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Judgment: approved by the Court for handing down | *Delivered:* **04/11/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

THE QUEEN

–v-

MARVIN CANNING

_____

RULING NO 3 – ABUSE OF PROCESS [FINAL]

_____

McCLOSKEY J

I INTRODUCTION

[1] This ruling determines finally the Defendant's application for a stay of the indictment on the ground that his continued prosecution would be an abuse of the process of the court. The Defendant is charged with two counts of kidnapping; two counts of assault/unlawful and injurious imprisonment; two counts of inflicting grievous bodily harm with intent; and one count of possession of a firearm with intent to commit an indictable offence. The injured parties are described in this judgment as BC and LD. The names of certain other persons have been similarly anonymised. The dates specified in the indictment are between 23rd and 25th April 2007. The protagonists in this prosecution are BC, LD and the Defendant. While there are many other members of the cast, they have roles of a lesser nature.

II THE PROSECUTION CASE

[2] The outline in the ensuing paragraphs reflects the opening statement of Mr. Hunter QC, who appeared with Mr. Russell on behalf of the prosecution. BC and LD are described as cohabiting partners who, in April 2007, resided together in a town in County Westmeath, Republic of Ireland which I shall hereinafter refer to as 'X'. BC operated a business in which LD performed various secretarial and administrative

duties. During the course of 23rd April 2007 (a Monday), BC spent a number of hours in the company of an acquaintance in a public house in X, drinking pints of beer. LD was also in their company for a period, drinking coffee. They had some suspicions about the conduct of two strangers who were present. LD went home first, followed by BC. Later, when the front doorbell rang, LD responded and was confronted by five or six men, who burst in. They attacked and injured her. BC was similarly attacked and injured, more seriously. There were shouts of "*Where's the €170,000? …*".

[3] A bag was placed over BC's head and his hands were tied behind his back. While LD lay face down on a bed, some ransacking of the premises occurred. Both were then led into a white van, which then travelled the long distance to Derry. At this second location, they were escorted into a house and separated. Once again, LD was obliged to lie face down on a mattress. Meanwhile, BC was interrogated and assaulted in another room. He was questioned about his business and money. It was represented that he was talking to "*the IRA*". Both captives were forced to undress and don a boiler suit of sorts. They were removed from the premises into the same vehicle and driven to a third location. The vehicle was then driven away, while two of their captors remained with them. BC was required to remove his boiler suit, duly replaced by another, while the sleeves of LD's attire were ripped off. While the captives were physically separated, BC, lying on the grass, was shot in both ankles. LD did not witness this, but saw two men running away. She was able to alert local residents, as a result of which police and ambulance personnel attended shortly before 5.00am on 24th April 2007. The location was a street in the Creggan area of Derry, to which I shall hereinafter refer as "Y". LD sustained relatively minor injuries. BC was more seriously injured and, in particular, his left eye was damaged to the extent that a loss of sight has ensued.

[4] The prosecution case is based, firstly, on the visual identification of the Defendant and recognition of his voice by the two injured parties. In this respect, the following are the central ingredients of the prosecution case:

(a) Both injured parties had become acquainted with the Defendant some time previously.

(b) BC had conducted three meetings with the Defendant (amongst others) during the previous year.

(c) LD had attended two of these meetings.

(d) Both injured parties were familiar with the Defendant's appearance and his voice.

(e) BC had spoken to the Defendant during the three meetings in question and had also spoken to him numerous times on the telephone.

(f) BC recognised the Defendant, fleetingly, during the first phase of the relevant events at the injured parties' home in X.

(g) BC also recognised the Defendant's voice during this initial phase.

(h) BC heard the Defendant's voice in the van during the journey between X and Londonderry.

(i) On 18th July 2007, during a video film identification procedure, BC identified the Defendant as "*a person who took me from my home address in a van to an unknown address in Londonderry, Northern Ireland*".

(j) LD was also familiar with the Defendant's appearance and voice through attending two of the said meetings and certain telephone conversations with him.

(k) During the same journey by road, LD saw the Defendant get into the vehicle.

(l) LD further recognised the Defendant's voice during a telephone conversation which unfolded in the course of the journey.

(m) LD also identified the Defendant by his voice during the events at the second location in Londonderry.

(n) On 25th April 2007, during an identification procedure, LD identified the Defendant as "*a person who on 23rd April 2007 at* [their home in X] *forced entry and took me and my partner to Londonderry in a van*".

[5] The other elements of the prosecution case against the Defendant were outlined to the court as the following:

(a) On 24th April 2007, in the course of a search of the Defendant's home in Londonderry, a cord style jacket was recovered from a washing machine, as a washed item. LD was shown this item and recognised it as something worn by one of the men in the back of the van.

(b) In interview, the Defendant accepted that he knew one MGH and that the latter had been in his house in the early hours of 24th April 2007. A pair of

jeans attributable to MGH were forensically examined. They had blood staining, three samples whereof gave a mixed DNA profile with partial major and minor indications. Both the partial minor profiles matched BC.

(c) On 2nd May 2007, a search of the residence of SW in County Sligo uncovered a silver Ford Transit van, which had blood staining on a rubber seal of the side door. Forensic examination established that this was BC's blood.

[6] It is the prosecution case that the Defendant acted as part of a joint enterprise, on his own behalf and that of others not before the court, to perpetrate each of the alleged offences. With regard to those offences committed in the Republic of Ireland, it is contended that this court has jurisdiction by virtue of Section 1 of the Criminal Jurisdiction Act 1975, which provides:

> *"Criminal liability for offences in the Republic of Ireland*
>
> *1. - (1) Any act or omission which-*
>
> *(a) takes place in the Republic of Ireland, and*
>
> *(b) would, if taking place in Northern Ireland, constitute an offence described in Part I of Schedule 1 to this Act,*
>
> *shall, for the purposes of the law of Northern Ireland, constitute that offence.*
>
> *(2) The law applied by subsection (1) above shall be construed in accordance with Part II of the said Schedule 1.*
>
> *(3) In this Act "extra-territorial offence" means-*
>
> *(a) any offence under subsection (1) above (read with Schedule 1 [$ S. Sch.1]),*
>
> *(b) any offence in the Republic of Ireland under section 2 of this Act,*
>
> *(c) any offence under section 3 of this Act,*
>
> *(d) any offence defined as an extra-territorial offence by section 6(3) of this Act.*
>
> *(4) Liability for an extra-territorial offence (as defined by subsection (3) above) attaches irrespective of the nationality of the offender, and notwithstanding the provisions of section 3 of the British Nationality Act 1948 (limitation of criminal liability of certain persons who are not citizens of the United Kingdom and Colonies).*

(5) Proceedings for an extra-territorial offence may be taken, and the offence may for the purposes of those proceedings be treated as having been committed, in any place in Northern Ireland."

