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**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE KING**

**v**

**NATHAN PHAIR**

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**Brian G McCartney KC with Declan Quinn (instructed by R P Crawford & Co, Solicitors) for the Appellant**
**David McDowell KC with Michael McAleer (instructed by the Public Prosecution Service) for the Respondent**

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**Before: Keegan LCJ, Horner LJ and McFarland J**

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

*Introduction*

[1] This is an appeal against conviction brought with leave of the single judge. Nathan Phair, the appellant, was convicted on 23 September 2019 of nine offences after a trial heard before His Honour Judge Rafferty KC ("the judge"). The offences are summarised as follows:

- Causing the death of Natasha Carruthers by dangerous driving.

- Causing grievous bodily injury to Sarah Gault by dangerous driving.

- Causing death by driving whilst unlicenced.

- Causing grievous bodily injury by driving whilst unlicenced.

- Causing death by driving whilst uninsured.

- Causing grievous bodily injury by driving whilst uninsured.

- Supplying a controlled drug of Class A, namely cocaine x 2.

- Offering to supply a controlled drug of Class A, namely cocaine.

[2] The above offences arose as a result of a fatal car chase which occurred following a failed drugs transaction between the appellant and another man named Padraig Toher. In short, Toher had paid the appellant for cocaine which the appellant did not provide. This resulted in an altercation and a car chase between the two men. The appellant, who was driving one of the cars, was injured. His girlfriend Natasha Carruthers was killed, and another young woman Sarah Gault was also seriously injured.

[3] Following conviction, a determinate custodial sentence was imposed on the appellant for the above offences which resulted in a total of 11 years' imprisonment. The appellant has also brought an appeal against the sentence he received. The same factual circumstance as apply in the appellant's case led to a conviction of Padraig Toher who was the driver of the other car on the night in question. He pleaded guilty to various offences including the manslaughter by gross negligence of Natasha Carruthers, causing grievous bodily injury by dangerous driving to the appellant and Sarah Gault. Toher also pleaded guilty in relation to the drugs transactions. Toher has an outstanding appeal against the sentence imposed on him.

[4] The test applied on appeal is that which emanates from the case of *R v Pollock* [2004] NICA 34 wherein Kerr LCJ at paragraph [34] recited four principles which have been consistently applied in this jurisdiction and are as follows:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe?'
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[5] We proceed on the basis of this appellate test to analyse the facts of this case.

*Agreed Facts*

[6] Within what is a rather complicated factual matrix the following facts/admissions were agreed and are recorded in a document dated 12 September 2019, which reads as follows:

> "The following facts are admitted between the parties, pursuant to section 2 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968:
>
> ***Cause of death***
>
> (i) On 9 October 2017 a post-mortem was conducted on Natasha Carruthers aged 23 years. The State Pathologist, Dr Ingram, determined that the cause of death was the injuries she sustained as a result of the collision. These included fractures of the skull associated with bleeding over the surface of the brain, fractures of the left femur, right humorous and nine of the left ribs as well as a traumatic amputation of the right lower leg and almost complete traumatic amputation of the left lower leg. The combined effects of these injuries would have caused her very rapid death.
>
> ***Text Message***
>
> (ii) While he was in hospital Nathan Phair sent a message via Facebook Messenger which read: "the rat an that Paurig boy rammed me cause I stroked them 500 euro."
>
> ***Drug in blood***
>
> (iii) On 8 October at 1:40 am, after his admission to South West Acute Hospital, a sample of Nathan Phair's blood was taken by a doctor in Accident and Emergency. It was later analysed for the presence of drugs and found to contain Alprazolam, also known by the brand name Xanax, in a concentration of 1.34mg/l. This concentration lies well above the range expected following therapeutic use, the therapeutic range being 0.02 to 0.07mg/l. Alprazolam is a drug that

is prescribed for the treatment of anxiety but is also subject to abuse. It is not available on prescription in the United Kingdom but is so [sic] available in the Republic of Ireland. It can cause drowsiness, delayed reactions, reduced alertness and lack of balance and co-ordination and consequently can impair driving performance. The analytical evidence that drugs were present does not necessarily imply the driving was impaired. As individuals vary in the extent to which they are affected by drugs, the toxicology findings should be used in conjunction with evidence from police, medical and other witnesses relating to the condition of the motorist at the time of the alleged offence. The elevated level of Alprazolam detected in Nathan Phair's blood has the potential to significantly impair driving performance.

***Convictions***

(iv) On 7 March 2019 Padraig Toher pleaded guilty to the following offences in respect of this incident: manslaughter of Natasha Carruthers on 7 October 2017; causing grievous bodily injury by dangerous driving of Nathan Phair; causing grievous bodily injury by dangerous driving of Sarah Gault; doing an act, tending and intending to pervert the course of justice by arranging to have repairs carried out to the BMW between 7 October and 16 October 2017; conspiracy to possess a controlled drug of Class A, namely cocaine, between 15 August and 6 October 2017.

(v) On 1 March 2019, Andrew Waters pleaded guilty to being concerned in the supply of cocaine between 15 August and 5 October 2017 and being concerned in an offer to supply cocaine on 6 October 2017.

(vi) On 7 October 2017, Nathan Phair had no driving licence; neither was he insured to drive the vehicle, Natasha Carruthers' Vauxhall Corsa.

(vii) The continuity and provenance of the exhibits, including the photographs and maps, is admitted."

[7] These agreed facts highlight some of the salient features of this tragic case. However, we will highlight some further details in the following section to provide full context to this appeal.

*Factual Background*

[8] As will be apparent from the summary provided above, the events which caused the tragic death of a young woman and serious injuries to others occurred on Saturday 7 October 2017. On that evening at approximately 23:45 hours a blue Vauxhall Corsa owned by the deceased, Ms Carruthers, was driven by the appellant, Nathan Phair. He lost control of the car on the Lisnaskea Road, Derrylin, Co Fermanagh. The car crashed into a tree on the opposite side of the road and caused the mayhem we have just described. Natasha Carruthers was in the front seat of the car and Sarah Gault was a passenger in the back of the car. The appellant was himself seriously injured in the collision and required hospital treatment.

[9] The Vauxhall Corsa had been pursued by another car, a black BMW car which was driven by Padraig Toher. He drove in pursuit of the appellant from Letterbreen, near Enniskillen, to the area of the collision, over a distance of approximately 12 miles.

[10] It is common case that the cause of this pursuit was a drug deal between Padraig Toher and Nathan Phair which had taken place in Newtownbutler on the night before the incident, Friday 6 October 2017.

[11] The contextual background to the meeting between these two persons was that the appellant, Nathan Phair, had on two previous occasions, at the arrangement of another man Andrew Waters, supplied cocaine to Toher to a value of £100. This was the third occasion where a transaction was to take place. On this occasion Toher paid the appellant £440 for a larger amount of cocaine, namely ¼ ounce. The appellant had taken the money for these drugs but had deliberately failed to supply the cocaine. Thereafter, the events of the following night occurred.

[12] A text message was sent by the appellant from hospital after the crash which refers to Andrew Waters and Padraig Toher ramming the appellant "cause I stroked them €500." It is apparent from the evidence that Padraig Toher was clearly looking for the appellant on Saturday 7 October 2017 having failed to obtain the drugs that he paid for. Ultimately, he found him in Letterbreen where he was with the two young women in the Vauxhall Corsa car. Toher was in a BMW car and once he came across the appellant he stopped, got out of his car and approached the appellant who was in the Corsa. He did this carrying a metal bar and demanding his money. He struck the windscreen of the car with the metal bar to such an extent that it was missing when the car was brought to a halt. Self-evidently this was a violent incident which resulted in the appellant driving off and Toher pursuing him.

[13] The pursuit between the Corsa and the BMW was high speed over a distance of some 12 miles and through the village of Derrylin. There CCTV captured the cars. The evidence established that the cars had achieved a speed of some 100mph. There was considerable forensic evidence about this pursuit during the course of the trial which included the issue of contact between the cars. It is common case that there was contact between the front of the BMW and the rear of the Corsa on at least three separate occasions. This was confirmed by the collision expert who provided a report and gave evidence in the case, Mr Damien Coll.

[14] Both the appellant and Andrew Waters alleged in evidence that the contact had occurred between 10 and 20 times. The appellant in his evidence as when interviewed by police described it as nudging. During the trial when he gave evidence, the appellant variously described the contact as being hit, bumped and tapped. He did agree with defence counsel that he had been rammed although said that the impact had "kind of moved me on a wee bit forward." However, the fact of contact was objectively validated by the presence of the BMW's number plate hanging off and, the CCTV footage in Derrylin showed that this number plate was hanging off by the time it entered the village, suggesting that the contact had occurred earlier on in the journey.

[15] The expert evidence concluded that there were four possible causes of the collision:

(i) that the Corsa had lost control of itself;

(ii) that contact had occurred between the front nearside of the BMW and the rear offside of the Corsa with the Corsa moving left to right across the BMW;

(iii) the same contact had occurred with the BMW moving right to left across the Corsa; and

(iv) a combination of the latter two scenarios.

