KNeutral Citation No: [2026] NICC 2	*Ref:*	SMY12984
	ICOS No:	23/051887
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	27/02/2026

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

THE KING

v

PAUL McINTYRE, CHRISTOPHER GILLEN, JORDAN DEVINE, PETER CAVANAGH, JOSEPH BARR, FOREST COFFEY aka McCRORY, JOSEPH FARREN aka CAMPBELL, PATRICK GALLAGHER aka MELLON and KIERAN McCOOL

Kieran Mallon KC with Sean Doherty (instructed by MacDermott, McGurk & Partners) for Gillen
Mark Mulholland KC with Rosemary Walsh KC and Aoife McAuley (instructed by Hampson & Harvey Solicitors) for McIntyre
Eilis McDermott KC with Dean Mooney (instructed by MacDermott, McGurk & Partners) for Devine
John Kearney KC with Stephen Mooney (instructed by Hampson & Harvey Solicitors) for Cavanagh
John Larkin KC with Cameron Faulkner (instructed by Phoenix Law Solicitors) for Barr
Niall Hunt KC with Liam McStay (instructed by Clarendon Legal) for Coffey
Seamus McNeill KC and Eoin Devlin KC (instructed by Quigley, Grant & Kyle Solicitors) for Farren aka Campbell
Gary McHugh KC with Mark O'Connor (instructed by McCann & McCann Solicitors) for Gallagher
Brian McCartney KC with Joe Brolly (instructed by McCartney & Casey Solicitors) for McCool
David McDowell KC with Mr Steer KC and Lauren Cheshire (instructed by the Public Prosecution Service) for the Crown

---

SMYTH J

Introduction

[1] On Thursday 18 April 2019, a young journalist, Lyra McKee, was shot and fatally injured in the Creggan area of Derry. Emmet Doyle, a community activist, had gone to the area of Fanad Drive and Central Drive with a journalist friend after news of a police convoy entering the area was received. Military vehicles then arrived, which he knew would provoke trouble particularly with the group of 50 or 60 mostly young people who had already gathered, as news spread over social media.

[2] Mr Doyle described petrol bombs and fireworks thrown at police vehicles which were set alight and the arrival at speed of a tipper truck which was then set on fire. He then saw two or three people moving, one of whom was taller and one smaller than him, tight to the wall towards the corner of Fanad Drive and Central Drive. He saw a masked man who was shouting IRA chants and heard cheers from others present. One of the men at the corner extended a firearm towards the closest Land Rover and fired a shot. He thought there was a gap in time between that and the next shots – as if the gun had jammed. He then heard a scream.

[3] Mr Doyle described seeing Lyra on the ground with her partner Sarah on her knees beside her. He thought Lyra was a child she was so small, curled up and he thought she had been hit by a stone but then he noticed a perfect small circle on her right temple. His hands were covered in blood. He took his coat off and tried to put it under Lyra's head and when a woman began to scream "a wean has been shot", he and another person banged on the Land Rover window, telling the occupants that someone was hurt.

[4] Mr Doyle described how five or six local people helped to place Lyra in the footwell of the vehicle, quickly and carefully. The Land Rover departed at speed to the hospital.

[5] At the hospital, Lyra was pronounced deceased.

[6] The defendants are all charged with riot and associated offences arising out of the civil disturbance that night. Some are charged with similar offences that occurred two days earlier, on 16 April.

[7] Paul McIntyre, Peter Gearoid Cavanagh and Jordan Devine are also charged with murder. They are not alleged to have fired the gun used to kill Lyra McKee but are charged with intentionally encouraging or assisting the gunman.

[8] All of the defendants are charged on the basis of their involvement in a joint enterprise. While those masked are alleged to have been directly involved in the disorder, often throwing petrol bombs themselves, the allegations against them also include the conduct of the other rioters in furtherance of the joint

enterprise. The masked defendants charged with murder are also charged on a joint enterprise basis.

[9] In relation to the riotous offences of 18 April 2019, they can be divided into two groups: masked individuals alleged to have been directly involved in the riot: Paul McIntyre, Gearoid Peter Cavanagh, Jordan Devine, Christopher Gillen and Joe Campbell and unmasked individuals, alleged to have intentionally assisted or encouraged them to commit those offences: Patrick Gallagher, Jude McCrory, Joe Barr and Kieran McCool.

[10] In relation to the 16 April riotous offences, the individuals were all masked and four of the same defendants are alleged to have been directly involved: McIntyre, Devine, Gillen and Campbell.

The applications

[11] These are defence applications at the conclusion of the prosecution case that none of the defendants have a case to answer under the well-known principles in *R v Galbraith* [1973] Cr App R 124 in particular, the second limb of *Galbraith*, based on insufficiency of evidence.

[12] The *Galbraith* test for granting such applications is modified somewhat by the fact that I am sitting without a jury and am therefore also the decider of facts in the case.

[13] The appropriate test for the court to apply is that approved by the Court of Appeal in *R v Courtney* [2007] NICA 6 namely:

> "Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to the exceptional cases where the judge can say, as did Lord Lowry in *Hasson* that there was no possibility of his being convicted to the requisite standard by the evidence given for the prosecution."

[14] The question I should ask is whether I am convinced that there are no circumstances in which I could properly convict based on the evidence I have heard.

[15] This is a circumstantial case based on a number of evidential strands including identification and recognition evidence. The principles with regards to a submission of no case to answer in a circumstantial case are set out in

Blackstone's Criminal Practice [2025] at D 16.64. The prosecution case should be taken at its height at this stage. On the proper application of the test in *Galbraith* the prosecution is not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution.

[16] In *Goddard* [2012] EWCA Crim 1756 at para [36], the court stated that the question was whether *a* jury, not *all* reasonable juries could, on one possible view of the evidence, be entitled to reach that adverse inference (see also *R (Boota) v Gwent M.Ct* [2012] EWHC 3550 (Admin)). Those principles have recently been reviewed and approved in *R v Michael Grimes* [2017] NICA 19.

[17] In *R v Courtney* [2007] NICA 6, at para [31], Kerr LCJ emphasised the importance of guarding against considering the evidence piecemeal:

> "[31] We can quite understand how the judge came to focus on the evidence of the McCulloughs and Mr Hagan since the claim that they made was the centrepiece of the Crown case. But we consider that he was wrong to isolate this evidence from the remainder of the Crown case. In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case."

[18] In *Hillier* (2007) 233 ALR 634, Gleeson CJ said at para [49]:

> "[49] In the present case, there was evidence (such as the evidence of unidentified DNA on the pyjama top) which was consistent with Mr Hillier's innocence. But the question for the Court of Appeal was whether, on the whole of the evidence, it was open to the jury to be persuaded beyond reasonable doubt that he was guilty."

[20] However, in *R v McGreevy* [NI] 125, the court said that:

> "Circumstantial evidence must be examined with great care for a number of reasons. First of all, such

> evidence could be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant."

[21] If there are such circumstances inconsistent with guilt, it is important that the court takes great care when considering the impact on the evidence overall.

[22] Since this case concerns identification evidence, I remind myself of the principles in *R v Turnbull* [1977] QB 224 that there is a special need for caution before convicting a defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification and there have been wrongful convictions in the past as a result of such mistakes. I remind myself in particular that an apparently convincing witness can be mistaken as can a number of apparently convincing witnesses. The circumstances in which the identification by each witness was made must be carefully examined and any specific weaknesses must be considered.

[23] The identifications of unmasked defendants have not been challenged. An initial challenge on behalf of McIntyre in unmasked images was wisely abandoned, since it was clear from a comparison of those images with the defendant in the dock that it was indeed Paul McIntyre. It is the identification of masked defendants that is in issue.

The identification evidence

[24] The core of the prosecution case is commercial footage from MTV which was making a documentary about Saoradh and filmed relevant events on 18 April both during the day and at night, although the fatal shooting occurred after the journalist Reggie Yates and his team had left the scene. The footage of the actual shooting is contained in poor quality mobile phone footage provided by the public, and in footage from the police evidence gathering camera.

[25] The disorder on 16 April was captured by commercial footage from a French TV company, Pangaia Productions.

[26] The defence challenge the admissibility of both the MTV and Pangaia footage on grounds of authenticity and in respect of MTV also submit that it was unlawfully obtained and should therefore be excluded under Article 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE") on the grounds that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

Police recognition evidence

[27] After the shooting of Lyra McKee, the PSNI issued a number of appeals to officers in the North West region, comprising several hundred police officers, attaching images both still and moving of relevant individuals to see if identifications/recognitions could be made. The images of unmasked individuals are contained in daytime footage. The images of masked individuals are contained in nighttime footage. For ease of reference, I have referred to the images attached to the appeals as either "daytime "or "nighttime." Appeal 24/19 which is the most contentious, is in two parts and contains both daytime stills and nighttime footage.

[28] The appeals carried a number of instructions, designed to ensure the procedure was transparent and that any identification was made in accordance with Code D of PACE Code of Practice 1989 which governs the admissibility of identification evidence in a criminal case. If an officer considered that s/he could make a positive identification s/he was required to make a note-book entry, indicate why s/he felt an identification could be made, speak to nobody about it and then make arrangements with Cyber Support Unit (CSU) on Strand Road to attend a controlled viewing to test the reliability of the identification.

[29] On behalf of McIntyre, Cavanagh and Campbell, it is submitted that the recognition evidence from the controlled viewings should be excluded under Article 76 of PACE on the grounds that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted. The defence submit that the nature and extent of the breaches of Code D have rendered the identifications unreliable and unfair.

[30] Whether or not the application is granted, it is submitted that the case should be stayed as an abuse of process, on both limbs, due to the effect of delay on memory of important witnesses and the breaches of Code D.

Imagery Analysis Evidence

[31] The main strand of the prosecution case against four of the five masked defendants (McIntyre, Jordan Devine, Gillen and Campbell), is based upon the evidence of Mr Wooller and Mr Stephens, Imagery Analyst experts. The evidence involves the comparison of clothing and other features of those

involved in the incidents on 16 and 18 April and/or with similar items owned or previously worn by them.

[32] The defence submit that the expert evidence is inadmissible on a number of grounds, including a lack of expertise in the subject matter (clothing) and breaches of the English Forensic Regulator (FSR) Guidance and Code of Practice.

[33] The prosecution submits that the imagery analysis, of itself, demonstrates a very strong case against McIntyre, Jordan Devine, Gillen and Campbell, such that the criminal standard is reached. In respect of Cavanagh, it is an important strand to the case against him. In his case, DNA and cell site evidence is also relied upon along with, to a lesser degree, the recognition evidence by police officers in controlled viewings.

[34] Before determining whether the defendants have a case to answer, I am therefore required to rule on the following matters:

(i) the admissibility of MTV footage;

(ii) the admissibility of identification/recognition evidence by police officers in controlled viewings;

(iii) the admissibility of expert evidence relating to the Imagery Analyst Mr Wooller;

(iv) the admissibility of expert evidence relating to the Imagery Analyst Mr Stephens;

(v) the admissibility of bad character applications relating to both the defendants and non-defendants who have been referred to in the course of the proceedings.

(i) The admissibility of MTV footage

[35] The issue is whether the footage is inadmissible on grounds of authenticity and/or that it was unlawfully obtained.

[36] I remind myself that the starting point for admissibility is relevance. *Cross on Evidence* states the basic proposition:

> "The main general rule governing the entire subject is that all evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded."

Authenticity

[37] The leading authorities on the authenticity of recorded evidence are *R v Murphy and anor* [1990] NI 306 and *R v Quinn* [2011] NICA 19. In *Quinn*, the court said at [13] that the prosecution is not required to prove the authenticity of video evidence before it could be admitted into evidence. Morgan LCJ said:

> "Such a video is potentially relevant evidence. It is for the jury to decide whether the video is authentic and if so what reliance to place on it. In general, the court will not prevent the jury receiving potentially relevant evidence in the absence of some statutory or other prohibition upon its receipt. Such a statutory framework governs, for example, the admissibility of alleged confessions but in our view has no application in this case. The test of whether the video is prima facie authentic is no more than a test of potential relevance."

[38] In *Murphy,* the court referred to a passage at para 655H in the judgment of Shaw J in *Robson* [1972] 1 WLR 651 before concluding:

> "We would not dissent from the point of this passage if it is that the prosecution must establish a prima facie case of admissibility by proving to the satisfaction of the judge a prima facie case of authenticity …"

[39] In relation to proof of authenticity, the court explained:

> "Authenticity, in our view, like most facts may be proved circumstantially. In the case of a video film, the direct way is to call the cameraman who took it and the court will normally expect him to be called. But if he is not available, he need not be called; other evidence will suffice if it is logically probative that the video was authentic… So, in our opinion, in the case of video recordings, the issue for the judge is, is it relevant? If it is, is it prima facie authentic? If it is, then it is admissible and it is left then to the jury or the Diplock judge to decide whether its authenticity is beyond doubt and if its contents prove or add to the proof of guilt beyond reasonable doubt."

Lawfulness of acquisition

[40] Apart from confessions to which special considerations apply, evidence obtained unlawfully is admissible subject to the court's power to exclude on grounds of fairness under Article 76 of PACE.

[41] In *Kuruma v The Queen* [1955] AC 197 at 203 Lord Goddard CJ stated:

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle."

[42] *R v Craig and Speers* [2003] NICC 19 Girvan J considered the stage at which the determination of admissibility should be made. At para [7] he said:

> "[7] The context of Diplock non-jury trials is of course different from jury trials. The function of a voir dire is to allow the tribunal of law to decide a point of law in the absence of a tribunal of fact. Magistrates and Diplock judges are both judges of fact and law. In *F v Chief Constable of Kent* [1982] CLR 682 it was stated that it is impossible to lay down a general rule as to when the question of admissibility should be determined by magistrates or as to when the decision should be announced every case being different. Issues relating to the admissibility of confessions raise a distinct issue under Article 74(2). However subject to that there is no general rule as to when admissibility shall be determined and the decision on it announced. Blackstone points out that where the defence makes a submission that magistrates should exercise a discretion to exclude evidence under section 78 (Article 76) they are not entitled to have that issue settled as a preliminary issue in a trial within a trial (*Vell v Chief Constable of North Wales* [1987] 151 JP 510). In *Halawa v Federation Against Copyright Theft* [1995] Crim App R 21 it was held that the duty of a magistrate on an application under section 78 (Article 76) was either to deal with the issue when it

> arises or to leave the decision until the end of the hearing the objective being to secure a trial that is fair and just to both parties. In some cases the accused will be given the opportunity to exclude the evidence before giving evidence in the main issues because if denied that opportunity his right to remain silent on the main issues will be impaired *but in most cases it is better for the whole of the prosecution case including the disputed evidence to be heard first because under Article 76 regard should be had to all the circumstances and fairness to the prosecution requires that the whole of its case in this regard be before the court*. In deciding, the court may take account of the extent of the issues to be raised by the evidence of the accused in the trial within a trial. A trial within a trial may be appropriate if the issues are limited but not if it is likely to be protracted and to raise issues which will need to be re-examined in the trial itself." [emphasis added]

The evidence relating to acquisition of the MTV footage

[43] A production order was granted at Londonderry Crown Court on Friday 3 May 2019 against Viacom, owner of MTV, requiring production of all digital material in relation to the events of 18 April 2019. It is an agreed fact that in correspondence prior to the granting of the order, Mr Roger Watts, solicitor, C and J Black solicitors, acting on behalf of Viacom, indicated that whilst there was no consent to the order "no active objection" would be taken. Viacom was legally represented at the hearing and once the order was made, the material was voluntarily handed over in hard drive to D/S O'Donnell, PSNI in London, the same day.

[44] D/S O'Donnell gave evidence that he believed the material handed over was an exact copy of the recording because the terms of the order were clear and there is no evidence to suggest that it was not.

The legality of making the production order

[45] The power to make a production order is contained in Part Ill of PACE, which governs powers of entry, search and seizure of materials in a criminal investigation. Article 11(1) provides for access to "excluded material" and "special procedure material", by making an application under Schedule 1. Journalistic material, defined by Article 15(1) as "material acquired or created for the purposes of journalism" falls into one of these two categories: "excluded material" or "special procedure material." There is no dispute that the MTV footage constitutes "special procedure material" rather than "excluded

material" because no duty of confidence applies or it is real evidence created or acquired for the purposes of journalism (Article 16). Article 11(1) provides for access to such material by means of an application under Schedule 1 which permits an application for a production order or a search warrant. The judge at Londonderry Crown Court was satisfied that the first set of access conditions was satisfied.

[46] The issue in dispute is whether a Northern Ireland court has power to make a production order for material held in premises elsewhere in the United Kingdom and if so, whether it was lawfully executed.

[47] On behalf of Mr Barr, Mr Larkin KC relied on the Divisional Court judgment in *Terence Duffy v The Commissioner of the City of London Police* [2021] NIQB 49, for the proposition that there is no power to make an order in respect of premises outside Northern Ireland. That case related to search warrants issued by Westminster Magistrates' Court under section 8 of the Police and Criminal Evidence Act 1984_which were subsequently endorsed by a Lay Magistrate in Northern Ireland and executed. In that case the court was concerned with the parameters of the Petty Sessions (Ireland) Act 1851 ("the 1851 Act") which governs the execution of orders outside Northern Ireland. It held that the execution of warrants permitted under the Act related to the enforcement of sentences of the court following conviction and warrants for arrest of persons and was "not to do with the investigation of suspected crime. The Act refers to "arrest, committal or levy, as the case may be because those are the ways that the warrants enforcing the punishment would be executed." They could not be executed by 'search of a property for evidence supporting an allegation' as happened in that case.

[48] In a response the prosecution relied on section 86 of the Criminal Justice and Police Act 2001 ("the 2001 Act") which deals with "Execution of process in other domestic jurisdictions." It is entitled "Process for obtaining excluded and special procedure material." Section 86(1) provides for the execution, in Scotland and Northern Ireland, of process issued by a circuit judge in England and Wales under Schedule 1 to PACE. Section 86(3) similarly provides for orders made under Schedule 1 to PACE in Northern Ireland. It states:

> "Section 27 of the *Petty Sessions (Ireland) Act 1851* (which includes provision for the execution of process of Northern Ireland courts in other places) shall apply to any process issued by a county court judge under Schedule 1 to the Police and Criminal Evidence (Northern Ireland) Order 1989 ... as it applies to a warrant mentioned in that section."

[49] The prosecution submits that section 86 of the 2001 Act was introduced because although summary processes could be backed within the different

jurisdictions, applications under Schedule 1 to PACE were not included since these were made to a circuit judge, who does not constitute a court of summary jurisdiction.

[50] Section 86(3) of the 2001 Act specifically applies section 27 of the 1851 Act to production orders. In these circumstances, the Londonderry Crown Court in Northern Ireland had power to make the production order under Schedule 1 to PACE and it was capable of execution in England.

[51] Mr Larkin, then submitted that the issue in contention was not whether there was power to execute a warrant outside Northern Ireland but whether a Northern Ireland court had power to make an order in respect of "premises" outside Northern Ireland. His argument was that since the 1989 Order extends only to Northern Ireland, granting powers to police in Northern Ireland supervised by a Northern Ireland judge, the relevant "premises" also had to be in Northern Ireland.

[52] Article 25 of PACE states that premises includes any place, any vehicle, vessel, aircraft or hovercraft, any offshore installation and any tent or movable structure. The prosecution submits that the words "any place" along with the context and purpose of the legislation demonstrate that its application is extra-territorial. It relies on *In R (KBR Inc) v Director of SFO* [2022] AC 519, where the Supreme Court considered the circumstances in which extra-territorial effect can be implied by a legislative provision. The applicable principles to be considered include:

(i) the language of the legislation, and whether it discloses any clear indication, either for or against, the extra-territorial effect.

(ii) the purpose of the legislation, and whether it could not effectually be achieved without such effect.

(iii) the practicality of enforcement.

(iv) the context of the provision, and its legislative history, including subsequent legislation, to include whether there is a close connection between a subject matter over which this country, and its courts, have jurisdiction, and another person or subject, over which it is suggested that they have taken jurisdiction, and whether "eyebrows would be raised" at the existence of such jurisdiction.

(v) the availability of "other means" by which the purpose of the legislation can be achieved, and the principles of international comity.

(vi) the safeguards and protections enacted by the legislation.

[53] Whilst on the facts of *R (KBR Inc*), the Supreme Court did not find extra-territorial effect, the prosecution relies on the principles to be applied. The purpose of the legislation is to enable documentation to be obtained for the purposes of criminal investigations conducted by the police into indictable offences. A mechanism must exist whereby one jurisdiction within the UK is able to obtain such documents from a person or company in another such jurisdiction. If the defence argument is correct, then the natural consequence would be that the terms "indictable offence" and "investigation" would also not have extra-territorial application, so that no production order could be sought in England and Wales for an investigation in Northern Ireland into an indictable offence committed there. The prosecution submit that it would frustrate the clear intention of Schedule 1 to PACE in both jurisdictions.

[54] The prosecution further submits that in determining this issue, the court is entitled to look to subsequent legislation in order to discern the proper construction to be put upon an earlier Act, where that earlier Act is ambiguous. The clear existence of the means of executing a production order made under Schedule 1 to PACE, within section 86(3) of the 2001 Act strongly supports the existence of extra-territorial effect within the earlier legislation, on its proper construction. The prosecution makes the point that parliament does not legislate in vain.

[55] It follows that a means of enforcement exists, which is a "particularly relevant consideration" when determining whether a statutory provision has extra-territorial effect. In *Masri v Consolidated Contractors International (UK) LTD and ors (No 4*) 1 AC 90 HL, Lord Mance said:

> "Whether and to what extent it applies in relation to foreigners outside the jurisdiction depends ultimately … upon who is "within the legislative grasp, or intendment "of the relevant provision"."

[56] There is a close connection between the power to make a production order in Northern Ireland and the similar power under PACE 1984 to make such an order in England and Wales. They operate in tandem, and "no eyebrows would be raised" by an order made in one UK jurisdiction having effect in another.

[57] Unlike in *KBR Inc,* mutual legal assistance is not available as between legal jurisdictions within the same state or country, the United Kingdom. There is no principle of international comity to concern the court. England is part of the same country as Northern Ireland.

[58] Whilst Mr Larkin refutes this analysis and submits that as a matter of constitutional law, the 1989 Order cannot provide for extra-territorial effect because it was made by the Queen in Council, even if the Northern Ireland

legislature intended that the word "premises" should have that effect. No authority for this proposition is advanced.

[59] The prosecution submits the 1989 Order although made by the Northern Ireland legislature, was approved by Parliament in the normal way. It is substantially similar to the English PACE Act 1984 and falls to be interpreted, as any legislation, by reference to Parliament's intention.

[60] The meaning of "premises" ultimately turns on the rules of statutory interpretation. In the recent judgment of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* [2025} UKSC 16 at para [9] the court restated the established principles:

> "[9] The general approach to statutory interpretation in the United Kingdom is well-established. The House of Lords and this court have set out the basic approach on a number of occasions, including in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349. Most recently, this court set out the approach in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 in which Lord Hodge DPSC, giving the leading judgment, stated (paras 29-31):
>
> > '29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
> >
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and

> the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

[61] In *JR 222* [2024] UKSC 35, the Supreme Court had emphasised at para [76] that:

> "[76] In addition, courts should seek to avoid an interpretation that produces an absurd result, since this is unlikely to have been intended by the legislature. In that respect absurdity is given a very wide meaning, covering, amongst other things, unworkability, impracticality, inconvenience, anomaly or illogicality: see *R v McCool* [2018] UKSC 23, [2018] NI 181, [2018] 1 WLR 2431, paras 23 and 24."

[62] In my view, any interpretation of the word "premises", other than that contended by the prosecution would be absurd. It cannot have been Parliament's intention that documents from one part of the UK could not be obtained for an investigation in another part of the UK, but that conversely, documents in a foreign jurisdiction could be obtained through mutual legal assistance.

The execution of the production order

[63] In order to execute an order outside Northern Ireland under the 1851 Act, the Chief Constable is required to endorse the order and thereafter, a Justice of the Peace and relevant others are required to authorise its execution in England and Wales. It is accepted that these requirements were not

complied with, and the issue is whether it was necessary to do so in the circumstances of this case.

[64] The prosecution submits that these requirements relate to the enforcement of orders which was unnecessary in this case because the material was voluntarily provided. The terms of the 1851 Act are therefore irrelevant.

[65] The prosecution sought leave to admit a letter from Roger Watts solicitor, now retired and outside the jurisdiction, as hearsay evidence, confirming that the decision of Viacom to co-operate with the court order would have been the same, whether or not the order was endorsed in the terms specified by the 1851 Act. The letter dated 3 September 2019 was sent to the PPS with the expectation that it would be lodged with the court.

[66] Mr Larkin on behalf of Mr Barr objected to the letter being admitted on the grounds that:

(i) the letter purporting to be from Mr Black did not bear his signature;

(ii) there was no evidence he had been acting on his client's instructions in giving the indication; and

(iii) Mr Black was acting in breach of legal professional privilege in writing the letter.

[67] The prosecution submits that it is evident from other information on the letterhead, including the reference with Mr Watts' initials, that the letter is genuine. There is no basis whatsoever for the assertion that Mr Black was not acting on his client's instructions when he wrote the letter and the court is entitled to proceed on the basis that he was acting as agent and had ostensible authority. Furthermore, there is no basis for asserting a breach of privilege – Mr Black was simply stating his client's position.

[68] I am satisfied that the letter is admissible in the interests of justice as an exception to the hearsay rules, pursuant to Article 18(1)d of the Criminal Justice (Evidence) Order 2004. I do not accept that any of Mr Larkin's objections have merit and to require Mr Watts' attendance to prove the letter would result in unnecessary delay, which is not in the interests of justice.

Conclusion

[69] I accept that the court order against Viacom was properly made and that the formal requirements of the 1851 Act have no bearing on its validity. The footage was not unlawfully obtained.

[70] In any event, even if the MTV footage had been unlawfully obtained, I would not have excluded it under Article 76 since no basis of unfairness has been raised, never mind established. This is commercial footage which can be cross-referenced with police evidence gathering footage and mobile phone footage provided by members of the public. It is clearly relevant since it shows the events as they occurred and is at the very least, prima facie authentic and admissible. There is no evidence at all to suggest that it is not reliable and authentic although whether the prosecution has proved authenticity beyond a reasonable doubt, is a matter that I will determine at the end of the trial.

[71] The only issue raised regarding the Pangaia footage is authenticity. This is also commercial footage and there is no suggestion that it has been altered in any way. I am satisfied it is also at least, prima facie authentic and I admit it along with the MTV footage. The ultimate decision regarding authenticity will be determined at the end of the trial.

[72] Mr Larkin further submits that a prosecution based on such evidence would be an abuse of process. In light of my conclusions that the production order was legally acquired and that even if there had been unlawfulness, no unfairness has resulted, I reject the submission that a fair trial is impossible or that it would be an affront to justice to try the defendants.

The admissibility of the controlled viewing evidence

[73] Following Lyra McKee's death, there was extensive media coverage of the circumstances in which she died. The arrest of suspects was a matter of intense public interest and photographs of those charged were printed along with details of their identities and hearings to determine bail applications were reported. One newspaper in particular, published photographs of the rioters with red circles around particular individuals.

[74] The possible identities of those involved in the public disorder were, not surprisingly, the subject of discussion amongst police officers, particularly those based in the District Support Unit (DSU) in Waterside station. These officers carried out a specialist role in relation to those suspected of dissident Republican activity in Derry and worked mainly in the Creggan, Bogside and Brandywell areas. The role required them to keep appraised of the latest intelligence picture including researching and familiarising themselves with persons of interest, proactively carrying out patrols of areas frequented by them with the aim of submitting intelligence sightings and carrying out stop and searches under various pieces of legislation, including the Justice and Security (Northern Ireland) Act 2007 ("the 2007 Act").