This jurisdictional basis is not challenged on behalf of the Defendant.

[7] In order to understand fully the context within which this ruling is made and to appreciate the unorthodox and chequered course of this now protracted trial, I shall summarise in the next section of the judgment the evidence adduced by the prosecution.

III THE EVIDENCE OF BC

Special Measures Direction

[8] Pursuant to a Special Measures Order made on 16th October 2009 under the Criminal Evidence (NI) Order 1999, most of the evidence in chief of both BC and LD was adduced through the medium of transcripts of their recorded interviews by the police. Any references in this judgment to examination in chief are to be understood accordingly. Cross-examination was conducted by live link television. A further aspect of the order related to the disconnecting of the public screen in court during their evidence. When it became evident to the court that this may not be achieving its aim, the order was varied so as to exclude members of the public entirely from the trial during the relevant stages. Given the special measures factor, it seems to me appropriate to clearly divide the examination-in-chief and cross-examination of both BC and LD. I shall also interpose certain comments and observations, where appropriate.

Examination-in-Chief

[9] BC initially provided a narrative of all material events. He recounted that he had spent much of the day in question in the company of an acquaintance, S, in a pub in X. There were some unfamiliar faces present and he had certain concerns about this. It is convenient, at this juncture, to divide the events into three phases:

(a) **First phase**: The events at the home of BC and LD in X.

(b) **Second phase**: The journey between X and Londonderry.

(c) **Third phase**: The events which unfolded successively at two separate locations in Londonderry.

In his narrative, recounting the initial phase at their home in X, he testified:

> "*… I identified one guy in particular … which was SW who was a friend of Mervyn Canning. Now I can't be one hundred percent sure whether I seen Mervyn Canning with SW but I did say to LD the next day even when I was in the hospital I said LD correct me if I'm wrong I'm sure I seen SW and Mervyn Canning at the door.*"

With reference to the journey from X to Derry, he testified:

> "*I had an idea I said we're going to Derry here because I knew the accents, I knew SW was from Sligo, I knew that he hang, he was mates with Mervyn Canning.*"

Describing events during the third phase, BC stated:

> "*I think there was three people in the room with me and one guy was doing the talking a guy that I actually recognised his voice from a telephone conversation …*
>
> *Mervyn Canning was there in the company of this guy this day because the lad came on the phone to me and he said that he had Martin McGuinness's brother-in-law in the back of the car. Unknown to the guy he didn't know I already met Mervyn Canning before.*"

In his narrative of events, BC said nothing further about the Defendant.

[10] This was followed by specific questioning from the interviewer directed to various aspects of the events. With reference to the first phase, when asked about the first voice which he heard at their home, he replied:

> "*No but as they were coming through and shouting and whatever else and speaking I know the Derry accent, I've employed lads from Derry …*
>
> *You know I knew the Derry accent from Mervyn Canning's voice.*"

He suggested that some five or six males entered their home and, when asked whether he recognised any of them, replied:

"*SW …*

And I thought off to the right Mervyn Canning because it was back a bit in the dark. They couldn't all get through the door at one stage …

What I'm saying is I think I seen Mervyn Canning …

For that split second but I can one hundred percent focus on SW".

The recorded interview of BC was played several times during the trial. In relation to the passage set out immediately above, it was clear from the recording that:

(a) In his immediate response to the question –

> "*And did you recognise any of these persons at this stage?*"

BC, when stating "*SW*", nodded positively and spoke firmly.

(b) Bearing in mind that the verb 'to think' features twice in the remainder, BC placed notable emphasis on the word "*thought*", when first referring to the Defendant. Simultaneously, he gesticulated in a manner which indicated that the existence of some distance between him and the person concerned was one of the reasons for his choice of words. The three other reasons expressly specified were that the person was not in his direct line of vision, but was "*off to the right*"; it was dark; and BC was "*going back*". By virtue of this latter consideration in particular, he "*wasn't concentrating*". The clear import of this discrete piece of evidence was that BC had to deal with – and concentrate mainly on – the male aggressors immediately confronting him. As appears from other elements of BC's evidence, during this initial phase he was the subject of a determined, violent and at times brutal physical attack, perpetrated by a substantial number of male aggressors, during which he defended himself to the best of his ability.

(c) The interviewer then began to formulate the following question:

> "*You saw SW and Mervyn Canning. Can …*".

At this point, BC interrupted with the reply:

"*What I'm saying is I think I seen Mervyn Canning*".

It was clear from the video recording that BC was correcting the interviewer's formula of words, placing some emphasis again on the word "*think*".

(d) This was followed by:

"*For that split second …*".

In articulating these words, BC clicked his fingers, evidently with a view to emphasizing the transience of the moment. In my view, the witness was clearly refraining from asserting a state of mind of certainty or something approaching certainty. On the notional scale, his belief or impression or recollection, as asserted and described by him, belonged to a rather lower level.

(e) BC was clearly making a notable distinction between SW and the Defendant, from the perspective of identification.

[11] One of the questions which followed shortly thereafter demonstrates that the interviewer had absorbed the aforementioned correction:

"*Okay and you say you **believe** for a second you saw a boy you know as Mervyn Canning?*"

[Emphasis supplied].

This elicited a positive, unqualified response ["*Mervyn Canning yeah*"], in contrast to the earlier reply. BC then described the noise and commotion generated by the incursion into their home. He stated:

"*… I was still in the hall trying to do what I could do …*

*Not knowing what the objective was or the reason that the boys was there for right '**cause there was only one I identified** and I thought what is he coming here for …*".

[Emphasis added].