[16] The driving of both the appellant in the Corsa and Toher in the BMW was described during the evidence as characterised by speed and "a hot pursuit." In particular, the evidence established that appellant's driving had the following features. Firstly, he drove straight across a crossroads at the Five Points near Letterbreen. Secondly, he was recorded on CCTV driving at 70mph on a back road at 44 Station Road, Letterbreen. Thirdly, at around 11:30pm on the evening in question he was recorded as travelling at 83/84 and 100mph in the main street in Derrylin village within a 30mph speed limit. Fourthly, he drove past a public bar in Derrylin which was on the other side of the road from a Chinese takeaway. Fifthly, there was residential housing throughout the village, with the footpath running its length. The calculated speed of 100mph occurred a short distance before another public bar which fronted onto the road. In addition, the Corsa driven by the appellant pulled away from the BMW as they went through Derrylin, even though the BMW was the

more powerful car. The appellant drove at 85mph on the Lisnaskea Road, on the wrong side of the road and on a right-hand bend.

[17] The injuries to the persons in the car were sustained when the Corsa, having gone through Derrylin village and having continued on the Lisnaskea Road, struck a tree after it had rotated at a speed of between 60 and 62mph. At this stage the average speed of the vehicle was provided by the collision expert as being in the region of 75mph. The evidence is that the appellant swerved from side to side across the road in order to prevent Toher overtaking him. The Corsa was straddling the centre line when it lost control. The Corsa also had a cracked windscreen and the driver's window had been smashed in such a way that it was open to the elements.

[18] There was also evidence given by independent witnesses that two unidentified cars were travelling side by side south towards Derrylin such that a car coming the other way had to stop to avoid a collision. It follows from the above that there was obviously a very serious scene whenever the Corsa struck the tree. The BMW that Toher was driving left the scene which was one of carnage.

[19] Toher pleaded guilty to the manslaughter of Ms Carruthers on the basis that he had deliberately made contact with the Corsa that this was gross negligence and he used the car as a weapon over the course of the pursuit. The prosecution made the case that the appellant was also guilty of the offences that he was ultimately convicted of. Specifically, the prosecution made the case that there was a high degree of danger associated with his driving. In addition, the prosecution highlighted the fact that no one in the Corsa called the police, despite four phones later being found in the car. Further emphasis was laid upon the fact that the appellant did not take the opportunity of seeking help from anyone along this route or seek to find refuge in a public area. He did not go to the nearest police station in Enniskillen.

[20] At trial and by virtue of his defence statement the appellant maintained that he had acted under duress of circumstances as he was escaping the intentions of Toher who had arrived with a metal bar and inflicted damage to his car prior to the chase. This was the nub of the defence case. The prosecution contended that this defence, once raised by the appellant, should fail on two grounds:

(i) that the appellant did not respond to the situation as a sober person of reasonable firmness sharing the characteristics of the defendant would have done; and

(ii) that he had voluntarily put himself in a position with others engaged in criminal activity, in which he foresaw, or ought reasonably to have foreseen, the risk of being subjected to compulsion by threats of violence.

*Grounds of Appeal*

[21] The grounds of appeal are as follows:

> "1. The learned trial judge erred in permitting evidence of the appellant's bad character to be placed before the jury.
>
> 2. The learned trial judge erred:
>
> (a) In placing a limitation on the defence of duress of circumstances; and/or
>
> (b) In allowing the limitation to be left to the jury.
>
> 3. The learned trial judge erred by failing to properly remedy the admission of hearsay evidence against the appellant.
>
> 4. The learned trial judge erred in failing to grant the defence application at the conclusion of the prosecution case for a direction in respect of counts 7-9 (the drugs offences).
>
> 5. That the learned trial judge's erred in:
>
> (a) Failing to provide the jury with any or sufficient explanation regarding the burden of proof and applicable standard of proof in relation to the appellant's defence of duress;
>
> (b) Failing to provide the jury with any direction of the limitation to the defence of duress other than as contained in the route to verdict document."

[22] In addition, during the course of appeal the appellant sought leave to amend the grounds of appeal to include a further ground of appeal, namely that the trial judge erred in declining to leave self-defence as a defence to the jury. We have considered all of these grounds and combined some of the appeal points which overlapped as follows.

*Consideration of the grounds of appeal*

*(i) Ground 1: The admission of bad character evidence*

[23] There are two aspects to the bad character evidence which the prosecution sought to admit at trial. The first related to several Facebook messages sent by the appellant to an acquaintance when he was hospitalised after the road traffic collision. The second related to a number of criminal convictions of the appellant arising out of a series of driving incidents which occurred on 23 November 2017, six weeks after the fatal collision involving the death of Natasha Carruthers and four weeks after the appellant's release from hospital. The prosecution applied to admit these matters into evidence pursuant to the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order").

[24] The said applications were made on the basis of the provisions found in two parts of Article 6(1) of the 2004 Order which, as relevant, read as follows:

> "6(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if:
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution;
>
> …
>
> (f) it is evidence to correct a false impression given by the defendant …"

[25] In addition Article 8(1) of the 2004 Order is relevant as follows:

> 8.—(1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> …
>
> (2) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—
>
> (a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

[26] Finally, we refer to the provisions of Article 10(1) of the 2004 Order:

> "10(1) For the purposes of Article 6(1)(f):
>
> (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
>
> (b) evidence to correct such an impression is evidence which has probative value in correcting it.
>
> (2) A defendant is treated as being responsible for the making of an assertion if—
>
> (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
>
> …
>
> (4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.
>
> (5) In paragraph (4) "conduct" includes appearance or dress.
>
> (6) Evidence is admissible under Article 6(1)(f) only if it goes no further than is necessary to correct the false impression."

[27] The factual basis for the applications made in this case was follows. First, in relation to the Facebook messages. These were sent by the appellant when he was still in hospital recovering from his injuries. He sent these messages to an acquaintance, Dylan Quale, as follows:

[The nomenclature is DQ – Dylan Quale; NP – Nathan Phair the appellant.]

The messages are as follows:

> "DQ : hahha 😊😊
>
> NP: Na lad il get a serious claim outathis
>
> [NP sends a picture of himself in hospital wearing a neckbrace]
>
> NP: Haha
>
> DQ: hahah panda panda boil a thought ye left me lol we buy a yoke themara 😊😊😊😊
>
> DQ: jkin lad na bad craic it is howd u crash er on that road I seen the tree ffs
>
> NP: Il b out in 4 weeks lad b on DLA aswel."

[28] It is important to note that the application to admit these Facebook messages was made by the prosecution during the appellant's examination in chief by his counsel, Mr McCartney KC. That was because the issue arose following a line of questioning undertaken by counsel which was to establish the appellant's state of mind after the collision as follows:

> "Q: Alright. And can you give the jury some idea of the effect that this incident has had on you mentally since then.
>
> A: I would be very depressed every now and again. I would be thinking about it all the time, Natasha.
>
> Q: Thinking about Natasha?
>
> A: Yeah. Could I have a minute please?"

[29] Following from the above the appellant broke down in tears and the hearing was adjourned. He later returned to the topic during his evidence and at that point said:

> "I went out of hospital in a wheelchair. I was depressed, as I say, thinking about Natasha all the time."

[30] After the conclusion of the examination in chief which encompassed the above passage, the prosecution sought to adduce the Facebook messages to effectively correct what it said was a false impression given by the appellant in his evidence, by

his emotional breakdown in the witness box and his evidence that he had regard for the deceased and had been depressed thinking about her all the time. In essence the prosecution maintained that this evidence conflicted with the Facebook messages to his friend where he referred to simply being able to obtain Disability Living Allowance "DLA" and a claim from the accident and during that Facebook exchange, of course, there had been no mention of his girlfriend who had been killed.

[31] A forerunner to this application was a previous application to admit this evidence along with other bad character evidence after what had been a clear attack during cross-examination on the character of a prosecution witness, namely Andrew Waters. This occurred at an earlier stage in the trial. The application was to admit the evidence pursuant to Article 6(1)(g) of the 2004 Order which is a different provision dealing with counteraction of bad character evidence. The trial judge ruled in favour of the defence in respect of that application and refused to admit the evidence.

[32] In this appeal we have examined the ruling of the judge. Having done so we can clearly see that he referred to this earlier ruling when reaching a different decision in relation to the Facebook screenshot evidence. In this regard he made the following comments:

> "At the time I indicated that I thought just about on balance the attack on Mr Waters' character had been conducted in a way that just about left it on the side of the defendant not receiving this evidence. I did at that stage give an oblique warning in relation to further evidence down this line."

[33] This oblique warning to which the judge referred was contained in his ruling and was expressed in the following terms:

> "I declined to admit it under the gateway of an attack upon a witness … and under that gateway alone, I make that clear, under that gateway alone, to exclude it under discretion. There are other gateways, there is a way to go in this trial yet and the defence case has not commenced. So, I reserve my position to any other gateways should I be asked to consider them."