[75] Details of intelligence acquired was then logged in the police computer system (NICHE or at that time, a mobile device known as PUMA) by an officer using his unique identification number. This system was accessed daily for

operational reasons. As part of the intelligence research, current addresses, vehicles used, new associates, areas frequented, changes of appearance and behaviour and where appropriate, bail conditions were logged and accessed by police carrying out these specialist duties

[76] Evidence gathering at unofficial parades and other types of interactions with persons of interest were also logged. The particular role carried out by these officers differed from that of neighbourhood police in that they were required to have a high level of knowledge about the identities of persons of interest and to focus on these persons as a matter of priority. The evidence that these officers were very familiar with the defendants has not been challenged.

[77] The PSNI issued a number of appeals, attaching images both still and moving of relevant individuals to see if identifications/recognitions could be made.

[78] The appeals carried a number of instructions, designed to ensure the procedure was transparent and that any identification was made in accordance with Code D of PACE. The purpose of Code D is to avoid the mischief that a police officer may merely assert that he recognises someone without any objective means of testing the accuracy of such an assertion. For that reason, where there is a breach of any provision, its impact on the fairness of the admission of the evidence must be carefully assessed.

[79] In the event that an officer believed that s/he could make an identification, s/he was required to make a notebook entry to include the reason for the identification and without discussing it with anyone, contact Cyber Support Unit to arrange a controlled viewing to test the reliability of the identification.

[80] The initial controlled viewings were governed by the PSNI guidance in force at that time. Information on appendix A was read to the officer, s/he was handed an appendix B form and asked to view the footage and record any identifications. The footage could be played as often as the officer wished and could fast forward or play in slow motion. The officer was then required to submit, as soon as possible, a witness statement confirming the identification(s) made. In practice, statements were often made weeks or even months afterwards. In June 2020, new guidance was issued which governed some of the later controlled viewings. The statement had to be written before leaving the viewing suite and a new appendix C had to be completed, confirming any research that had been carried out in advance of the viewing or any information provided from any source, relevant to the identification.

[81] By 7 May 2019, relevant identifications of unmasked defendants had been made. On that date, appeal 12/19 (nighttime footage) issued consisting of 10 still images of masked individuals. No police officer indicated that they

could make an identification. Consequently, the Senior Investigation Officer (SIO Murphy) directed that a new appeal (24/19) (nighttime footage consisting of moving images of masked individuals along with daytime stills) should issue in the hope that the ability to view the movements, gait and stature of individuals would lead to identification. It is the purported identifications of masked individuals, specifically Mr McIntyre, Mr Cavanagh and Mr Campbell at controlled viewings from appeal 24/19 which is the main subject of challenge.

The evidence of Officer A

[82] Officer A was a member of DSU and familiar with relevant persons of interest. His supervising officer was Sgt Anderson, and his team of eight to 10 officers included acting Sgt Lynn, Constable Matthews, Constable Fenn and unnamed others.

[83] On 7 May 2019, he viewed appeal 12/19 (nighttime footage) but made no identification. On 9 May 2019, having viewed appeal 14/19 (daytime footage) he attended a controlled viewing supervised by Constable Jayne Parkes and on the appendix B noted identifications of: "Christopher Gillen ("known as Christie Gillen") of Balbane Pass, Londonderry, Joe Campbell of Carrickreagh Gardens, Londonderry, Jordan Devine of Synge Court, Londonderry and Paul McIntyre of Ballymagowan, Londonderry."

[84] In his statement dated 6 June 2019, he said that he had known Christopher Gillen for approximately three years at that time, Joe Campbell for approximately one year, Jordan Devine for approximately two years and Paul McIntyre for approximately seven years. The statement includes details of house numbers and dates of birth, which were not recorded on the appendix B. He accepted that these details were subsequently obtained from NICHE.

[85] On 24 May 2019, he attended a controlled viewing in relation to appeal 17/19 (daytime footage) and identified Kieran McCool, Peter Cavanagh, Joe Barr, Paddy Mellon (referred to in this judgment as Gallagher), Jude McCrory and others not before the court, who he said he had known for a number of years.

[86] On 27 July 2019, he attended controlled viewings in relation to appeals 20/19, 24/19 and 15/19 conducted by Constable Elliott and an appendix B was completed for each appeal (appeals 20/19 and 15/19 concern daytime footage and 24/19 concerned both daytime stills and nighttime footage). In relation to appeal 20/19, he identified Kieran George McCool. In his statement made on 15 August 2019, details of Mr McCool's date of birth and address were included which he had subsequently obtained from NICHE, although he said he had known him for approximately eight years, with numerous interactions.

[87] In relation to appeal 24/19 (nighttime footage) he purported to identify "Gearoid Cavanagh" and "Paul McIntyre." The following details were recorded on the appendix B:

> "Gearoid Cavanagh of Northland Road, dark peak cap, "camo" face scarf, bomber style jacket, no gloves on; actions, walking behind person with crate of petrol bombs, eventually joins in the throwing petrol bombs at police."

In evidence, he pointed him out on the screen as the person in the middle of three, in clip 4. In clip 6, he purported to identify Mr Cavanagh, again with the "camo" scarf and hat on two occasions and noted his actions as:

> "runs up towards van and runs away once it is set on fire."

In the course of the trial, this individual has been referred to as "camo man" on account of the camouflaged scarf.

[88] In daytime stills he had already identified Mr Cavanagh while unmasked describing him as:

> "…. of Northland Road wearing a Celtic FC shirt and grey trousers and bottoms and dark shoes" along with …" Joe Barr of Ard Grange, Londonderry pushing a pram dark baseball hat and dark long-sleeved top,"

and others who are not before the court, all of whom he said he had known for a number of years.

[89] In relation to Mr McIntyre the details recorded from appeal 24/19 (nighttime footage) are:

> "all dark clothing, a hat and scarf; actions noted as fixing scarf and turning round."

In evidence, he pointed Mr McIntyre out in clip 5 as a person standing with his back to the camera:

> "he's just turning around to the left there with the black hat and a black scarf up over his face in the middle of the screen."

[90] There was no indication of what features had triggered the identification/recognition of these masked individuals in either Officer A's notebook, his appendix Bs or in his subsequent statement. Two years later, on 7 September 2021, having been asked to attend a "clarification interview" in controlled circumstances he recorded for the first time, that his recognition of Mr Cavanagh was triggered by his "build, size and gait" and in respect of Mr McIntyre, by his "build, size, movement and gait. The circumstances in which the clarification interview took place are set out at paragraphs [149]–[178] below.

[91] It should be noted that although Code D requires this triggering information to be provided at the time the images were played at the controlled viewing, the police guidance read out to each officer from an appendix A, only required that it be recorded in the statement of evidence. Plainly, it was envisaged that the statement would be provided contemporaneously or very shortly afterwards when the evidence was fresh. In this case, statements were not provided until weeks or months had elapsed.

[92] In evidence, he said he was "very confident" of the recognitions he had made in July 2019. When the reason for his confidence was queried, he said it was:

> "primarily from [Mr Cavanagh's] gait, the way he carries himself in a rather … rigid fashion." He described him as being "upright and stiff … standing straight, not slouching."

Officer A accepted that he had no expertise in gait analysis and that no expert had been instructed by the prosecution in respect of Mr Cavanagh. He said he would describe Mr Cavanagh's build is medium and his height approximately 5ft 8 or 5ft 9.

[93] Officer A was asked why he had failed to recognise the same masked individual as Mr Cavanagh when he had previously viewed the four still images of Camo man in appeal 12/19 (nighttime footage) even though the build and height could be seen or why he had failed to do so from other moving footage where gait could be observed. He said he had no explanation but maintained his positive identification.

[94] In evidence, he said he had had numerous dealings with Mr Cavanagh, often in very close proximity and was very familiar with his appearance. His first dealings with him occurred on 2 August 2014, outside Strand Road police station in an interaction which took place over a period of time. On 12 September 2024, he was asked to provide a complete list of his dealings with Mr Cavanagh prior to 18 April 2019 from the NICHE system and 21 interactions were recorded, none of which have been challenged.

[95] Officer A said that he was also very familiar with Mr McIntyre's appearance and provided a complete list of his dealings with him between November 2015 and prior to 27 July 2019, when he first identified him from moving images at a controlled viewing. Fifteen interactions were recorded, none of which have been challenged.

[96] In cross examination, the extent of Officer A's access to identification details from NICHE records of Mr Cavanagh and Mr McIntyre, and others, shortly before and after controlled viewings became apparent. On 21 April, he had also accessed the Lyra McKee murder investigation file on the system, without any operational reason. It is not possible to say what the file contained on that date.

[97] By 7 May, Paul McIntyre was deemed a suspect and on 8 May 2019, appeal 14/19 issued (daytime footage). It was viewed by Officer A at 17:12 hrs. Less than an hour later, at 17:14 hrs, he conducted a search for Paul McIntyre retrieving 16 different descriptions him within eight seconds. Each description automatically retrieved two images and a large number of descriptions had photographs of head and shoulders. The images are postage stamp sized when they initially appear and can be enlarged.

[98] On 9 May, Paul McIntyre was arrested and at 09:32 hrs Officer A made a note in his notebook that he believed he could identify Mr McIntyre from the 14/19 appeal. He also indicated that he could identify Mr Gillen, who had also been deemed a suspect by 7 May and was arrested on 9 May. His email to CSU at 09:56 hrs said:

> "Folks, I can ID persons re 14/19. Happy to do controlled view when it suits."

[99] On 9 May, at 13:25 hrs, Officer A accessed NICHE in relation to Christopher Gillen and retrieved two images. Mr Gillen's custody record was opened which would have contained not merely photographic images but also personal details including addresses, height and unique features as well as the specific allegations against Mr Gillen relating to this case. One minute later, Officer A selected the "associates" tab which would have indicated both associates and family members before viewing the appeal again at 13:45 hrs.

[100] On 8 May, he also accessed NICHE in relation to Joe Campbell and a Mr McCaughey, who is not a defendant and on 9 May at 09:32 hrs, appeal 14/19 (daytime footage) was viewed for a second time, followed by a NICHE search in relation to Joe Campbell. At 10:01 hrs and 10:02 hrs, he searched for two family members of Joe Campbell.

[101] In the afternoon of 9 May, Officer A, along with a number of his colleagues from Waterside station, attended the controlled viewing with Constable Parkes. It was at this controlled viewing that he identified: Christopher Gillen ("known as Christy") Joe Campbell, Jordan Devine and Paul McIntyre.

[102] Officer A did not record in his notebook the searches that he had carried out on 8 May in relation to Mr McIntyre or the descriptions and images that had been retrieved either automatically or by specific search. Nor did he make that information known to Constable Parkes.

[103] Officer A accepted that in advance of preparing his statement of 6 June, it would have been common practice to open up a NICHE profile and extract whatever information he considered necessary to put into the statement, generally dates of birth or addresses. He said that the additional details in his statement relating to Paul McIntyre had been obtained in that way, but in fact, the record shows that he did not access NICHE on the date the statement was made. When asked to explain the anomaly he suggested that sometimes he would type the statement in draft and save it to a folder before printing to ensure it did not get lost. It was possible that the information could have been on a prior statement. He said he had no recollection of speaking to his colleagues who had also provided statements with the same date of 6 June, in relation to the same controlled viewing.

[104] On 8 July 2019, appeal 24/19 (nighttime footage and daytime stills) issued which included moving images of masked individuals and it was viewed by Officer A on 12 July. On that date, he accessed NICHE in relation to persons who are not before the court.

[105] On 27 July 2019, Officer A attended three controlled viewings in relation to appeals 20/19, 24/19 and 15/19 (daytime and nighttime footage). At 13:44 hrs, an hour beforehand, he accessed appeal 24/19 again and at 14:00 hrs, made a notebook entry relating to the identification of Paul McIntyre in clip 5. He could not recall why he had been carrying out research prior to attending a controlled viewing.

[106] Prior to the controlled viewings on 27 July, Officer A also carried out searches in relation to Billy Elliott (the defendant now deceased), Joe Barr and others who are not before the court and identified them on the appendix B.

[107] Between 9 May 2019, when he attended the first controlled viewing and 27 July 2019, Officer A had carried out a number of further searches on NICHE:

(i) on 13 May 11:53 hrs, he retrieved and enlarged images of Christopher Gillen;

(ii) on 14 May at 12:51 hrs, he viewed the investigation file in relation to the Lyra McKee case;

(iii) on 24 May and 10 June, he again viewed appeal 14/19, which related to the controlled viewing that had already taken place and at 16:45 hrs on 10 June he selected the "warnings/flags" tab for Mr McIntyre which displays warnings such as bail conditions and also viewed intelligence reports and enlarged images;

(iv) on 16 June searches were carried out in relation to Christopher Gillen and further searches were conducted from 18 June onwards; and

(v) On 19 June, he again viewed appeal 14/19 along with the 12/19 appeal which was the first appeal consisting of still images of masked individuals and from which he had failed to make any identification.

[108] The fact that these searches had been made was not communicated to the identification officer at the controlled viewings on 27 July.

[109] Officer A was challenged about his apparent inability to recall important matters of detail including events, meetings and emails which he agreed were unusual events. It was submitted that this could be contrasted with his purported ability to recall with confidence how Mr Cavanagh (and Mr McIntyre) moved or walked, enabling him to identify them although their facial features were fully disguised.

[110] He explained that these were people whom he knew and recognised as a result of his specialist police duties in DSU over a long period of time.

[111] The court notes that it is an agreed fact that Officer A misidentified two persons from footage in Op Arbacia (separate Crown Court proceedings). This goes to show the inherent dangers in identification evidence even by witnesses who are convinced of its accuracy.

[112] It was also noted that during the period that he had accessed NICHE in relation to defendants, he had also accessed the files for individuals who have never been suspects in this trial, such as Feargal Melaugh and Jamie McCaughey, and that the reason for the researches may have been intelligence related, rather than to assist in any identification.

[113] Whilst he did not dispute the contents of the NICHE audit, he maintained that operational requirement would have been the only reason for his access. He denied the suggestion that his modus operandi was to "NICHE research" individuals whom he subsequently identified at controlled viewings.

[114] Officer A accepted that he contravened the controlled viewing procedure, that he knew the procedure that ought to have been followed and that without the objective evidence from the NICHE audit, the court would have been unaware of information which may have a bearing on the reliability of his identifications.

[115] However, he denied that neither the NICHE research undertaken, nor any other improper communications had influenced his identifications at the controlled viewing of appeal 24/19, maintaining that his specialist knowledge as a member of DSU, enabled him to identify both masked and unmasked individuals.

The evidence of Constable Matthews

[116] On 10 May 2019, Constable Matthews viewed appeal 14/19 (daytime footage), made a notebook entry indicating that she could identify a person from a still image, and contacted Cyber Support Unit. She attended a controlled viewing the same day. At that viewing, she recorded on the appendix B that she could recognise Christopher Gillen, whom she had known for approximately three years, Joe Campbell, whom she had known for approximately five months, Jordan Devine, whom she had known for approximately one year, and Paul McIntyre, whom she had known for approximately four years.

[117] On the same date, Constable Matthews viewed appeal 15/19 (daytime footage) followed the same procedure and attended another controlled viewing. At the viewing, she recorded on the appendix B her recognition of James Devine (brother of Jordan Devine) whom she had known for approximately 10 months. In evidence, she said that the detail of his house number contained in her statement of evidence came from the NICHE computer system, although she was aware that he lived in Synge Court.

[118] On 10 July 2019, she viewed images from appeals 17/19, 20/19, 21/19 and 24/19 (mixture of daytime or nighttime footage), followed the same procedure, and attended a controlled viewing on 11 July 2019 in relation to appeal 24/19 (nighttime footage). She recorded on the appendix B that "3 seconds in" she recognised Joe Campbell as a masked individual from the moving images. She described him as wearing:

> "a hooded black jacket with his hood up, black scarf over lower face exposing eyes, dark tracksuit bottoms and bright white trainers, walking past shop fronts on Central Drive."

She also recorded on the appendix B her recognition of Joe Campbell in clip 2:

> "standing at the end of railings on Central Drive towards Fanad Drive, accompanied by a smaller male, stood right side of Campbell, wearing black hooded coat with hood up, scarf covering mouth and nose from brow to bridge of nose visible, dark tracksuit bottoms and bright white trainers."

[119] When challenged about her ability to identify the masked individual, she agreed that the quality of the clip was relatively grainy which made it difficult to make out the person's eyes. She was also asked to watch clip 3, 22 seconds long, in which she had made her identification after 12 seconds, and asked whether she could detect an abnormal gait. She said it was a combination of his movements when he walked, along with his build and posture, but it was clip 2 which gave a better view of the manner of his walking.

[120] Constable Matthews made her statement relating to the 11 July viewing on 30 August 2019. In that statement she referred to the reasons for the identification of Joe Campbell. The statement records:

> "I've known Joe Campbell for approximately seven months and I've had a number of dealings with him. On 26th March 2019, I was on mobile patrol of Rossville Street, Londonderry … I observed Joe Campbell on foot for approximately three minutes. My attention was drawn to his abnormal gait and he appeared laboured when progressing along the street."

[121] She gave a similar account of the incident in the statement made in September 2021 after the "clarification" viewing.

[122] In evidence, she described that incident in March. She gave a similar description of him appearing "laboured" and as having an abnormal gait. She said he had his back to the police vehicle, but she could identify him immediately, describing him as fairly heavily built, and it was his build that triggered the identification. She was asked to describe what she meant by "laboured" and she explained that he did not appear to be moving with ease, it seemed like some effort was involved. She and her colleague conducted a stop and search, and she stood approximately two feet away from him whilst her colleague carried out the physical search. She had a clear, unobstructed view of his build and posture.

[123] Although she said this was one of multiple occasions when she dealt with him, she agreed that she did not have a notebook entry for any of them and the system recorded only 26 March 2019 stop and search and a sighting recorded on PUMA. However, the NICHE audit reveals that on 30 August

2019 (the date of her statement), she searched for him and one of the searches related to 26 March 2019. The entry recorded only the date of the search – not information relating to his appearance or any reference to "laboured" walking.

[124] In re-examination, she was asked to describe "his single most obvious physical feature" and she said it was his build and clearly reluctant not to cause offence, added "he would be very overweight." She also said that although it was difficult to see Mr Campbell's face because of the black scarf covering his lower face, she saw nothing which differed from the person she knew as Joe Campbell.

[125] Constable Matthews accepted in evidence that after the committal proceedings, she received her audit record from NICHE and that she had been asked to make a statement concerning her NICHE access relevant to her identifications between 9 May 2019 (the day before she viewed any police appeals) until 30 August 2019.

[126] As well as searching for Mr Campbell on 30 August, she agreed that she had searched for him on 10 May 2019, an hour and a half after identifying him, and that the system automatically retrieved two of his images, thumbnail in size. At 11:38 hrs she enlarged one of the images. She said this is something she would do routinely to confirm the accuracy of the profile retrieved. Asked why she was accessing NICHE for his profile after she had identified him at a controlled viewing, she said she assumed it was to complete the statement made on 10 May 2019. She needed the details: name, DOB, address. After enlarging the image, she opened the addresses tab, and 14 minutes later searched for him again, although she said she did not know why.

[127] On 11 May, she was also shown further images from appeal 24/19 (nighttime footage) and a new appendix B had been completed. As well as others who are not defendants, she recorded an identification of "Peter Cavanagh (junior)" whom she had known for approximately three years. She had also recorded an identification of Joe Barr whom she had known for approximately four years.

[128] She had then completed another controlled viewing in relation to appeal 20/19 (daytime footage) and identified Kieran McCool, whom she said she had known for approximately four years. She had also identified others who are not defendants.

The evidence of Sgt Anderson

[129] On 10 July 2019, Sgt Anderson viewed a number of images from appeal 24/19 (nighttime footage) made a notebook entry and contacted CSU. The following day 11 July, he attended for a controlled viewing with Constable

Elliott, the identification officer. He recorded on the appendix B an identification of "Peter Cavanagh junior." He described him as wearing:

> "a dark baseball cap, a facemask up to his nose, black jacket, dark bottoms, dark trainers with a NIKE tick and a white sole, walking along Central Drive towards Fanad Drive."

In evidence he pointed him out as the male wearing the camouflage mask.

[130] In his statement dated 1 September 2019, he had added details of address and date of birth as - Flat G, 19 Northland Road. He said he believed he would have obtained that information from NICHE.

[131] Sgt Anderson said he had had a number of dealings with Mr Cavanagh during the period that he had known him, of between two to three years:

(i) On 2 June 2018, accompanied by a Constable Houston he had assisted in relation to a stop and search under the 2007 Act, after a blue Vauxhall Astra car had been stopped and the driver had been Jude McCrory. On that occasion Sgt Anderson referred to him as "Pete Cavanagh." He knew him as Pete, Peter or Gearoid Cavanagh.

(ii) On 19 March 2019, he stopped and searched him under the 2007 Act in an interaction that lasted approximately 10 minutes involving face-to-face contact and a time when Mr Cavanagh was staring directly into his eyes

[132] Sgt Anderson was then shown further images from appeal 24/19 (daytime) by Constable Elliott and recorded identifications of three persons who are not defendants, as well as "Mr Peter Cavanagh junior" and Joe Barr. He said he had known Mr Barr for between three to four years and had had a number of dealings with him in his duties in the DSU.

The evidence of D/C Gary Moore and the Waterside viewing

[133] D/C Moore was appointed receiver for the Lyra McKee investigation on 7 May 2019. As receiver, he was part of the Major Investigation Team (MIT) acting as a link between the Senior Investigation Team and police officers on the ground. In effect he had an overall "bird's eye view" of everything that was happening in the investigation and was very involved in it. Although he was not the initial receiver, he accepted that upon appointment he appraised himself of all relevant developments.

[134] In the course of his duties, he exhibited the still images and the moving footage for the purposes of police appeals. Between 30 June 2019 and 1 July

2019, he reviewed CCTV footage contained within the MTV footage, to identify moving images of masked rioters. He identified six clips in total, and these were subsequently used in appeal 24/19 (nighttime footage) which was then uploaded to the police intranet. DC Moore said that he then opened and reviewed the six video clips and noticing that the quality was not as good as the working copy that he had been provided with, contacted CSU. Constable Gormley confirmed that the software adversely affects the quality of the footage when it is uploaded onto the intranet.

[135] DC Moore said that he explained the significance of these particular clips for identification purposes, in particular, the face, gait and build of masked rioters and was told there was nothing that could be done to enhance the quality but that the better quality footage would be available at any controlled viewing that an officer might attend.

[136] Following on from that conversation, DC Moore emailed Sgt Anderson from the DSU at Waterside to ask when his team was next on duty. He was aware that the team had carried out a lot of controlled viewings in relation to still images and he had decided to show them the better quality moving footage of 24/19 that he had, to give them the best opportunity of making a positive identification. He made this decision without the knowledge or authority of any member of the Senior Investigation Team.

[137] He arrived at Waterside and played the footage to Sgt Anderson and some members of his team on 10 July 2019. He made no notebook entry of the event or what occurred, nor did anyone else who may have been present.

[138] It is unclear exactly who was present. Constable Matthews and Sgt Anderson were certainly present. DS Moore initially gave evidence that Officer A was also present, although when asked by prosecuting counsel to refresh his memory from the statement he had made 10 months after the event, on 3 May 2022, he said that he had made an error, Officer A was not present, but Constable Neill and Officer C were present. Both Officer A and Officer C have denied being present and it is an agreed fact that Officer A was not logged onto any terminal in Waterside police station on 10 July 2019. There is also evidence that his duties at that time required him to parade from a different police station. Nevertheless, the defence does not concede that he was not present. Officer Neill has confirmed he was present but says he made no identifications.

[139] DC Moore said appeal 24/19 (nighttime footage) had been uploaded, consisting of moving images of masked rioters (as well as some daytime stills) because the still images of masked rioters exhibited with appeal 12/19 had not resulted in any identifications. He explained to those present that the quality was not as good as the footage that would be used in a subsequent controlled viewing and that he was going to play them six clips of the better quality

footage, so that they could look at "partial face, gait and build" for potential identifications.

[140] He said he was unaware whether those present had already viewed appeal 24/19 because nothing was said to that effect. However, the PPS has since disclosed that Constable Matthews had looked at appeal 24/19 at 10:26 hrs on 10 July, made a notebook entry at 11:30 hrs and had looked at the footage again at 12:05 hrs, 12:09 hrs, 12:36 hrs and 15:27 hrs. Sgt Anderson had looked at appeal 24/19 at 15:50 hrs, less than an hour before it was played by DS Moore.

[141] DS Moore said he was not sure whether he had played each clip in totality or in part. His intention was to pinpoint masked individuals of interest for identification purposes. He said he would have stopped at various points, pausing the clip if there was a masked individual or pausing on request. He was asked whether there was any discussion between them and he said:

> "I could hear voices … but I couldn't distinctly hear what was being said at the time, or if it was one officer or, you know, multiple officers that were present."

[142] However, DS Moore did confirm that Constable Matthews said the name "Joe Campbell" and Sgt Anderson said the name "Gearoid Cavanagh" or "Cavanagh." He did not recall Officer A (immediately corrected in evidence to Officer C) or Constable Neill making any comment about the footage. He said he did not react in any way to the persons identified, although he had also suspected that Joe Campbell was the same person that Constable Matthews had identified. This was disputed by Sgt Anderson who told the court that DS Moore had responded to the name "Cavanagh" by turning towards him and nodding, in confirmation.

[143] DS Moore said that after playing the clips on the police laptop, he told those present that if they felt they could make an identification then they should contact the CSU to take part in a formal identification procedure. Constable Matthews and Constable Neill said that they may be able to do so and if they could, they would do so before 12 July.

[144] DC Moore said he felt "embarrassed" at showing the footage in this way but at the time he thought it was the right thing to do because of the software impact on the quality of the footage exhibited with the appeal. In hindsight, he accepted it was wrong, that he acted in breach of the Code of Practice in a number of respects and that he should not have done so without seeking direction from the SIO, Jason Murphy.

[145] He said he did not make a notebook entry or inform his superiors that two officers had identified masked rioters because he did not know whether they would contact CSU or not. When pressed, he said:

> "I suppose whenever I showed the clips, I knew it was outside of the Service procedure"

but he felt he had no choice. He did not ask anyone to stay silent about the viewing and did not disguise his entrance to Waterside. He did however candidly admit that at that time, he was unaware that any access to a police system leaves a digital footprint.

[146] During cross-examination, the prosecution disclosed that whilst at Waterside, DS Moore also viewed appeal 12/19 and appeal 14/19, along with the "poorer quality" 24/19 footage although he could not recall why he might have done so. He had also viewed a number of appeals unrelated to this investigation, although he had no recollection of it.

[147] DS Moore was re-examined by the prosecution about a police chart prepared prior to the Waterside viewing, noting those suspected as masked rioters in the footage exhibited to appeal 24/19. It confirmed that the person suspected by police in clip 1 was not identified by anyone present at the Waterside viewing although the person suspected in clip 2 was so identified. In clip 3, two of the three persons suspected by police were not identified by anyone present. Although Sgt Anderson identified Mr Cavanagh from clip 4, he was not a suspect at that time.

The evidence of Constable Neill

[148] Constable Neill confirmed that he had been at the Waterside viewing but did not record it in his notebook. He was asked who else was present at the Waterside viewing, and he said he couldn't recall if Officers C or A had been there. He could not recall what DS Moore had said when he arrived, nor could he recall any discussions whilst the footage was playing. He did not know if arrangements had been made in advance to come to the station and assumed that the footage was shown to them because it was thought their team would be able to identify the suspects. In hindsight, he agreed that it was "odd" but presumed it was directed by SIO Murphy. He was asked if he had not identified anyone during the Waterside viewing, even unmasked persons he knew. He said he had no explanation.

How the Waterside viewing came to light

[149] The circumstances in which the Waterside viewing came to light within the wider PSNI are disputed. However, the following sequence of events is agreed: prosecuting counsel Mr Steer KC raised a query about the

identifications of masked individuals from images attached to appeal 24/19 (nighttime) with the PPS, who in turn emailed SIO Murphy on 8 July 2021. In response, the SIO sought clarification of the circumstances in which Mr McIntyre, Mr Cavanagh and Mr Campbell had been identified in controlled viewings undertaken by Sgt Anderson, Officer A and Constable Matthews.