This discrete passage calls for interpretation and, having considered it exhaustively, I interpret this as a reference to SW. As recorded in paragraph [25] *infra*, BC later testified, in cross-examination, that SW was the main focus of his attention, his

"*fixation*", because he believed him to be carrying a weapon. Continuing, BC described the Defendant as someone who had business relations with SW, asserting in terms that he had got to know them together. He described the Defendant as originating from Londonderry. He continued, as regards the Defendant:

> "[… You're confronted by a number of people one you immediately recognised as SW and another who you believe you think was there was Mervyn Canning?]
>
> *Yeah for an instant …*
>
> [For an instant a brief instant you believe that was Mervyn Canning?] …
>
> *Yeah the reason for that I think he took a step back because I would've identified him …*
>
> *Right there was a group of lads coming. SW would have been centrefold at the back …*
>
> *And I'm sure that I caught a glimpse of Mervyn Canning to his left* [i.e. the left of SW] *which would have been my right looking out …*
>
> *I've this gut feeling that he just stepped back out of my view so that I could be overpowered …*
>
> *I seen Mervyn Canning right, I know Mervyn Canning's voice, it wouldn't matter where. It's a voice I know I heard once …*
>
> *It's a voice I'll never forget again not just that night I heard it when I first met him and if I'm right and correct with the whole commotion going on when the lights went out I heard his voice in that, in that kitchen …*
>
> *You know what I mean and I know his voice… I know his accent because it's deep, you know it's quite distinctive from some Derry voices that I would … be familiar with …*".

It is tolerably clear that the replies set out immediately above relate to events belonging to the first phase. Accordingly, BC purported to identify the Defendant both visually and audibly during this phase. He also attributed to the Defendant the words "*… get him down…* ".

[12] BC then described events during the journey between X and Londonderry:

> "*… I heard a mobile phone ringing and with that I heard Mervyn Canning …*
>
> *And when I say I heard Mervyn Canning I know Mervyn Canning's voice…*
>
> *In a very low key tone but like I know it was him*".

The tone of these particular answers was fairly confident and the answers were made in unqualified terms. BC then repeated this, in slightly different terms:

> "*And it was after that somebody had got into the van after that then the phone went and I heard Mervyn Canning's voice, whether he was in the van the whole time or at what point he got into the van I don't know. LD seems to have identified, have identified him getting into the van*".

Again, there was no evident hesitation or qualification in this discrete passage. Later, when describing the accent of one of the other captors, BC continued:

> " *… the only other person that spoke that I can say with hand on heart was Mervyn Canning when the phone rang…*
>
> [Do you believe the voice was Mervyn Canning and whereabouts in the van was he at that stage?]
>
> *The front.*"

[13] BC later described how his acquaintanceship with the Defendant had begun. Some of the details of this are of mere peripheral relevance. The acquaintanceship had its origins in a dispute arising out of one PT being engaged to work for BC's business and receiving a loan of some €28,000 from the firm, in circumstances where he owed €80,000 to SW. PT evidently deployed his loan in part payment of this debt. PT was thus unable to repay any of his debt to BC's company. This was the impetus for contact between BC (on the one hand) and the Defendant, SW and a third individual, RL (on the other). BC testified that he was anxious to distance himself and his business from any dealings with these persons. Following several unproductive phone calls, a meeting (the first meeting) was arranged, at a hotel in X which I shall hereinafter refer to as "GA". In attendance were BC, LD, the Defendant, SW and one PB, who worked for BC. Describing this first meeting, BC testified:

"*… Mervyn Canning had a lot to say for SW …*

The first time I met [Mervyn Canning] *was in the [GA hotel]. Spoke to him numerous times on the phone. We would get phone calls left, right and centre in the middle of the night myself and LD and we'd have a few drinks and it would turn messy … and threatening one another …*".

[14] BC described the Defendant as "*the muscle*", while SW was "*the brains*". BC then described a *second* meeting at the same hotel, attended by him, LD, PB, the Defendant and SW. RL was not present on this occasion. Next, he recounted a third meeting in a public house, attended by BC, LD, PT, PB, SW and the Defendant. He testified that following this meeting he had no further contact with the Defendant. However, beforehand, there had been "*numerous phone calls to SW and Mervyn Canning and it went on and went on, went on for a couple of months …*". On his account, the stalemate associated with these repeated, unproductive phone calls was the impetus for the meetings arranged subsequently.

[15] Finally, BC testified that he participated in a video film identification procedure on 18th July 2007. Having viewed the recording, he identified the Defendant as a person who had been involved in his abduction and the other events on the date in question. This person was, in his words, "*the same Marvin Canning who I had met with SW during previous meetings in the course of my business*".

Cross-Examination

[16] BC was questioned initially about the notebook of one Sergeant McClarence relating to his attendance at Y, in Londonderry on 24th April 2007. This records that the sergeant encountered BC upon arrival at the scene and continues:

"*The male stated that he had been shot in both ankles*".

It is evident from the notebook entry that BC provided his name, date of birth and address. As confirmed by later evidence, the sergeant instructed Constable Graham to accompany BC, while Constable Dixon was similarly instructed to accompany LD. Then they were conveyed to hospital. In reply, BC testified that in the aftermath of the shooting and en route to hospital he was in great pain. He stated that "*Everything was a total blank*". The impact of the pain was dominant. His health was his priority at this stage. He had no specific recollection of having spoken to a police officer at the scene. While agreeing that he did not then identify any of the perpetrators, he emphasized that he was in great pain, in shock and in fear. For him, the hospital was "*the first safe environment*". Initially, he expressed a belief that, at the scene, he had not been "*asked*

for an account". Then he acknowledged that he *did* speak to police officers at the scene, a process involving certain questions and answers. He further asserted:

> "*Well I spoke to the police … at the very point that I felt that I could trust people, that I was in a safe environment and that over and above the initial fact that I was going to live*".

[17] BC was also questioned about a police command and control log entry, bearing the time 05.22 hours, in these terms:

> "[LD and BC] *report that earlier this evening at approx* [blank] *five or six males entered their family home and took them to an unknown location approximately 15 – 20 mins away from their current location where they were held and interrogated. They were then brought to [Y in Londonderry] and the male was shot in both ankles. The I/P states that they recognised one of the males as a SW from Mayo. This male currently owes the I/P's business money. The I/P states that some of the men spoke with northern accents and they were brought in a white Transit Sprinter van.*"

BC was questioned about why he had not named the Defendant at this juncture. In reply, he made two assertions. Firstly, he was ninety-nine point nine percent sure that he had seen the Defendant. Secondly, he was one hundred percent sure that he had heard the Defendant in the van and in the Londonderry house. He was one hundred percent sure that he had seen SW – this he described as "*a positive ID*". He continued:

> "*I may have been asked was there any indication as to whom may have been involved or did I recognise people …*
>
> *What it states in the notebook would have been relevant to the questions I may have been asked at that time*".

Why did he not name the Defendant at this stage?

> "*Maybe I was taken off at the ambulance at that time, maybe I was being administered painkillers or administered a blanket …but if I was asked that question I surely would have given that answer …*".

