imposed as has been highlighted by some of the appellants, but principally Ms Campbell KC on behalf of Brown. However, the fact that family and children suffer because of the criminal acts of their relatives does not mean that sentences should be reduced in a brutal murder case such as this.

[159] Next, we turn to the whether there was adequate reduction for the guilty pleas entered by Brown and Sewell. The simple point is made that the judge underestimated the pleas given he said they had "limited effect." The pleas were undoubtedly of value in that they assisted the presentation of the case by the prosecution. That said, this was clearly a case with many strands of circumstantial evidence which were well put together by the prosecution and stacked up strongly against the appellants, including Brown and Sewell. In addition, the pleas were entered at a late stage. Thus, there were several factors of relevance for the judge in deciding upon the appropriate reduction for the guilty pleas.

[160] Having considered the matter in the round, we think that the judge's description of the pleas as of limited effect was unfortunate and may have given the impression that he underestimated the value of them. However, the pleas were late in the day and so the value attached to them had to be balanced against that. The level of reduction is within the judge's discretion. This is not an area the appellate court readily interferes with absent clear error. On an overall view we consider that the judge was entitled to apply a reduction below the one sixth maximum recommended in *R v Turner* which applies at arraignment. Therefore, we conclude that the application of a one-eighth reduction was within range and should stand. This was a period of two and a half years reduction on the 20 years' sentence which we consider just and proportionate.

[161] Furthermore, we are not satisfied that in the context of largely no comment interviews, lies and destruction of evidence, that declarations of remorse are to be viewed as genuine or result in any further reduction. Hence, this third ground of appeal also fails.

[162] The final appeal point relates to delay. In relation to this the recent authority of *R v McGinley* [2025] NICA 11 was raised orally and advanced by Mr Toal KC in support of the argument that a reduction for delay should be made. The primary point of principle to be derived from *McGinley*, was that if a reduction in sentence is to be allowed for delay it should attach to all offenders not just the more meritorious criminals. This decision did not change the law in any other respect and the principles expressed in *R v Dunlop* [2019] NICA 72 were expressly adopted.

[163] This case was complex and characterised by non-cooperation. The police are to be commended for collecting and piecing together all the circumstantial evidence which was presented at trial. None of the appellants helped them. When pressed, none of the appellants' counsel could point to what the culpable delay against the police or PPS was. The height of the case being made is that there was some delay in judgments being reached during proceedings. That delay was unfortunate but was corrected. It does not, in our view, in such a complex case translate into any appellant being entitled to a reduction in sentence for delay. Hence, the judge was entitled in this case to record the fact of delay but decline to apply any reduction in sentence. Such an approach accords with the principles set out in *R v Dunlop* and represents an unimpeachable assessment on the facts of the case.

[164] Therefore, the sentence appeals all fail. We uphold the judge's chosen minimum tariff for all of the appellants, that is 20 years in the case of Ervine and Rainey which is also the minimum tariff imposed on Spiers (who did not appeal) received and 17½ years in the case of Brown and Sewell on the basis that they pleaded guilty.

Overall conclusion

[165] Accordingly, for the reasons we have given we dismiss all of the appeals against sentence and conviction.

[166] We conclude this judgment by commending counsel and their instructing solicitors for all of the appellants for the extremely impressive written and oral submissions made. Similarly, we are grateful to counsel for the prosecution and their solicitors for the assistance they have provided in writing and orally. We also commend the judge in this case for providing such a comprehensive judgment in what was a complicated fact-heavy, evidence-heavy case.

[167] Finally, we hope that this judgment brings some closure to the bereaved family of Ian Ogle and the community in which he lived. This case serves as a

reminder that group violence of the nature displayed in this murder has no place in our society and that those who engage in such activity will be brought to justice and appropriately punished.