[150] An email from Mr Murphy was forwarded to the three officers by DS Moore on 17 August 2021. Although DS Moore told the court that he did not ask the reason for the clarification, a note disclosed by the prosecution indicates that the issue was discussed with DS Moore and DC Hamilton before the email was sent.

[151] The email stated:

> "From: Detective Superintendent Murphy
>
> To: Constable …
>
> Re: Request for clarification
>
> On …, you conducted a controlled viewing of briefing page 24/19, during which you recognised, a person you refer to as ... The documentation which was completed as a result of that identification needs some further clarity, in order to comply more fully with the requirements of paragraph 3.37of the PACE (Northern Ireland) Codes of Practice, specifically:
>
> (a) Whether you knew or were given Information concerning the name. or identity of any suspect prior to conducting your earlier controlled viewing;
>
> (b) What you had been told before the viewing about the offence, the person(s) depicted in the Images or the offender, and by whom;
>
> (c) Whether you were familiar with the location shown in any Images or the place where you saw the individual and if so, why;
>
> (d) The reason for you recognising the individual; and
>
> (e) What specific features of the image or the individual triggered your recognition? If you

wish, you may express the degree of confidence you have in your identification.

Senior Counsel has requested a further statement from you, covering the points above in as much detail as possible and in respect of each person that you recognised. It is recognised that the recognition took place some time ago. To enable you to detail the reasons for your recognition, you may if you wish, view again the images from which your recognition emanated. Such a viewing will be conducted in controlled conditions.

This is not a further controlled viewing - it is a refresh of your memory to enable you to provide the requested clarity. Any viewing of the images will be managed by an identification officer who has not been involved in the viewings previously conducted.

I would ask that if you view images, you make notes about points (a)-(e) above from which your further statement may be made. The statement should be made immediately after the viewing takes place and handed to the identification officer, together with any notes you have made.

My team will be in touch with you shortly to establish whether you wish to view the images again, and if so, arrange for you to do so.

Many thanks for your continued support.

Jason Murphy
Detective Superintendent - Serious Crime Branch."

[152] On 23 August 2021, DS Moore met with Constable Gormley and Sgt Catterson to brief them as to the conduct of the "clarification" interviews. He did not disclose the Waterside viewing to them, although he accepted that he ought to have done and that he had a clear conflict of interest by that stage.

[153] Nor did DS Moore inform them that he was aware that officers, including those requested to attend these "clarification "interviews had carried out relevant research before attending the earlier controlled viewings. Constable Matthews had even accessed NICHE before attending the controlled viewing for 24/19, the appeal in respect of which clarification was being

sought. This information had come to light as a result of disclosure requests during the committal proceedings of which DS Moore was aware.

[154] SIO Murphy had directed DS Moore to telephone the three officers to ensure they understood the directions in his e-mail. There is no note that he spoke to Officer A and he had no recollection of doing so.

[155] As a result of both communications, Sgt Anderson gave evidence that he expressed concerns to DS Moore on 24 August about the fact that senior management did not appear to have been aware that he and others had been shown 24/19 at Waterside Station in uncontrolled circumstances - not that the viewing had happened in the first place. There is no note of this conversation having taken place. Sgt Anderson, Constable Matthews and Constable Neill all gave evidence that they had understood that the direction to view the (Waterside) footage had come from SIO Murphy and that there was nothing improper in it being shown prior to the controlled viewings.

[156] DS Moore said that he had told Sgt Anderson that he "should simply be open and honest about the footage being shown." On the same date, DS Moore updated SIO Murphy for the first time about it and agreed to prepare a report. He said he had always intended to prepare it once the clarification process had been concluded. He denied that he would never have revealed the Waterside viewing had Sgt Anderson not expressed his concerns about the email from SIO Murphy and his realisation that it was about to be discovered. Although DS Moore prepared a report, he was not asked for a witness statement until May 2022, three months after he ceased to be receiver for the investigation.

[157] The prosecution submits that I should conclude that the Waterside viewing came to light as a result of Sgt Anderson voluntarily disclosing it to senior police, through his conversation with DS Moore. This conclusion would support the prosecution case that the officers involved had no concerns about the propriety of the viewing, there was no secrecy about it and whilst it is now accepted that it ought not to have occurred, no officer was acting in bad faith.

[158] The defence disputes the prosecution account of events and the proper inferences to be drawn from the facts. The defence submits that the absence of any note or communication by any officer that as a group, they had had an "informal" viewing points plainly to their appreciation that such a viewing was in breach of Code D. The defence submits that the true circumstances in which the Waterside viewing came to light are as follows:

> "Constable Matthews, who was the first officer to attend for the clarification viewing on 3rd September 2021 told Constable Gormley, the Identification Officer, about it. Constable Gormley gave evidence that Constable Matthews was clearly upset and reluctant to take part in the viewing, so

> he asked her was there something he should know about. She told him that they had had a prior viewing of the footage outside of the CSU procedure and she was concerned about the points SIO Murphy had directed should be covered in her statement. In particular, she was concerned about the first two points in the email, namely whether she knew or had been given information about the role or identity of any suspect prior to conducting to her 24/19 controlled viewing, and whether she had been told before the viewing anything about the offence or the suspects depicted in the images. She said she felt somewhat pressurised into making a statement that day although she didn't say who was exerting the pressure. In evidence, DS Moore, denied exerting any pressure.
>
> Constable Gormley told her that he had not been aware of the Waterside viewing and that he was concerned about the integrity of the 24/19 controlled viewings as a result. He had a number of specific concerns including the fact that it had been a group viewing and DS Moore, as an MIT investigator, should never have been part of any identification process. Constable Gormley told Constable Matthews that he could not force her to make a statement, and he then involved Sergeant Catterson, who directed that the controlled viewing would not proceed. Constable Matthews was advised to seek further advice from her Sergeant, who was Sgt Anderson."

[159] There is no note to confirm the conversation between Sgt Anderson and DS Moore after SIO Murphy's request for clarification was received. In my view, it was clear at that point that the Waterside viewing was about to be discovered and is likely to have been the trigger for DS Moore's report to SIO Murphy. I do not accept that Sgt Anderson was "voluntarily" informing his superiors about the viewing through his conversation with DS Moore. I conclude that he was concerned when he got SIO Murphy's email, as was Constable Matthews, because he knew that the circumstances of the viewing were improper. Those outside the Investigation Team only became aware when Constable Matthews attended with Constable Gormley.

[160] Later on 3 September, Constable Gormley received two phone calls from Sgt Anderson and Officer A indicating that they would not be attending CSU until further direction had been sought. Someone had clearly told them what had happened, most likely Constable Matthews.

[161] Constable Gormley then received a phone call from DS Moore, asking him about the circumstances of Constable Matthews' attendance and the situation was explained, along with his concerns about the integrity of the

viewing process and the fact that DS Moore had never informed him about the Waterside viewing during the briefings for the September clarification viewings.

[162] DS Moore apologised for not informing CSU, but he also said that he had made a deliberate decision not to do so. Constable Gormley told DS Moore that he would make no decision regarding further statements from the three officers because he had to remain impartial. Constable Gormley had no further involvement in this process. He was never asked to make a statement, and these events only came to light in disclosure from PPS to defence.

[163] Constable Gormley was asked about the NICHE research that had been carried out by a number of officers before attending the controlled viewings. He said that none of the officers had brought this to his attention and if they had, it would have given rise to concern. However, the important issue was transparency, and whether the research might have had an impact on the reliability or the independence of their identification.

[164] Constable Parkes who supervised some of the controlled viewings confirmed that none of the officers who attended on 9 and 10 May 2019 had brought to her attention that they had been given information, either by accessing NICHE or through conversations with other officers. If she had she been aware eg that images of suspects had been enlarged prior to attending, she would have sought advice from her supervisor.

[165] Constable Gormley was asked about his understanding of the status of the September "clarification" viewings and why they were not to be conducted in accordance with the 2020 guidance, including the completion of an appendix C. He said that was the direction that was given to CSU.

[166] Sgt Anderson subsequently did attend CSU on 7 September 2021 after confirmation from SIO Murphy that he had not been aware of the Waterside viewing and that any impact it may have on the identifications was the responsibility of DS Moore and MIT, and it was neither Sgt Anderson's responsibility, nor any member of DSU. He also explained the reason he had sought clarification and asked that the viewing be conducted if it was necessary in order to answer the queries set out in his original email.

[167] When Sgt Anderson was questioned about the reason he had indicated to Constable Gormley on 3 September that he would not attend the viewing until further direction, he said he had no notebook entry for that date and could not recall anything about it. However, documents disclosed from the PPS appear to indicate that on 3 September, he had reported his concerns to his line manager, Inspector Hamilton, who in turn liaised with SIO Murphy.

[168] On 7 September, Sgt Anderson watched the clip from which he had recognised Mr Cavanagh at his earlier controlled viewing on 10 July 2019. In his statement of 7 September, he confirmed that the Waterside viewing had occurred prior to his identification of Mr Cavanagh and that he had believed SIO Murphy had directed it. DS Moore had played, rewound and paused the footage at his request and at points of his own choosing. He said he could not recall how many officers were present, but he recalled at one point saying aloud, "that's Pete Cavanagh." He had not invited a response, but DS Moore quickly nodded his head as if to confirm what he had said.

[169] He was asked how he recognised Mr Cavanagh in the footage, and he said it was the way he moved, walked and stood. He said it was very distinct and recognisable.

[170] In relation to the controlled viewings in 2019, he agreed that although he had identified Mr Cavanagh as the masked person, he did not identify any of the unmasked people whom he knew. He denied that he had been told to focus on the masked individuals only, as the others had already been identified. He agreed that it was not possible to see the colour of the masked man's eyes, and it was his gait, his stance which was the identification trigger. Although he had only referred in his statement to Mr Cavanagh's gait, in evidence he said that the term included his body composition, build and height. It was pointed out to him by the defence that at the committal proceedings he had not referred to height or build only to gait, the way he walked, and his stance and when two images of the person standing were shown to him, his stance did not assist in identification.

[171] Sgt Anderson was also asked why he had failed to identify the same masked person in the stills exhibited to appeal 12/19, if features other than gait were the trigger. He said he did not recall viewing the still or why he had discounted it.

[172] In relation to searches he had conducted on NICHE, he said he had been aware at the time that "every key stroke on a police computer is recorded …" However, when the NICHE audit was provided to him, before the second committal proceedings (NICHE audits having been obtained for the first time, during the first committal proceedings at the request of the defence), his response was "why are you sending me this?", and "what's this all about?" He accepted that the 2020 change in police identification procedures specifically prohibits access to NICHE unless there is a good operational reason, and if so, the reason must be recorded.

[173] As Sergeant, responsible for his DSU team, he accepted that he ought to have informed his line manager Inspector Hamilton of anything that might have contaminated the identification process and that included NICHE

research in advance of controlled viewings carried out either by him or his team.

[174] In evidence, Constable Matthews gave her account about the Waterside viewing. DS Moore arrived and made herself and her colleagues aware that he had footage to show them in the office. The lights in the office were turned off to assist in the viewing. She believed that the viewing was at the direction of SIO Murphy and it did not occur to her that there was anything improper about it. DS Moore did not tell her to keep it secret, and she wasn't under the impression that it was to be kept secret. She said she couldn't confirm with 100 per cent certainty who else was present at the Waterside viewing, although she said Constable Neill, Sergeant Anderson and Officer C were present. When it was pointed out that Officer C had denied being present, she said she was not aware of her denial. Although she gave evidence that the first time she had viewed the images was at the Waterside viewing, subsequent disclosure from the PPS has confirmed that she had viewed the images earlier that day, before that viewing took place.

[175] Contrary to DS Moore's evidence, she said she did not recall saying Joe Campbell's name out loud during the Waterside viewing. She said Mr Campbell was a relatively new face to this group of individuals and although she was aware of him, she didn't think a lot of other officers were.

[176] She said she recognised Joe Campbell from the footage shown by DS Moore and did not give any indication of what had triggered the recognition. She said she wasn't prompted by anyone and she didn't recall anyone else suggesting that it might be or was Joe Campell.

[177] On 3 September, when she attended for a clarification viewing, she agreed that she had expressed concerns to Constable Gormley because she had never been asked to do a re-run of a controlled viewing before. She also agreed with his account of what happened although she denied feeling pressurised into making a statement. She said she wanted to be transparent and if she felt pressure, it was because of the timescales involved. She said she understood what was required and was not compelled to make a statement.

[178] After the viewing was stood down by Sgt Catterson and Constable Gormley, Constable Matthews subsequently returned to CSU on 8 September to undertake the clarification interview and made a statement confirming the points set out in SIO Murphy's email. Constable McMullan had been tasked to replace Constable Gormley as Identification Officer. Constable Matthews confirmed her identification of Joe Campbell and in evidence denied that her July 2019 identification was influenced in any way by the Waterside viewing.

The evidence of Sgt Lynn

[179] Sgt Lynn attended a number of controlled viewings at which he identified relevant persons during daytime footage when they were unmasked. On 1 September 2021, he attended CSU and watched footage from appeal 15/19 (daytime) which came from the 720 Bar close to the Saoradh office. He identified Jordan Devine in a number of clips, walking on the road wearing a black Hunger Strike t-shirt with 81 on it, navy tracksuit bottoms and white shoes. He said he had known Jordan Devine for four years at that point, as a result of numerous interactions in his capacity as a member of the neighbourhood policing team.

[180] Both Sgt Lynn and a number of other officers confirmed that they had accessed NICHE and obtained identification details, such as house numbers, addresses and dates of birth which were incorporated into statements after controlled viewings. But, since he also accessed NICHE as part of his routine duties he was unsure whether the information came about as a result of deliberate research or not.

[181] He was specifically asked about the procedure for countersigning police statements and the propriety of one identification witness countersigning the statement of another.

[182] Sgt Lynn was asked about the process for countersigning statements, and whether it was appropriate that fellow identification witnesses would countersign each other's statements. He said, while he had countersigned statements as well as making his own, he had no reason to look through anyone else's statement to see who they had identified.

***Is the recognition evidence of the police officers at the controlled viewings admissible*?**

[183] In Northern Ireland, the PACE Code of Practice D came into effect after 31 May 2015:

> "**Code D**
>
> Code D, paragraph 1.2A states:
>
> "1.2A In this code, separate provisions in Part B of section 3 below apply when any person, including a police officer, is asked if they recognise anyone they see in an image as being someone they know and to test their claim that they recognise that person as someone who is known to them. Except where stated, these separate provisions are not subject to the eye-witnesses identification procedures described in paragraph 1.2."

Part B of section 3 states:

(B) Evidence of recognition by showing films, photographs and other images

3.35 This Part of this section applies when, for the purposes of obtaining evidence of recognition, any person, including a police officer:

(a) views the image of an individual in a film, photograph or any other visual medium; and

(b) is asked whether they recognise that individual as someone who is known to them.

…

3.36 The films, photographs and other images shall be shown on an individual basis to avoid any possibility of collusion and to provide safeguards against mistaken recognition … the showing shall as far as possible follow the principles for video identification if the suspect is known, see Annex A, or identification by photographs if the suspect is not known, see Annex E.

3.37 A record of the circumstances and conditions under which the person is given an opportunity to recognise the individual must be made and the record must include:

(a) Whether the person knew or was given information concerning the name or identity of any suspect.

(b) What the person has been told before the viewing about the offence, the person(s) depicted in the images or the offender and by whom.

(c) How and by whom the witness was asked to view the image or look at the individual.

(d) Whether the viewing was alone or with others and if with others, the reason for it.

(e) The arrangements under which the person viewed the film or saw the individual and by whom those arrangements were made.

(f) Whether the viewing of any images was arranged as part of a mass circulation to police and the public or for selected persons.

(g) The date time and place images were viewed or further viewed or the individual was seen.

(h) The times between which the images were viewed or the individual was seen.

(i) How the viewing of images or sighting of the individual was controlled and by whom.

(j) Whether the person was familiar with the location shown in any images or the place where they saw the individual and if so, why.

(k) Whether or not on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone known to them, and if they do:

(i) the reason;

(ii) the words of recognition;

(iii) any expressions of doubt;

(iv) what features of the image or the individual triggered the recognition.

3.38 The record under paragraph 3.37 may be made by:

• the person who views the image or sees the individual and makes the
recognition.

• the officer or police staff in charge of showing the images to the person or in charge of the conditions under which the person sees the individual.

Notes for guidance

…

3G The admissibility and value of evidence of recognition obtained when carrying out the procedures in Part B may be compromised if before the person is recognised, the witness who has claimed to know them is given or is made or becomes aware of information about the person which was not previously known to them personally but which they have purported to rely on to support their claim that the person is in fact known to them."

[184] The purpose of Code D is to avoid the mischief that a police officer may merely assert that he recognises someone without any objective means of testing the accuracy of such an assertion. For that reason, where there is a breach of any provision, its impact on the fairness of the admission of the evidence must be carefully assessed.

[185] *Archbold* (*2025)* at 14-33 cites *Reid v R* [1990] AC 363 PC and *Ramsden* [1991] Crim LR 295 et seq as authority for the following principles:

(i) The Turnbull guidelines apply equally to police officers.

(ii) Honest police officers are likely to be more reliable than the general public.

(iii) Provided that the usual warnings are given, the reasons scrutinised, and the integrity of the witness is not in any doubt, the tribunal can give effect to what is only common sense.

[186] With regard to recognition from CCTV footage, *Archbold (2025)* at 14-63 citing *Att-Gen's Ref (No 2 of 2002)* [2002] EWCA Crim 2373 identifies three circumstances where a jury may be invited to conclude that the defendant committed the offence on the basis of an image taken from the scene of the crime:

(a) where the image is sufficiently clear to allow comparison with the defendant in the dock;

(b) where the image is identified by a witness who knows the defendant sufficiently well to recognise him; and this may be so even if the image is no longer available for the jury; or

(c) where the identification is based on opinion evidence.

[187] *Archbold* (*2025*), at 14-57, deals with the court's approach to a breach of the Code and any resulting unfairness. Two preliminary issues are, firstly, did the breach occasion the mischief which the code was designed to prevent and, secondly, was the breach caused by a flagrant disregard of the code. See also *Blackstone* (2025) at F19.4.

[188] The court has taken account of a number of authorities where, on the facts, the court either admitted or refused to admit the recognition evidence of police officers from CCTV. These are fact-specific and require a detailed analysis of a number of factors.

[189] In *R v Smith* [2008] EWCA Crim 1342, evidence of recognition by an officer was not admitted, where contrary to the evidence, the court concluded that it would not have been possible for anyone to see the suspect's eyes and the witness was "driven to assert "that she could recognise him only "by the stature, the clothing, it's everything, it's not one particular thing, it's the whole really."

[190] The court emphasised the importance of a record in place to assist in gauging the reliability of the assertion and of setting out the officer's initial reactions so that they can be subject to scrutiny. Whether the recognition was on first viewing was important and the words used may also be of importance along with a record of what it is about the image that is said to have triggered the recognition. Absent any such record, it will not be possible to assess the reliability of the recognition.

[191] In *Smith,* had the evidence been confined to that recognition, the conviction would have been unsafe. However, there was other compelling evidence against the appellant, including a jacket with the word "Athletics" on it and phone calls which followed the course of both cars involved in the incident. Accordingly, the appeal was dismissed.

[192] Code D was introduced partly as a result of concerns expressed in *Smith.*

[193] In *R v Jamie Deakin* [2012] EWCA Crim 2637 the case depended upon his identification from CCTV footage, by a police officer who viewed the footage over four months after the incident. The officer purported to recognise the defendant because he had visited him at his home address between 2002 and 2006, had interviewed him on two occasions in 2010, and had also seen his mugshot photograph, which the local police force had, because they had an interest in him. The officer said he had looked at the footage three times and although he had made no notes at the time, he was "100 per cent" sure of his recognition. He had watched the CCTV after another officer had asked him if he remembered dealing with the defendant and when he confirmed that he did, was asked to view footage where it was believed the defendant was involved. The defence submitted that the identification evidence ought to have been

excluded on the basis that it had been obtained in flagrant breach of Code D: 3.35, 3.36 and 3.37.

[194] The conviction was quashed on the basis that the evidence ought to have been excluded due to "the wholesale breach of Code D … [which] undoubtedly created very significant difficulties for the defence in testing the validity of the position being articulated by the police, and which posed precisely the kind of difficulty identified in the case of *Smith*." In particular, the defendant's name had been given to the officer rather than being asked to watch the video to see if he recognized anybody; no record had been made of any question of doubt, what features had triggered the recognition, the words of recognition and no contemporaneous note had been made as to the officer's recollection at the time of viewing as to what he recalled about seeing D on earlier occasions.

[195] In *R v Lariba* [2015] EWCA Crim 478 the masked suspect was identified by police officers from footage that had been broadcast on Crimewatch and YouTube. The officers were from the Enfield Safer Neighbourhood Team who knew well the members of the gang who were alleged to have carried out the murder. They then attended formal viewing procedures in which no contemporaneous notes were taken, although statements were provided following its conclusion.

[196] One officer, who had been a member of the Neighbourhood Team for around six months, had viewed the footage when he was on his home computer whilst off duty. He said in evidence that he had recognised the appellant from his "hairline, skin tone, build and clothing." He said he had no doubt it was him and explained how he knew him well. When he made his initial identification, he had reported his identification by telephone to his sergeant

[197] His sergeant, who had been a member of the Neighbourhood Team for two years then looked at the footage himself. He recognised Lariba saying that of the light skinned young men in the gang, he was one of the lighter ones and from his "distinctive lower hairline. He said that while he knew of the other officer's recognition of Lariba, his own was unaffected by that knowledge. Neither officer made a contemporaneous note of their informal identification.

[198] A third police witness was the Safer Schools Officer assigned to a local school where Lariba was a pupil. He knew him from his dealings there and his concerns that he was recruiting sixth formers to the gang. He recognised him from his stance and gait on the bicycle, the depth of his forehead between the hairline and eyebrows, the clothing style and the characteristic shoulder bag. He first reported his identification on the day he made it, saying he had recognised him from "his general demeanour, his hair, his hairstyle, his hairline and a line he has across his forehead, also his eyebrows."

[199] These three officers were asked to attend a formal viewing and, at its conclusion made a statement. Two other officers attended the formal viewing procedure only and also made identifications, in general terms, from his skin tone, hair and posture. A further eight officers were invited to attend a formal procedure but failed to make an identification.

[200] The court considered, at [34], that the recognition evidence was clearly relevant and, subject to its quality, admissible, identifying that the issue was whether, by reason of any weakness in the evidence or the absence of adequate safeguards it should have been excluded either as failing to reach "a minimum standard of reliability" or "because fairness demanded that it be excluded under section 78."

[201] In deciding these issues, the court identified, at [35] to [44] that a number of factors are of importance:

(a) the quality of the images available for the jury;

(b) the strength of the connection between the witness and the identified person;

(c) the extent of the record of the basis for the identification;

(d) the existence of supporting evidence; and

(e) any counterbalancing measures.

[202] In that case, the CCTV showed a view of the upper half of the suspect's head, including his hair and hairline, his eyebrows, eyelashes and eyes, and the bridge of his nose. Pitchford LJ said:

> "… the images were of sufficient quality to enable the jury to assess whether a recognition made from them was one on which they could safely rely even though they were not of sufficient quality to permit an identification of their own."

[203] He noted at [40] that the purpose of Code D was to test the witness's ability to identify the suspect as the person seen on a previous occasion and to provide safeguards against mistaken identification.

[204] He considered that:

> "[45] The issue for the judge was whether the breaches of Code D 3.36 rendered the evidence plainly unreliable or unfairly prejudicial to the

> appellant. We agree with the learned judge that it did not for the following reasons:
>
> It could not be in doubt that the police officers were, as they claimed, familiar with the appearance of the appellant as a result of their regular contact with him in the course of their duties over significant periods of time. We did not understand this to be disputed on the appellant's behalf. What was not agreed was the ability of the officers to recognise the appellant from the images available. Thus, submitted Mr Spens QC, the absence of contemporaneous recording of the reason for recognition, the words used, any expressions of doubt and the features of the appellant or the suspect on which the witness relied, was a material disadvantage to the appellant and to the jury in testing the reliability of the officers' evidence."

[205] He concluded that the breaches of the Code did not render the evidence plainly unreliable or unfairly prejudicial and was, therefore properly admitted: paras [46] to [48]. However, it was noted that the jury were put at a disadvantage due to the lack of a contemporaneous record of the reason for recognition, the words used, any expression of doubt and the features of the suspect on which the witness relied but took into account the following features:

(a) the police officers' familiarity with the appellant;

(b) that the officers provided witness statements immediately after the controlled viewings which recorded the basis for the recognitions;

(c) that the witnesses and images were available to the jury;

(d) that the appellant was able to demonstrate that eight officers who knew him had not recognised him from the images;

(e) the judge was able to explain to the jury the respects in which the breaches of the Code had disadvantaged the appellant and to call for extreme caution;

(f) the availability of supporting evidence, in the form of a qualified identification by an eye-witness.

[206] In *Yaryare* [2020] EWCA Crim 252, the court following *Lariba,* admitted the recognition evidence despite the lack of contemporaneous recording of the words used, expressions of doubt and features of the appellant relied on for the purported recognition. The court cited para [39] of *Lariba:*

> "… Once the judge concluded that the images were of sufficient quality to permit the evidence to be given, it remained the task of the jury to assess whether they could be sure that the recognition based upon it was reliable. The advantage that a jury has in a case of recognition from a scene of crime image is that they can see exactly what the witness saw and the image is permanent. That is not the position when there is no photographic record and the jury is considering only the quality of identification evidence given by an eye-witness to an ephemeral scene. In our judgement these images were of sufficient quality to enable the jury to assess whether a recognition made from them was one on which they could rely even though they were not of sufficient quality to permit an identification of their own."

Conclusion on admissibility

[207] There is no question that there were multiple breaches of Code D in the controlled viewing procedure and that the Waterside viewing seriously breached both its letter and spirit. It was shown in advance of controlled viewings, by a member of the investigation team who was fully aware of the evidential difficulties at that time in identifying masked individuals. I am satisfied that the reason DS Moore decided to show the footage to members of Waterside DSU was because they were the officers most likely to be able to identify those involved due to their specialist knowledge of dissident Republicans, suspected of the disorder and the killing of Lyra McKee. However, I do not accept that the evidence establishes that the purpose was to falsely identify any individual or that any purported identification was made in bad faith.

[208] That does not in any way justify what can only be regarded as deeply disturbing behaviour by an experienced police officer who displayed an unhealthy desire to identify the perpetrators at any cost. The requirements of Code D are not technical. They are important safeguards in an evidence type that is recognised as particularly prone to error.

[209] I am satisfied that both DS Moore and every officer present knew at the time, that it was in breach of Code D and that it ought not to have occurred.

The complete absence of any note, email or mention in any subsequent statement supports that conclusion. Even if the officers had genuinely assumed that the showing had been directed by SIO Murphy, which was incorrect, each of them was prepared to be complicit.

[210] Sgt Anderson did not reveal the circumstances in which he had viewed 24/19 (and it appears also 12/19 and 14/19), to Constable Elliot when he attended the controlled viewing in 2019 and made significant identifications.

[211] Nor did Constable Matthews reveal the viewing until she was requested to attend a "clarification" interview about those identifications, two years later. I accept Constable Gormley's evidence that Constable Matthews was clearly upset and feeling under pressure to make a clarification statement because her involvement in improper behaviour would be revealed if the queries were truthfully answered.

[212] The very fact that the viewing at Waterside was a group viewing was in itself a breach of the Code and identifications expressed with confirmatory nods given, breached the duty of confidentiality as well as giving rise to the clear risk of contamination of a procedure designed to provide a safeguard against mistaken identifications.