Then he suggested that he might have been in shock. He acknowledged that the entry in the notebook of Constable Tosh to the effect that "*… he had been shot by what he thought was an automatic pistol*" was possibly based on information supplied by him.

[18] BC was also questioned about a slightly later entry in the command and control log, bearing the time 06.07 hours:

> "*The I/P also states that he recognises the voice of one of the males involved as being a Mervyn or Marvin Canning from Derry*".

The time separation between the two entries is of 45 minutes measurement. Why mention the Defendant at this stage? BC's response was that he was in a safe environment, in good hands, more relaxed and had received painkilling medication. Why not claim to have *seen* the Defendant, at this stage? His response was that he was not speaking in a police interview context, he had grave injuries and he was about to be admitted for a serious operation. There were "*people talking to me left, right and centre*". There was a lot going through his head. In particular he had thoughts about the IRA, possible later court proceedings in which he would have to make accusations against individuals and related matters. He was not in a normal state of mind. Moreover, LD was conscious, had seen more than him and was "*well able to speak*", at this stage. He reiterated: he saw the Defendant at his home in X and he heard the Defendant's voice at that location and also in the van. He was lying on a stretcher in hospital at the material time, aware that he was about to undergo a four-hour operation and was at risk of losing the sight in his right eye. Why, at this stage, identify the Defendant by voice only and not by sight also? BC replied:

> "*Well, if I never said that at that very present time or any one time, I was still in fear for my life like you know, I didn't know who I was really dealing with*".

Some inconsistency between this discrete reply and the immediately preceding replies is evident. Then BC highlighted that he had received morphine injections. Next, he added:

> "*Well I caught a glimpse of him definitely at [X], which was an issue for the Guards but I mean … I didn't catch a glimpse of him in Derry, which may explain that …*
>
> *If I had been asked the question by the PSNI* [Did I see Marvin Canning?] *I would take that in relation to did I see Marvin Canning at the shooting?*"

In these particular replies, BC was clearly seeking to explain what he had and had not said to the Northern Ireland police during this particular phase and why he had not

said certain things by reference to the different roles and responsibilities of the two police organisations potentially interested in the events in their totality.

[19] BC was then questioned about the journal entry made by Sergeant McSharry, who visited the hospital at 10.30am on 24th April 2007. This is based on discussions which the sergeant had with BC at that time. It begins with:

> "*SW [age] lives in Sligo*".

This is followed by an account of the attack and abduction at their home in X. In this account, there is no attempted identification of any of the perpetrators. It continues:

> "*Taken out and placed in back of Transit van …*
>
> *There was no talking in the van, total silence. Mervyn Canning phone went; when he answered I recognised his voice. I have had dealings with him in the past.*"

BC recalled speaking to this officer following his operation. At this stage, he was sedated and "*on a morphine pump*". He testified that the sergeant brought their discussion to an end because BC was "*talking in riddles*". So the sergeant had to "*leave it be*". At this juncture, BC testified that just before his operation, he had spoken to LD and had asked her:

> "*Is this what happened? Did I see Marvin Canning and SW at our door?*".

He suggested that these questions were stimulated by his condition at the particular time and his realisation that he was about to undergo a serious operation. According to him, LD's twofold response was that (a) she had seen SW at the door of their home and (b) she had seen the Defendant in the van. BC confirmed that when he spoke to Sergeant McSharry he was aware that there had been two arrests. He *thought* that this included the Defendant. He felt that the sergeant was asking for general indications about what had happened. He recalled no direct questions relating to the Defendant. When pressed further about why he had not suggested to Sergeant McSharry that he had seen the Defendant at his home, he replied:

> "*I mean, as I stated to you before, that LD would already have cleared this issue up regarding, you know, seeing Marvin Canning.* ***I mean, I couldn't say I seen Marvin Canning at the house***."

[Emphasis added].

This was in response to a question which had employed the words "*the house at [X]*". This was a clear reference to the injured party's place of residence in X. BC also highlighted the absence of direct questions from the police relating to the Defendant. He further re-emphasized that he was dealing with *Northern Ireland* police officers in a hospital in *Londonderry*. He was disposed to accept that Sergeant McSharry would, or could, have asked him to recount what had occurred, in general terms.

[20] At this juncture, the cross-examination of this witness focussed on certain questions and answers contained in the deposition made by BC, on 18th July 2008, during the committal for trial hearing. These occurred in the context of BC describing his conversation with LD prior to his operation viz. within a couple of hours of the police arrival at the scene:

> "You were sure that one person SW was at the door?
>
> *That's correct.*
>
> But you weren't sure whether Marvin Canning was at the door?
>
> *I wasn't one hundred percent sure as per discussion with LD given the benefit of doubt there was one percent that I couldn't say but LD gladly assured me that she identified Marvin Canning entering the back of the transit van and slapping her on the face.*
>
> So LD helped you reach your conclusion?
>
> *By the way on her seeing Marvin Canning prior to this the small bit of doubt at the front door I heard Marvin Canning speaking on his mobile phone. That was the assistance and clarification by LD on that one percent.*
>
> By LD?
>
> *She was able to confirm that on our discussion the one percent of doubt that I had because she knew Marvin Canning to see.*
>
> You would accept [BC] that because of the pandemonium in your house you only had a fleeting glance?

I seen the people that I knew that's right. SW one hundred percent. A person moving off to his right ninety-nine percent ***possibly*** *being Marvin Canning.*"

[Emphasis added].

[21] BC testified that during a period of approximately eight hours he had consumed nine pints of Budweiser, on the relevant day, in the company of his friend S. He described himself as a "slow" drinker and conveyed the impression that he was not intoxicated when the relevant events unfolded later. It was not suggested to him that his recollection or awareness were significantly impaired by reason of alcohol consumption. He was vague as regards the previous day (a Sunday), suggesting he might have drunk a pint somewhere. He did not suggest that he had been in the company of his friend S or anyone of this name.

[22] BC described his first meeting with SW and the Defendant. According to him, the Defendant was introduced to him as a friend of SW. The first of BC's two previous encounters in person with the Defendant occurred at the GA Hotel in X in 2006. Also in attendance were SW, LD and PB, an employee. BC rejected the suggestion that most of this meeting had been conducted in the Defendant's absence, while BC and others smoked outside. On the contrary, said BC, the Defendant "*had most of the talking to do*" during the meeting, he was "*doing the main talking … he had plenty to say*". Of those present, SW was the only non-smoker. He did not disagree with the suggestion that the two meetings occurred in August/September 2006. His belief was that they were separated by approximately one month.