[34] During argument the appellant suggested that the failure to mention the deceased in the Facebook messages did not assist to establish whether the impression that the appellant was thinking about her all the time was in fact false and therefore the messages only served to prejudice the jury against the appellant. The argument reaching its natural conclusion was therefore that this evidence should not be admitted.

[35] In examining this argument we bear in mind the grasp of this case that the trial judge clearly had. It is important to recognise that the trial judge had carriage of the case and had heard the evidence and has a significant advantage in a case such as this in terms of that knowledge. This is a principle articulated by Judge LJ in *R v Renda* [2005] EWCA Crim 2826 at paragraphs 3 and 4 where he said:

> "[3] We have some general observations. Several of the decisions or rulings questioned in these appeals represent either judgments by the trial judge in the specific factual context of the individual case, or the exercise of a judicial discretion. The circumstances in which this court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However, we emphasise that the same general approach will be adopted when the court is being invited to interfere with what in reality is a fact specific judgment. As we explain in one of these decisions, the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instances which this court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called "authority", in reality representing no more than observations on a fact specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this court on a number of occasions. The responsibility for their application is not for this court but for trial judges.
>
> [4] Finally, even if it is positively established that there has been an incorrect ruling or misdirection by the trial judge, it should be remembered that this court is required to analyse its impact (if any) on the safety of any subsequent conviction. It does not follow from any proved error that the conviction will be quashed."

[36] We endorse these comments. As we have said the judge heard the evidence and observed the witnesses in the witness box. He saw the display of emotion by the appellant in this case. He was therefore better placed to determine what impression the appellant was portraying to the jury and whether the Facebook messages had the potential to have corrected what could have been a false impression. He was best placed to determine what, if any, would be the potential prejudice. He summarised his observations and assessment on this issue as follows:

> "The defendant has now portrayed himself as someone racked with remorse about the death of

> Natasha Carruthers and now there is evidence that appears to somewhat fly in the face of that."

[37] Bearing in mind the unique position of the trial judge we are of the view that the decision that he made fell well within the permitted exercise of judicial discretion and in no way could it be argued that the decision was wrong. In this sense the judge was entitled to admit the evidence according to the provisions of the 2004 Order to correct a false impression. We therefore reject this aspect of the appeal.

[38] In addition to this primary argument the defence raise a criticism of the trial judge for failing to give any directions to the jury about this evidence and as to the use they were entitled to make of it. The text message sequence that we have set out clearly fell into the reprehensible conduct category. It was admitted to correct a false impression regarding the applicant's concern or lack of concern for the deceased after the events about which the jury were considering. In the context of all the evidence the jury heard, it could not be argued that the evidence could in any way suggest any propensity to commit the driving offences and the supply of drugs offences of which he was charged.

[39] In *R v Bilas* [2012] EWCA Crim 2659 evidence of the defendant's homosexual disposition was adduced to correct a false impression given by the defendant during police interview that he was not of such a disposition. The Court of Appeal considered that a failure to direct the jury on this evidence was not fatal as a matter of logic drawing an inference that showed that this showed a propensity to commit offences (in this case the sexual abuse of young boys) where propensity to lie made no sense.

[40] We can see that the judge's charge is open to question on this issue. We can see that if taken in isolation this evidence may provide some form of sensation however it was not of particular relevance in this case. We consider the judge should have explained it and that would not have been a difficult process. However, we do not consider that the failure to do so was fatal having looked at the case as a whole. This evidence was introduced to put a fair balance before the jury in relation to how the appellant portrayed himself as a man devastated by grief. Whether he actually grieved for Natasha Carruthers or not had very limited relevance to the counts that he faced and, in light of the other evidence in this case, we do not have any sense of unease, never mind a significant one arising from this omission on the part of the judge.

[41] However, we also note that Crown counsel and defence counsel listened to this charge, and no one appeared to be concerned that the judge did not specifically refer to the evidence or give a direction concerning it. That is probably because the issue was clear and not going to the core of the charge in terms of the nature of the driving. Therefore, this court does not consider that intervention is appropriate given that there was nothing flagged by counsel of concern.

[42] The approach we take accords with the principles set down by Stephens LJ in *R v Hazley* [2020] NICA 35 at [60] and [61]. Stephens LJ made the following comments in relation to failures in this area:

> "[60] The judge in his charge to the jury did not highlight this evidence to the jury and, indeed, did not even mention it at all in his charge. In this way the judge did not bring this evidence to the attention of the jury. That could be seen as an advantage to the applicant but on the other hand the judge gave no directions to the jury assisting them in dealing with it in the evidence that had been given.
>
> [61] We proceed on the basis that the judge ought to have assisted the jury in his charge in relation to this evidence. The question thereafter becomes whether we consider that the verdicts are unsafe. In order to arrive at that conclusion we would have to think that the verdicts are unsafe having examined the evidence given at trial so that we had a significant sense of unease. ... On the basis of that significant evidence and the lack of any requisition we consider that in particular circumstances of this case and given the lack of any reference at all to this evidence in the judge's charge that there is no significant sense of unease about the verdicts."

Accordingly, this aspect of this appeal point must therefore fail.

[43] We then turn to the admission of evidence in relation to the appellant's subsequent convictions. These were obviously convictions of a similar nature and the prosecution sought to introduce the evidence relating to the appellant's conduct in issue between the parties pursuant to Article 6(1)(d) of the 2004 Order. The factual basis for this was that six weeks after the fatal collision and four weeks after being released from hospital on 23 November 2017 the appellant stole a motor vehicle from the driveway of a house. He drove the vehicle without insurance or a licence and was chased by a motor vehicle driven by the owner of the stolen vehicle. A 10 mile pursuit ended when the appellant crashed the vehicle. On apprehension he said "I am off my head on pills." He was convicted on his pleas of guilty and sentenced on 29 October 2018 to four months' imprisonment.

[44] The evidence was not to show a propensity to drive dangerously as this was not in issue given the appellant's concession that he had driven dangerously on 7 October but rather for two separate reasons. Firstly, that the appellant maintained in his evidence that drugs had not impacted on his ability to drive on 7 October 2017 despite the presence of Xanax at 19 times the upper limit of the therapeutic range in his blood. Secondly, in relation to the defence of duress it showed a propensity to

drive in this manner and over the distance he did on 7 October 2017 because it was asserted that he has a tendency to drive dangerously when attempting to escape the consequences of his criminal actions.

[45] The judge admitted this evidence under the second limb of the prosecution application and said that this was the basis for it. In other words, "it goes to an important issue between prosecution and defence – the propensity or otherwise of the defendant to drive in a dangerous manner in circumstances where he finds himself behind the wheel of a vehicle with the generalised surround of criminality – is an issue which goes not just to this case but also potentially his defence." The judge did not consider admission of evidence under the first limb relating to the ability to drive under the influence of drugs.

[46] This approach was entirely correct, as it was not an issue between the parties and so it could not have been admitted under this limb under the Order. However, in our view, the evidence was admitted in relation to the propensity to drive in a dangerous manner when attempting to escape the consequences of his criminal actions and this was an issue between the parties and was relevant to the defence of duress, particularly, the association limitation which was raised by the prosecution. The association limitation meant that the prosecution had to prove that the appellant put himself in a position with others engaged in criminal activity in which he foresaw, or ought reasonably to have foreseen, the risk of being subject to compulsion by threats of violence.

[47] In support of this argument the appellant relied on one core authority of *R v Bullen* [2008] EWCA Crim 4. In this case the defendant had killed a man and the only issue was his state of mind at the time, whether he intended to kill or seriously injure his victim. In the circumstances it was held that the admission of a number of previous convictions for crimes of violence was wrong as they shed no light on his intention when he struck the fatal blow. That was correctly identified by the appellant as authority for the proposition that the bad character needs to have a relevance to the disputed issue or issues in this case.

[48] However, *Bullen* went on to say, by approving *R v Duggan* [2005] EWCA Crim 1813, that the evidence of previous convictions would have been admissible had the issue been one of self-defence when the evidence could have been relevant to determine whether the defendant or the deceased was the aggressor, they were evidence of previous aggressive conduct and therefore would have been relevant to whether he had acted in self-defence. Therefore, we do not consider that the *Bullen* case supports the argument made on the facts of this case.

[49] We consider that the evidence of the appellant's subsequent conduct which resulted in criminal convictions was highly relevant to the issue. It was relevant to the third question posed by the route to verdict provided to the jury (see [58] below) by the judge relating to the duress defence, namely:

> "Had the defendant voluntarily put himself in a position in which he knew, or ought to have known, that he might be compelled to commit a crime by threats of violence made by other people?"

[50] The appellant's propensity to act in the manner that he did six weeks later had relevance both to whether he put himself voluntarily into the position that he did on the day of the fatal crash, and whether he knew, or ought reasonably to have known, that he would have been compelled to act as he did. We consider that this undeniable reality to the complexion of this case permitted the trial judge to consider admission of this evidence taking into account all of the relevant factors. The decision made, therefore, fell within the discretion available to the judge to admit this as evidence applying the terms of the 2004 Order.