[213] The Waterside viewing is of course only one part of the controlled viewing evidence. The nature and extent of the NICHE access for information carried out by all or most of the officers after viewing appeal images, before and sometimes after controlled viewings and before making identification statements without disclosing those facts, is also a significant breach of the spirit of the Code.

[214] It is also contrary to the internal restriction on access to PSNI systems for anything other than operational reasons. Whilst officers suggested much of the access may have been related to a sighting or simply to update intelligence in line with the specific duties of the DSU in Derry, the timings and the nature of the intelligence sought including the enlargement of images of persons apparently, well known, suggests otherwise.

[215] The prosecution submits that the NICHE access to identification details has no bearing on the reliability of the identifications of the masked persons who are purported to be Mr McIntyre, Mr Cavanagh and Mr Campbell because none of the information obtained could have contributed to identifications based on gait, stance or body movement. That presupposes the court accepts that that the reasons given for the identifications two years after the event, are reliable.

[216] In respect of Mr Campbell, details of a particular interaction on 26 March 2019 appeared for the first time in Constable Matthews' statement, weeks after

the initial controlled viewing took place which was the same date that she sought out the details on NICHE. However, NICHE contained no details about his "laboured" walking or indeed anything about his body movement on that occasion.

[217] It is correct that Mr Campbell is of a noticeably large build. But that in itself does not mean that the danger of misidentification of a wholly disguised person is not real. The case is not made that his physical body shape is so distinctive within the area that the risks are mitigated.

[218] I accept that the issues that have arisen have to be seen in context. Police procedures did not accord with Code D in that there was no requirement to explain the identification triggers on the appendix B. Whilst appendix A was read to each officer and they were instructed to record the reasons in the statement, the delay in providing them meant that reliable information was unlikely to be recorded. The question remains as to what impact this has on the reliability of the identifications and the fairness of the proceedings.

[219] Naturally, there was a lot of talk amongst officers who would ultimately be asked to consider making identifications, which was not helpful in this situation. But we live in the real world, and the tragedy of Lyra McKee's death was a source of great concern throughout the community. While it is understandable that talk turned to possible perpetrators, particularly within the group of officers who had specialist knowledge of those who continue to support senseless acts of violence, the importance of strictly adhering to legal safeguards to prevent mistaken identifications in this investigation cannot be overstated.

[220] I have to balance a number of factors:

(a) the quality of the images available for me as a judge sitting alone;

(b) the strength of the connection between the witness and the identified person;

(c) the extent of the record of the basis for the identification;

(d) the existence of supporting evidence; and

(e) any counterbalancing measures.

[221] The starting point is the quality of the images. These were wholly disguised individuals and there is no dispute that identifications/recognitions in those circumstances are inherently problematic. As the tribunal of fact, I am unable to test their reliability which means that an important safeguard is absent. Short clips of Mr Cavanagh have been adduced, including one from the

Cost Cutters shop earlier on 18 April 2019 to enable me to judge whether his stance, gait and manner of walking appear distinctive. I am unable to discern from those clips the features observed on Person G, the masked individual alleged to be Cavanagh.

[222] I have taken into account the fact that the defendants have not disputed that the officers who purport to recognise them had frequently interacted with them over the periods of time given in evidence, in some cases, over a period of years. Nor has there been any challenge to the evidence that officers in DSU had quite specific intelligence related duties in relation to those suspected of violent Republican activities. No doubt that would have been obvious from the number of stop and searches carried out under the 2007 Act and the evidence that house searches were not an unusual occurrence for those associated with Saoradh.

[223] I accept that this background is important and sets this case apart from most cases. These were officers whose job was to know everything about these particular individuals; they were continually watched with every sighting logged, any change in appearance noted along with associations and places frequented. The strength of connection in this case is unusually strong.

[224] However, that does not mean that the court should not be alert to the reality that the identifications based solely on stature, gait or movement are inherently fraught with difficulty. Honest witnesses can be mistaken. Even a number of honest witnesses can be mistaken and if there are circumstances, as in this case, which include a deliberate decision to have an uncontrolled group viewing, a dispute about who was present, a dispute about what was said and what nods of encouragement were or were not given, the risk of tainted and mistaken identification increases substantially.

[225] I observe that each of the officers involved in the Waterside viewing seemed to draw a complete blank when asked about important details of what occurred and who was present and for some unexplained reason, Sgt Anderson had no recollection whatsoever about 3 September 2021, when he refused to attend the clarification interview and sought advice from his line manager. I consider the inability to recall details about events that were most unusual and an obvious matter of concern, to lack any credibility.

[226] The court also notes that information relevant to the reliability of identifications in this case, including the NICHE audits was only obtained following disclosure requests from the defence legal teams during the first committal proceedings. But for those requests, this court would have been left with a misleading impression as to the reliability of that evidence. The careful scrutiny of Crown counsel which led to the revelation of the Waterside viewing must also be noted.

[227] I also have to take into account the record of the basis for the identification. There is no contemporaneous record of identifications made at the Waterside viewing. Neither at the controlled viewing nor in the statement supplied thereafter is there any record of the triggers for the identifications. Whilst the police procedures were deficient, a fault that does not lie at the door of any officer, the fact remains that the first time that gait, body movement, stance or stature is mentioned is two years after the purported identifications, when the spotlight was shone.

[228] The court is also required to consider any supporting evidence.

Supporting evidence re Mr Cavanagh's identification

DNA

[229] The Crown relies on Cavanagh's DNA on a zip pull (MOS 3) found on the remains of material burning in Cromore Gardens after the hijacking of the Mokka and the shooting had taken place. The Mokka was owned by Mr McBrearty. The fire had been lit in order to burn the item of clothing along with gloves. The masked men on 16 April had also burnt their gloves, clearly as a forensic precaution.

[230] Person G (alleged to be Cavanagh) wore a bomber jacket consistent with the remnant of clothing which appeared ribbed and elasticated. It had a zip toggle which appeared to be circular (like that recovered) which could be seen moving from side to side as he walked. Whilst the defence challenge the description of a "bomber jacket "and assert that the nature of the fabric worn by person G cannot be identified, I am satisfied from the optimised images of the garment produced by Mr Wooller that this description is correct. I am also satisfied that the zip pull found in the burning material, matches that seen on the images of the jacket.

[231] The DNA profile was a single profile matching that of Cavanagh. A calculation based on the Northern Ireland population survey data shows that this profile obtained from the zip would be at least one billion times more likely to arise if the DNA originated from Mr Cavanagh than from an unrelated man.

[232] The expert evidence from Mr Craig, the forensic scientist, was that he did not know how the DNA had got onto the zip toggle; whether it was by touch or otherwise and there were a number of potential mechanisms by which it could have been deposited. He also agreed that the presence of DNA on any item does not necessarily mean that its owner was the last person to touch it. He acknowledged the possibility of secondary transfer although in such a case, a mixed profile would be expected, including the owner's profile with the minor contributor being the third-party. He also accepted the possibility of transfer

through associating with others, shaking hands etc, although washing of clothes, hands etc removes such DNA.

[233] Mr Craig was asked about the absence of Cavanagh's DNA from the hijacked car left at Cromore Gardens close to where the burning fragment of zip pull was found. Person G is not alleged to have been wearing gloves. Although the defence place emphasis on the fact that fingerprints from two others who are not before the court were found in the car, suggesting that person G was not, the prosecution relies on Mr Craig's evidence that it was possible to find only one set of DNA on an object such as a door handle which has been touched by many people, so there may be an explanation for the absence of evidence even if Cavanagh was in the car.

[234] The prosecution point out that there is no evidence of any other explanation for the presence of the defendant's DNA on the item other than involvement in the crime. The defendant did not provide any alternative explanation; he made a no comment interview and specifically failed to respond to questions as to why his DNA was on a jacket that had been set on fire near to the hijacked Vauxhall Mokka While his counsel put forward hypotheses on his behalf, these are not supported by any evidence.

[235] The prosecution submits that in accordance with the principles in *Tsekiri* [2017] EWCA Crim 40 the nature of the DNA evidence, when taken together with the other supporting evidence plainly calls for an answer. In *Tsekiri* the court emphasised that no evidential or legal principle prevents the case being left to the jury solely on the basis that the defendant's DNA profile was found on a movable article left the scene of the crime. The cogency of such evidence in any given case will, however, depend on the facts of that case, and in particular on whether there is a plausible "innocent explanation" for the presence of the defendant's DNA on the item in question (*Blackstone* F19.32)

[236] Mr Wooller, the imagery analyst concluded that he could not *rule out* that the zip pull having originated from the bomber jacket worn by "Camo man" and the Crown submits that the conclusion should be drawn that Mr Cavanagh's DNA could only have been deposited on the zip pull when recently zipping it up. The defence submit that the court could not be satisfied that it is in fact from the same jacket and cannot rule out other means of DNA transfer, consistent with innocence.

Cell site evidence

[237] The prosecution submits that there is an obvious geographical association between the offence and the offender, which is not merely that he is a resident of Derry. The cell site evidence shows that, at 21:41 hrs on the night of the incident, his phone moved from using cell sites, including his "home" mast of Londonderry Foyle West 50° indicating that his phone was in the

Brandywell area, to cell sites indicating that he was at the top of the hill, in the Creggan from 21:44 hrs until 23:47 hrs. The disorder occurred during that time. Cavanagh texted his partner Mr McClelland at 23:44 hrs and was called back by him immediately after. The prosecution suggests that he was "checking in" with home. Thereafter, at 00:28 hrs, his phone connects with a mast halfway down the hill.

[238] Person G was first seen on camera at around 22:06 hrs, just before the second round of petrol bombing. The first round of petrol bombing, in which Person G did not take part, was coming to a conclusion when Cavanagh's phone first connected to the Londonderry Creggan 190° cell site at 21:44 hrs.

[239] However, significantly, there is no cell site evidence suggesting that Mr Cavanagh's phone was at the junction of Central Drive and Fanad Drive. The defence submit that this evidence is exculpatory. Although Mr Hope could not say precisely what the coverage was on 18 April, on the evidence of the survey before the relevant date and the survey after (April and July 2019), he did not think that the phone was at the crossroads at the time of the key events there.

[240] Expert evidence from Mr Hope was that a later February 2020 survey demonstrated that the cell site was "physically capable" of providing coverage at the crossroads, although he placed greater reliance on the surveys before and after the incident. There is an area, Bligh's Lane, which had not been surveyed for coverage because a vehicle could not access it. There is an alleyway nearby where there was coverage. The prosecution submits that Cavanagh's phone could have been left there while he was at the crossroads. The prosecution relies on Mr Hope's evidence that although it was likely the phone was not at the crossroads when it connected to the cell site, it was nevertheless possible or the phone could have been within 200 yards of the crossroads. On that basis, the prosecution submits that the evidence is not exculpatory because even assuming he was in possession of the phone, that does not necessarily mean he was not at the crossroads.

[241] Taken at its height, this evidence supports the case that he was present at the scene of the riot and that DNA on a jacket similar to that worn by Person G is attributable to him and currently unexplained.

Mr McIntyre

Imagery analysis

[242] In respect of Mr McIntyre, the primary evidence against him is the imagery analysis evidence of Mr Wooller, supported by Mr Stephens. That evidence is subject to a separate admissibility challenge. For reasons set out

below, I accept that the evidence of Mr Wooller is admissible, although the weight to be attached to it can only be determined at the conclusion of the trial.

Cell Site evidence

[243] The prosecution also relies as supporting evidence of cell site evidence that shows Mr McIntyre's phone was located in an area which included the crossroads and other areas of the Creggan between 20:05 hrs and 21:43 hrs, was abruptly removed from the network at 21:40 hrs just before the first round of petrol bombing and rejoined the network at 23:19 hrs approximately 15 minutes after the shooting, when there is a telephone call to Mr Gillen. It is suggested that the most likely reason for the removal of the phone from the network was that it was put on aeroplane mode.

Mr Campbell

Imagery analysis and gait analysis

[244] The main evidence relied on to identify Mr Campbell is also the imagery analysis evidence. In addition, the prosecution adduced evidence from an expert witness in gait analysis who concluded that there was moderate support for the proposition that he has been correctly identified by the prosecution. The most notable comparison with the distinctive slaying of the right foot during swing and the abduction of both feet prior to heel strike which could be seen on both the questioned and reference footage.

[245] The prosecution also relies on a signed statement made to the police on 23 April 2019 in which it is alleged that Mr Campbell falsely stated he was at home from 15:00 hrs and 16:00 hrs when footage from the 720 bar confirms that he was in fact at the Saoradh office around the time of the meeting at 19:00 hrs on 18 April. I remind myself of the directions commonly given to juries that there may be many reasons why a person tells a lie and it does not necessarily indicate guilt. The weight to be attached to this evidence is a matter to be considered at the end of the trial.

[246] I am also required to consider whether there are any counterbalancing measures. I have concluded that there are none.

[247] Having considered all the relevant factors, I have concluded that the breaches of Code D have been so egregious that the purported recognitions cannot be considered reliable or admissible, notwithstanding the unusual degree of connection and the existence of some supporting evidence, which will have to be weighed in due course.

[248] The reality is that this court cannot be sure exactly what happened at the Waterside viewing, who was present, what was said by whom or what

influence a word or gesture may have had. Nor can the court be sure what influence the checking of NICHE records or the investigation file may have had, even subconsciously, on any of the controlled viewing identifications. Had these matters been disclosed to the identification officers and a proper assessment made as to the potential impact been made at that time, that may have assuaged the court's concerns. But they were not.

[249] The whole purpose of Code D is to test the reliability of a single witness's purported identification from a still or footage. It is difficult to reconcile the detailed personal knowledge of the defendants that these officers apparently had, with their evident wish to check identification details in advance of the controlled viewings or in advance of preparing their statements. Adding small but important details such as house number, full name and date of birth to statements, admittedly obtained from NICHE, whatever the intention, can only have the effect of increasing the perceived credibility of an identification.

[250] Even if the identifications could be considered admissible, for the same reasons, I would have excluded that evidence under Article 76 of PACE on the grounds that its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

[251] The power to exclude evidence under Article 76 is not a punitive remedy but is an important safeguard to ensure a fair trial. The prosecution submits that in a judge alone trial, the risk that the tribunal of fact might be unfairly prejudiced by the admission of potentially unfair evidence is not a relevant factor. A professional judge is perfectly capable of attributing appropriate weight to the controlled viewing evidence taken into account all of the weaknesses that have been exposed. In those circumstances, it is submitted that the evidence is clearly admissible.

[252] Whilst it is correct that a professional judge is not in the same position as a jury, and the required provision of a written judgment provides an added safeguard, that does not mean that a judge sitting alone is not required to give proper consideration to the circumstances in which unfairness is said to arise when an application to exclude evidence is made. If the prosecution submission is correct, Article 76 would have no application to a judge-alone case, since even in the most egregious case of unfairness, the remedy would simply be to attach no weight to the evidence. I do not accept that submission.

[253] However, for the sake of completeness, I would not have attached any weight to this evidence even if it could be said to be admissible, and the risk of unfairness obviated by a judge alone determination.

[254] With regard to the unmasked individuals, none of the identifications have been challenged despite the widespread NICHE searches prior to

identification at controlled viewings. Evidently, that is because the quality of the commercial footage is such that the court is able to make those identifications itself. However, the evidence of these searches is still submitted to be relevant to an abuse of process application

Abuse of process - the legal principles

[255] The defence submits not only should the evidence of the controlled viewings be excluded but the proceedings should be stayed as an abuse of the court process. The law as to the power of the court to make a stay is set out at para [13] of the judgment of Lord Dyson in the Supreme Court in *R v Maxwell* [2011] 1 WLR 1837:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 74 g) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in *R v Latif* [1996] 1 WLR 104 , 112 (f)."

[256] Lord Dyson went on at para [23] to refer to the speech of Lord Steyn in *Latif* at p112G to 113B where Lord Steyn made clear that proceedings could be stayed not only where a fair trial was impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. There were an infinite variety of cases, but a judge must weigh in the balance the public interest in ensuring that those that were charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the end justified the means.

[257] Those principles were recently reaffirmed by Keegan LCJ in *Murphy, Moen and Gilmore* [2025] NICA 41.

[258] In *R v Owen Corrigan* [2020] NICA 52, Morgan LCJ stated:

> "[13] In cases of delay the position has been clear since *Attorney General's Reference* (No 1 of 1990) [1992] QB 630 and was reaffirmed in *R v F(S)* [2012] QB 703. An application to stay proceedings for abuse of the process of the court, made on the grounds of delay, cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice occasioned by the delay which cannot fairly be addressed in the normal trial process."

[259] In determining this application, I have taken into account the judgments of both Treacy J, and the Northern Ireland Court of Appeal in the case of *R v Valliday & Valliday (Abuse of Process)* (15/031545), currently subject to a reporting restriction.

[260] The judgment of Treacy J makes clear that the issue of a fair trial involves an evaluation of events taking place in the future, not the past. The proceedings can only be stayed if the court concludes that the defendants cannot receive a fair trial going forward.

[261] Whilst the existence of the NICHE audit logs and the Waterside viewing only came to light as a result of requests from the defence, their contents have been fully exposed in the course of the trial, enabling the court to properly evaluate all of the evidence. With regard to delay and memory lapses, I am satisfied that the trial process is equipped to deal with those issues and that the defendants can have a fair trial.

[262] The relevance of past events and conduct is to the second limb of the abuse test and I take into account that this is a circumstantial case which requires the court to consider the evidence with great care.

[263] I have weighed the public interest in ensuring that those charged with grave crimes should be tried with the competing public interest that the court should not convey the impression that the end justifies the means. Whilst there have been significant and inexcusable breaches of Code D, I do not consider that it would be unfair to try the defendants, particularly when a fair trial is possible.

[264] There is no evidence that any member of the Senior Investigation Team was aware of DS Moore's behaviour in showing the Waterside footage or that proper inquiries were not put in place immediately the query was raised by Crown Counsel. There is no fault whatsoever attributable to the Public Prosecution Service.

[265] I therefore refuse the application for a stay on grounds of abuse of the court's process.

The admissibility of expert evidence from Mr Wooller

[266] The main strand of the case against Mr Devine, Mr Gillen, Mr McIntyre and Mr Campbell is based on comparison of clothing features worn by masked individuals on 16 and 18 April 2019, with reference material seized from their homes and observed during stop and search encounters or sightings logged onto the NICHE computer system. It is also an important strand in the case against Mr Cavanagh.

[267] The prosecution called evidence from Mr Andrew Wooller of Acuity Forensics and Mr Matthew Stephens of Diligence as expert imagery analysts. The defence objected to the admissibility of their evidence on the grounds that neither of them are experts and their evidence should be excluded. Whilst in normal circumstances this would be determined as a preliminary issue, I accepted the prosecution submission that the question of expertise could only properly be determined by hearing their evidence in context.

[268] In *R v Hosie* [2017], Sir Declan Morgan cited with approval the leading authority on the test for the admissibility of expert opinion evidence is the Australian case of *R v Bonython* [1984] 15 ACR 364:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:
>
> (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience, and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness

> would render his opinion of assistance to the court.
>
> The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

[269] As with any other witness, it is my task to weigh up the evidence of the experts, which includes any evidence of opinion, and to decide what I accept and what I do not. In doing so, I should take into account the qualifications, practical experience, methodology, source material, quality of analysis, whether or not the opinion is based upon a statistical analysis, and the objectivity of the experts.

[270] The importance of purported experts eliminating cognitive bias was dealt with by Colton J in *R v Gleeson* [2023] NICC 17, in the following way, at para [107]:

> "[107] ... Once instructed the experts must ensure an appropriate distance from the prosecuting authorities. Mitigating steps such as peer review and independent verification are important. It may well be that the cost and time in ensuring the elimination of cognitive bias and a robust system to ensure reliably independent evidence will be prohibitive. However, it is clear that the issue of cognitive bias needs to be addressed by prosecuting authorities and experts in the particular context of forensic voice comparison analysis."

[271] Judicial rulings on the importance of both experts and judges recognising the existence of cognitive bias and the need for experts to take steps to eliminate such risks in their methodology is formally reflected in The Forensic Regulator (FSR) Code of Practice - Image comparison at 109.3.19 - which refers to 'insulating' the forensic practitioner conducting the analysis. In an appropriate case, evidence which would otherwise be admissible may be excluded on account of the failure to ensure their evaluation is independent and impartial.

[272] There is, however, an important distinction in the way in which the judge approaches her role, particularly in a circumstantial case and the forensic witness. The judge must consider the evidence as a whole in reaching conclusions, weighing up both its individual and collective strength. The forensic witness must only carry out an evaluation of the evidence within his

expertise and must actively guard against his conclusions being tainted by any other information.

[273] Mr Wooller has confirmed that in line with best practice he considered all questioned material (poorer quality and showing masked individuals) prior to viewing any reference material and that all identification tasks were carried out by way of "blind analysis." This approach (linear sequential unmasking) is recognised as a key factor in eliminating cognitive bias risks.

[274] The defence submit that both witnesses purport to make "clothing comparisons" which is not a field of expertise. However, imagery analysis is a recognised area of expertise. Mr Wooller made it clear that he is not an expert in clothing, and it is evident that few imagery analysists have that specialism. His specialism is in vehicles. He explained his expertise thus:

> "I stated that I'm not an expert in clothing types because I cannot inform the court whether one type of shoe or jacket is more prevalent, when specific models were made or whether more than one model designation was applied to similar looking garments. What I am vastly experienced in is the analysis of features within imagery and the assessment of what physical object could have created such a feature."

[275] The role of the Forensic Regulator (FSR) in criminal proceedings in Northern Ireland was the subject of dispute. His statutory remit does not extend to Northern Ireland and the prosecution submits that the guidance and Code of Practice should be considered of "persuasive" value only. Whilst that is accepted by the defence, it submits that insofar as an expert has not complied with the guidance or the provisions of the Code, that is a factor that should be taken into account in ruling the evidence inadmissible. A similar dispute relates to aspects of the expert's declaration and the English Criminal Procedure Rules which do not apply to Northern Ireland.

[276] This court has been greatly assisted by the recent judgement of the Northern Ireland Court of Appeal in *R v Raymond O 'Neill* [2025] NICA 69. Of particular significance is the court's assessment of the expert's use of levels of support and the impact of a lack of accreditation to ISO 17025, which is the current FSR recommendation. Like many other experts in this field, neither Mr Wooller nor Mr Stephens hold this level of accreditation.

[277] The court confirmed that since the jurisdiction of the FSR is confined to criminal proceedings in England and Wales, it has no application in Northern Ireland, so the Code of Practice and other guidance is of persuasive value only.

[278] The court stated at paras [149]–[158]:

> "[149] On the second issue … it is accurate to state that the views of the Regulator and other forensic science bodies do not bind the court. In *R v T* [2011] Cr App R 9, Thomas LJ rejected the endorsement by the Regulator of the approach taken by a number of forensic scientists and examiners within the UK who employed a likelihood ratio in the interpretation of footwear mark evidence, despite the lack of a statistical database: see [52]–[53] and [60]–[61]. He went on at [92]–[96], to reiterate the admissibility of an evaluative opinion and scale as approved in the judgment of Hughes LJ in *R v Atkins and Atkins* [2010] 1 Cr App R 8.
>
> [150] In *R v Atkins and Atkins*, the Court of Appeal considered the admissibility of evidence of photographic comparison and the use of expressions of levels of support in the absence of a statistical database. Hughes LJ said at para [23]:
>
> > '... we do not agree that the absence of such a database means that no opinion can be expressed by the witness beyond rehearsing his examination of the photographs. An expert who spends years studying this kind of comparison can properly form a judgment as to the significance of what he has found in any particular case. It is a judgment based on his experience. A jury is entitled to be informed of his assessment. The alternative, of simply leaving the jury to make up its own mind about the similarities and dissimilarities, with no assistance at all about their significance, would be to give the jury raw material with no means of evaluating it. It would be as likely to result in over-valuation of the evidence as under-valuation. It would be more, not less, likely to result in an unsafe conclusion than providing the jury with the expert's opinion, properly debated through cross-examination and, if

not shared by another expert, countered by contrary evidence.'

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

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

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

> 'We conclude that where a photographic comparison expert gives evidence, properly based upon study and experience, of similarities and/or

> dissimilarities between a questioned photograph and a known person (including an applicant) the expert is not disabled either by authority or principle from expressing his conclusion as to the significance of his findings, and that he may do so by use of conventional expressions, arranged in a hierarchy, such as those used by the witness in this case and set out in [8] above ...'
>
> [153] *Atkins* was approved by Thomas LJ in *R v T* and, in this jurisdiction was relied upon by the Northern Ireland Court of Appeal, in *R v McDaid* [2014] NICA 1, in the context of facial mapping. The expert in that case used the FIAD scale to express his conclusions: see para [5]. Coghlin LJ said at para [10]:
>
> > 'Such a witness may give evidence of facial similarities without being able to make a positive identification and, provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled to make use of the assessment framework employed in this case.'"

[279] In *O'Neill*, the court concluded that whether the FSR Code strictly applies, it is clear that verbal scales continue to be used in the criminal justice system and that it may help the jury to explain that levels of support are simply subjective labels and "different experts may not attach the same label to the same degree of comparability." The important point is that the meaning of the evidence and its relative strength is conveyed to the jury.

[280] Regarding the question of accreditation, the court noted that this is an expectation of the FSR and not a mandatory requirement. Both this court and the Court of Appeal have both been told "that accreditation to ISO17025 is a costly process, beyond the financial capabilities of many of the relatively small firms who provide expert forensic imagery analysis. To the prosecution's knowledge, no imagery analyst in the United Kingdom has yet been accredited to that standard, some years on from the introduction of the requirement in the FSR Codes. That has not prevented the continued reliance on such evidence by

the courts." The court concluded that the lack of the relevant accreditation had no bearing on the reliability of the expert's evidence.

[281] The field of imagery analysis in simple terms, requires knowledge that a feature on an image may appear as something that it is not and uses techniques to optimise an image by adjusting light and darkness, which is different from enhancement, which in itself can cause distortion. Insofar as Mr Wooller explained the application of imagery analysis principles to relevant images, I accept that it is evidence that is outside the knowledge or experience of this court, and admissible as expert opinion:

(i) The resolution of an image affects the fine detail that can be captured. A lack of ample resolution can limit the opportunity to detect significant detail which would otherwise allow subjects or objects to be analysed alongside and positively differentiated from those seen in comparison imagery.

(ii) In any comparative analysis, a single difference between source and comparison outweighs any number of similarities between them.

(iii) The effect of different types of lighting on the appearance of colour. For example, under sodium-based lighting, which is most street lighting, the colour blue may appear in an image as black. Commercial lighting, such as that used in the MTV footage may affect images in different ways.

(iv) How to recognise an artefact, which is a feature that is only seen once on an image. By tracing through a number of images where the same feature (size and shape) continues to be seen in the same place, as an individual moves, it can be concluded that the feature is not an artefact.

(v) Specifically, how an area of fabric damage can be identified and distinguished from an artefact.

(vi) Understanding the possibility of distortion where a flare on a feature appears to be a highlight. Flaring can occur when light, often from a bright source bounces off the lens and creates an artefact. Only by tracing how the feature moves with the individual is it possible to say that there is a genuine feature that has created that degree of flare, such as a metallic bracelet.

[282] However, I do also recognise the expertise of an imagery analyst to draw to the court's attention relevant features which those unfamiliar with studying images may not observe. Whilst it may be said that in so doing the witness is acting as a witness of fact, the court in *Atkins* confirmed "an expert who spends years studying this kind of comparison can properly form a judgment as to the significance of what he has found in any particular case. It is a judgment based

on his experience …" The ultimate conclusion is of course for the tribunal of fact, taking into account all of the evidence in a circumstantial case.

[283] While much criticism was levelled at Mr Wooller's expertise, the court notes that it was not suggested that his evidence in relation to any of these matters was incorrect. The court had agreed to hold a voir dire to determine the issue of admissibility and directed that the defence would have the opportunity to call any defence expert immediately after the prosecution experts had been cross-examined. In the event, no defence expert was called.
[284] In relation to these matters of expertise, Mr Wooller's evidence was of considerable assistance to the court. He gave his evidence in a balanced, straightforward manner and was careful to draw to the court's attention to potential weaknesses in his analysis as well as the limitations of his expertise.