[23] The "cast" in attendance at a further meeting – at a pub in X – was unchanged, with the exception that PB did not attend, whereas PT, whose conduct was the impetus for both meetings, was there. BC testified that the Defendant was in his company throughout this meeting, both inside the pub and in the exterior smoking area. He was unsure how the second meeting had come about, though the two meetings were inter-related. The outcome of this meeting was that the Defendant was the person who would resolve the various issues in play. At the end of the meeting, the Defendant offered – and BC accepted – his phone number. Taken in conjunction with his examination-in-chief, the thrust of BC's evidence was that he had many telephone conversations with the Defendant before and between the two meetings. The underlying premise of this aspect of the cross-examination was that the Defendant did not dispute that he and BC had been in attendance at two meetings.

[24] BC was unable to describe the Defendant's attire at their home in X. He testified that it was dark and wet outside. Referring to the Defendant, he said that he just got a glimpse of a dark haired, tall guy. He used the words "*glimpse*", "*split second*" and "*an instant*", in this context. He stated that, at the very beginning of the

events, his "*fixation*" was on SW, because he was armed with something, possibly an iron bar. As he was "*fixing* [his] *glance*", presumably beyond the notional line between him and SW, "*… with that that person went out off to the side*". The Defendant, by virtue of his build and appearance, would have stood out amongst the others, who had shorter or shaven hair. He recognised the Defendant's voice when "*get him down*" was shouted inside the house. [This was the first assertion to this effect in his evidence]. He twice stated that the Defendant "*may*" have said this. He described the Defendant as a person with a heavy voice and heavy breathing, possibly suffering from asthma. He agreed that he did not make this assertion when interviewed by the police on 16th May 2007. At this stage, he said, he remained incapacitated and was on medication. He described the Defendant as "*a heavy set person*". While the Defendant and others were shouting "*get him down …*", BC contrasted the voice of the person who shouted "*I'll shoot the bastard …*" – this was a very distinctive voice, not that of the Defendant. He was "*quite sure*" that he heard the Defendant's voice during this phase.

[25] Elaborating on the van journey from X, BC explained that it occurred to him that SW was the owner of Transit Vans. He was asked about the following response made during his interviews by the police:

> "*I had an idea I said we're going to Derry because I knew the accents …*
>
> *I knew the Derry accent well, so they're not gonna bring me to Cork. So when we got up to Derry they took us out of the van …*".

He agreed that he had failed to specifically identify the Defendant's voice at this juncture. Why had he not made this claim during his interview? His answer was "*Something that has been overlooked in the context of this statement*". He repeated his "*ninety-nine percent sure glimpse*" of the Defendant at his home and that he had heard the Defendant's voice in his home. He also repeated having recognised the Defendant's voice in the van, in the context of a mobile phone call: *then* he was "*convinced*" that the Defendant had been in his home. He suggested that for months following the events he remained in shock, still trying to comprehend what had happened, attempting to come to terms with the events and continuing to take medication. He acknowledged that when he stated during the interview "*I knew the Derry accent from Mervyn Canning's voice*", he did not specifically identify the Defendant as one of the perpetrators. At another stage of the interview, he stated "*I think I seen Mervyn Canning*". He agreed that he had not claimed to have *heard* the Defendant's voice at any stage. He further asserted that LD had told him that the Defendant had struck her on the face after getting into the vehicle and he claimed that he heard this blow.

Recall

[26] Following the close of the prosecution case, the Defendant, contending that his prosecution was an abuse of the court's process, applied for a stay of the indictment. The court delivered a separate ruling in respect of this matter [see ruling McCL 7903]. In consequence, both BC and LD were recalled and their evidence was augmented, in further cross-examination and in response to certain questions from the court. The impetus for the recall of both witnesses was the disclosure of certain materials to the defence following completion of the prosecution case. This was the first *tranche* of mid-trial further disclosure by the prosecution. [I shall revert to the significance and consequences of this later in the judgment]. In summary, this first batch of new materials:

(a) Embody a description of the assailants/abductors as "*a gang of six armed and masked men*".

(b) Contain a suggestion by PT that, on the day immediately preceding the index events (a Sunday), BC was drinking with (*inter alios*) his acquaintance S, PT and others in a hotel near Dublin, which I shall hereinafter describe as "CW", where an incident involving a threat occurred.

[27] BC maintained that he did not describe his assailants and abductors as "*armed and masked*" or "*armed*" or "*masked*" to any police officer or LD or anyone else. While maintaining this stance firmly, he was prepared to concede, as a possibility, that he "*could*" have said this, in a state of shock. However, he had no recollection of consciously stating this. He emphasized the speed of events and the lighting conditions. He recounted that he followed LD to the front door, which "*got kicked in*". Then there was "*a tide of people*". While he was being pushed back towards the kitchen, the lights went out. He believes that they "*hit the fuse box*", which is situated about three feet inside the front door. They were using flashlights. Then he was "*smacked*". Elaborating, he explained that he was physically "*hit*" for the first time when inside the kitchen.

[28] When asked whether he saw the faces of some of the gang members, he replied initially in the negative, adding that he did not see them for sufficiently long to identify all the faces. But, he claimed, he did identify some of them. He saw their faces as they came towards him. He reiterated that at the scene in Derry he did not speak to any police officer, his first conversation with a police officer having taken place in the ambulance.

[29] BC was then questioned about his earlier evidence regarding events during the immediately preceding day (see paragraph [21], *supra*). He testified that *now* he

recalled that he had consumed "*a couple of pints*" that day. He was accompanied by S and PB. He confirmed that he knows JG. He claimed that this had probably occurred in a pub in X, which I shall hereinafter describe as "TOS". This, he said, was his regular pub and it was his wont to go for a couple of drinks on a Sunday.

[30] BC denied any suggestion that he had been in the CW Hotel during the previous Sunday. He acknowledged that he had been in this hotel on occasions, in particular for the purpose of meeting his accountant, who lives near Newbridge. He mentioned two other Dublin area hotels, in this context. He accepted that he had been in the CW Hotel on a number of occasions and had spent the night there once. He had a specific recollection that, on certain other occasions, he had driven from X to this hotel, accompanied by S. Meetings at this hotel with his accountant would occur on weekdays, rather than weekends. He claimed that he would not frequent this hotel for a casual or social drink, describing it as "*very up market*".