[51] In addition, the appellant, refers to what he argues are defects in the summing up to the jury on this issue. Once again, as with the Facebook messages we point out that these defects were not so apparent to the legal representatives or Crown Counsel at the time to be the subject of any requisition. The judge's direction to the jury followed the guidance given to judges by the Judicial Studies Board. He advised them that the convictions were only background, they did not tell the jury whether the appellant had committed the offences they were dealing with and the judge asked the jury to focus on the evidence relating to those matters.

[52] The judge clearly cautioned the jury about being unfairly prejudiced against the appellant. He then explained that the jury may consider the appellant's conduct and convictions relevant in support of the prosecution contention that he has a tendency to drive dangerously when escaping, as they put it, the consequences of his actions and that this supports the prosecution case that he drove dangerously on this occasion. The judge concluded this part of the summing up by cautioning the jury that the fact that the appellant had done this on another occasion does not prove that he did it on the day of the fatal accident and the convictions could only be used in supporting the prosecution case provided that they think it is right to use it for this purpose. In other words, it was for the jury to decide having considered all of the evidence whether or not this was something of support.

[53] It is tempting with hindsight to forensically critique how the judge actually expressed this and, indeed, at this remove appellate courts may suggest improvements. However, that is not the test on appeal. We do not consider that the judge misdirected the jury in relation to this issue. Taking this section of the charge as a whole we are satisfied that it identified the relevance of the evidence, directed the jury as to its use, and warned the jury as to what it should not be used for. The fact that there was no requisition by the defence or the prosecution in a case where there were many applications and a robust defence and prosecution strategy strengthens us in our view that the direction to the jury was adequate (see *R v Dorrian* [2022] NICA 47).

[54] In summary, we are satisfied that, in considering the two types of bad character evidence in this case, the judge applied the provisions of the 2004 Order correctly, considered all relevant factors, and made decisions to admit the evidence which we are not minded to interfere with. We consider that he gave an adequate direction to the jury and although improvements may be suggested overall we have no reason to consider that the judge's approach to this issue renders the verdicts unsafe which is the ultimate appellate test. Therefore, this first ground of appeal must fail.

***(ii) Ground 2: Limitation on the defence of duress by circumstance***

[55] There is no dispute that the defence of duress was properly left to the jury. However, it is contended that the judge should not as a matter of law have included a voluntary association limitation as part of his direction. In the alternative it is argued that there was no evidential basis for the limitation of the defence to be left to the jury. To determine the merits of these arguments we begin by examining the judge's approach which must be evaluated in light of the evidence in the case. The first step is to look at the judge's direction and ruling on this issue as follows.

[56] The judge provided a comprehensive route to verdict written document dealing with the defence of duress. This was entirely appropriate in a case such as this. We highlight some relevant extracts from this comprehensive document he provided as follows.

[57] In relation to the driving offences the judge provided the following directions comprised in four questions:

> "1. Was the defendant driving? This is accepted. Move to consider question 2.
>
> 2. Did the defendant's driving cause the death of Natasha Carruthers?
>
> If you are sure that the defendant's driving did cause the death of Ms Carruthers move to question 3?
>
> 3. Did the defendant's driving fall far below and not just below what would be expected of a competent and careful driver?
>
> It is for you to decide what was the standard to be expected of a competent and careful driver in all of the circumstances.

4. Would it have been obvious to a competent and careful driver that it would be dangerous to drive in the way the defendant did?"

[58] There is no criticism of the above sequence. Under the sub-heading "defence of duress" the judge then set out three questions for the jury to determine in the route to verdict as follows:

"1. Was Nathan Phair, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious personal injury would result?

If you are sure that the defendant was not, return a verdict of guilty and disregard the following questions. If you are sure that the defendant was or think he may have been, go to question 2.

2. Would, or may, a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted?

If you are sure that this was not the case, return a verdict of guilty and disregard the following question. If you are sure that this was, or think it may have been the case, you should go to question 3.

3. Had the defendant voluntarily put himself in a position in which he knew or ought reasonably to have known that he might be compelled to commit a crime by threats of violence made by other people?

If you are sure that this was the case the defence of duress is not available and you should return a verdict of guilty.

If you are sure that this was not, or you think it may not, have been the case, you should find him not guilty."

[59] The issue arises with question 3 above which comprises what is commonly known as a voluntary association limitation to the defence of duress. The core

question is whether the inclusion of this was correct in law where there were no direct threats which compelled the appellant to commit crimes but, rather, he committed crimes due to the circumstances that arose.

[60] Duress of circumstances is discussed in *Blackstone's Criminal Practice* 2022, A3.50-A3.52. This aspect of duress has developed and arisen in cases involving road traffic offences which we have been referred to. In *R v Martin* [1989] 88 Cr App R 343 the appellant drove his car whilst disqualified and was charged with a criminal offence. Before arraignment he sought a ruling from the trial judge as to whether the defence of necessity was open to him in that the appellant maintained that he drove as he did because his wife had threatened suicide. The trial judge determined that the defence was not available however this was overturned by the Court of Appeal. Simon Brown J delivered judgment on behalf of the court at 345/6 as follows:

> "The principles may be summarised thus. First, English law does in extreme circumstances recognise a defence of necessity. Most commonly this defence arises as duress that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called duress of circumstances.
>
> Secondly, the defence is available only if from an objective standpoint the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.
>
> Thirdly, assuming the defence to be open to the accused on his account of the facts the issue should be left to the jury who should be directed to determine these two questions first was the accused or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness sharing the characteristics of the accused have responded to that situation by acting as the accused acted? If the answer to both these questions was yes, then the jury would acquit: the defence of necessity would have been established."

[61] Another driving case relied upon is *R v Conway* [1989] QB 290. In that case the Court of Appeal in England and Wales considered the application of the defence of duress of circumstances to reckless driving. The appellant drove a car recklessly as his passenger was wanted by police and directed him to move when police

approached the car. The Court of Appeal decided that a defence of duress should be left to the jury. Woolf LJ said at 297(f):

> "As the editors point out in Smith and Hogan, Criminal Law 6th edition 1988 page 225, to admit a defence of duress of circumstances is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, i.e. do this or else. This approach does no more than recognise that duress is an example of necessity. Whether duress of circumstances is called duress or necessity does not matter. What is important, is that, whatever it is called, it is subject to the same limitations as to do this or else species of defence. As Lord Hailsham of St Marylebone LC said in his speech in *Reg v Howe* [1987] AC 419 429:
>
> > 'There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is … a distinction without a relevant difference, since on this view of duress it is only that species of the genius of necessity which is caused by wrongful threats. I cannot see that there is anyway in which a person of ordinary fortitude can be excused from the one type of pressure of his will rather than the other.'"

[62] For this appeal we need not say any more about the nature of the defence in general or engage in the interesting debate as to the relationship between this defence and necessity. The only question for us is whether the defence having arisen, the jury should also have been told that it was not available if the appellant had voluntarily exposed himself to the risk of compulsion to commit crimes. The judge directed the jury on that basis.

[63] The guide case on this limitation to the defence of duress which is binding upon this court remains the decision of the House of Lords in *R v Hasan,* also known as *R v Z* [2005] 2 AC 467.

[64] In that case the defendant was a driver and minder for a woman who ran an escort agency and was involved in prostitution. He was charged with aggravated burglary and relied on a defence of duress. In support of this the defendant said he was coerced into committing the burglary by another man with a reputation of being

violent and a drug dealer. The trial judge directed the jury that the defence of duress would not be available to the defendant if they found that by associating with the other man he had voluntarily put himself in a position in which he knew he was likely to be subjected to threats. The defendant was convicted. The Court of Appeal allowed his appeal against conviction.

[65] The House of Lords allowed an appeal by the Crown and established the following principle which is contained in the headnote of the decision as follows:

> "(1) A defendant was not entitled to rely on the defence of duress where as a result of his voluntary association with known criminals he had foreseen or ought to have foreseen the risk of being subjected to any compulsion by threats of violence (per Baroness Hale of Richmond, compulsion to commit criminal offences); and that it was not necessary that he should actually have foreseen compulsion to commit crimes of the kind for which he was charged."

[66] Lord Bingham provided the lead judgment in this case. At para [17] he refers to the limited application of a defence of duress:

> "The common sense starting point of the common law is that adults of sound mind are ordinarily to be held responsible for the crimes which they commit; to this general principle there has, since the 14th century, been a recognised but limited exception in favour of those who commit crimes because they are forced or compelled to do so against their will by the threats of another. Such persons are said, in the language of the criminal law to act as they do because they are subject to duress."