[285] Because he is not an expert in clothing comparison, he offered only suggestions as to the model and make of jackets and footwear. In the absence of evidence to the contrary, I accept that all items were mass produced and likely to be in wide circulation within the community. The question remains as to the likelihood of the same combination of similar clothing items, along with personal items, being worn by different people.

[286] Mr Wooller's evidence that a comparison based on one or two similar features is not as strong as one based on five or six, in my view, is no more than common sense and the court is equally well qualified to note obvious descriptors such as taller, shorter, heavier etc, used broadly and with the caveat that video-recorded footage may be misleading. Whilst expertise in height and body mass can be found, Mr Wooller did not lay claim to it:

> "I am not an expert in clothing types, nor am I an expert in anatomy or biomechanics."

[287] In explaining his conclusions, he was candid that he had partly based his identification of Mr Devine, Mr Gillen, Mr McIntyre and Mr Campbell as masked individuals on both the 16 and 18 April on an assumption that the same broad group of individuals is likely to have been involved. There is no scientific basis for this, but Mr Wooller considered that it might be a commonsense inference that the court might draw.

[288] I accept that on 18 April, when Reggie Yates first met the masked men at the end of Creggan shops, he asked whether they were responsible for throwing the petrol bombs two nights before, two of them (alleged to be Jordan Devine and Christopher Gillen) nodded their agreement. So, clearly there is evidence of a connection. However, there are dangers in relying on an assumption to support the identification of wholly disguised persons, and I do not do so. That does not mean that the court cannot consider the identification evidence of persons present on both 16 and 18 April and where appropriate,

treat identifying features as providing increased support that they are one and the same.

[289] I note however that insofar as Mr Wooller did purport to express a view on the likelihood of the same masked individual being present on both 16 and 18 April, his opinion was no higher than:

(i) The individuals involved in the disorder on both dates could be the same – it was *possible* that they were one and the same (taking account of clothing and footwear in addition to personal characteristics including height and build)

(ii) Assuming that the court is prepared to draw a likely link between both groups (which it is not), his opinion increased to "likely to be one and the same person."

[290] The manner in which Mr Wooller expressed his conclusions is said to confirm cognitive bias in his methodology. It appears that whilst Mr Wooller correctly viewed the questioned footage first followed by the reference material in a graduating order, for the purposes of his report he revisited his initial findings re the questioned material and amended them to reveal his ultimate conclusions. Whilst no criticism is made of that approach in principle, it is submitted by counsel on behalf of Mr McIntyre that the risks of cognitive bias should have been acknowledged in his report. Mr Wooller was entirely open and transparent about his methodology and although defence counsel submitted that steps ought to have been taken to mitigate those risks, no steps have been identified and it is difficult to see how Mr Wooller could have conducted his work in any other sensible way, given the task he was set. In any event, I am satisfied that this is a matter of weight, not admissibility, to be assessed at the end of the trial.

[291] Mr Wooller was questioned about where the similarities and dissimilarities between persons were set out in his working notes. He said he would note "a really clear significant difference" but, not something that is not "a really clear significant difference." The point is made that this is contrary to the "Forensic Image Comparison and Interpretation Evidence: Guidance for Prosecutors and Investigators" which refers to noting the degree of similarity or dissimilarity in the observed features, with no such caveat as to the 'significance' of the dissimilarity. This also is a matter of weight not admissibility and the court is well placed to take any limitations into account in its evaluation. It is also noted that although the defence had experts present throughout the imagery analysis evidence, it was not suggested that any significant dissimilarities had been missed or ignored.

[292] In conclusion, I answer the questions posed in *Hosie* in the affirmative and admit Mr Wooller's evidence.

The admissibility of Mr Stephens' evidence

[293] Mr Stephens was employed by Diligence as an Imagery Analyst.

[294] The initial meeting between SIO Murphy and Mr Stephens was on 18 July 2019. Mr Stephens' contemporaneous notes are limited, SIO Murphy is not a witness and it appears that no notes of his interactions with Mr Stephens either at that meeting or thereafter exist. Mr Stephens confirmed that imagery was shown at some point, although the context is not recorded, and that SIO Murphy was "setting out his interpretation of the case at this stage." He also accepted that in referring to the names and details of potential suspects, DSI Murphy was telling him about particular suspects and his belief/theory about them.

[295] In the first page of his notes, Mr Stephens had written the term "contextual bias." Asked about this note, he stated:

> "This is something that I would have raised with DSI Murphy to inform him that he needed to be aware that I didn't want to be influenced, that I didn't want to fall foul of contextual bias. So, I wanted to make him aware at the very earliest stage that I needed to do things in keeping with best practice."

[296] He explained what he meant by the note in this way:

> "If I could use the example of clothing comparison, contextual bias would be where we are viewing initially high quality imagery of an item of clothing and then look - and noticing detail that could be viewed within that high quality imagery, and then looking or attempt - having that - having that level of detail in one's mind when they then go to view lower quality incident imagery, for example, and trying to find something within the imagery that they - that the expert might otherwise not have seen otherwise."

[297] He said his understanding of SIO Murphy's purpose in showing him footage and explaining the case theory at that first meeting was to "give [him] an understanding of what the case involved, the level of evidence available to [him] should [he] be instructed further - further down the line."

[298] Subsequent to this meeting, Mr Stephens received a "case brief" from DSI Murphy sometime after 22 July 2019 which can no longer be located either

by PSNI or Diligence, the company with which Mr Stephens was employed. Mr Stephens did confirm, in cross examination at committal, that it would have contained a background to the case and the subjects said to be identified. He also presumed that it would have contained the information about particular locations that he had referred to in his report including Iniscairn Road and the Saoradh offices on Chamberlain Street as well as "approximate times."

[299] No explanation has been provided as to why this was sent to Mr Stephens, who gave the direction and compiled its contents or why it cannot be located by either PSNI or Diligence.

[300] There is a copy of the "Record of Instruction "which was then provided. It required Mr Stephens to address the respective heights of the subjects and also to take into consideration, group association. He explained that he considered:

> "the association of subjects … to be relevant information or relevant to the analysis to add degrees of support to the contention that one person is somebody else. If we're always seeing subject 1 with subject 2 repeatedly in scenes, it improves my acceptance of the continuity between sightings … There's no technical - there's no measurements involved. It is opinion based."

[301] Following the issuing of Mr Stephens' Record of Instruction, SIO Murphy sent a formal "Letter of Instruction" on 2 August 2019. He was asked to consider eight specific individuals (A to H) and accompanying the instruction was the compilation PJC14 which contains clips of footage with markings and identifiers of the people said to be each depiction of A to H and a spreadsheet setting out the times within each clip that each person was believed to appear. This included the same arrows and identifiers in the comparator footage (ie the daytime MTV footage).

[302] Specifically, SIO Murphy had stated in the 'letter of instruction':

> "Some of the individuals are being compared across multiple clips, or multiple times within the same clip. That is because these individuals are believed to be involved multiple times or there is a necessity to gather evidence with regard to specific offences. It will be necessary for me to demonstrate the recurring presence of some individuals."

[303] By the time he was formally instructed, Mr Stephens had been provided with five sources of information, namely:

(i) the content of the meeting with DSI Murphy on the 18 of July;

(ii) the case brief;

(iii) the letter of instruction;

(iv) the spreadsheet setting out which individuals the PSNI were suggesting could be seen at particular times;

(v) the compilation of a number of clips of footage "throughout the day and night with arrows and labels for each of the purported subjects.

[304] Mr Stephens prepared a number of "draft" reports, which he then amended, apparently as a consequence of suggestions from SIO Murphy. The version of the report dated 5 September 2019 was preceded by a telephone call between Mr Stephens and SIO Murphy. There are no notes, but an email exists attaching the report stating:

> "Para 18 and 231 amended as discussed …"

[305] The same email also contained the line "70.a has been amended to "dark-toned" rather than "black" and the working notes for the same date read "70.a dark-toned not black." Para [70] of this version of the report solely concerns the footwear said to be worn by Subjects A and Z. This version reads that the subjects wore "dark-toned trainers." However, the first version of the report that is available, dated 3 September 2019 had the equivalent paragraph asserting that the subjects A and Z wore "black trainers". Asked why this was changed, Mr Stephens said that:

> "I would have to suggest that, based on my limited notes and not having a recording of that telephone conversation with SIO Murphy, that SIO Murphy may have suggested that I veered from my usual terminology or my usual reluctance to fully describe something with a given colour. He has noted that I've perhaps been too - too sure of the fact that they could be described as black and he's quite right - he's drawn my attention to that and I have referred to them as dark toned. I should have done all along."

[306] Mr Stephens insisted that he was responsible for the change – and not SIO Murphy - and that the change reflected his own view. When it was put to him that he would not have recorded his opinion that the trainers were "black" in the 3 September report if that had not been his view, he stated:

> "I don't agree with that. It's a working document. It wasn't intended for service. I've written black, I accept that. I've amended that. I'm content that those are dark toned trainers and I would expect that most imagery analysts would prefer to side - a cautious approach of referring to them as dark toned rather than black."

[307] Mr Stephens agreed that three out of the five imagery analysis forms he had completed (and would have used to compile his draft report) referred to the trainers as being "black" and on the other two, the box to fill in colour had been left blank. He agreed that nowhere on these forms had he used the term "dark-toned." Asked if he had referred back to the imagery analysis notes before making the change, Mr Stephens stated that he did not have a record of that.

[308] When asked how SIO Murphy would have known whether the use of the term "black" was too strong, Mr Stephens stated that he (Murphy) had:

> "… considerable experience in policing and reading other people's reports" and he may have noted that the term dark toned or light toned had been used in other parts of the report and thought he had been a little "less cautious" in using the term "black." He sought to maintain that it was not his conclusion at this juncture that the trainers were "black"; but said it was a "summary of [his] findings."

[309] Mr Stephens also said he had used the word "black" for "a degree of convenience" and "perhaps for ease" and did not accept that this was one of his initial findings.

[310] In an email sent to Mr Stephens on 25 October 2019 at 16:54 hrs, he was asked to complete further work. Further footage and a table setting out which individuals labelled A–J were believed to be seen within the 14 new clips was provided. In fact, A-J were the labels given to individuals already identified in the daytime footage. Mr Stephens understood that the purpose was to fill in gaps left by the departure of the MTV team.

[311] Although he had estimated that a further four hours work would be involved, there are no working notes or imagery analysis forms evidencing the work undertaken.

[312] Mr Stephens agreed that the task required him to look at further reference material after he had seen the comparator imagery, which was not best practice.

[313] In relation to his 5 September report, he was questioned about para 60(d) which reads:

> "Limited continuity exists between Subject Z6 and Subject Z7. The last sighting of Subject Z6 is outside Ladbrokes on Central Drive and the first sighting of Z7 is at the end of same stretch of road approximately 130 metres north."

[314] This was contrasted with the version dated 7 November 2019, where the same section has become para 59 and the equivalent sub-paragraph reads:

> "Limited continuity exists between Subject Z6 and Subject Z7. The last sighting of Subject Z6 is outside Ladbrokes on Central Drive and the first sighting of Z7 is at the end of same stretch of road approximately 130 metres north. The association with other subjects and the clothing comparison satisfy the contention that they are the same person."

[315] The same addition regarding the assertion that "association with other subjects and the clothing comparison satisfying the contention they are the same person" was also added in relation to sub-para 59(f) and (g) of 7 November 2019 report.

[316] Mr Stephens agreed that the additions, were all inserted in relation to MTV footage and were not related to the mobile telephone and evidence gathering footage which were the subject of the request for further work.

[317] Whilst he agreed that there were no notes to suggest he had gone back and revisited any analysis of the MTV footage and that he had "expanded" on his findings on foot of the request for further work, he explained that the report had been a draft and denied that he had been influenced by remarks in the request for further work by concerns about gaps in continuity. He was specifically asked if he had gone back to the earlier paragraphs regarding the MTV footage and amended them to fit in with the issue of continuity. He stated:

> "I've re-addressed those parts of the report, I haven't re-analysed in terms of clothing comparisons that earlier imagery, I've continued to develop what was at the time a working document and was clearly marked as a draft."

[318] In an email dated 15 November 2019, SIO Murphy asked for an amendment to para 59(j) of the 7 November 2019 report which read:

> "Timings between subsequent sightings cannot, as yet, be determined" so that it would read:
>
> "Timings between subsequent sightings cannot, as yet, be *accurately* determined."

[319] Mr Stephens made the amendment and sent the new version within an hour and a half of receiving the email, without making it clear that this information came from the PSNI and was not based on his own assessments of sightings or was not a matter within his own knowledge. The issue of timings was relevant to his ultimate conclusions. He refuted any significance to the amendment and said:

> "I think without having a fresher memory of this perhaps there was ongoing work by PSNI to establish accurate timings, and I believe there was a spreadsheet being produced to that effect."

[320] An email from Mr Stephens to SIO Murphy on 4 December 2019 at 09:50 hrs indicates that there was a meeting between them on 3 December 2019. There are no notes of such a meeting and Mr Stephens suggested he may have been attending on other matters, and they may have met socially. However, an email sent five minutes later referred to obtaining an exhibit reference for a new mobile telephone clip "showing Z run up the hill with the bag" which would suggest that the case was discussed, and the clip possibly shown. In the absence of notes, Mr Stephens had no recollection. Nor could he assist the court in explaining how he was able to describe the new clip when an email confirms that he had not carried out any analysis on new clips by that date, if he was not simply repeating the description given to him by SIO Murphy.

[321] There are a number of other concerns arising from Mr Stephens' evidence:

(i) His failure to consider the footage as a whole, fast forwarding from one annotated piece to another and only focusing on the particular individuals that he had been directed to consider.

(ii) His failure to consider the footage from the poorest quality first (the shooting footage) back to the broadcast quality footage which should have been done to eliminate risks of cognitive bias.

(iii) The absence of objectivity is reflected in his final opinion, being "sure beyond a reasonable doubt" which is not an appropriate way to express levels of support.

[322] *May on Evidence* discusses the obligations of an expert witness referring to para 271 of *R v Harris and Others* [2006] 1 Cr App R 5 which was subsequently approved in *Bowman* [2006] 2 Cr App R 3:

> "[271] …
>
> (1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.
>
> (3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.
>
> (4) An expert should make it clear when a particular question or issue falls outside his expertise.
>
> (5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.
>
> (6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court ..."

[323] Having considered these obligations, I have concluded that the independence of Mr Stephens' evidence has been undermined by:

(i) the failure of either Diligence or the PSNI to retain important material relating to repeated contact between senior police and Mr Stephens.

This has resulted in the court's inability to properly assess the extent to which Mr Stephens may have been exposed to biasing information along with

(ii) Mr Stephens' apparent willingness to comply with requests to "look again" at his conclusions and make significant amendments, without disclosing either the fact or the rationale in subsequent reports.

[324] In my view, his evidence could not be seen to be, the independent product of the expert witness uninfluenced as to form or content by the exigencies of litigation. That leads me to conclude that whilst applying the *Hosie* test his evidence is admissible, I exclude it under Article 76 PACE, because it is unreliable and its admission would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

The admissibility of bad character and evidence of association

The defendants

[325] The prosecution relies on bad character and association evidence against all the defendants. It is submitted that either the evidence has to do with the facts of the offences, in which case no bad character application is required under the Criminal Justice (Evidence) (Northern Ireland Order) 2004 ("the 2004 Order") or, if a gateway for admission under the Order is required, Articles 6(1)(d) (defendant's bad character) and Article 5(1)(b) (non-defendant's bad character) are relied on. The defence submit that the applications are out of time and that time should not be extended because the wide-ranging nature of the applications based on evidence served late in the trial has caused irreparable prejudice. It is unclear what that irreparable prejudice is since none has been identified and counsel has had the opportunity to seek relevant disclosure and make necessary enquiries.

[326] Under Article 3 of the 2004 Order, "bad character" evidence is evidence of misconduct or a disposition towards misconduct but does not include evidence which has to do with the alleged facts of the offence with which the defendant is charged or evidence of misconduct in connection with the investigation or prosecution of that offence. "Misconduct" is defined in Article 17 as the commission of an offence or other reprehensible behaviour.

[327] Article 6(3) of the Order specifically provides that the court must not admit evidence under Article 6(1)(d) if the defendant applies to have the evidence excluded and it appears to the court that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. When considering such an application the court must have regard to, in particular, the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

[328] Evidence has already been adduced that these defendants associated with each other and that they were associated with Saoradh. Mellon, McCrory and Barr are recorded on the MTV footage discussing their positions within Saoradh or Eistigi (the youth wing) and expressing their support for Irish Republican violence, which is described as "acts of resistance" to "Crown forces." Anyone who disagrees with them is criticised, the term "collaborators" is used, and Sinn Fein is expressly criticised for supporting the police. McCool pushes the community worker, Stephen Mallett, after an altercation which also includes McCrory and Barr when he tries to intervene to stop the younger people rioting. Others were present in the Saoradh office on 18 April or filmed erecting banners or flags associated with Saoradh (McIntyre, Gillen, Devine, Campbell and James Devine). IRA slogans are written on hoardings and posters expressing support for the IRA and its campaign are displayed in and outside the Saoradh office. When Reggie Yates queried the slogans he was told by those being interviewed that these were historical references.

[329] Despite the willingness to justify violence and hostility to police to MTV, remarkably, none of the defendants have made any such concessions in the course of this trial.

[330] In those circumstances, the prosecution has sought to adduce evidence of alleged bad character and association, or both, falling into the following categories:

(a) Involvement in Easter and other republican parades, funerals, commemorations or protests, usually whilst dressed in paramilitary clothing;

(b) Convictions;

(c) Attacking, assaulting, resisting, abusing, insulting, demonstrating hostility towards or seeking to threaten or intimidate police, or attending/ interfering with police operations concerned with other persons;

(d) Other evidence (including that on social media) showing animosity towards the police and support for the IRA/violent Irish Republicanism and/or its aims and principles;

(e) Evidence demonstrating unity, solidarity or support for a grouping, gang or organisation who exhibit such a disposition; and

(f) Association between the various persons, defendants and non-defendants.

[331] In broad terms, all of the evidence the prosecution wishes to adduce is said to support the case that the defendants had a motive to engage in the offences namely hostility towards the police and support for Irish Republican violence. The prosecution relies on authorities where evidence of gang membership was admitted to assist the jury in determining whether a defendant had been correctly identified. It contends that gang- related violence aptly describes what occurred on 16 and 18 April 2019.

[332] In *R v Elliott* [2010] EWCA 2378, evidence of gang membership was admitted to assist the jury in deciding whether the defendant was in knowing possession of drugs and guns found at his address.

[333] *Myers v The Queen* [2016] AC 314, the Privy Council held that such evidence could be admissible, even under the common law, as evidence of motive which:

> "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." (at para 44)

[334] It is plain from that judgment that the evidence can operate as a further strand of a circumstantial case: see [44] to [49].

[335] Similarly, in *R v Awoyemi* [2016] 4 WLR 114, a case in which it was noted that the incident "bore all the hallmarks of gang related violence", it was admissible to establish a possible motive for a shooting, an association with firearms and lethal violence and could negative innocent presence and association (see conclusion at para 33).

[336] The defence seek to distinguish those gangland cases on the basis that the sole reason for involvement in a gang is criminality. The English Court of Appeal cases make it clear that the raison d'être of criminality provides the relevance to the question of motive. Whilst it is accepted, certainly in the case of Mr McIntyre, that he is associated with Saoradh, it is not accepted that that is in any way equivalent to involvement in a gang.

[337] The defence object to the evidence being adduced on grounds of relevancy and submit that its real purpose is to bolster a weak case and is therefore inadmissible. Specifically, it is submitted that none of the alleged incidents or convictions establish a motive or have any probative value.

[338] In *R v Christopher Robinson* [2021] NICA 65 the Court of Appeal upheld the trial judge's ruling that evidence from the defendant's social media account and his internet browsing history was relevant to motive in the case of the

terrorist murder of the prison officer Adrian Ismay. The court concluded at paras [66] to [68]:

> "[66] The appellant's social media activities demonstrate a clear support for violent Irish Republicanism and support for Irish republican prisoners. We accept Mr Harvey's point that the court should not read too much into the Facebook images. The items found in the appellant's house are not enough in themselves to establish guilt nor is the appellant's support for militant Irish Republicanism. However, in our view the learned trial judge was correct in his conclusion that this was relevant evidence and part of the overall picture. The issue is really the inferences that can be drawn from this evidence.
>
> [67] It is understandable that Mr Harvey isolates a few pieces of evidence and critiques how the learned trial judge dealt with them individually. However, this category of evidence must be considered alongside all of the other evidence in this case. When that exercise is undertaken, there are very compelling strands of circumstantial evidence to consider ... particularly those associated with the internet searches relating to Mr Ismay, the search relating to Tesco Castlereagh opening hours and the search regarding the magnetic qualities of aluminium. We consider that the other material from Facebook is less convincing on its own but it forms part of a picture as does the appellant's sympathies with militant Irish republicanism and the items found in the house. We accept that when looked at in the round these strands gain more significance because this was a terrorist attack.
>
> [68] In our view the learned trial judge may have placed a little too much emphasis on the appellant's Facebook pictures and his political support however this does not affect the overall result in this case given the overwhelming amount of other evidence about the appellant's motivations and interests in the run up to Mr Ismay's murder. The appellant's own actions amply demonstrate a sinister and evil purpose. Therefore, this ground of appeal is dismissed."

[339] It is therefore important to consider the disputed evidence in context. It is also important to note that the purpose of the legislation is to assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice (see *Hanson* [2005] EWCA 824 para [4]). For that reason, the strength of the prosecution case must always be considered. Evidence of bad character cannot be used simply to bolster a weak case or to prejudice the minds of a jury against the defendant. For a discussion on what does not constitute a "weak case" *JR Spencer "Evidence of Bad Character"* 3rd ed provides a useful discussion at para 1.70–1.73.

[340] I accept that evidence of hostility towards the police and support for Irish Republican violence is relevant to an important issue between the prosecution and the defence: in respect of the masked group it is relevant to motive and identification. In respect of the unmasked group, alleged to have intentionally provided encouragement or assistance, it is relevant to the question of whether or not they were innocently present at the disorder. Whilst the test for admission of a defendant's bad character is simply relevance and not enhanced relevance, the court must still be careful to ensure that any disputed evidence admitted is sufficiently relevant to the issues in this case, where the offences charged are murder and serious riot and associated offences.

[341] The content of the interviews with MTV was not the subject of defence objection, nor could it have been and so this court has been told in the clearest of terms how the police are viewed by those being interviewed and by inference, others associated with Saoradh. Since Saoradh is a group that openly supports Irish Republican violence, the gangland cases have clear resonance. However, mere hostility to police or association with those of that mindset is not probative of guilt, but it can, depending on the circumstances, be a relevant part of the overall picture.

[342] Apart from involvement or association with Saoradh, other categories of disputed evidence, need careful consideration. The number of events and convictions the prosecution seeks to in adduce evidence, contained in a "summary of evidence of association and bad character" dated 25 August 2025, spans many pages and covers a wide range of behaviour. If the evidence is to be truly relevant to the ultimate issue, namely the correct identification of the masked rioters and the intention of those who are present and unmasked, the facts and circumstances need to shed some light on the likelihood of a correct identification or guilty presence. For example, the conviction of Mr Cavanagh for disorderly behaviour and resisting police when he was drunk and verbally abusive to police (item 11) is based on the following behaviour:

> "Why have you joined the police? "Orange Bastard" "fuck off you RUC bastard", "Who's going to arrest me, you? I would like to see that."

It is difficult to see how a conviction based on those facts assists the court in determining whether he is the masked man who intentionally encouraged or assisted the gunman and is guilty of murder as a secondary party, or whether he was guilty of riot.

[343] Similarly, convictions for taking part in an illegal street collection in respect of McIntyre and a non – defendant Kevin Brady on 30 September 2017 (item 4) based on them "standing at Free Derry Corner with green collection tins which they were holding out to motorists", is hardly of assistance in proving the serious charges McIntyre faces. The conviction relates to collecting money without a permit contrary to the Police Factories (Miscellaneous Provisions) Act 1916.

[344] Devine, Campbell, Gallagher, McCrory, Barr, McCool and three other persons were part of a group of " 30-40 people" who gathered at a "counter protest" to an "Apprentice Boys Of Derry parade", displaying messages such as "End British Internment", "No sectarian parades", "Hey peelers leave those kids alone", and "End British policing". They were convicted of taking part in an unnotified procession (item 12). The relevance to the issues in dispute in this case must be open to question.

[345] As the Court of Appeal in *Robinson* made clear, each individual piece of evidence must be examined in the context of all the various pieces of evidence, viewed as a whole. The case against the masked defendants is primarily based on identification and expert imagery analysis evidence, supported by telephone communications, cell site evidence, DNA in the case of Cavanagh, gait analysis in the case of Campbell and the contents of commercial footage from MTV and Pangaia. There are two issues – were they present at the scene and if so, have they been correctly identified directly engaging in the offences.

[346] In *R v Christopher Robinson – Ruling on Bad Character Evidence* [2019] NICC 19, the trial judge's decision to admit the evidence from social media and the internet browsing history was based on the facts and circumstances of that particular case. Although he concluded that the disputed evidence would not, in isolation, constitute evidence of a disposition towards the commission of an offence or other reprehensible behaviour, he considered at para [31]:

> "… when combined with and supplemented by an image depicting the holder of those beliefs and expressions of support carrying and posing with a realistic looking, modern firearm, when viewed in the context of a find of balaclavas and walkie-talkies

> in the house of the individual holding those beliefs and expressions of support, and in the context of the holder of those beliefs and expressions of support purchasing self-defence gloves, a morph mask and balaclavas on the internet in the period leading up to the date of the offences with which he is charged, are matters which are clearly capable of constituting evidence of a disposition towards the commission of an offence or other reprehensible behaviour. By its nature, this evidence is clearly relevant to an important matter in issue between the defendant and the prosecution, namely the involvement of the defendant in the operation to attach an improvised explosive device to the underside of the van of the deceased …" [31]

[347] In respect of some of the Facebook posts such as the general expression of support by the Irish Republican Prisoners Welfare Association for the release of the defendant on bail in respect of the charges the trial judge at para [31] concluded that it did not constitute evidence of bad character and:

> "… Even if it did, [he] would be strongly minded to exclude such evidence under Article 6(3) on the basis that its admission could very well have an adverse effect on the fairness of the proceedings having regard to the fact that the motivation for making such a public statement of support is very much open to question."

[348] Although I do not accept that many of the incidents or convictions the prosecution wish to adduce are relevant to the issues in this case, I am satisfied that the circumstances of some, namely those connected to terrorism, are sufficiently relevant and there is no good reason to exclude them:

(i) convictions with a clear link to terrorism such as those under section 13(1) of the Terrorism Act 2000 are clearly relevant although the description of the offence attributed by the prosecution is incorrect: the offence is committed when a person wears an item of clothing … in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation;

(ii) Attendance at marches and gatherings, including funerals whilst dressed in paramilitary clothes or walking in a colour party;

(iii) Facebook material on Joe Campbell's phone, in particular posts containing appeals and messages from Oglaigh na hEireann, along with

one depicting a masked individual with a weapon and the words: "IRA Volunteer on active service photographed minutes before engaging Crown forces" with an account of the individual firing upon an armoured Land Rover from a distance of around 18 metres penetrating it in the process: "it cut through the armour, like a knife through butter";

(iv) Photos of murals with messages of support for masked terrorists and internet searches for "New IRA sophistication" and a named police officer who was the subject of an attempted murder. These are relevant because they may be considered to demonstrate support for the kind of attack that occurred in this case;

(v) , Messages on Cavanagh's Instagram account: "Happy Easter ... Easter 1916 … *Easter 2019 Unfinished Revolution*" dated 20 April 2019 (two days after the shooting of Lyra McKee) and "those who held and hold the cause of Irish Freedom higher than any peak or summit on Earth. Those men and women who fought with rifle and grenade and died for liberty and fraternity. Easter 1916, Irish Republican Army, Tiocfaidh Ar La". These posts are relevant because they may be considered to represent current and not merely historical views that attacks are justified.