[31] BC suggested that it was his "*routine*" to have a couple of drinks in "*[TOS]*" pub on a Sunday. He would have had no reason to deviate from this routine on the Sunday in question. An alleged incident in the CW Hotel the previous day, described in PT's statement of evidence [provided to the Gardai], was put to him. He denied that any such incident had occurred. He maintained that he would have recalled anything of this nature, particularly if it involved a threat to him. He further maintained that PT was not the kind of person who would make offensive remarks to a woman. He said that he had thought about events preceding 23rd April 2007 on countless occasions.

IV EVIDENCE OF LD

Examination-in-Chief

[32] LD is the sentimental partner of BC. She discharges various administrative and secretarial duties in the business. At the relevant time, they had been based in X for just over one year. Initially, LD provided a narrative of the events in question. Describing the initial phase, she recounted that –

> "*… there was five or six men literally standing at my face at the front door, one of whom I know to be SW …*".

Recounting the journey from X to Londonderry, she continued –

> "*… Nobody was talking … the whole time my head was covered, [BC's] head was covered and I kept on trying to get glimpses … we were going along a good long time when we stopped and the guy that had been with me got out and a*

> *different gentleman got in and again I got a glimpse of who it was* ***and I can be nearly certain that it was Mervyn Canning because he kept telling me to stop lifting the towel, stop lifting the towel and I recognised his accent ninety-nine point nine percent that it was him****.*"

[Emphasis added].

This particular portion of LD's recorded interview was replayed several times. In this passage, LD expressed herself in reasonably firm and confident terms. She placed more emphasis on voice recognition than visual identification. In relation to the third phase of the events, in the house at Londonderry, she testified:

> "*There was a guy watching me the whole time and at one point he whispered to me this should never have gone this far and I'm almost certain again he was SW.*"

She concluded her narrative of events with a description of the shooting of BC and the immediate aftermath thereof.

[33] Thereafter, the police interview of LD assumed a pattern of questions and answers. LD described the private debts and borrowings, none of them involving BC, which formed the background to the events. In this context, she recounted two meetings attended by certain protagonists. The first, held at the GA Hotel in X, was not attended by her. In contrast, she was in attendance at the second meeting, at the same location. Those in attendance included LD, BC and the Defendant who was brought there by SW. She described the Defendant as a person from Derry. She recounted that during this meeting the Defendant made a series of telephone calls, audible to everyone there. The Defendant made these calls in somewhat aggressive terms. Subsequent to the meeting:

> "*And I'd hear him on calls to* [BC] *and whatever, he'd be quite aggressive*".

She recalled that the first two meetings were held in September 2006.

[34] LD suggested that there was a third meeting, in a different pub in X. Once again, those in attendance included LD, BC and the Defendant. In common with the earlier meeting, the outcome was inconclusive. She suggested that there were subsequent telephone calls from the Defendant to BC. Approximately one month before the events in question, this pattern terminated. There were no further communications between the parties thereafter and the financial dispute remained unresolved.

[35] LD described the Defendant as six feet tall, very stocky, having a beer belly, with tidy, short black hair, a round face, dark eyebrows and a moustache. She recalled that once he sported an earring, probably in the left ear. She estimated that he weighed sixteen to seventeen stones. She learned that he was from Derry. With specific reference to the first phase of events at their home, she was asked:

> "*Were you able to recognise any of the other persons that was there?*"

LD replied:

> "*I don't think so I was too focussed on SW*".

Her disinclination to speculate about the identity of any of the others present at their home was notable. As regards the second phase of events, on what basis was she asserting that the Defendant entered the rear of the vehicle in the course of the journey? She replied:

> "*I got a glimpse when they opened the door there was public lighting and I could see him …*
>
> [His attire] *seemed to be a like a stripy shirt as in lines going down …*
>
> [The Defendant said] *Put your head down and he literally pulled the towel down and pushed my head down as well …*
>
> [And did you recognise the voice? …]
>
> *Yes … Mervyn Canning.*"

[36] At a later stage of the interview, LD reiterated:

> "*… I suppose the next significant thing would have been when the first changeover happened the guy that was with me …*
>
> ***And that's when I saw Mervyn Canning get in***."

[Emphasis added].

LD spoke these particular words without qualification or hesitation. She then reiterated her voice recognition of the Defendant, in similarly assured terms. As regards visual recognition, she stated:

> "*I got **a glimpse** when they opened the door there was public lighting and I could see him*".

[My emphasis].

This particular reply was accompanied by a firm, nodding head and a physical gesture of assurance. It was followed by a reasonable description of this person's upper body attire. LD replied negatively when asked whether she had had any further view of the Defendant. Thus her purported visual identification of him was based on this "*glimpse*". She based her recognition of the Defendant on her familiarity with him arising out of the two previous meetings. She added:

> "*… I heard him in the house … I recognised his voice … In the house when we got here*".

I interpret "*the house*" as referring to the house at the Londonderry location. Did she **see** the Defendant at *their* house, in X?

> "*No… I would have recognised him at the door*".

Furthermore she did not claim to have *heard* the Defendant at their home in X. Accordingly, in summary, the incriminating features of LD's evidence are confined to her asserted visual and auditory recognition of the Defendant in the captors' vehicle, during the second phase, coupled with further auditory recognition in the third phase.

[37] On 25th April 2007, LD participated in a video identification procedure. During this, she identified the Defendant as one of the persons involved in the events on 23rd/24th April 2007. This procedure was conducted in accordance with the appropriate regulations. LD repeated her identification of the Defendant, describing him as "*the same Marvin Canning as I had met at previous meetings*". Finally, LD testified that while at the hospital, on 24th April 2007, police showed her certain items of clothing. These included a cord jacket, which she believed had been worn by one of their captors by virtue of an observation made by her in the journey from X to Londonderry.

<u>Cross-Examination</u>

[38] LD indicated that there had been an initial meeting attended by interested parties, in her absence. She suggested that the two subsequent meetings attended by

her had taken place around September/October 2006, separated in time by a few weeks. She resolutely rejected the suggestion that most of the first meeting had been conducted in the exterior smoking area, in the Defendant's absence. The Defendant was introduced to her at this meeting. At the second meeting, LD made a note of the Defendant's telephone number in an office diary and recorded it on her mobile phone. The premise underlying this questioning of LD was an acceptance on behalf of the Defendant regarding an initial meeting in the GA Hotel, followed by a further meeting in a public house.