[67] Between paras [18]-[20] Lord Bingham also provided the following analysis which we paraphrase as follows:

> "(a) That duress is a defence, which, if established, excuses what would otherwise be criminal conduct;
>
> (b) Duress affords a defence which exonerates the defendant altogether. It does not serve merely to reduce the seriousness of the crime;
>
> (c) The burden is on the prosecution to negative the defence of duress to the criminal standard, despite the practical difficulties often involved therein."

[68] At para [21] Lord Bingham sets out the most important characteristics of the defence which we recite in full as follows:

> "(1) Duress does not afford a defence to charges of murder (R v Howe [1987] AC 417), attempted murder (R v Gotts [1992] 2 AC 412) and, perhaps, some forms of treason (Smith & Hogan, Criminal Law, 10th ed., 2002, p 254). The Law Commission has in the past (eg in "Criminal Law. Report on Defences of General Application" (Law Com No 83, Cm 556, 1977, paras 2.44-2.46)) recommended that the defence should be available as a defence to all offences, including murder, and the logic of this argument is irresistible. But their recommendation has not been adopted, no doubt because it is felt that in the case of the gravest crimes no threat to the defendant, however extreme, should excuse commission of the crime. It is noteworthy that under some other criminal codes the defence is not available to a much wider range of offences: see, for example, section 20(1) of the Tasmanian Criminal Code, section 40(2) of the Criminal Code Act of the Northern Territory of Australia, section 31(4) of the Criminal Code Act Compilation Act 1913 of Western Australia, section 17 of the Canadian Criminal Code and section 24 of the Crimes Act 1961 of New Zealand.
>
> (2) To found a plea of duress the threat relied on must be to cause death or serious injury. In Alexander MacGrowther's Case (1746) Fost. 13, 14, 168 ER 8, Lee CJ held:
>
> > "The only force that doth excuse, is a force upon the person, and present fear of death."
>
> But the Criminal Law Commissioners in their Seventh Report of 1843 (p 31, article 6) understood the defence to apply where there was a just and well-grounded fear of death or grievous bodily harm, and it is now accepted that threats of death or serious injury will suffice: R v Lynch, above, p 679; R v Abdul-Hussain (Court of Appeal (Criminal Division), 17 December 1998, unreported).
>
> (3) The threat must be directed against the defendant or his immediate family or someone close to him: Smith &

Hogan, above, p 258. In the light of recent Court of Appeal decisions such as R v Conway [1989] QB 290 and R v Wright [2000] Crim LR 510, the current (April 2003) specimen direction of the Judicial Studies Board suggests that the threat must be directed, if not to the defendant or a member of his immediate family, to a person for whose safety the defendant would reasonably regard himself as responsible. The correctness of such a direction was not, and on the facts could not be, in issue on this appeal, but it appears to me, if strictly applied, to be consistent with the rationale of the duress exception.

(4) The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions. It is necessary to return to this aspect, but in passing one may note the general observation of Lord Morris of Borth-y-Gest in R v Lynch, above at p 670:

> "….. it is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested."

(5) The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon.

(6) The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take. It is necessary to return to this aspect also, but this is an important limitation of the duress defence and in recent years it has, as I shall suggest, been unduly weakened.

(7) The defendant may not rely on duress to which he has voluntarily laid himself open. The scope of this limitation raises the most significant issue on this part of this appeal, and I must return to it."

[69] From point (7) of the above extract it flows that a defendant may not rely on duress to which he has voluntarily laid himself open. The court set out the rationale for this strict approach at paragraph [22] as follows:

> "I must acknowledge that the features of duress to which I have referred in paras [18]-[20] above, incline me, where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on. In doing so, I bear in mind two of the observations of Lord Simon of Glaisdale in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 (dissenting on the main ruling, which was reversed in *R v Howe* [1987] AC 417):
>
> > 'Your Lordship should hesitate long lest you may be inscribing a charter for terrorists, gang leaders and kidnappers. The same system of criminal justice does not permit a subject to set up a countervailing system of sanctions or by terrorism to confer criminal immunity on his gang.'"

[70] Lord Bingham also reiterated the import of these considerations in his judgment at para [38] where he said:

> "The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so."

[71] The majority answered the certified question at para [39] of the ruling as follows by opting for the widest option presented to the court:

> "39. I would answer this certified question by saying that the defence of duress is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.."

[72] The above disposal of the case undeniably cast the net of voluntary association wide. Specifically at para [37] Lord Bingham refers to the fact that voluntary association is not confined to foresight of coercion to commit crimes:

> "Nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit

> the defendant's subservience. There need not be foresight of coercion to commit crimes…"

[73] Continuing at para [38] Lord Bingham also said that the defendant's foresight must be judged by way of an objective test. In other words, it is enough that he ought reasonably to have known he would compelled to commit crimes by virtue of the association.

[74] Subsequent authority has consistently applied this law to different circumstances. For example, in *R v Ali* [2008] EWCA Crim 716 it was applied to someone who joined a criminal gang. In that case a juvenile convicted of robbery maintained that he was acting under duress of another associate. The Court of Appeal applied *Hasan* in the following way:

> "It is true that Lord Bingham refers at paragraph 39 to a voluntary association with others "engaged in criminal activity." That is not surprising because in most cases where A subjects B to compulsion by threats of violence, A is engaged in criminal activity. But as the Judicial Studies Board specimen directions makes clear, the core question is whether the defendant voluntarily put himself in the position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence. As a matter of fact, threats of violence will almost always be made by persons engaged in a criminal activity; but in our judgment it is the risk of being subjected to compulsion by threats of violence that must be foreseen or foreseeable that is relevant, rather than the nature of the activity in which the threatener is engaged. As further support for this, we point out that the direction given by the trial judge in Z made no reference to the nature of the activity in which the threatener was engaged and yet Lord Bingham said in terms that there was no misdirection."

[75] One other obvious scenario is where someone joins a terrorist organisation. This was highlighted by Lord Lowry in the case of *R v Fitzpatrick* [1977] NI 20. In a decision which has stood the test of time the court said that a terrorist could not take on the "breast plate of righteousness" by raising duress in an effort to escape criminal liability. The public policy imperative in preventing the gang member or terrorist from availing of a defence of duress is clear. The circumstances will vary as to when this issue may arise. However, as a matter of law we consider that the voluntary association defence can apply to duress of circumstances just as it can apply to duress by threats. That is because of the width of the *Hasan* decision which to our mind does not limit the voluntary association limitation due to public policy

considerations and the need to ensure that duress was not raised as an easy excuse for criminals engaged in criminal enterprises.

[76] Clearly some confusion has arisen by virtue of the Crown Court Bench Book NI which does not specifically provide for a voluntary association limitation being applied to a defence of duress by circumstance. However, this source is out on its own. In particular, it is in contradiction to the Crown Court Compendium England & Wales. The trial judge was made aware of this. He decided that the Crown Court Bench Book NI required modification and that the limitation to duress should be part of his direction to the jury.

[77] We have considered the judge's ruling on this issue. He said as follows:

> "My review of the authorities on the academic literature is this:
>
> I am satisfied that the defence of duress has had a blurring with the defence of necessity over the years, I am satisfied that the true position is that the defence of duress is a coherent defence on its own. Whether the threats arise from threats or circumstance does not affect the limitations that are applied upon it.
>
> I am satisfied that there are compelling public policy reasons and compelling legal reasons that that should be so. It seems, on my review of the authorities, that our Bench Book must necessarily be modified. It may well be that the limitations expressed to apply to duress of threats in our Bench Book arose in a piece meal fashion because of cases such as *Lynch* and *Fitzpatrick*, where only the defence of duress by threats was argued and therefore it was assumed or implied that the limitations were imposed solely upon that defence. I am satisfied that the defence of duress is a coherent and continuous defence; and it stands on its own whether or not the threat arises from a threat of violence directly or a threat of circumstance therefore, I am satisfied that the limitations that apply to one apply to the other. That is my ruling and that is how we will progress on this trial."

[78] We do not see much wrong with the above. There is also support for this outcome from other sources other than the Bench Book referred to which have been set out comprehensively by the prosecution. In *R v Conway* Woolf LJ said at para 297f when examining the parameters of duress of circumstances that "what is important is that, whatever it is called, it is subject to the same limitations as the do this or else species of duress."

[79] The prosecution refer to Law Commission report no 218. At para 35.9 there is an express recognition that the voluntary association limitation is applicable to both species of defence. In *Smith Hogan and Ormerod* Criminal Law 15th edition the principles governing the defences are also dealt with as one.

[80] A key factor which must be borne in mind is the moral culpability of the defendant in a given case. This is highlighted by *Smith, Hogan and Ormerod* at 10.2.1 at page 344 when an example is given which illustrates that whether by threats or circumstances the moral culpability is the same:

> "For example, D is told that he will be killed unless he acts as a getaway driver for a robbery. The compulsion on D to do the act is exactly the same whether the threat comes from someone demanding that he do it or an aggressor or other circumstances. His moral culpability or lack of it seems exactly the same."