[349] A large amount of body worn footage (BWF) was played in court to demonstrate apparently hostile behaviour towards police at stop and searches. The defence submit that on a fair assessment of the footage, there is clear evidence of cooperation between defendants and the police and what is described as intimidation could equally be described as banter. Both sides are used to the same stop and search format and what occurred should be seen in the context that they are all weary of it. No doubt such searches are unwelcome and considered unnecessary and tempers may fray. Certainly, any behaviour was not deemed sufficient to reach the level for an obstruction charge. Even if behaviour seen on BWF could be deemed sufficiently relevant, I would exclude it under Article 6(3) on the grounds that evaluating the evidence in context, its admission in evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.

[350] In respect of Mr McIntyre, his previous convictions for riot are admissible as propensity despite the fact that he was very young when the first offence was committed. Had that earlier offence alone been the subject of a bad character application, I would have excluded it under Article 6(3) on account of the length of time that elapsed. However, the fact that Mr McIntyre has two convictions for the same type of behaviour and one is recent suggests a tendency to what might be described as fairly unusual behaviour particularly in a man of his age. In that context, the earlier conviction assumes a relevance it would not otherwise have on account of his youth at that time. While there is

some dispute about the actual facts of the riot offences, I consider that the nature of the offence in itself is relevant.

Terrorist convictions and Saoradh association of others who are not defendants

[351] The prosecution relies on terrorist convictions and long association with Saoradh of others who were not before the court to support the case against the defendants. Their presence at the scene of the riot, relevant actions allegedly undertaken in furtherance of the riot after particular communications between them and some defendants, the flurry of telephone communications between them and some of the defendants at Ballymagowan Gardens where the plan to orchestrate the riot was said to have been hatched are relied on as an important strand of circumstantial evidence.

[352] If the evidence does not have to do with the offences charged, the test for admission of a non-defendant's bad character is higher than that for the admission of a defendant's bad character; it is one of enhanced relevance and leave is required. Article 5(1)(b) of the 2004 Order permits the evidence to be adduced:

> "(b) where it has substantial probative value in relation to a matter which:
>
> (i) is a matter in issue in the proceedings; and
>
> (ii) is of substantial importance in the context of the case as a whole."

[353] In my view this evidence has to do with the facts of the offences because there is a clear nexus in time. The terrorist convictions are the context which makes the contemporaneous communications relevant. However, if I am wrong about that I consider that the test for admission is met and leave is granted. At 2.25 *Spencer* opines that "when confronted with some questionable activity or tendency, the courts have (in essence) seen the main issue as one of relevance and the categorisation of the evidence as of secondary importance." The question of whether public disorder was orchestrated by those involved in a terrorist organisation, in the course of which Lyra McKee was shot dead is at the heart of this case. The prosecution submit that the fact of communications between the defendants and mostly older men with terrorist convictions is of substantial probative value in relation to that core issue. Whilst I accept that submission and admit both the terrorist convictions and evidence of association with Saoradh, I am mindful that the content of the communications is unknown. The inferences the Crown seek to draw will have to be carefully considered, in light of all the evidence.

[354] As the tribunal of fact, I will also have to determine whether I am sure that the evidence admitted is capable of supporting the prosecution case and if so, to what extent. But, none of the defendants can be convicted wholly or mainly because of it. The fact that someone has displayed hostility to police in the past or even has expressed views supporting violent Irish Republicanism does not mean that they are guilty of any of these offences. It is therefore important that the relevance of bad character evidence is not overstated.

[355] In this case, it will also be necessary to determine whether any of this evidence advances the prosecution case in light of the evidence already adduced without objection.

[356] Since the test is relevancy, it matters not whether this evidence is adduced against the defendants under a statutory gateway or considered to be to do with the facts of the offences. Clearly the considerations overlap. Insofar as it is necessary, time is extended for an application under the 2004 Order because there is no prejudice to the defendants. I do not consider that the true purpose of admitting either Mr McIntyre's convictions or the other pieces of disputed evidence is to bolster a weak case. *Spencer* at 1.70 makes it clear that I am not required to consider whether there is a case to answer, absent this evidence. In *Darnley* [2012] EWCA Crim 1148, the argument was whether evidence of previous convictions for burglary ought to have been admitted where there was no direct evidence that the defendant had committed the burglary in question and the only evidence against him was DNA found on a movable item at the scene. The Court of Appeal considered that the other evidence was sufficiently strong to survive a "no case "challenge but if they were wrong about that, the bad character evidence should not have been excluded.

Is there a case to answer?

[357] In order to determine this question, it is necessary to set out the prosecution case against each defendant and consider the points made on their behalf along with the relevant legal principles. I remind myself that at the direction stage the Crown case must be taken at its height and where there is evidence against each defendant, the only basis on which I can stop the trial is where I have concluded that the evidence is so discredited or so intrinsically weak that it could not properly support a conviction. That means that I must ask myself whether this is one of those exceptional cases where there is no possibility of each defendant being convicted to the requisite standard by the evidence given for the prosecution. In considering that question, I bear in mind that the test is whether *a* jury not *all* reasonable juries could, on one possible view of the evidence, be entitled to find each defendant guilty of each charge.

The case against each of the unmasked group

Patrick Mellon and Jude McCrory

[358] The prosecution relies on the MTV footage recorded at Ballymagowan Gardens before the disorder began. The MTV team had been at the McCrory home and recorded conversations between various persons both inside and outside the home, which included Mr Gallagher, Mr McCrory, Mr Elliott, Mr Barr and Mr McCool who lived nearby. On becoming aware of the presence of police Land Rovers in the Creggan, there was discussion outside McCrory's home. Barr and McCool took part in the flurry of telephone traffic between them and other older persons (who are not defendants) who are alleged to support violent Irish Republicanism.

[359] Although the content of those conversations is unknown, it is the Crown case that it is likely that the disorder was planned at that time. Mr Gallagher and Mr McCrory endorsed Mr Elliott's stated reason for going to where the police Land Rovers were, namely "for support … for their friends". McCrory said that if someone has been "targeted by the Crown Forces people often go and show support for their families and stuff." Gallagher added: "and assist them." Their stated purpose in making their way to the shops was to support and assist.

[360] Gallagher and McCrory suggested to the MTV team that they go to the shops, Gallagher said because there was "a bit of activity" there and made reference to "acts of resistance." The prosecution submits that in fact, there was no activity at that time because the disorder did not begin until they arrived when the petrol bombs were retrieved from the back of the shops.

[361] In short, it is submitted that Patrick Gallagher and Jude McCrory brought the camera crew to the disorder where the masked men were waiting for them. Two of the masked men, alleged to be Mr Gillen and Mr Campbell, approached them as they arrived and plainly they were known to one another. In fact, it is alleged that they were associates and had been in the Saoradh office together earlier on 18 April. They were at ease in each other's company, the masked men giving an interview to Mr Yates and providing him with a petrol bomb to inspect. Gallagher and McCrory engaged with the masked men, showing familiarity. There was nothing to suggest that the camera crew was a surprise to them, which supports the case that this had been planned. As they had arrived at Central Drive, Patrick Gallagher told a person called Kieran Gallagher on the phone "Aye, we're walking over now."

[362] When they arrived at the shops, the masked man alleged to be Gillen informed McCrory of their intentions and later, at the end of the service road, the man alleged to be McIntyre approached Gallagher, McCrory and Elliott to tell them they were going to attack a police Land Rover.

[363] The prosecution submits that there was coordination between the masked men and the camera crew who got remarkably close during the first round of petrol bombing, demonstrating that the purpose was to "put on a show" for the camera. Gallagher commentated on events. He and McCrory clearly approved of the rioting which they attempted to justify to Yates. They were critical of the police.

[364] The prosecution relies on the behaviour of McCrory towards Stephen Mallett the community worker, intervening when he sought to stop some of the younger rioters. He justified the disorder, undermining his claim that he had stepped in for Mallett's safety. Gallagher joined the criticism of Mallett, endorsing Barr's description of him as a "collaborator" and contrasting the community's view of him with that of himself, Barr, McCrory and the masked men. McCrory also aggressively grabbed the front of the top of a man looking for his son.

[365] The prosecution invites the court to infer that a telephone call from Thomas Ashe Mellon (a non-defendant with a terrorist connection) to Joe Barr and the second round of petrol bombs are connected. Shortly after the call, Barr and McCrory walked to the shops, from where the attack was mounted. McCrory and Barr returned at around the time the attack began.

[366] The prosecution relies on McCrory's behaviour when a hoax bomb was deposited on Fanad Drive, close to the Land Rovers. He acted to make the crowd move back from the apparent threat, appearing as if he were "marshalling" it. He and Gallagher remained closer to it than the rest of the crowd, suggesting a degree of authority.

[367] When the film crew became aware that a woman had complained that the disorder had been set up for the camera, Barr, Gallagher and McCrory sought to assuage their concerns, assuring them that the criticism emanated from those who disagree with them. McCrory told Yates before they left: "I hope you don't miss any more camera opportunities."

[368] Gallagher, McCrory and Barr then accompanied the film crew from the crossroads, ensuring their safety and directing their route. On at least two occasions, the cameraman was instructed by Gallagher not to film or point his camera in a particular direction.

Joe Barr

[369] The prosecution relies on the fact that Mr Barr brought the news of the Land Rovers in the Creggan to McCrory's home in Ballymagowan Gardens. Thereafter, Barr was very active, liaising with McCool and making and receiving a number of calls and received texts around that time, including from senior militant republicans such as Melaugh and Ashe Mellon. He later spoke

to Gillen after he arrived in his Audi A4 before taking a call from Eamon Barry Millar and communicating something to McCrory as if telling him something. The contents of the telephone calls is unknown. Shortly after he was seen with Mellon, McCrory, McCool and Elliott, McCrory and Mellon suggested to Yates that they go down to the shops where there was "a bit of activity."

[370] It is the Crown case that this flurry of discussion and telephone contact (although the contents are unknown), when considered with the presence and actions of those involved at the junction of Central Drive and Fanad Drive later, resulted in the disorder.

[371] The Crown submits that Mr Barr was busy from his arrival at the crossroads, at 21:47 hrs, when he came running down to the crossroads from the direction of the Land Rovers. He immediately remonstrated with the community worker Stephen Mallett telling him to "fuck off" before indicating to McCrory that he wanted to tell him something in private. McCool arrived less than a minute after Barr and he and Barr then approached Mr Mallett again, and were aggressive towards him, McCool particularly so, raising his voice and saying "I'm telling you to fuck off. Get down the street now. Get down the fucking street now" and pushing Mallett back and forcing him to retreat down Fanad Drive. The prosecution then points to McIntyre threatening to punch Mallett before McCrory intervened. Barr then sought to justify the disorder and perhaps also the removal of Mallett from the area.

[372] It is alleged that Barr and McCool, in their challenge and removal of Mallett were preventing any further disruption to the rioting. They are described as "policing" it and enabling it to continue. Barr's position in the hierarchy was shown by him declining Mellon's request to tell Yates whose home was being searched.

[373] Barr was phoned by Ashe Mellon at 21:49 hrs and moved off to take the call. Ashe Mellon called him again at 21:59 hrs. In between those calls, Barr was in the company of Patrick McDaid and Kevin Brady, militant Republicans, standing in the mouth of Fanad Drive. The Crown draws a link between these events and the fact that at 22:04 hrs, four minutes after Ashe Mellon had called him, Barr and McCrory walked off in the direction of the shops, from where the attacks were mounted. Although there had been no significant disorder for the previous 15 minutes, the second round of petrol bombing followed almost within two minutes. Barr did not miss the start of it, alleged to have "strided" into view. He is alleged to have told someone to "stand in" as he passed, acting as if he had authority. McCrory had also returned as he is seen with Yates and the others when the camera first shows them after the attack had begun.

[374] During the sustained attack on the police Land Rovers that followed over the next three minutes, someone close to the microphone (possibly Barr) was heard to shout "Get into them" twice. Barr and McCrory (who has also

returned) were seen on camera standing watching beside Yates, slightly off the footpath on the other side of the road.

[375] Yates pointed out that one of the Land Rovers was struck and that a police officer had got out to spray the flame (at 22:08 hrs), it appears that something was thrown at that officer because Barr made an "excited movement", and while the prosecution accepts that the words are difficult to make out, he appears to say: "hit him", followed by "fuck sake", when it missed. The sound of a smash could be heard (on Track 2) just before he allegedly swore.

[376] When the film crew learnt of the disquiet surrounding them being there, Barr dismissed concerns and encouraged them to remain. When they did leave, it was Barr who led them back up towards the shops and is said to have "controlled" their exit from the area. He spoke to Gillen on the opposite footpath, directing him to cross over the road out of the path of the film crew. Barr then crossed back over himself and spoke with Melaugh and another, with Gillen, McCool and Millar close by. He then escorted the film crew out of the Creggan.

[377] In short, the case against Mr Barr is that he plainly played an intentional role in the disorder. The clearest evidence of intentional encouragement or assistance is said to be his removal of the community worker and his reaction to the petrol bomb being thrown at the police officer who had got out of the Land Rover, but the other strands of evidence are said to combine to show his authority "on the ground" at the disorder.

Kieran McCool

[378] Mr McCool was also involved at Ballymagowan Gardens, when Mr Barr ran to speak to him. McCool then called the number ending '4270' while Barr was on the phone to Melaugh. Ashe Mellon then provided a connection between '4270' and Melaugh before calling McCool himself. '4270' followed Ashe Mellon in calling McCool and there was further contact between Ashe Mellon, '4270', Canning and Melaugh. McCool remained talking to Barr and McCrory after Gillen arrived and spoke to Barr and Elliott. At that stage, Gillen had already spoken to McIntyre and he did so again after his arrival. McCool, Barr and McCrory were joined by Mellon before the latter two walked over to Yates and McCrory and suggested that they go down to the shops where he said he thought there was "a bit of activity." The prosecution submits that it is a natural inference that that information came from his discussions with McCool and Barr.

[379] It also submits that the court could conclude, bearing in mind McCool's later presence at the disorder, that his telephone conversations concerned "a

reaction to the arrival of the Land Rovers and that the plan to conduct the disorder was hatched."

[380] McCool's next known involvement was on his arrival at the crossroads at 21:48 hrs to remove what the prosecution describes as the disruptive influence of Mallett. That action assisted in the continuation of the disorder. For his part, McCool was aggressive towards Mallett, assaulting him by pushing, and telling him to "get down the fucking street."

[381] Save for a sighting a few minutes later on the opposite footpath, McCool did not feature again until 22:38 hrs when he was seen, somewhat isolated from the remainder of the crowd (who had moved back because of the suspected bomb), standing in the road talking with Kevin Brady, a fellow militant Republican, as they looked up the hill towards the Land Rovers.

[382] He was next seen, as the camera crew left the area at 22:53 hrs, at the southern end of the shops, standing on the footpath of Central Drive with Millar, next to Gillen and close to another group including Melaugh and Barr. On more than one occasion, the film crew and camera were directed away from where those persons were gathered.

[383] The final sighting of McCool was as the gunman made his escape. After the gunman passed, McCool briefly walked in the same direction as him (as Millar did before him). However, McCool then turned to look behind him, towards the crossroads, while continuing to move slowly, and without any apparent urgency, backwards, in the same direction as the gunman. Nothing more was seen as the footage came to a conclusion.

[384] The person using the number '4270' called McCool at 02:55 hrs on 19 April, and again at 15:20 hrs. McCool called him back at 15:25 hrs. '4270' called again, at 18:40 hrs, on that day. Barr called McCool at 15:28 hrs before sending a text (apparently as one of a group) at 21:41 hrs.

[385] McCool's involvement at the outset at Ballymagowan Gardens coupled with his treatment of Mallett, ensuring the removal of Mallett's disruptive influence on the disorder, together with McCool's continued non-coincidental presence in the area is, the prosecution submit, sufficient evidence to show his intentional encouragement of what occurred. The prosecution submits that like McCrory and Barr, his involvement with the community worker suggests that his involvement extended to "assisting."

[386] The prosecution submits that the identification of relevant persons of interest at the scene is significant. Eamon Barry Millar, Fergal Melaugh, Thomas Ashe Mellon and Mark Canning are amongst a group of people standing on the side of the road on Central Drive, shortly after the shooting of Lyra McKee. Whilst these persons are not defendants, their known association

with Saoradh and relevant convictions are alleged to support the case that Saoradh representatives intended to encourage the riot by their presence. Evidence has also been adduced that some of the defendants were in telephone contact with these individuals when they were at Ballymagowan Gardens when the plan to stage a riot for the cameras is alleged to have been hatched.

The defence submissions of no case to answer

[387] Counsel on behalf of all the unmasked defendants rely on the evidence of Emmet Doyle who explained the context in which the riot began. PSNI vehicles had unexpectedly arrived to carry out a search at the home of a Saoradh member in Mulroy Gardens on the evening of 18 April 2019. The news quickly spread through social media, as it commonly did. A fair number of young people – about 50 or 60 had already gathered in the area of Fanad Drive and Central Drive by the time military vehicles arrived and personnel in military attire got out and went towards the house being searched.

[388] Mr Doyle remembered feeling horrified as he knew the arrival of the British army in the Creggan would cause trouble, disorder of some kind. Coming into the Creggan at that time in those circumstances would have been viewed as "outrageous" particularly by the young people present. Some of the crowd began to disperse and he then saw a Land Rover reversing, which had been hit by a petrol bomb and was on fire. People were standing at their front doors and a crowd in excess of 30 was spread across Central Drive – mostly young people aged 10–16.

[389] He saw the tipper truck coming at speed with someone on the back and petrol bombs and fireworks thrown. He thought people probably were not frightened because the target was police vehicles and they were far enough away.

[390] In light of that evidence, it is submitted that the whole Crown case is based on a false premise: the riot was not orchestrated by Saoradh or any of the defendants, it was a spontaneous reaction by members of the public to the arrival of police, accompanied by the British army into the Creggan. The evidence contradicts the Crown contention that the riot was a "show "put on for the MTV cameras. Had that been the case, the MTV team would have been encouraged to remain at the scene to witness the escalation in violence that resulted in Lyra McKee's murder. They had been safely escorted from the scene, at their request, by that stage.

[391] On behalf of Jude McCrory, it is also submitted that he has denied intentionally assisting or encouraging the riot from the outset. He and Patrick Gallagher were the key points of contact for MTV, and they speak openly about their political views and the views of local people to Reggie Yates in the footage.

[392] In police interviews, whilst he refused to answer questions his solicitor gave a pre- prepared statement in which he said:

> "I Jude McCrory … hereby confirm that I deny committing any criminal offences on 18 April 2019."

At the beginning of the second interview, his solicitor read out a further statement which said:

> "I, Jude McCrory … hereby confirm that at no point did I have prior knowledge that there would be rioting. I did not plan, participate in or encourage the riot. I did not play any role in the making, possessing or throwing of petrol bombs. I did not incite anyone to throw petrol bombs and I had no conversations with anyone regarding the commission of criminal offences."

[393] In the course of interview he said that "at no point" did he speak to the people wearing masks and denied that he was the person on the footage. At the conclusion of the interview he said:

> "I'd just like to reiterate it again that I had no involvement in the planning, encouraging or assisting anybody in rioting, hijacking or bringing a gun onto the streets of Creggan to fire shots of police and killing Lyra McKee, no knowledge of anything whatsoever regarding any of it."

[394] In short, it is submitted that Mr McCrory neither said nor did anything to assist or encourage any of the riotous behaviour nor did he intend to do so. He was present simply because he and Mr Gallagher had been escorting the MTV team around places of historical interest in Derry and when news spread of the arrival of police, Reggie Yates wanted to see what was happening.

[395] Whilst he willingly discussed his attitude to police and used terms such as "Irish freedom", "the struggle", "the British withdrawal", "Crown Forces" and "occupied Ireland", it is submitted that this has no bearing on the charges alleged against him. Animosity towards the police, is not in itself either illegal nor is it unusual even in other areas within the UK. His presence was entirely innocent, and his words and actions are filmed throughout the MTV footage.

[396] Whilst the prosecution submits that the relative ease with which he interacts with masked individuals with petrol bombs shows that they were known to each other and part of a joint enterprise, putting on a show of violent

Republicanism for the cameras, the defence submit that this is mere speculation.

Patrick Gallagher

[397] On behalf of Patrick Gallagher, the same submissions are made. In addition, it is submitted that Mr Gallaher's criticism of Stephen Mallett, the community worker who intervened to express his strong disapproval of the behaviour of the rioters and the failure of the unmasked defendants to bring it to a close, is not evidence from which intentional encouragement or assistance can be inferred. It is submitted that the terminology used by the prosecution both in the opening and in the course of submissions unfairly characterises what can be seen and heard on the footage.

[398] There is no doubt that the views he expressed are strongly held and his account of the history of public disorder in Derry and the type of serious incidents that can occur is simply a factual account of those events, from his perspective. None of it can properly be construed as knowledge that riotous behaviour was going to occur or his involvement in a joint enterprise by encouraging the perpetrators by their presence, not intervening to stop it or objecting to others such as Mr Mallett intervening.

Joe Barr

[399] It is submitted that the MTV footage from Ballymagowan Gardens demonstrates that Mr Barr and the others only became aware that a police convoy was approaching the Creggan in a message from a community worker, not anyone connected to Saoradh. In fact, Reggie Yates was shown a Facebook page dedicated to spreading this kind of news. No one could have predicted that the police and the army would carry out a search of premises that night and the initial thoughts of those present, was that a search was likely of either the McCrory home or another Saoradh member within the immediate area. Attempts were immediately made to conceal laptops and phones to prevent them being seized. None of this suggests a plan to initiate a riot in Central Drive or anywhere else for the MTV cameras.

[400] The defence submit that the prosecution reliance on telephone calls between defendants and others who have relevant convictions does not assist the prosecution. The content of those telephone calls is unknown and there are no text or WhatsApp messages to shed light on the issue. The submission that the plan to orchestrate a riot and encourage and assist those actively involved was hatched during those conversations is purely speculative.

[401] In particular, it is submitted that there is no evidence that Mr Gallagher and Mr McCrory's suggestion to Reggie Yates that they go down to see the "bit of activity" at the shops, arose out of a conversation with Mr Barr. It is

submitted that the use of the word "purposefully" to describe the manner in which Mr Barr walked away from Mr McCrory's house has been deliberately chosen to add weight to a case that lacks any evidential credibility.

[402] It is clear from the MTV footage that the riot had most definitely started by the time Mr Barr arrived at the scene at 21:47 hrs. In those circumstances, it is submitted that there is no evidence of intentional encouragement or assistance on his part.

[403] The prosecution contention that Mr Barr assisted or encouraged the riot by remonstrating with the community worker Mr Mallett who was making his disapproval very clear, has no basis because the Crown has conceded that by that point Mr Mallett had already stopped trying to intervene because of the behaviour of other defendants. The defence disputes that comments made to Mr Mallett recorded on the footage – "are you slabbering?" and remarks - "he's fucking slabbering again" can be attributed to Mr Barr. Similarly, it is disputed that shouts of "get into them" can be attributed to him as petrol bombs were being thrown or an exasperated shout of "hit him, fuck sake" when a missile appears to have missed a police officer.

[404] The defence dispute that an inference of intentional encouragement or assistance can be drawn by Mr Barr's mere presence in this case, because he had earlier introduced himself as chairman of Saoradh. Furthermore, it is submitted that his apparent gesture to Mr Gallagher indicating that he should not reveal the name of the person whose house was being searched to Mr Yates, should not be construed as an act of control but simply a desire to protect the privacy of that person.

[405] The defence dismiss as mere speculation, the Crown contention that a telephone call between Mr Barr and Thomas Ashe Mellon, who has a relevant terrorist conviction, caused Mr Barr to immediately walk off in the direction of the shops to encourage a second round of petrol bombing, there having been no significant disorder for the previous 15 minutes. There is no evidence at all to support that inference.

Kieran McCool

[406] On behalf of Mr McCool it is submitted that the extent of the evidence against him is entirely speculative. The case against him is characterised in this way:

(i) He was filmed by MTV chatting with his neighbour Joe Barr, some time after 21:00 hrs on 18 April outside the McCrory home in Ballymagowan Gardens.

(ii) He was observed on his phone, in a call with a person called Gary Hayden. He then received a call from a Thomas Ashe Mellon (neither of whom are co accused). The contents of the calls are unknown.

(iii) Various comments are made by the prosecution regarding his demeanour "looking up the street outside his home", later "walking briskly from the direction of the shops" at the scene of the disorder.

(iv) He engaged in an altercation with the community worker Mr Mallett involving swearing and a push, telling him to "get down the fucking street now." Mr Mallett had voiced his objection to the ongoing riot but had then given up trying to intervene.

(v) He is seen talking to a person (Kevin Brady) who, although not a defendant, is alleged to have communicated with Joe Barr and another person in advance of the second round of petrol bombs, and the events are said to be linked.

(vi) At the time the Audi was set alight at the crossroads, unknown figures were seen in the area where Mr McCool had been standing at earlier.

(vii) Later Mr McCool was seen walking in the direction of his home "with no apparent urgency."

[407] Even if admitted, the bad character evidence against him amounts to three convictions for Participating in an Unnotified Procession and a conviction for disorderly behaviour and assault on police in 2017. It does not assist the prosecution case.

The legal principles relating to joint enterprise

[408] The prosecution case is based on joint enterprise. *Blackstone (2025)* at A 4.1 explains that responsibility for a criminal offence may be incurred either as a principal offender or as an accessory. A principal offender is the actual perpetrator of the offence, the person whose individual conduct satisfies the definition of the particular offence in question, whilst an accessory is one who aids, abets, counsels or procures the commission of the offence.

[409] *R v Jogee* [2017] AC 387, the Supreme Court clarified the acts and the mental element necessary to prove liability as a secondary offender. A person who does any act (or in some circumstances, omits to do an act) which is capable of encouraging or assisting the commission of an offence, and who intends to encourage or assist that offence, is guilty of an offence as an accessory or secondary offender. If the crime requires a particular intent, the secondary offender must intend (it may be conditionally) to assist the perpetrator to act with such intent.

[410] Encouragement and assistance may take many forms. Although mere presence at the scene of a crime is generally not enough to establish criminal liability for encouraging or assisting, it may do so depending on the circumstances. It may include providing support by contributing to the force of numbers in a hostile confrontation:

> "With regard to the conduct element, the act of assistance or encouragement may be infinitely varied. Two recurrent situations need mention. Firstly, association between [the alleged secondary offender] and [the perpetrator] may or may not involve assistance or encouragement. Secondly, the same is true of the presence of [the alleged secondary offender] at the scene when… the crime [is perpetrated]. Both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided. Numbers often matter. Most people are bolder when supported or fortified by others than they are when alone. And something done by a group is often a good deal more effective than the same thing done by an individual alone. A great many crimes, especially of actual or threatened violence, are, whether planned or spontaneous, in fact encouraged or assisted by supporters present with the principal lending force to what he does. Nevertheless, neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts." (*Jogee*, para [11])

[411] What matters is whether the secondary offender encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a *particular way* of committing it though he may sometimes do.

[412] Mere foresight of a potential crime is not enough to convict someone of that crime; instead, foresight can only be used as evidence from which a jury can infer intent to encourage or assist the crime.

[413] The prosecution does not have to prove that the encouragement or assistance had a positive effect on the perpetrator's conduct or on the outcome. For example, if a number of persons encourage him, the encouragement of a single one of them could not be shown to have made a difference; or he may ignore the encouragement.