[39] LD suggested that, in the immediate aftermath of the shooting incident, she had spoken to one police officer or two. This interaction occurred both outside and inside a police vehicle. She was asked why, in her initial dealings with the police, she had not mentioned the Defendant. These questions were based on the contemporaneous records made by certain police officers and the command and control log. She agreed that there was no good reason for not implicating the Defendant at the earliest stage possible. She added that, at this very early stage of their interaction with the police, her priority was their joint welfare and getting to a hospital. She couched this in the terms of a possibility. She agreed that she was not afraid to identify the Defendant. Then she added that she "*might have been afraid at the time*". She emphasized the terror to which she had been subjected during the previous six or seven hours. She pointed out that she did disclose the Defendant's name to police within a couple of hours, suggesting that the name might not have "*come to her*" until then. She did so before BC's operation, maybe an hour after arriving at the hospital.

[40] The second relevant passage in the command and control log records:

> "*06.07 … message from ND 16 – on speaking with hospital staff they state that …*
>
> *The I/P also states that he recognises the voice of one of the males involved as being a Mervyn or Marvin Canning from Derry*".

LD agreed that this information was probably supplied by BC, rather than her. In this context, two aspects of her deposition made during the committal hearing were highlighted. Firstly, she stated that she told the police:

> "*I recognised two men one being Marvin Canning and the other SW …*
>
> *To be honest the police officer wrote down everything I said. I can't remember if I said one hundred percent or what I said all I know is that I said I seen them SW and Marvin Canning.*"

Secondly, LD stated that she communicated this to police whilst being conveyed to the hospital. She agreed that this claim is not borne out by any of the police notebook or journal entries. With reference to the notebook entry of Constable Reid, she could offer no explanation for her failure to implicate the Defendant. In this context, the evidence includes the account of Constable Giles, who described a discussion with LD between 10.30 and 11.15am on 24th April 2007 at the hospital. The constable made notes as the discussion progressed and these include the following passage:

> "*I reckon van drive for a couple of hours before made a stop – I think I recognised man getting in as Mervyn Canning – he got into the back of the van – one of the men got out. Heavy set, black hair – he also spoke to me – 'keep the towel down, keep the towel down.' I know him as he hangs about with SW – he came to [X] – work in the [same industry as BC].*"

This is the only mention of the Defendant in this contemporaneous police record, the most extensive of all such records. LD testified that Constable Giles informed her that she would be undergoing a more detailed interview later. LD agreed that she had not made any assertion to Constable Giles about hearing the Defendant's voice in the Londonderry house. Finally, in this context, she asserted that she was unaware at this stage that the Defendant had been arrested.

[41] LD was also asked about certain questions and answers in her committal deposition:

> "You identified Mr. Canning because you recognised his accent ninety-nine point nine percent by his voice?
>
> *That's correct you will see later on in my statement but not in that paragraph that I saw Mr. Canning not just heard him.*
>
> You accept that you had a glimpse of who it was is that correct?
>
> *Correct.*
>
> And that's the only glimpse you had?
>
> *I had seen him getting into the van because of the public lighting mainly the street lights.*

You accept that you stated in your statement that you are only ninety-nine point nine percent sure that it was him?

That was his voice I recognised his accent ninety-nine point nine percent.

You accept … that you qualified that?

What do you mean by qualified?

I got a glimpse of who it was and I can nearly be certain that it was Marvin Canning [your words …].

That's correct."

In the next passage of her committal statement, LD asserted that she had implicated the Defendant to the police, whilst in a police vehicle at the scene. The deposition continues:

"And what did you tell them?

I recognised two men one being Marvin Canning and the other SW.

And did you tell this policeman that you were nearly certain it was Marvin Canning?

I cannot be sure of the conversation I had with the police officer.

So … you might have told the police officer that you were nearly certain it was Mr. Canning?

To be honest the police officer wrote down everything I said. I can't remember if I said one hundred percent or what I said, all I know is that I said I had seen them SW and Marvin Canning."

Later in her deposition:

"It's still your evidence that Marvin Canning was not at the house but was collected two-and-a-half hours later by the van, isn't that correct?

He wasn't at my house and he was collected a few hours later."

LD further recounted in her evidence that prior to BC's operation, he had said to her:

> "*Before I'm put under anaesthetic, tell me that I wasn't dreaming – did I see SW and Marvin Canning?*"

LD replied in the affirmative, while acknowledging that, *from her perspective,* this could not relate to events at their home in X, as she had not seen the Defendant there. Specifically, she did not place him among the five or six men at the front door.

[42] As regards events in the van, she did not place her visual identification of the Defendant or her recognition of his voice in any particular ranking order. Specifically, she disagreed with the suggestion that her recognition of the Defendant's voice was the more important of the two. She testified that the Defendant was positioned to her left, towards the rear of the van. She recalled that at one stage he leaned into the front (there being no partition), talking to those positioned seated there. She could distinguish the silhouettes of the three men in the front. The Defendant wore no mask or anything else to conceal his identity. She did not recall the Defendant speaking by telephone during the journey. BC was positioned closer to the front of the vehicle than her. LD asserted that her physical contact with the Defendant was confined to him "*pushing her head down*" under the towel. She testified unequivocally that he did not slap her in the face.

[43] In reply to the court, LD described "*numerous*" telephone calls from the Defendant following the meetings, which continued until about five or six weeks before the events. On these occasions, the Defendant was seeking to speak to BC. He never really had anything of substance to say to LD. These telephone calls were made to either LD's or BC's mobile phone. LD at no time had occasion to telephone the Defendant. This stimulated a final piece of cross-examination, when it was put to LD that her failure to mention these telephone communications to Constable Giles was in stark contrast with her description to the constable that, previously, there had been "*constant*" phone calls and texts from *SW*. When invited to account for this, she replied several times "*I don't know*". Finally, when put to her that the Defendant was in no way involved in the events in question, she replied:

> "*I know in my heart what I saw that night and Mervyn Canning was there and I don't want what happened to me and* [BC] *to happen to anybody else. I am one hundred percent sure that I saw Mervyn Canning getting into that van and he was there …*

I know Mr. Canning was there."

This particular piece of evidence was given in firm and measured terms.

Recall

[44] The circumstances in which LD was recalled are rehearsed in paragraph [26] above [and see ruling McCL 7903].

[45] LD was questioned about the description "*six armed and masked men*". Could this be attributed to something said or reported by her? She replied firmly in the negative. Such a description would be "*completely wrong*". She was "*quite sure*" that she had not said this, for the simple reason that she *did not* see any armed and masked men. She added that, specifically, she saw and recognised SW at their house in X. The men did not have "*any guns or anything on them*". The witness was clearly describing a fleeting encounter, at the front door of the premises. She was adamant that there was a minimum of five assailants and no more than six.