[81] *Halsbury Laws* Volume 25 (2020) at para 48 also refers to the fact that defence of duress by threats is not available if it is proved that the defendant failed to take advantage of an opportunity to neutralise the effects of the threat which a reasonable person of a sort similar to the defendant in his position would have taken, and is not available to a person who voluntarily puts himself in a position where he foresaw, or ought reasonably to have foreseen, the risk of being subjected to any compulsion by threats of violence. Para 49 also deals with defence of circumstances and states that:

> "The defence of duress of circumstances is concerned with the situation where the defendant acts to avert what he reasonably believes to be a threat of death or serious physical injury to himself (or to another person for whom he would regard himself as, responsible), whether from another person or from a natural cause. Unlike the defence of duress by threats the threat does not have to be accompanied by the instruction to commit an offence 'or else.' As to the matters to be determined by the jury where the defence of duress of circumstances is open to the defendant it should be left to the jury with directions."

[82] During submissions Mr McCartney KC and Mr Quinn analysed this appeal point as follows. He said that the limitation applies in circumstances where there is compliance by the person threatened who has voluntarily associated themselves with criminality in circumstances where such a threat is foreseeable, that is the terrorist member carrying out an act for the terrorist organisation or gang members under threat by the organisation or gang. However, he argued that the limitation does not apply in circumstances where the same person commits a criminal offence in escaping a threat of death or serious injury from an associate.

[83] Therefore the appellant contended that there are logical public policy and moral distinctions between the two forms of duress. Counsel argued that the limitation should not apply in circumstances where the same person commits a criminal offence in escaping a threat of death or serious injury from an associate. He argued that the public policy should not be so broad as to mean that a criminal associate can never rely on duress of circumstances where they are in the act of attempting to escape from a threat of death or serious injury.

[84] We are not convinced by these arguments. That is because in drawing all of the above strands together it is our view that the voluntary association limitation is not confined to circumstances of direct threat. It seems to us proper to apply it in other circumstances where the threat is implied or derived from circumstances ie duress of circumstances. It would be artificial and against public policy to make a distinction. However, particular care must be taken by a trial judge to relate the specific facts of a case to the law. If there is sufficient evidence the jury can then make an assessment on an objective basis as question 3 set out at para [58] herein envisages.

[85] The facts of this case are also key. We summarise them as follows. The appellant by his own actions engaged in drug dealing. This type of activity involves violence, threats and retribution is highly foreseeable. However, the added ingredient in this case is that having associated before with Toher, the appellant then took his money and failed to provide drugs to him and "stroked him."

[86] We consider it clear that in these circumstances the appellant could have foreseen or ought reasonably to have foreseen the risk of being subjected to compulsion to act in a criminal way by threats of violence to commit criminal offences. The threats in this case are clearly not explicit but the entire circumstances of the drugs transaction including the deception of Toher meant that the circumstances that arose were foreseeable namely a violent aftermath occasioned by not supplying the drugs once paid for. When viewed through that prism we think it entirely foreseeable that the offended party would seek revenge as here and that the defendant may be compelled to commit criminal offences when so confronted. That includes a circumstance of causing death or grievous injury by dangerous driving as here.

[87] In our view, it was reasonably foreseeable that Toher would have reacted to being 'ripped off' by the appellant in a number of ways both seeking revenge and by requiring the appellant to commit criminal acts by threats of violence – compelled him to supply drugs to Toher at no cost, compelled him to sell drugs/steal/rob to generate money to make good Toher's losses, or, alternatively or in addition, compelled to commit criminal acts to escape from Toher's vengeance – eg careless/dangerous driving, speeding, causing criminal damage, theft of a vehicle/taking and driving away to make good an escape. We think all these are

potentially reasonably foreseeable, both to being subject to compulsion and the nature of the criminal acts that may need to be committed.

[88] It would be invidious to our mind if a court could not give a direction to the jury in relation to voluntary association in a case such as this. This is not the usual case of duress by threats which is 'do something or else', where a person commits a crime to comply with the threatener's demands as in *Fitzpatrick* or *Ali*. However, in our view, that does not mean that this type of behaviour precludes the voluntary association limitation given the policy considerations which must equally apply to this type of situation.

[89] As a matter of policy and principle we consider that the defendant who accepts money to supply illegal drugs but does not supply them puts himself in a position where he is likely to be subjected to threats requiring him to commit crimes at the behest of the duressor should also attract this limitation. In other words, this person cannot take advantage of his own criminal behaviour. It also matters not, it seems to us, in line with the case of *Hasan* that the offence was one that spontaneously arose, such as dangerous driving, rather than one that was chosen for him, such as robbery or violence against a third person.

[90] In support of our conclusion we rely on the obvious underpinning of the current law and the width of the principle settled by Lord Bingham in *Hasan* at para [38] which is worth repeating:

> "The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse <u>any act</u> which he is thereafter compelled to do by them …"

[91] We have added the emphasis and it is clear from the above that Lord Bingham does not qualify in any way the nature of the act the accused is compelled to do or the nature of the compulsion. It follows that we must reject this limb of the appeal point.

[92] The second limb of this appeal point was that there was insufficient evidence to permit the jury to consider this limitation or defence. We have had less trouble in dealing with this argument as we consider that it is not supported by the evidence in this case. There was enough evidence in this case that the appellant had engaged with others in drug dealing activity including that he had swindled his co-defendant

in the course of a cocaine deal. This evidence emanates from himself in a series of texts that he sent from hospital, in particular, the text which read:

> "the rat [referring to Andrew Waters] an that Paurig boy [referring to Padraig Toher] rammed me …. Cause I stroked them 500 euro."

[93] Also, in his own evidence, the appellant accepted supplying cocaine to Toher on two occasions in the few weeks prior to this event. He also accepted agreeing to supply ¼ ounce of cocaine on the third occasion, taking his money but failing to supply the drugs. Both the co-defendants Toher and Waters had pleaded guilty to the drugs offences. The amount of cocaine the appellant agreed to supply is significant. We also agree with the prosecution submission that the evidence suggested that Phair was not naïve in relation to drugs given the text messages and that 34 Xanax tablets and 4.3 grams of MDMA were found in the Corsa. There is sufficient evidence, in our view, on the basis of looking at this trial as a whole to found criminal association as part of the particular factual matrix of this case. The trial judge was therefore correct to leave this matter to the jury.

[94] We see some merit in the argument made that the evidence put to the appellant in relation to his knowledge of Toher and what might happen was not as comprehensive as it might have been. However, that does not mean that the evidence is entirely insufficient to found the prosecution case when the facts are recalled as follows.

[95] The appellant clearly sought to limit the extent of his foresight as to the consequences of his engagement with Toher. This is apparent from the following extract of his cross examination:

> "Q. What did you think was going to happen after you stroked Padraig Toher?
>
> A. I thought worse-case scenario I had to pay him back in a couple of days. I never thought nothing like this was going to happen.
>
> Q. Well did you think he was just going to come and say oh you forgot to get my drugs the other night something like that?
>
> A. I didn't think this was going to happen anyway.
>
> Q. It wasn't a surprise to you that someone was trying to be violent with you over stroking them over drugs was it?
>
> A. Its not something you'd expect to happen."

[96] Whether this account was an accurate statement as to the appellant's foresight was really a matter for the jury to determine. In any event, the jury were entitled to consider the matter objectively to decide what the appellant ought reasonably to have foreseen.

[97] Therefore, we consider that there was sufficient evidence that the circumstances were such that the appellant knew or ought to have known that he would be compelled to commit criminal offences. It was proper to leave this issue to the jury to make their own objective assessment. We will therefore dismiss this ground of appeal.

[98] Finally, we do not accept that the directions of the trial judge as to the burden and standard of proof on the issue of duress were insufficient. We have no reason to doubt that the jury were at any disadvantage in relation to this. We note that there is no criticism made of the actual route to verdict document provided by the judge. As in many of these cases counsel have raised the fact that the judge could have done more to explain the question of voluntary association. However, we reiterate that directions in trials of this nature are not a counsel of perfection.

[99] In *R v Stoddart* [1909] 2 Cr App R 217 Lord Alverston CJ made some general observations about this issue which we have applied in recent cases as follows at 245/6:

> "We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this court. As appears from the judgment which has just been delivered the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial, probably no summing up and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of 20 days would fail to be open to some objection. To quote Lord Esher's words in *Abrath v The North Eastern Rail Company* above page 233:
>
> > 'It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that

> something wrong was said, or that something was said which would make wrong that which was left to be understood."

[100] The coherent theme that emerges from the law in this area is that every charge to the jury must be regarded in the light of the facts of a trial and the conduct of a trial. A charge should also reflect the questions which have been raised by counsel for the prosecution and the defence. The trial judge is uniquely placed to frame his charge accordingly. This Court of Appeal will consider whether or not any misdirection or non-direction has been made but also, crucially, what effect that has on the safety of the conviction in any case which is the ultimate test. As we have said, charges and directions are often open to improvement, but they should not be subject to a scrutiny which extends beyond the ultimate test for this appellate court which is safety of the conviction.