[414] Questions of intent often have to be decided by a process of inference from the facts and circumstances proved:

> "… In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But, as we have said, liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If a person joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if the perpetrator acts with intent to cause serious bodily injury and death results, both he and the other person will be guilty of murder." (*Jogee*, para [95])

[415] Where the offence charged does <u>not</u> require any mental element, the only mental element required of the secondary party is that he intended to encourage or assist the perpetrator to do the prohibited act, with knowledge of any facts and circumstances necessary for it to be a prohibited act.

Conclusion whether there is a case to answer in respect of the unmasked group

[416] In respect of those who are unmasked (Gallagher, McCrory, Barr and McCool) the question is whether a jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to conclude that they intentionally encouraged or assisted those directly involved in riotous offences (*Goddard* [2012] EWCA Crim 1756).

[417] Since I am a judge sitting alone and will have to determine the outcome of this case in fact and in law, it is inappropriate at this stage that I should go into detail, particularly on issues of the weight that should be attributed to the individual pieces of evidence (See *Courtney* [2007] NICA 6). Final conclusions about weight cannot be determined at this stage of the trial.

[418] In respect of Jude McCrory and Patrick Gallagher, I am satisfied that their presence, as representatives of Saoradh, facilitating an MTV camera crew filming the riot and observing at close quarters those possessing and throwing petrol bombs, could be considered as capable of intentionally encouraging or assisting those directly involved. They describe themselves and Joe Barr as

community as leaders, to whom people look up. Both of them make their political views clear, including their hostility to police and to those whom they perceive as supporting police, including Sinn Fein. They describe acts of criminality and violence in terms of "acts of resistance" and use other terminology consistent with supporting violence for political ends.

[419] In respect of Joe Barr, the same points can be made. He is introduced to Reggie Yates as a senior member of Saoradh and he is the person to whom Mr McCrory and Mr Gallagher defer if unsure of how to answer a question. In his case also the evidence is capable of amounting to intentional encouragement or assistance. The question of whether the words encouraging actual violence towards the police officers present can be proved to the criminal standard to be attributable to him is a matter ultimately, to be determined at the end of the trial. Taking the prosecution evidence at its height, I am not convinced that there are no circumstances in which I could properly convict based on the evidence I have heard.

[420] In relation to Kieran McCool, the major plank of the prosecution case is his aggressive treatment of Stephen Mallett, preventing his attempts to stop the rioting. In that way he is said to have been involved in "policing" the rioting and thereby encouraging or assisting it on a joint enterprise basis. The prosecution submit that taken together with his involvement in the conversations both physically and by telephone with relevant others at Ballymagowan Gardens and his continued non-coincidental presence in the area, there is a case to answer. I consider the case against him to be weaker than the others because he does not appear to play a leadership role, unlike Barr, nor was he involved to the same extent as McCrory and Mellon. Nevertheless, I am not convinced that there are no circumstances in which I could properly convict based on the evidence I have heard.

The case against each of the masked group

[421] Paul McIntyre, Peter Cavanagh and Jordan Devine are each charged with murder on a joint enterprise basis by intentionally assisting or encouraging the gunman who shot Lyra McKee and possession of a firearm and ammunition, as secondary offenders.

[422] To establish the offence of murder as a perpetrator, the prosecution must prove beyond reasonable doubt that a defendant killed a person, without lawful excuse, with the intent to kill or cause grievous bodily harm. Since an intent to cause serious bodily injury and a resulting death is sufficient, the Crown must therefore prove that each of these defendants intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary.

The alleged acts of assistance or encouragement of murder

[423] It is alleged that Paul McIntyre, Jordan Devine and Peter Cavanagh are the masked individuals accompanying the gunman walking towards the corner of Fanad drive and Central Drive, from where the shots were fired. As well as accompanying him, which is alleged to be an act of encouragement, Paul McIntyre and Jordan Devine are alleged to have assisted him by picking up bullets which misfired and fell on the ground. The defence do not accept that the identifications are correct, nor do they accept that what can be seen on poor quality mobile phone footage is capable of amounting to assistance or encouragement.

[424] The prosecution submits that the evidence of intention can be readily inferred from the actions of the individuals as seen on the footage. Accompanying the gunman to the position from which the shots were fired and removing incriminating evidence in the form of discharged bullets, can only have been done with a view to encouraging or assisting the gunman.

[425] The defence refute this submission. Leaving aside the deficiencies in the poor-quality mobile phone evidence, which is the core identification for the murder charge, the defence submit that neither the relevant intention can be proved to the criminal standard, nor can the alleged acts of encouragement or assistance. The height of the evidence is a gunman firing at armoured police vehicles with a low calibre handgun. No particular person has been identified as a target and the intention of the gunman is unclear since it is unlikely that a police officer would leave the safety of his armoured vehicle in circumstances of attack by petrol bombs. Even if the gunman can be inferred to have the relevant intent, there is no evidence that it was shared by any of those charged with murder as secondary offenders. As well as proof of identification, the prosecution must prove knowledge that the gunman was in possession of a gun and intended, by walking bedside him and picking up evidence by way of misfired rounds, to encourage or assist him to cause really serious harm or death. The defence submit that if the act of assistance is alleged to be a "clean-up operation" that cannot be established because it could not have been foreseen that the gun would jam or misfire.

[426] The Crown case in relation to identification of the defendants charged with murder is based on the imagery analysis evidence of Mr Wooller. It is accepted that the starting point for his analysis is poor quality mobile phone footage where no identifying clothing features can be seen and no facial features can be seen. This is the core evidence of the shooting. Whilst this was the starting point, he then worked backwards, studying better quality imagery, identifying emerging features from commercial quality MTV footage and comparing them with daytime images showing matching clothing or parts of clothing. This is best practice, a technique designed to eliminate the risk of cognitive bias. He then prepared his report for the court on the basis of all of the features he was able to identify, applying his technical expertise.

[427] In detailed submissions, the defence have highlighted the specific weaknesses in the identification evidence, Mr Woollers' acceptance that cognitive bias cannot be excluded from the analysis, areas of dissimilarity that were not highlighted and errors corrected by his peer reviewer Mr Cass. In particular, when asked by the prosecution to provide further clarification, Mr Wooller accepted that his second report, in which he was able to identify additional features could have been influenced by his full knowledge of the images at that stage. Clearly, the weight that should be attached to the imagery analysis evidence, considered with all of the other evidence as a whole, is a matter that can only be determined at the conclusion of the trial and adopting the approach endorsed by the Court of Appeal in *Courtney* it is not appropriate at this stage to go into detail about those matters.

[428] At this stage of the trial I have to decide whether the evidence is so tenuous that there are no circumstances in which I could find the defendants guilty of the charge of murder.

[429] Paul McIntyre, Jordan Devine, and Peter Cavanagh, are also charged with riot and possessing, throwing or making petrol bombs on 18 April along with Christopher Gillen and Joe Campbell. All except Cavanagh are charged with riotous behaviour and associated offences on 16 April.

[430] Paul McIntyre is also charged with robbery, arson, belonging to proscribed organisation, perpetrating a bomb hoax, hijacking and common assault.

[431] Peter Cavanagh is also charged with robbery and arson along with Christopher Gillen.

[432] There is no dispute that the offences of riot and associated offences were committed. For the purposes of this application, it is unnecessary therefore to set out the ingredients of each of those offences. The issue is the identification of the offenders.

The identification evidence against each of the masked group

Mr Paul McIntyre

[433] Mr Wooller's evidence is that on 18 April 2019, person D (the masked man alleged to be Mr McIntyre) was present at all of the significant events of the disorder including the shooting of Lyra McKee. He wore a bracelet and four items of clothing matching that owned or previously worn by McIntyre, including his Adidas trainers, his O'Neill's tracksuit bottoms, his Nike cap and a faded red Superdry t-shirt.

[434] On 16 April 2019, the masked man, person PP1(17) (also alleged to be Mr McIntyre) had a tattoo and wore three items of clothing matching that owned or previously worn by McIntyre, including his padded jacket with the emblem on the sleeve and stitching closer on the shoulders, his Nike cap and his Adidas trainers with the lace adornment.

[435] On each occasion Mr McIntyre was filmed in days leading up to 18 April 2019 he was wearing these trainers. He wore the Nike cap on multiple occasions. He habitually wore his bracelet. His tattoo is permanent.

[436] When Mr Wooller viewed the Pangaia footage from 16 April, he instantly referred to PP1(17) as Person D (from 18 April). He said the person bore an obvious similarity in height, build and general appearance, in addition to the shoes and cap. He was similarly shorter than the majority of other people in the same clips (though taller than Person C).

[437] The difference in height between Person D and Person L (alleged to be Mr Gillen) is similar to that between McIntyre and Gillen.

[438] The prosecution submits that because of the connection between the incidents, the evidence implicating the defendants should be considered as a whole. The connection between McIntyre and 16 April; that between 16 and 18 April; and that between McIntyre and 18 April significantly strengthens the proposition that the person on both occasions was McIntyre.

[439] If it was the same masked person on both occasions, in total he had a tattoo, a bracelet and five items of clothing in common with Mr McIntyre.

[440] Mr Wooller attributed the highest level of support available, ie that it was "much more probable" that both persons in footage from 16 and 18 were Mr McIntyre. Given the number of connections, the prosecution suggest that this is a conservative expression of the degree of support. However, Mr Wooller was taking into account an assumption that the two groups were broadly the same, which I have rejected as speculative.

[441] The masked man on 16 and 18 April had very short or shaven hair underneath his cap. He was, in each instance, of a similar height and build to Mr McIntyre who was of relatively distinctive shape, particularly amongst the others involved.

[442] The prosecution submits that the features Mr McIntyre had in common with the person on 16 and 18 April cannot be dismissed as a coincidence. The possibility of another owning the very same items and wearing them in combination is so remote as can be safely discounted. The evidence that he was both masked persons is overwhelming.

[443] Mr McIntyre's trainers, O'Neill's tracksuit bottoms and Nike cap were not recovered which the prosecution suggests is because they were disposed of. The red t-shirt was retained, likely in the belief that it had not been visible during the disorder on 18 April.

[444] Person L (alleged to be Mr Gillen) put his hand up to hide Person D's face from the camera while McCrory stepped across in front of the camera (at 21:35 hrs) suggesting he might be recognised on camera as the person filmed earlier that day.

The comparison between Person D (alleged to be Mr McIntyre during the disorder on 18 April) and the person who encouraged or assisted the gunman (as depicted in images D1- D4)

[445] The prosecution relies on Mr Wooller's evidence that the analysis, and the images themselves, reveal the following features in common between Person D (D1 to D4) at the time of the shooting and Person D during the disorder:

(a) general similarity in the overall appearance;

(b) a lowered hood with a bulge between the head and shoulders;

(c) a light tone highlight on the right shoulder;

(d) dark shoes with light soles;

(e) the peak of a cap;

(f) a highlight in the same location and approximate size as the O'Neill's logo; and

(g) a highlight from the area of the cap consistent with a reflection from the front left side of the cap.

[446] The highlight on the right shoulder, the highlight in the same place as the O'Neill's logo and that on the cap were all real features, not artefacts.

[447] Other images in the minutes leading up to the shooting showed highlights in common with Mr McIntyre's clothing, including down the left thigh and on the left breast, as well as similarity in all the other features.

[448] There was no alternative candidate for Persons D1 to D4. Only Persons B, I and N had a large logo on their left thigh. Each of them was otherwise obviously different to Person D.

[449] There were no new actors at the time of the shooting, save for the gunman

[450] All involved at the outset (Persons B, C, D, F and L) remained involved at the time of the shooting, save when Person L took off his coat and remained at the shops. Person G who joined later remained involved at the shooting.

[451] If Person D1 to D4 was new on the scene, it was a remarkable coincidence that he shared a number of clothing and physical features with Person D from earlier in the disorder. If it was not Person D, he was unaccounted for elsewhere.

[452] Person D had played a leading role at every event. It was inconceivable that he would not have remained for the shooting, particularly when his colleagues remained.

[453] McIntyre played a prominent role in everything he did with Saoradh in the days leading up to the disorder, just as he did on the night of 18 April.

Supporting evidence

[454] Mr Gillen phoned Mr McIntyre four times (getting though on three occasions) in the minutes before and after his arrival in his car at Ballymagowan Gardens, at the time of the flurry of phone activity involving those at Ballymagowan Gardens and other more senior persons who have demonstrated support for violent Irish republicanism. The prosecution submits that this phone activity likely planned the disorder.

[455] There is evidence that between 20:05 hrs and 21:43 hrs Mr McIntyre's phone was located in an area which included the crossroads and other areas of the Creggan.

[456] His phone was abruptly removed from the network at 21:43 hrs which the prosecution suggests was most likely done by being put on airplane mode. This was just before the first round of petrol bombing.

[457] The phone only rejoined the network, ie. was switched back from airplane mode at 23:19 hrs, approximately 15 minutes after the shooting. He called Gillen at 23:19 hrs who had not been with the others at that time.

[458] The masked and unmasked men clearly knew each other and were comfortable with each other's presence. Mr McIntyre and the others alleged to be masked were associates of each other and the unmasked defendants.

[459] Four of the five masked defendants were in the Saoradh office together earlier on 18 April, along with James Devine (brother of Jordan) who the prosecution submits was likely one of the masked men.

[460] McIntyre is particularly closely associated with Gillen, the other older member of the group of masked men. They interacted closely during the disorder. Gillen was the first person McIntyre called after he switched his phone back on. He was with him the next day in the car.

[461] Bad character evidence shows Mr McIntyre has a propensity to attack the police, including in the context of a riot.

Jordan Devine

[462] On 18 April 2019, the masked man, Person B (alleged to be Jordan Devine with the 'Team 9' tracksuit bottoms), was present at most of the significant events. He wore 3 items of clothing owned or previously worn by Jordan Devine, including grey Nike Air Max trainers, a Nike snood and a US Polo Association cap.

[463] On 16 April 2019, the masked man, Person PP/1(5) (also alleged to be Jordan Devine, wore two items of clothing owned or previously worn by Jordan Devine, including grey Nike Air Max trainers and an orange and grey 'Long Kesh '81' t-shirt.

[464] The grey Nike Air Max trainers were worn by the masked person on both 16 and 18 April. On both dates he had the same basic body proportions

[465] Jordan Devine was seen wearing trainers with the same features on a number of occasions

[466] Mr Wooller concluded that he considered it 'much more probable' than not that Person B and PP/1(5) were both Jordan Devine. Again, this was the highest level on his scale.

[467] Person B was readily identifiable, from his Team 9 tracksuit bottoms and grey trainers, as the person standing close to the gunman who raised his arm in celebration as the gunman fired and threw a likely petrol bomb. He could also be seen in the minutes up to the shooting. He was able to be identified by fewer features due to timing and context.

[468] Person B on 18 April admitted being present at the incident on 16 April to Reggie Yates when he asked him and Person L (Gillen). In effect, the masked man on both dates had four items of clothing (including the distinctive t-shirt) in common with Jordan Devine.

[469] The features Jordan Devine had in common with the person on 16 and 18 April cannot be dismissed as a coincidence. The possibility of another owning the very same items and wearing them in combination is so remote as can be safely discounted. The evidence that he was both masked persons is very strong indeed.

[470] Jordan Devine's Nike snood and grey Nike Air Max trainers were not recovered, suggesting they were disposed of.

Supporting evidence

[471] The prosecution relies on footage from 15 April when he is seen with bottles taken from the 720 Bar close to the Saoradh offices in support of its submission that these were used to make the petrol bombs used on 16 April and in the disorder on 18 April.

[472] It further submits that it is clear from the MTV footage that the masked and unmasked men clearly knew each other and were comfortable with each other's presence. Jordan Devine and the others alleged to be masked were associates of each other and the unmasked defendants. Four of the five masked defendants were in the Saoradh office together earlier on 18 April, along with James Devine who was likely one of the masked men (paras 192 to 194).

[473] On the night of 18 April, he was regularly in the company of Person C who was likely to be his brother, James Devine.

[474] The wi-fi at Jordan Devine's home showed that his phone was at home at 17 Synge Court, at the time of the disorder but messages from his mother and girlfriend (whose phones were also connected to the wi-fi at 17 Synge Court), at 23:12 hrs and 23:20 hrs respectively, showed that he was not at home. He answered the latter text only at 00:40 hrs. James Devine's phone was not connected to the wi-fi at 17 Synge Court between 20:17 hrs and 00:18 hrs suggesting he was out that night as well.

Christopher Gillen

[475] On 18 April 2019, the masked man, Person L, was present at most of the significant events, save for the shooting when he was seen in the area of the shops as MTV left the area. He played a prominent role in the disorder. He wore four items of clothing owned or previously worn by Christopher Gillen, including a black 'Trespass Qikpac' jacket with yellow or light green zips, navy Adidas tracksuit bottoms with white stripes to the mid-thigh, blue/black Nike trainers and a black t-shirt with white Adidas logo. He also wore a striped beanie hat.

[476] On 16 April 2019, the masked man, Person PP/1(2/14), wore 2 items of clothing owned or previously worn by Christopher Gillen, including a black 'Trespass Qikpac' jacket with yellow or light green zips and an Adidas tracksuit bottoms with blue stripes to the mid-thigh. He, too, wore a striped beanie hat like that on Person L.

[477] Christopher Gillen was similar in height and build to both masked persons. He is of distinctive build, having a tendency to lean back when standing upright, with his shoulders back and tummy forwards. He is also taller than most of his associates.

[478] The difference in height between Person D and Person L is similar to that between McIntyre and Gillen.

[479] If the court accepts that Person L is Mr Gillen on 18 April, that same individual admitted being present at the incident on 16 April to Reggie Yates.

[480] Christopher Gillen wore a similar Trespass jacket when stopped by police, with McIntyre on 20 December 2018. He also wore navy Adidas tracksuit bottoms with blue stripes to mid-thigh. He wore these tracksuit bottoms earlier on 16 April during the canvassing in the hours before Person PP/1(2/14) wore them at the manufacture of the petrol bombs and later on Central Drive. He wore navy tracksuit bottoms with white stripes to mid-thigh on a number of occasions including earlier on 18 April in the Saoradh office. Both tracksuit bottoms were recovered in the search of his home (paras 218 to 226).

[481] The navy tracksuit bottoms with white stripes to mid-thigh found at his home address had a burnt or melted hole in them on the back of the left knee. A feature similar in size, shape and appearance was visible on Person L's tracksuit bottoms in the footage from the disorder. This it is submitted is, on its own, very compelling evidence against Gillen.

[482] A man was seen in the area of a lamppost, opposite Creggan shops as MTV left the area at around 22:53 hrs. He pulled his t-shirt up to obscure his face from the camera. The t-shirt had a logo consistent with the large Adidas logo on the t-shirt worn by Gillen earlier in the day and later seized from him in custody. His trousers, shoes and possibly headwear were consistent with Person L. Around this time, the gunman was wearing a jacket (which was too big for him) that was possibly the black "Trespass Qikpac" jacket with yellow or light green zips.

[483] Mr Wooller concluded that he considered it 'much more probable' than not that Person L and PP/1(2/14) were both Christopher Gillen (para 233). Again, this was the highest level on his scale.

[484] The prosecution submits that the description on the scale significantly understates the overwhelming clothing evidence against Gillen in respect of both 16 and 18 April.

[485] In effect, the masked man on both dates had five items of clothing (including the distinctive jacket) in common with Gillen.

[486] The features Gillen had in common with the person on 16 and 18 April cannot be dismissed as a coincidence. The possibility of another owning the very same items and wearing them in combination is so remote as can be safely discounted. The evidence that he was both masked persons is very strong indeed.

Supporting evidence

[487] Gillen's Trespass jacket (worn in the stop and search on 20 December 2018) and blue Adidas trainers (worn in the Saoradh office) were not recovered suggesting they were disposed of.

[488] Gillen's Audi A4 car pulled up at Ballymagowan Gardens during the flurry of telephone activity involving those present there, at Jude McCrory's home and other more senior persons who have demonstrated support for violent Irish Republicanism (including Thomas Ashe Mellon who has a terrorist conviction). Gillen phoned McIntyre four times (getting though on three occasions) in the minutes before and after his arrival. He was also in contact with one of the senior men, Mark Canning. This phone activity likely planned the disorder.

[489] Evidence from the phone showed that between 20:20 hrs and 22:19 hrs Gillen's phone was using cell sites on the Londonderry Creggan 190° mast consistent with his phone being in the area of Central Drive or elsewhere in the Creggan.

[490] At 23:19 hrs, approximately 15 minutes after the shooting Gillen, who had not been with the others at that time, was called by McIntyre for 32 seconds (para 256).

[491] Gillen was seen on the CCTV at the 720 Bar when Jordan Devine wheeled the container of empty bottles towards Junior McDaid House on 15 April (para 257).

[492] The masked and unmasked men clearly knew each other and were comfortable with each other's presence. Gillen and the others alleged to be masked were associates of each other and the unmasked defendants (paras 258 to 260).

[493] Four of the five masked defendants were in the Saoradh officer together earlier on 18 April, along with James Devine who was likely one of the masked men.

[494] Gillen is particularly closely associated with McIntyre, the other older member of the group of masked men. They interacted closely during the disorder. Gillen was the first person McIntyre called after he switched his phone back on. He was with him the next day in the car (paras 259 to 260; and 147 to 149).

Joseph Campbell

[495] On 18 April 2019, the masked man, Person F, was present with Person L at the outset of the incident and, later, at all three rounds of petrol bombing. He was present at the shooting but did not appear to have a role and is not charged with murder.

[496] He wore two items of clothing owned or previously worn by Joe Campbell, including navy Adidas tracksuit bottoms with white stripes to mid-calf and an Adidas logo on the left ankle, and white Adidas trainers with dark stripes and other notable features.

[497] He clearly had a larger build than most of the other persons seen.

[498] On 16 April 2019, the masked man Person PP/1(11) wore two items of clothing owned or previously worn by Joe Campbell, including dark Adidas trainers with light stripes and other notable features and light grey Adidas tracksuit bottoms with blue stripes extending the full length.

[499] On both 16 and 18 April, the masked man alleged to be Campbell wore a "visually identical" dark hooded jacket with a ventilation flap across the chest. His trainers on 16 April were the reverse colour scheme to that on 18 April.

[500] He was on the periphery of the activity on both occasions and appeared rather ineffectual.

[501] Grey tracksuit bottoms with blue full length stripes wholly consistent with those worn by PP/1(11) were recovered in a search of his address.

[502] Mr Wooller concluded that it was "much more probable that Person F and PP/1(11) are one and the same person, than they were not: and that it is more probable that Joseph Campbell is both Person F and PP/1(11), than he is not." Again, this conclusion was partially based on an assumption that the same broad group was present on both 16 and 18 April.

[503] Because of the connection between the incidents, the evidence implicating the defendants should be considered as a whole.

[504] The connection between Campbell and 16 April; that between 16 and 18 April; and that between Campbell and 18 April significantly strengthens the proposition that the person on both occasions was Campbell.

[505] If it was the same masked person on both occasions, in total he had four items of clothing in common with Campbell.

Supporting evidence

[506] Campbell's navy Adidas tracksuit bottoms, with white stripes to mid-calf and both his white adidas trainers and black Adidas trainers were not recovered suggesting that they were disposed of.

[507] While Mr Wooller had noted Campbell as "clearly having a larger build than most of the other persons seen," The prosecution submits that he was, in fact, of a particularly distinctive and identifiable shape

[508] Campbell's face is described by the prosecution as soft-featured, which could be seen above the mask in the footage of the disorder on 16 and 18 April. The prosecution submits that this description means "baby faced" although no witness describes it as such. The mask worn by Person F and PP/1(11) exposed their eyes, eyebrows and the bridge of their nose. That part of their faces bears an obvious similarity to each other and to Campbell's.

[509] Gait analysis provides moderate support for the proposition that the figure in the questioned footage is Campbell in the reference footage.

[510] Evidence from his phone showed no recorded events for Campbell's phone between 19:58 hrs and 23:17 hrs, meaning that his phone was turned off during the period of the disorder until after the shooting. At 23:17 hrs, his phone was again connected to the network, for a short period of around 30 seconds, using the Londonderry Creggan 190° cell ID which provided coverage to an area of south Creggan, including an address connected to him at 4 Carrickreagh Gardens.

[511] In a signed statement to the police on 23 April 2019, Campbell falsely stated that he was at home at Carrickreagh Gardens from 15:00 hrs or 16:00 hrs. It is apparent from the 720 Bar footage that he was at the Saoradh office around the time of the meeting at 19:00 hrs on 18 April (paras 300 to 301).

[512] The masked and unmasked men clearly knew each other and were comfortable with each other's presence. Campbell and the others alleged to be masked were associates of each other and the unmasked defendants. Four of

the five masked defendants were in the Saoradh officer together earlier on 18 April, along with James Devine who was likely another of the masked men.

[513] During the day of 18 April, Campbell was regularly in the company of James Devine another of the youngest of those at the Saoradh office. Person F was regularly seen in the company of Person C throughout the disorder.

[514] Campbell was in phone contact with Mr Barr on 18 April. The day after the murder Gillen called him at 09:21 hrs and again at 14:07 hrs and 14:08 hrs.

[515] Bad character evidence shows Campbell's support for violent Irish republicanism and an animus towards the police.

Gearoid Peter Cavanagh

[516] The finding of Mr Cavanagh's DNA on the remains of a zip pull, said to match that seen on a bomber jacket worn by Person G (alleged to be Cavanagh) along with the cell site evidence tracing the movements of his phone are the main planks of the evidence against him (see paras [229] – [236] above).

Supporting Evidence

[517] The prosecution submits that Person G in the disorder, is of thin build with skinny legs. He walked in an upright fashion. It is contended that footage from the 720 Bar and the CCTV from Costcutter on 18 April 2025 shows that Cavanagh was of similar build and also walks in a stiff or upright manner.

[518] Cavanagh is associated with other persons involved, masked and unmasked. He was at the Saoradh meeting around 19:00 hrs to 19:30 hrs on the night of the murder. On the morning after, he called Patrick Mellon and Paul McIntyre.

[519] While no clothing connected to Person G was found at Cavanagh's addresses, his address at 19G Northland Road was searched later than the others, on 6 June 2019. Clothing attributed to Person G had been burnt in the fire at Cromore Gardens as evidenced by the remains of the zip pull. The other address connected to him was searched on 15 September 2021.

[520] The bad character evidence against Cavanagh demonstrates his support of violent Irish Republicanism and an animus towards the police.

The defence case

Jordan Devine

[521] On behalf of Mr Devine it is submitted that his case can be distinguished from that of the other alleged "masked suspects" for the following reasons:

(i) No police officer has ever purported to identify him at a controlled viewing as one of the "masked suspects" involved in disorder on 16 or 18 April 2019;

(ii) There is no cell site analysis which places his mobile phone within the area of any disorder at the material times, including the events leading up to and including the shooting of Lyra McKee;

(iii) Whilst the prosecution accept that his mobile phone was connected to his home router on the evening of the 18 April, the defence reject the submission that other evidence suggests that he was present at the scene albeit, his phone was not;

(iv) There is no forensic link between Mr Devine and any clothing nor vehicles examined at the scene of the disorder;

(v) There is no gait analysis evidence to support his identification as one of the masked suspects; and

(vi) At no time is Mr Devine seen unmasked or even partially masked on the footage of the disorder of either date.

[522] The most distinctive feature of the person identified as Person B (Jordan Devine) by Mr Wooller during the disorder on the 18 April is the distinctive "TEAM 9" joggers. No such item of clothing was recovered from his home and there is no evidence linking Mr Devine to any similar and distinctive pair of jogging trousers either before, on, or after the 18 April 2019. The significance of these trousers is evident from the repeated references to the "TEAM 9" logo which has been a feature throughout this case and used as a means to identify this individual in all of the footage of the disorder.