***(iii) Grounds 3 and 4***

***Hearsay Evidence/Submission of no case to answer***

[101] We will deal with these two grounds together as they are interlinked and were dealt with by both counsel as one point. These grounds of appeal relate to the evidence of a prosecution witness, Andrew Waters. He made a statement to police which was dated 21 December 2017 and he then gave evidence at the trial. The nub of this point on appeal is that Mr Waters' evidence at trial differed from his statement and contained hearsay evidence. It is important to note that there was no objection at the time to this evidence, however, later there was an application at the end of the prosecution case for the jury to be discharged and no case to answer on counts 7-9 (the drugs offences).

[102] In the defence skeleton argument seven points are raised which form the basis of what the defence say was inadmissible hearsay evidence. This is set out as follows:

> "(i) Toher phoned the appellant on the first and second occasion and arranged to buy drugs from the appellant. (Waters did not hear what was discussed.)
>
> (ii) Toher phoned Gault on the third occasion and arranged to buy drugs. (Waters did not hear what discussed.)
>
> (iii) That cocaine was supplied on first and second occasions. (In his oral evidence, Waters stated that he did not see what, if anything, was handed over

and his evidence relied solely on what Toher told him.)

(iv) Toher used drugs in London. (This evidence was based solely on what Toher is alleged to have told Waters.)

(v) Toher wanted to deal drugs at the Filthy Animals Bike Rally. (This evidence was based solely on what Toher is alleged to have told Waters.)

(vi) The motivation for the car chase was a failed drugs deal. (Because the only evidence of the failed drug deal is what Toher told Waters in relation to the third alleged transaction.)

(vii) That the €500 "stroked" from Toher related to a failed drugs deal. (Because the only evidence of the failed drugs deal is what Toher told Waters.)

[103] Flowing from the above the defence maintain that the oral evidence of Waters differed significantly from his written statement of evidence and his police interviews insofar as the witness statement did not include important elements of the impugned hearsay evidence. In fact, the defence say that his statement contained a completely different version of events, namely that he, Waters, and not Toher, made the phone calls with the appellant to arrange to purchase the drugs on behalf of Toher. The defence therefore maintains that they were not put on notice that this witness was likely to change his evidence from that contained in the witness statement and therefore, were taken by surprise and that there was not an attempt, even a belated attempt, to comply with the relevant rules governing applications for admission of hearsay.

[104] In reply to this case the prosecution in its argument, summarises some of the evidence that was given and essentially makes the case that it did not have notice itself of what this witness would actually say and, in some respects, his evidence in the witness box was more favourable to the appellant than his statement. The prosecution reminds the court that Waters said in evidence that Toher had asked him whether he could get him any cocaine to which he said "Nathan Phair is your man there." He said Toher had phoned Phair using his phone and to get a £100 bag. He explained that by arrangement they met Phair at the football pitch in Newtownbutler where Phair got out of the car and approached their car taking £100 from Toher before going off in a car and returning five minutes later to give him the cocaine. He said he had not seen the cocaine. He timed this as two to three weeks before the collision. This was the first transaction that he described. Then he described a second transaction with a similar process a good week after the first, again, at the football field in Newtownbutler.

[105] As to the events of 6 October 2017 which frame this incident, the appellant said that Toher again asked him if he could get in touch with Phair. He wanted a ¼ oz of cocaine on this occasion in order to sell it at the Filthy Animals Bike Rally. He said that Phair could not be reached but that they got through to Sarah Gault before arranging again to meet the football field as before. They met Phair who was in Natasha Carruthers' car with Sarah Gault. The price was €500. Toher gave him £450 and received £8 change. Toher never received the drugs. The Corsa drove off in the direction of Enniskillen. The prosecution accept that the statement signed by the witness stated that he had spoken to Phair to arrange the deals which was different from his oral evidence.

[106] The point at issue is whether or not there has been firstly, non-compliance with the rules and, secondly, whether or not that should have led to a discharge of the jury on the basis of the evidence that was filed.

[107] Only one authority was supplied to us in relation to this appeal point. The context, of course, is that hearsay applications should be made in a timely way to allow for a fair trial. This principle has been enunciated in many courts including by Gillen J in *R v King* [2007] NICC 17. But what happens if this is impossible? The case relied on is *Emlyn Williams t/a TA Williams of Portmadog v Vehicle and Operator Services Agency* [2008] 172 JP 328 DC. In that case hearsay evidence was given that the driver of the offending vehicle was employed by the defendant company. No application had been made by the prosecution for it to be admitted nor was there any express agreement from the defence. The question therefore was whether the evidence should have been admitted.

[108] In that case Treacy J said at para [14] as follows:

> "Those experienced in criminal litigation are familiar with the situation whereby something is done in the course of a hearing by one party without demur from the other side. Judges and justices up and down the country regularly hear evidence admitted without anything formal being said by the parties to the court. The tribunal infers, in the absence of objection or submission, that there is no objection to the admissibility of the evidence, and thus that there is agreement to its admissibility. In effect, the agreement is implicit, or capable of being implicit, in the circumstances pertaining before the court, and particularly in circumstances where the appellant has the benefit of legal representation."

[109] Keene LJ added at [18] to [19]:

> "18. I agree. Like my Lord, I cannot accept that s.114(1)(c) of the 2003 Act can only be met by an express agreement on admissibility. That would mean, for example, that hearsay evidence might be given on an important point without objection, though without express agreement, on which evidence the prosecution relied, and it then being argued, after the close of the prosecution case, that there was no admissible evidence on that point and so, in certain circumstances, no case to answer. If that were done as a deliberate tactic by the defence, it would amount to an ambush, against which the courts have set their faces for some time. I do not suggest that that was the situation here, but it would be one which could easily arise if the appellant's argument were right. In my judgment, for that reason, as well as for those given by my Lord, agreement under s.114(1)(c) may be express or implied."

In particular, at para [19] the court also said:

> "19. … But such an inference may be open to the court where the defendant is legally represented and no objection to admissibility is taken."

[110] The factual foundation for this appeal point is that, in essence, there was no consent which is required by the rules to the admission of the hearsay evidence but that argument falters in that the provisions of Article 18(1)(c) of the 2004 Order allow the admission of hearsay evidence if, all parties to the proceedings agree to it being admissible. *Archbold Criminal Pleading, Evidence and Practice* 2022 refers that "where hearsay is relied on by a party, the court is entitled to infer in the absence of objection by another party that there is no objection to its admissibility and, thus, that there is agreement to its admissibility."

[111] To our mind the above quotation truly captures the position in this case. We see no dilution of the principles or contradiction with the case referred to by the defence of *R v Riat, Doran, Wilson, Clare Bennett* [2012] EWCA Crim 1509. In essence, there was no objection to this evidence and an application made retrospectively at the close of the prosecution case does not change that. We can see no error in the ruling of the trial judge in relation to this matter. We agree with the prosecution submission that in this case, like in the *Williams* case referred to, the evidence was not contradicted or rebutted by evidence from the accused. Indeed, there was no challenge to Waters' evidence in this part of cross-examination. The appellant accepted in his evidence that the transactions had actually occurred although issue was taken as to the nature of the substance actually supplied.

[112] In any event, there was other significant evidence which supported Waters' core evidence that the drugs offences had occurred and upon which a case to answer could properly be founded. This alternative line also militates against the defence and we are satisfied from our examination of the evidence and the portions highlighted by counsel that there was more than enough to continue with a case in relation to the drugs offences. Not least, in this area, is the fact that on 1 March 2019 Waters pleaded guilty to being concerned in the supply of cocaine between 15 August and 5 October 2017 and being concerned in an offer to supply cocaine on 6 October 2017. On 7 March 2019 Toher pleaded guilty to conspiracy to possess a controlled drug, namely cocaine, a Class A drug, between 15 August and 6 October 2017.

[113] The convictions of Waters and Toher were evidence not only of their involvement in the drug deals but also the fact of those deals. This supplemented the evidence from Waters regarding meeting Phair in Newtownbutler and the handing over of money in exchange for what was given to Toher. Further, confirmatory evidence is found in the screenshot text messages sent by Phair from hospital that is:

> "The rat an that Paurig boy rammed me … cause I stroked them 500 euros."

[114] Also, text messages which we have been taken through recovered from the phone further support the facts of the offer to supply the day before from Toher at 1325 hours on 7 October:

> "You think you're smart doing that to me? For your own good you best get that back to me now."

[115] From Stephen Morton, later that day at 1600hrs there is the following:

> "Who the fuk do you think you are. You have boys my coke you fucken day cunt keep it up an well see who yu think you have"
>
> At 1601:
>
> "Cock"
>
> At 1602:
>
> "Your only a fool an I havnt forgot about you. I'll be home soon."