[523] On 16 April 2019, the person identified as Person PP1(5) (Jordan Devine) is described by Mr Wooller as wearing a waist length, parka type jacket with a 'fur' lined hood. In some images it is possible to see a small highlight that is consistent with the head of a press stud fastener on the front pocket flap;

- Under the hood, there is a dark cap. Due to the fur lining of the hood, only the peak of the cap is seen;

- Under the lower rear edge of his jacket, the tail of his shirt is visible. This is orange and grey in colour and is not dissimilar to a camouflage pattern.

- He has jogger style trousers, in a dark tone, possibly dark blue, with three red stripes down the full length of the outside of each leg. There is an Adidas logo on the front of the left thigh.

- He has light tone, possibly grey, Nike trainers with a light sole wedge and dark features on the shoe body, as well as within the sole wedge. These are consistent with the "Nike Air Max 90 Ultra Wolf Grey"

[524] There is no evidential link either on 16 April or 18 April or at any other time of Mr Devine wearing a similar distinctive fur lined parka jacket, nor the distinctive Adidas trousers described above.

[525] Mr Wooler compared the clothing worn by Person B on 18 April to that worn by Person PP1(5) during the disorder on 16 April (both alleged to be Jordan Devine). He concluded:

Person B

A cap with a small red logo on the front above the peak
A darkface mask with a Nike "swoosh"
Jogging trousers with the logo "TEAM 9" down the left thigh
Grey Nike trainers consistent with the appearance of the Air Max 90 model

PP1(5)

PP1(5) has the same design of trainers as Person B but is wearing a different style of jacket and trousers. He could not observe either PP1(5)'s cap or the detail of his face covering in any of the PP1 clips. His ultimate conclusion was that the basic body proportions would not preclude PP1(5) and Person B being one and the same, but the only clothing match is the shoes.

[526] Mr Wooler then compared the items of clothing he had identified on both Person B and PP1(5) to clothing linked to Mr Devine in reference footage, namely the trainers a snood, a cap, and the tail of a shirt.

[527] The defence make the point that all of these items are likely to be mass produced and in any event no branding is identifiable on either the cap worn by Person B nor the tail of the shirt worn by Person PP1(5).

[528] Whilst Mr Wooler had reported that there was a match between the shoes, in evidence he accepted that the shoes depicted in the various pieces of imagery displayed a marginally different tone, which he explained by reference to the different lighting conditions. He conceded that in his initial depictions of the trainers, he could not categorically state the colour of the trainers worn by

either suspect and had described both as being "light-toned, possibly grey". He agreed that if they are possibly grey, then they are possibly some other colour. The defence make the point that the height of his comparison evidence is that the trainers are similarly coloured Nike trainers of the same model which are likely mass produced.

[529] Mr Wooller was asked to look at image Person B (7) with the "TEAM 9" logo down the side of the bottoms and what appear to be grey trainers. He was asked to compare the grey trainers with the image of the shoes worn by PP15(B) on 16 April. He agreed that to the naked eye, the shoes appear to be a different colour but explained that the reason for the marginally different tone was different lighting.

[530] Mr Wooller was asked to compare his analysis of the cap worn by Person B on 18 April with the cap seized from Mr Devine's home (a US Polo Association baseball cap found on the top of the sofa in the kitchen). He was challenged about his use of the word consistent between the two items, and he agreed that the logo seen on both was "wholly consistent" in size and shape but that it was not possible to decipher what exactly the logo might be. It is submitted that not only is the content of the logo unidentifiable, but this is likely also to be a mass-produced item.

[531] Mr Wooler had noted in respect of Person PP1(5) "under the lower rear edge of his jacket, the tail of his shirt is visible; this is orange and grey in colour and is not dissimilar to a camouflage pattern". In his report he had compared this portion of fabric to a shirt attributed to Jordan Devine in what has become known as the "rehearsal" footage from an earlier occasion. Mr Wooler was challenged about his analysis concluding that the two images were identical. Although he agreed that the portion of clothing that can be seen on PP1(5) is significantly smaller than the shirt that can be seen on the rehearsal footage, he was adamant that the portion that can be seen is identical to the same portion of the shirt that can be seen in the "rehearsal" footage. Again, the defence make the point that this item of clothing is likely to be mass produced.

Christopher Gillen

[532] The evidence against Mr Gillen is based on identification by clothing which is accepted as being commercially massed produced. A pair of black Adidas tracksuit bottoms with blue stripes from mid-thigh to the trouser bottom were seized following a search of Mr Gillen's home. They are alleged to match the bottoms worn by the masked male making petrol bombs (PP/1(2)d) on 16 April. However, the defence submit that the colour of the stripes is inconsistent.

[533] In interview with police on 15 March 2022, in relation to the public disorder allegations on 16 April 2019, a prepared statement was read on his behalf in which he said:

> "I Christoper Gillen would like the following to be put on record. I completely deny any involvement whatsoever in the offences which are alleged against me on 16th April 2019."

[534] When asked if he was present with the French production company Pangaia, when police were petrol bombed, Mr Gillen responded "… it's not me."

[535] When asked by his solicitor whether he was the masked male as alleged by police he responded, "I am not that person.".

[536] The defence point out that the height of Mr Wooller's analysis that PP/1(14/2) and Person L/Subject Y (all alleged to be Mr Gillen) on both the 16 and 18 April 2019 is expressed as follows:

> "I stated above that I considered it likely that Person L and Person PP/1(14/2) were one and the same person; this was based on their having some items of clothing in common, a not dissimilar build and being present in the two assembled and potentially linked groups."

[537] However, the defence refute the suggestion that the trouser bottoms and footwear worn by the relevant person in the footage for each date are of a similar type. The defence submit that they are quite distinct in appearance. On 16 April 2019 the prosecution alleges the tracksuit bottoms are black with blue, mid-blue or purple stripes from mid-thigh to the trouser bottom. On 18 April, the allegation is that the tracksuit bottoms are blue with white stripes from the knee down to the trouser bottom. The footwear worn on 16 April are described as trainers with a white mid sole and a reverse Nike tick. On 18 April 2019 the footwear is described as two toned blue Nik Air Max Plus.

[538] The prosecution attach significant importance to the similarity of the jackets worn on each occasion. The defence submit that the prosecution cannot prove they are the same jacket. Mr Wooller accepted that he could not say for certain what colour the zip, central zip and pocket zip were. He said the pocket and central zip were either yellow or green. When he was challenged about the colour he said:

> "… but yes there is still going to be some question mark over [the colour] because as has again been

discussed at length, we are dealing with mixed colour lighting."

[539] Mr Wooller also concluded that it is likely that a beanie hat worn by Person L and Person 14/2 (dark toned with a light stripe around the front) showed a level of consistency in head wear but he accepted that there was a real possibility that they are not the same.

[540] Mr Wooller emphasised the point he made throughout his evidence that he is not an expert in clothing types, nor is he an expert in anatomy or biomechanics. With that caveat, the physical build of Person L and Person PP/1(14) was not dissimilar.

[541] In relation to the 18 April 2019 and the alleged offences of riot (count 3), possession of petrol bombs (count 4), throwing petrol bombs (count 5), and arson on the Ford Transit tipper truck (count 9), the defence point out that there is no facial imagery of person L to prove his identification and that the most that can be said is person L is wearing a particular combination of mass produced articles of clothing. In relation to the prosecution submission that damage to the rear of the left knee area on a pair of blue Adidas tracksuit bottoms seized from Mr Gillen's home on the 9 May 2019 is similar to a feature seen on person L at 09:44 hrs on 18 April 2019, Mr Wooller described the features as having "the appearance" of having a burnt/melted area, Whilst the prosecution submits that the area of damage is very similar in size/shape and appearance, there is no evidence that it is in fact the same dimensions or type of damage. The defence also submit that the tracksuit bottoms that are attributed to Gillen are not linked to him forensically.

[542] Whilst the prosecution also rely on two images at Y14 and Y15 which show an unmasked male prior to the Audi being burnt, said to be Gillen, during the riot on 18 April 2019 the defence submit that due to blurring facial features it is not possible to definitively identify him from those images.

[543] Mr Wooller was asked to comment on those images and opined that the person's trousers, shoes and possibly headwear were consistent with those of Person L and having seen the imagery he suggested that the large white Adidas logo on the t-shirt of Christopher Gillen was consistent with that seen on the person he had suggested could be person L.

[544] When he was cross examined about this issue, he agreed that his opinion was that it was possible that the person in the image (X9) may have been wearing a beanie hat but he agreed that it could also be a rolled-up snood.

[545] It was suggested to him that on image X9 the only thing that can be observed is a solid block logo. Mr Wooler agreed that the rendering (ie how the image appeared) of that logo is solid and the actual script of the logo cannot be

seen. He also agreed that what he had opined showed three stripes on the side of the trousers appeared as a block and it was impossible to discern three breaks in the stripes. Mr Wooler explained that the reason for the "block" appearance of those features is a combination of the resolution and the fact that at that distance the image is slightly defocused and it is common for light areas to coalesce under those conditions. Therefore, in his opinion, the appearance of that logo on this t-shirt is consistent with the image seen later the reference imagery. On behalf of Mr Gillen the defence rejected the submission that essentially three stripes have merged into one. But Mr Wooler maintained that that is "commonly what happens".

[546] In relation to the robbery of the Ford Transit tipper truck (count 8), the defence submit that the identification of the robbers by Mr Knightly and his partner Miss McEleney is not consistent with clothing alleged to have been worn by Mr Gillen. Mr Knightly described the robbers as followed:

> "They were all between 5 foot 8 and 5 foot 10. They were all wearing black bomber/puffa style jackets with hoods, black tracksuit type trousers and black trainers. I recall seeing the white soles of their trainers. They were all dressed very similar, and I don't remember seeing any makes or logos in their clothing. They were wearing gloves with fingers (not mitts), these were not woollen gloves, they were more like ski gloves and were also black in colour. They all had scarves covering their faces … the scarves were black in colour with some white lines running through them".

[547] The defence notes that this was not a fleeting description, and the description given by Miss McEleney also does not accord with the clothing of the person alleged to be Person L or Subject Y. She described the first male:

> "He was not all in black: black coat three quarter length past his hips with the hood up with red stripes on the arms; his bottoms were navy/black with white on them (somewhere not sure) and all white slippers, black thick gloves."

[548] She described male 2, who got into the passenger side of the lorry as:

> "wearing a black scarf around his face. This male was all in dark/black clothing and a three quarter length coat with a black hood up; navy/black bottoms."

[549] She described male 3 as:

> "His clothing was all in black. He was wearing a black jumper type top with a hood and had the hood up ... and had a black scarf covering his face; he was wearing black tracksuit bottoms that appeared plain black; I think he was wearing black footwear but I am unsure".

[550] She described male 4, who had remained in the hallway and in respect of whom Mr Knightly had not provided a description, as:

> "Dressed all in black, black scarf, black top and bottoms".

[551] The defence make the point that there was adequate lighting to enable both individuals to give accurate descriptions about the clothing of the robbers and there is no evidence that either Mr Knightly or Miss McEleney observed any of the males who enter the flat wearing navy Adidas tracksuits with three stripes from the knee down to the trouser bottoms, or two toned blue Nike sports footwear and in particular wearing a Trespass logo jacket with yellow/green zips.

Joseph Campbell

[552] The defence submit that the basis of the Crown case against Joseph Campbell may be summarized as:

(i) Cell site analysis
(ii) Identification evidence of one police officer - Constable Matthews
(iii) Purported clothing matches - Mr Wooller
(iv) Gait analysis - Nadia Asgeirsdottir.

[553] Since I have excluded the identification evidence of Constable Matthews I set out the remaining three aspects of the case that are challenged by the defence:

Cell Site analysis

[554] The defence submit that the evidence from Mr Campbell's phone does not support the prosecution case that he was present at the scene of the riot on 18 April 2019 and there is no evidence at all from his phone on 16 April 2019. While his phone appears to have been turned off between 19:58 hrs and 23:17 hrs on 18 April 2019 (during the period of the disorder until after the shooting), it connected again to the network at 23:17 hrs using the Londonderry Creggan 190° cell ID. However, at that time, the defence note that this mast provided

coverage to an area of south Creggan which included an address connected to him at 4 Carrickreagh Gardens, and so it does not assist the prosecution case.

Purported clothing matches (Mr Wooller)

[555] The defence rely on Mr Wooller's acknowledged lack of expertise in clothing comparison along with the mass-produced nature of all the items. He agreed that he did not undertake any specific research into any particular item of clothing or footwear, as in who the manufacturer was, what styles or range they come in, what colours they come in or anything of that nature. All of his observations about potential colours comes with the health warning about the ambient light. Colour appears different under different types of light.

[556] Mr Wooller's assumption that the two groups of rioters on both 16 and 18 April 2019 were, broadly speaking, likely to consist of the same individuals is challenged and I have rejected it as speculative. Since I have discounted this factor, it is noted that absent this, the strength of his opinion is weaker. The defence submit that it is little more than an opinion that Person F on 18 and Person P1(11) are possibly one and the same.

[557] With regard to Mr Campbell's physical build, which Mr Wooller describes as distinctive, the defence challenge his expertise to comment suggesting that this is a mere layman's observation.

[558] In relation to the comparison of footwear, in particular, the defence highlight the difficulties in being certain as to the actual colour of the relevant footwear, given the effect of different types of light. Although he has suggested possible similar items of "light toned" footwear, the defence submit that one of the suggested images is actually white. The same point is made in respect of Mr Wooller's opinion that Joe Campbell's clothing is "black"; he accepted that "black" can encompass a range of colours and tones.

[559] The defence also submit that there were two individuals being considered by Mr Wooller before he settled on the person to whom he attached the label "Person F" and his decision may have been influenced by a police indication that Joe Campbell was a person of interest.

Gait Analysis evidence

[560] The prosecution adduced evidence from Nadia Asgeirsdottir, an acknowledged expert in gait analysis. Her opinion was that the evidence she viewed from footage provided "moderate support" for the proposition that Joe Campbell was one of the masked rioters. The defence highlight a number of limitations in the analysis she was able to undertake:

a. The figure in the questioned footage is wearing what appears to be a

hooded top with the hood up, which limits observation of head position and movement.

b. There is a variation of the speed of walking of the figure in some of the questioned footage.
c. The path of progression observed being taken by the figure in some of the questioned footage and the subject in the some of the reference footage is not in a straight line, which may have affected their gait.
d. The figure in the questioned footage and the subject in the reference footage is wearing what appears to be loose clothing, which limits the observation of knee and elbow position and movement.
e. The figure in some of the questioned footage and the subject in some of the reference footage appear to lift their right or left hand up to their head, which may have affected their gait.
f. The figure in some of the questioned footage and subject in some of the reference footage are holding what appears to be an object in their right and/or left hand, which may have affected their gait.
g. The figure in some of the questioned footage and the subject in some of the reference footage are only partially in frame.
h. There is a limited number of steps observed being taken by the figure in some of the questioned footage and the subject in some of the reference footage.
i. The figure in some of the questioned footage and the subject in some of the reference footage are partially obscured by other persons and/or objects.
j. The figure in some of the questioned footage and the subject in some of the reference footage are walking close to other persons and/or objects, which may have affected their gait.
k. The subject in some of the reference footage is holding their hands in front of their torso and/or in pockets, which may have affected their gait.
l. The subject in some of the reference footage appears to be adjusting their clothing, which may have affected their gait.
m. The subject in some of the reference footage continually turns their head and torso, which may have affected their gait.

[561] As a result of the quality of the footage and/or the fact that the subject was obstructed, there is no material available to the court in respect of a number of different characteristics (5, 9, 10, 13 and 14), typically used as comparators. The defence also point out that the expert was not provided with very much footage of the subject walking sideways on to the camera. Most clips were either towards or away from the camera, and the analysis was affected by the quality of the footage from the camera and lighting issues.

[562] The amount of footage of the subject was very limited. Thus clip 1 and 2 are the same clip. Appearance 2 was 4 seconds long. Appearance 8 and 9 are 12 seconds and 5 seconds long. So, in actual fact, very little footage was

available for analysis.

[563] It was noted that the analysis revealed a number of apparent differences in gait. The expert explained that these variables can be from within the same person because of mental state at the time or walking close to a person or object where an individual may subconsciously vary gait to avoid walking into objects. However, the variables can also indicate a different person. With regard to the corresponding features, these were said to be fairly common.

Paul McIntyre

[564] In addition to the points already set out on behalf of those defendants charged with murder, counsel on behalf of Mr McIntyre emphasised the poor quality of the shooting footage, the breaks in the timeline and the absence of any evidence of visual identification of the suspect. The defence submit that the evidence is so weak that there are no suitable warnings that can address these deficiencies.

[565] Detailed submissions are made in relation to the actus reus and mens rea required of the principal to a murder charge and that of the alleged secondary offender. The primary submission is that since the height of the evidence is that shots were fired in the direction of the police Land Rovers, the prosecution has not identified how the intent could be to cause death or grievous bodily injury in this particular case.

[566] In the Crown opening, the actus reus in relation to Paul McIntyre was set out at paragraphs 156- 160):

> "156. Behind the gunman is another masked man of short and stocky build in a dark coat with a hood and a motif on the back of the right shoulder, dark bottoms and with white soles on his trainers. After the first misfire, he takes up a position near to the wall, crouching a few yards behind the gunman. After the further misfires, he moves forwards and, like Devine later on, bends down as if to pick something up from the ground, in the area where the gunman had cleared his weapon. As the gunman leaves the scene, he can be seen again bending down to pick something up from the ground in the same area. As he turns, one can see a light-coloured mark on his left thigh, consistent with the O'Neill's logo on the tracksuit bottoms worn by McIntyre. The prosecution contend that this man is Paul McIntyre.

157. On subsequent examination of the scene four spent cases were recovered. The inference can be drawn that the items being picked up by the man were live rounds of ammunition, ejected from the weapon after the misfires.

158. Another of the masked men can be seen walking purposefully towards the corner at the same time as the gunman and others. He is wearing a mask with a camouflage print. The prosecution contend that he is Gearoid Peter Cavanagh. He walks slightly behind the gunman and just off the footpath and so walks at a similarly brisk pace to the gunman and the three who accompany him and take up positions on the footpath.

159. He positions himself closer to the middle of the road from where he watches the shooting. On two brief occasions he can be seen facing the crowd as if 'stewarding' them in an 'official' capacity. After the final shot, he makes his way directly to where the gunman was standing as if to assist but McIntyre and Jordan Devine are already picking what must be the misfired cartridges from the ground. He then walks off in the same direction as the gunman. He does so briskly, again with apparent purpose.

160. It is submitted that the actions of McIntyre, Devine and Cavanagh are demonstrative of their involvement in the joint enterprise to possess and fire the weapon with the requisite intent for murder. That is, they offer intentional encouragement or assistance to the possession and use of the weapon with that intent."

[567] The defence challenge what precisely can be seen to have occurred after the gunman left the scene (with reference to the Crown's invited inference that items are being picked up and that those items are live rounds of ammunition ejected from the weapon after it misfires). Jonathan Greer initially gave evidence that the gun had misfired on three occasions and that the two figures shown on the footage were "likely to be picking up misfired cartridges as no misfired cartridges were recovered". However, in cross-examination, he confirmed that upon examination of the weapon (later retrieved), and during the test fire, it appeared to function properly and effectively and had no obvious defects. He agreed that the quality of the footage prevented a definitive assessment and his conclusion was based on a likely inference of what had

occurred, rather than any certainty. The defence emphasise that it isn't possible to actually see the discharge of any live rounds, nor is it possible to see the precise actions of those who remain after the gunman leaves, due to the poor-quality imagery of the mobile phone.

[568] In respect of mens rea, the defence rely on the evidence of the police officers in the police Land Rovers parked in protective "box formation" on Fanad Drive. In summary, such formation represents a controlled police response to the prevailing conditions and the views of the police officers within the vehicles was that they were safe within the vehicle, because it was armour plated with bullet proof glass and capable of taking a "hit". The police were aware of "cracks" appearing within the windscreen after "pops" were heard and it was evident that the bullet proof glass worked and that the bullets had been repelled in some way. Two areas of damage suspected of being bullet strike marks were found upon examination of a vehicle. One was on the off-side area of the steel window grill, and the second was on the front near-side door frame/armour skin area. The defence submit that the appropriate inference is that the gunman's intended targets were police Land Rovers i.e. inanimate objects and therefore the intent to cause death or grievous bodily harm cannot be proved.

[569] On this analysis the court could not properly conclude that a secondary participant had an intent to assist or encourage the gunman to act with an intent to cause death or grievous bodily harm.

[570] In relation to the identification evidence, by clothing comparison, the defence submit that such evidence is based on camera footage of differing quality. The primary footage of the shooting is poor quality mobile phone footage from unidentified individuals provided to police directly or by email, in which case it is impossible to say how the copy may have been degraded in quality. In those circumstances, it is submitted that no actual weight could or should attach to the imagery analysis evidence.

[571] The defence rely on the fact that the clothing upon which the analysis is based is mass produced, and relying on the footage of the shooting alone, it is impossible to identify any of the features said to identify Paul McIntyre as person D.

[572] The defence also rely on the limits of the analysis including the risks of confirmation bias admitted by Mr Wooller. In addition, the particular limitations presented by a variety of lighting sources from the nighttime footage means that it is simply impossible to say with any certainty what colour any item of clothing or footwear actually is. In the case of mixed lighting, it was his expert opinion that colour should be taken with a pinch of salt in such situations.

[573] Particular significance is drawn to the fact that the CAT coat, said to be the coat worn by Mr McIntyre at the time of shooting, has never been seen at any time on Paul McIntyre, despite enumerable police sightings and stop and searches during 2017 and 2018.

[574] In relation to technical issues affecting mobile telephones, Mr Wooller accepted that any form of capture of video recording normally results in some degree of compression and certainly in the case of mobile phones, the issue of compression is an important issue when dealing with image analysis for comparative purposes as compression allows the video to be captured in as small a file size as is practicable. This will affect ultimately the level of detail that can be captured. If the subject to be identified is a substantial distance from the camera, or only occupies a small proportion of the image, then the number of pixels that make up the subject may be low … and therefore, consequently, as a result the level of detail will be very limited and may not be suitable for reliable interpretation. The mobile phone footage of the shooting was 238 seconds in total. Mr Wooller carried out a thorough and meticulous examination of the footage around the shooting, lasting several hours, and the working notes recorded by him for person D, alleged to be McIntyre read:

> "Dark trousers with no obvious markings, dark hooded jacket. Hood may be up initially but is lowered after person D passes behind others and camera stabilises. Head remains lowered, poss by a cap and/or a balaclava. There is a small highlight (badge?) on the rear of the right shoulder. Dark shoes with light sole wedge."

[575] Finally it is submitted that where the other identification evidence is wholly inadequate, and the court is asked by the prosecution to perform its own identification exercise based on the video footage, it is not appropriate for the court to do so in this case, because the quality of the footage is poor and it does not comply with the requirement detailed in *AG's reference (No 2 of 2002)* [2003] 1 Crim Appeal R 21 for the footage to be "sufficiently clear."

Gearoid Peter Cavanagh

[576] On behalf of Mr Cavanagh, the defence make a number of points in relation to the controlled viewing identifications, which it is not necessary to set out since I have excluded that evidence.

[577] The primary evidence against Mr Cavanagh relates to the DNA evidence from MOS3 zipper and zip toggle on a garment found amidst burnt clothing which is said to match that found on the bomber jacket worn by Camo Man (person G), who is said to be Mr Cavanagh. I have set out the points made on

behalf of the defence and prosecution at paras [229]-[236] above, and do not repeat them.

[578] Additionally, the defence make the point that the facial features of the individual are entirely disguised and similar shoes and clothing were not found in Mr Cavanagh's home, nor has the prosecution been able to point to any other occasion, including the day in question, on which he has been seen wearing similar clothing.

[579] Similarly, the cell site evidence is set out at paras [237]-[241] above, along with the points made by both the defence and prosecution and I do not repeat them, other than to say that there is a fundamental dispute as to whether the cell site evidence is exculpatory of this defendant in the circumstances.

[580] In relation to the murder charge, counsel on behalf of Mr Cavanagh have repeated many of the same points in relation to actus reus and mens rea, made on behalf of Mr McIntyre, and insofar as that is the case, I do not repeat them, but I have taken them into account in respect of each defendant charged with murder.

[581] The prosecution set out Mr Cavanagh's role in the murder at paras 158-160 of the written Crown opening:

> "158. Another of the masked men can be seen walking purposefully towards the corner at the same time as the gunman and others. He is wearing a mask with a camouflage print. The prosecution contend that he is **Gearoid Peter Cavanagh**. He walks slightly behind the gunman and just off the footpath and does so walks at a similarly brisk pace to the gunman and the three who accompany him and take up positions on the footpath.
>
> 159. He positions himself closer to the middle of the road from where he watches the shooting. On two brief occasions he can be seen facing the crowd as if 'stewarding' them in an 'official' capacity. After the final shot, he makes his way directly to where the gunman was standing as if to assist but McIntyre and Jordan Devine are already picking what must be the misfired cartridges from the ground. He then walks off in the same direction as the gunman. He does so briskly, again with apparent purpose.
>
> 160. It is submitted that the actions of McIntyre, Devine and Cavanagh are demonstrative of their

> involvement in the joint enterprise to possess and fire the weapon with the requisite intent for murder. That is, they offer intentional encouragement or assistance to the possession and use of the weapon with that intent."

[582] Particular emphasis is placed on the Crown's description of the defendant's actions in facing the crowd, tantamount to him having acted as a "steward" and having acted in an "official" capacity. It has further been stated that his actions in walking towards the gunman may be interpreted "as if to assist". The defence submit that there is simply no evidence of any encouragement or assistance by the person alleged to be Mr Cavanagh, in contrast to the case made against the person said to be Jordan Devine (alleged to be person B) where he is said to have been raising his arm, with the Crown invitation that he was shouting and cheering at the firing of the shots and is further said to have hurled a missile of some description in the direction of police after the first shot is fired. Unlike Mr Devine and Mr McIntyre, Mr Cavanagh is not alleged to have picked up any misfired rounds after the shooting.

[583] Although the prosecution submits that the reason he did not pick up any of the misfired cartridges is because they had already been picked up, the defence challenge this analysis and submit that "Camo Man" could easily have done so before person B (Jordan Devine) did. The defence submit that taking the Crown evidence at its height, all that can be said is that "Camo Man" walks in the same direction as the gunman to the corner, is present when the shooting occurs and then walks off in the same general direction as the gunman after the shooting. It is submitted that this falls manifestly short of establishing a prima facie case of assisting and encouraging the gunman.

[584] On behalf of Mr Cavanagh it is also submitted that there is no discernible difference between the evidence against person F (Cavanagh) according to Mr Wooller and the evidence against Joe Campbell, who is not charged with murder.

[585] The defence invite the court to stay these proceedings as an abuse of process on both limbs namely, that it is not fair for the defendant to stand trial (second limb) and because he can no longer receive a fair trial (first limb). I have already considered these submissions, following my decision to exclude the controlled viewing evidence, and determined that there are no grounds for staying the proceedings notwithstanding the significant breaches of Code D.

Conclusion whether there is a case to answer in respect of the masked group

[586] With regard to the murder charge, the actus reus alleged by the Crown is based on what can be seen on poor quality mobile phone footage, the inferences

that should properly be drawn and whether the prosecution can persuade me, so that I am sure, that the alleged acts constituted encouragement or assistance. That is a matter to be determined at the end of the trial.

[587] With regard to the mens rea of the gunman, which must be shared by the defendants charged as secondary offenders, in order to find them guilty, again, that is a matter of appropriate inferences and ultimately whether the prosecution can prove that the gunman possessed and fired the gun with the intention to kill or cause grievous bodily harm, and whether that intention was also held by the defendants.

[588] Having considered all of the evidence I do not consider that there are no circumstances in which I could properly convict any of the defendants charged with murder.

[589] With regard to the remaining defendants and the remaining charges, the weaknesses in the identification evidence are apparent and ultimately the weight that should be attached to it, taking into account any supporting evidence is a matter to be determined at the end of the trial. Having considered the evidence as a whole, I do not consider that there are no circumstances in which I could properly convict any of the defendants charged with the remaining offences.