[116] Some effort was made to explain these text messages, however, in our view these were flimsy explanations and they are obviously strong evidence of the transactions that took place. There, as the prosecution said, was also evidence from

other texts sent and received on that day that Phair was a drug dealer and dealt cocaine, one of which refers to Newtown, suggesting that he supplied from there. Accordingly, we entirely agree with the prosecution submission that even in the absence of the hearsay evidence which was admitted we say, fairly, there was sufficient evidence upon which a reasonable jury properly directed could convict of the three drugs offences.

[117] The appellant also refers to a comment made by the witness, Andrew Waters, in the context of his evidence regarding the third and final drug deal. This comment was to the effect that he thought Phair was going to rob Toher as he was known for doing so. No application was made to discharge the jury as a result of these comments made during the evidence. Therefore, there is no further traction to be gained from this argument.

[118] The core element of the progress of the case was that no objection was taken to Waters' evidence, primarily we think, because it was at that stage when the evidence seemed to be favourable to the appellant. We do not support an argument that retrospectively that situation can change. Rather, we consider the stronger argument is that the defence had impliedly agreed to the admission of this hearsay evidence. In any event, in considering the overall fairness of this there was other sufficient evidence of drug dealing transactions as we have said which formed the basis of a case to answer. So overall, whilst the strictures of the 2004 Order have not been followed the oversight was predictable due to the way the case was presented by the defence and also has led to no unfairness in this case. We are left with no sense that this issue makes the convictions on counts 7-9, the drugs convictions, unsafe in any way.

***New ground of appeal: Self-Defence***

[119] This is a new ground of appeal which was not initially pursued, namely that the judge erred in declining to leave self-defence as a defence to the jury. In making his decision on this the trial judge said as follows:

> "The self-defence that is suggested to me is that during the course of the driving, the defendant may, at some stage, having driven defensively in terms of blocking an overtake or the like. In my view, that falls far short of self-defence. The circumstances of the case that he was pursued from Letterbreen to the accident locus and effectively, what he did in the course of his driving, should be excused if the defence of duress applies. It does not resemble a case where self-defence is the apposite defence, and I am satisfied that the correct defence, that I will leave to the jury is the question of duress of circumstance."

[120] There are two considerations which flow from this. Firstly, any defence must be established on a factual basis. Secondly, in a case such as this when two potential defences were available the judge must choose which to put before the court. The latter is a proposition of law which has been applied consistently and which we approve, see *R v Riddell* [2017] 1 WLR 3593. We will return to this in a moment, but first the pressing issue is whether or not there was a factual basis to raise self-defence in this particular case.

[121] We find this argument hard to maintain on the facts. It needs to be emphasised that following some high risk taking driving by both Toher in his BMW and the appellant in his Corsa, the appellant crashed into a tree on the Lisnaskea Road, Derrylin, on the date in question. Toher, the driver of the BMW, had paid the appellant for drugs but the appellant did not provide them. Toher's reaction to being 'stroked' by the appellant was to strike the appellant's Corsa with a metal bar causing damage to the windscreen, driver's window and rear offside passenger window. The appellant then sped off. It appears that there was contact between the cars and then a loss of control. There was also clearly speed. There is evidence from expert witnesses on this issue and, as we have said, Toher pleaded guilty to certain offences. During the course of his police interview the appellant was always clear that the contact which precipitated the crash into the tree was the left hand side of the BMW striking the rear driver's side of the Corsa. The appellant's description of the accident to the police was as follows:

> "He was nudging me and he came from the side of me and he hit the back rear end of the Corsa and I went straight into a tree."

[122] It follows from this evidence which emanates from the appellant himself that he has, in fact, never made the case that he sought to defend himself by nudging or colliding with or crashing into the BMW driven by Toher. The two legal questions to be asked in a case where the issue of self-defence arises are:

(i) Were the facts (as the appellant believed them to be) such that the use of force was necessary? This is the subjective question; and

(ii) Was the degree of force reasonable for that purpose in the light of the perceived facts? This is the objective question.

[123] Before any defence can be left to the jury there must be evidence which, if accepted, could raise a prima facie case of self-defence. If there is such evidence, then whether it is relied on by the defence or not it should be left to the jury, see *DPP (Jamaica) v Bailey* [1995] 1 Cr App 257. Of course, the outcome and answer to these questions will depend on the facts of the case. In this case we are satisfied that the prosecution was right to claim that there was no evidence of unlawful force or, indeed, any force being asserted by the appellant when driving the Corsa on the BMW which resulted in the appellant's car colliding with the tree.

[124] In short, there is no evidence available which in the present circumstances could raise a prima facie case of self defence on the facts. Rather, the trial judge who heard the evidence decided that the evidence fell far short of self defence and we agree with that assessment. This was a view which the trial judge was entitled to take on the basis of his knowledge and understanding of the case and we see no reason to interfere with it.

[125] We have referred to the case of *Riddell* and in that Davis LJ refers to this issue in some detail as follows:

> "That the defence of self defence ordinarily arose where a person used force in order to meet an actual or perceived force or threat of force; that, although the application before it was not an inherent part of the offence of dangerous driving, contrary to section 2 of the Road Traffic Act 1988, the alleged facts relating to the charge of that defence, might, nevertheless, be such that force had been applied in response to threated or actual force; that, while self-defence would rarely be capable of proving a defence to a count of dangerous or careless driving, there was no right reason to deny its availability whereon the particular facts, use of responsive force had been involved in the driving alleged. That, where, in a given case the defences of both self-defence and duress were potentially available, a judge should seek to adopt one to the exclusion of the other and that in the present case self-defence would be the more apposite defence on the count of dangerous driving."

[126] Davis LJ also said at para [362A] as follows:

> "Whilst such a charge does not of itself convey use of force, the alleged facts relating to the driving charge may nevertheless be such that force has, indeed, been applied in response to threatened or actual force. In the vast majority of driving cases, of course, a defence of self-defence simply cannot arise: just because no force, as such, is being used at all by a driver to meet any actual or threatened force. The driving is or is not, quite simply, dangerous or careless, as the case may be. Even where a person responds to perceived force by fleeing in the car, and drives dangerously in so doing, self-defence ordinarily, applying the conventional approach, still would not arise: just because the defendant is not in fact using force to meet force, actual or perceived. But there

> are, as we see it, potentially cases, rare that they may be, that can, on the particular facts, be different and where the alleged dangerous (or careless) driving does involve the use of force. *R v Symonds* [1998] Crim LR 280 appears to have been just such a case. The present certainly is such a case. Accordingly, the fact that a count of dangerous driving is a charge which, by reference solely to its constituent legal elements, does not inherently involve the use of force should not, in our view, preclude the availability of self-defence where, on the particular facts, use of responsive force, is indeed, involved in the dangerous driving alleged."

[127] It follows from the above dicta that the defence is available even in a dangerous driving case but, of course, it must be based on the facts of the case. As we have said on the facts of this case, there is no sustainable case to be made that the appellant was using force back towards his assailant and, therefore, that self-defence was open to him.

[128] In any event, if both defences are available to the appellant then the judge should seek to exclude the less apposite defence available. This is established law as Davis LJ said at 363(d):

> "Where on a given case both defences are potentially available, on the facts, then a judge should seek to adopt one to the exclusion of the other.
>
> In the present case, the more apposite defence, on the facts in count 4 was self-defence."

[129] That defence was clearly the best defence to be left in that case. By contrast in the present case there can be no doubt that the more apposite defence on the facts was that of duress by circumstances. We are therefore satisfied that the trial judge did not err in leaving only the defence of duress by circumstances to the jury. Rather, he considered whether self-defence was available on the facts and found that it was not. We can see no reason to interfere with that assessment. Secondly, in any event, only one defence should be left, and in this case, we consider that the defence of duress by circumstances was clearly the defence at the forefront of this case and was the one that should rightly have been left to the jury.

[130] Therefore, in all of the circumstances this court will refuse leave to the appellant to amend the grounds of appeal for the reasons given which are in symmetry with those provided by the trial judge. We do not consider that he committed any error in law by failing to put the defence of self-defence before the jury in this case. This court is entirely satisfied that the trial judge was correct not to

allow the defence of self-defence to be put before the jury and does not consider that that decision in any way, undermines the safety of the convictions of the appellant.

[131] This conclusion chimes with the evidence which is not supportive of a self-defence case but rather an escape case. One only has to look at the evidence given by the appellant in relation to this particularly where he described the loss of control as follows:

> "As we were going up the wee hill, the Corsa kind of slowed down a wee bit because it's not a powerful car, and he came up behind me, he was right up behind me. He bumped me about twice, and then he got around a corner or two and then it looked like he was going up beside me and just all of a sudden he tapped me again, and it just happened so quick into the tree."

[132] The appellant confirmed this in cross-examination where he was not suggesting clearly that he used force to defend himself from the threat of attack but rather than the only force was emanating from bumping or tapping from Toher's car which was behind him.

***Overall Conclusion***

[133] Accordingly, we dismiss each ground of appeal. We record our thanks to counsel for the comprehensive and diligent way in which this case was argued. Finally, we commend the trial judge for his overall management and conduct of what was a particularly complex case.