[46] In her words, "*it happened so quickly*". When she opened the door, the men came through it. She was knocked to the floor in the process. They barged in. There was, at most, "*a very slight delay*" between the witness opening the door and the men barging in. They came in "*looking for BC*" – they were shouting his name and asking where the bank draft was.

V CONTEMPORANEOUS POLICE RECORDS

Command and Control Log

[47] This records that the "*Incident Log*" was opened at 04.53 hours and the officer "*assigned*" was "ND16" (confirmed in later evidence as Sergeant McClarence). The log contains "*incident linked to incident 164, 23/04/2007*". It is recorded that Sergeant McClarence arrived at the scene at 04.59 hours, followed by a brief communication from him (at 05.01 hours) that there was a male suffering from gunshot wounds to both ankles and "*the male and female have been lifted from County Wexford* [sic] *and brought to Londonderry where the male was shot*". The attendance of the Ambulance Service at 05.03 hours is then documented. At 05.17 hours, there is an entry "*seen commence*".

[48] Next, there is a significant entry at 05.22 hours in the log:

"***05.22***

[Re LD and BC] *These persons report that earlier this evening at approx* [**blank**] *five or six males entered their family home and took them to an unknown location approx 15-20 mins away from their current location where they were held and interrogated. They were then brought to [Y in Londonderry] and the male was shot in both ankles. The I/P states that they recognised one of the males as a SW from Mayo. This male currently owes the I/Ps business money. The I/P states that some of the men spoke with Northern accents and they were brought in a white Transit Sprinter van …*

[The next two entries are considered *infra*, in the context of the evidence of Constable Fawcett].

05.28

Paramedics are taking the female to the hospital …

05.35

As well as the gunshot injuries this male has also had a bad beating …

05.53

The I/P has sustained a ruptured eyeball in this assault which will require it to be removed in surgery …

O6.07

On speaking with hospital staff they state that …

The I/P also states that he recognises the voice of one of the males involved as being a Mervyn or Marvin Canning from Derry …

07.11

… Brief descriptions of persons involved: 2/3 males …

Older males: one. This male was in his forties, heavy build, approx 6 feet tall, black short hair, moustache (possible) …

Most of the persons involved had Northern accents …

09.44

[Arrest of Marvin Canning] *for unlawful imprisonment, GBH with intent, possession of a firearm with intent …*

09.48

We are going to effect another arrest at [the Defendant's address] …

11.42

[LD] *has left the hospital and is attending Maydown for an interview …*".

The evidence was that this command and control log is a compilation of radio transmissions from various police officers to the Communications Room at Strand Road Police Station. There, these transmissions are entered into the log, following which they can be read by interested officers at computer terminals. Constable Fawcett elaborated on certain aspects of this system, *infra*.

Sergeant McClarence - Notebook Entry

[49] This records that the sergeant attended the location outside Y, Creggan, Londonderry at 05.00 hours on 23rd April 2007. There he observed a male person, seated:

"*This male showed sign of injury in that he had badly swollen eyes and was bleeding from the lower leg area. The male stated that he had been shot in both ankles and I noticed a large amount of blood on the pavement …*

The male identified himself as [BC – date of birth and address noted]. *He only had a pair of boxer shorts on. There was also a female present who identified herself as* [LD – date of birth – same address]. *She complained of a sore head. Ambulance conveyed both parties to hospital.*"

Sergeant McClarence testified that the time lapse between the respective arrivals of police and ambulances at the scene was minimal. Given his obvious injuries, attention to BC was the priority. BC was obviously in pain. In contrast, LD was complaining of a sore head only. The sergeant agreed that during this evidently brief encounter he

would have been seeking to gather as much information as possible, including the identities of any suspected perpetrators. He pointed out, however, that securing medical attention was the main priority *and* this encounter did not enfold in an interview setting. The sergeant was the most senior police officer initially present at the scene.

[50] Sergeant McClarence is one of several police officers who were, upon the ruling of the court, recalled to the witness box. This occurred prior to the close of the prosecution case. The impetus for this was the emergence of a disclosure issue revolving around the witness statement of one Garda McDonnell, which was evidently procured by the Defendants' solicitors from the lawyers representing SW, who is being prosecuted in the Republic of Ireland. This was the first of several controversial disclosure eruptions during the trial. (This is documented more fully in paragraph [87], *infra*. This stimulated the service of (a) an amended and updated schedule of non-sensitive material and (b) Garda McDonnell's statement and a summary of the Garda interviews of SW as additional evidence. In due course, Garda McDonnell's statement was read to the court by agreement. In this statement, Garda McDonnell recounts that he was employed in the Communications Room at the Garda Station in X on 24th April 2007. He continues:

> "*… at 5.13am I received a phone call from … Constable John Fawcett of* [Strand Road PSNI Station] *… I was informed by Constable John Fawcett that one* [BC] *and* [LD] *aged forty and thirty-eight years respectively, with an address at … [X]* ***had allegedly been abducted by a gang of six armed and masked men from that address some time between 8.00pm and 9.00pm on Monday 23rd April 2007 ...*** [and] *… taken away in a white van of the Ford Transit type to a location unknown, but believed to be in Northern Ireland, within fifteen to twenty minutes from Derry City …* ".

Naturally, the suggestion in this passage that the injured parties' captors had been "*masked*" was highlighted on behalf of the Defendant as a matter of substantial significance.

[51] When recalled, Sergeant McClarence maintained that neither of the injured parties had said anything about their captors being armed and masked. He testified that had this been said in his presence or reported to him by any other officer he, as the senior officer at the scene, would have recorded it and communicated it by radio transmission. In cross-examination, he was disposed to accept as a *possibility* that this could have been said by the injured parties. He testified that there were at least five or six police officers at the scene. He accepted that, at this remove, his recollection of events is faded. He was unable to specify the time when he made his notebook entry.

He said that Constable Fawcett (paragraph [69], infra) was on duty in the Communications Room and the sergeant communicated with him quite regularly, from the outset of his involvement, until termination of his duty. He had travelled to the scene in either police vehicle ND70 or ND71.

Constable Tosh - Notebook Entry

[52] This records that the constable arrived at Y in Londonderry at 04.55 hours, where BC identified himself:

> "*He had been badly beaten with significant swelling to his face. He was wearing only boxer shorts and had been given a blanket by the resident. He also had two gunshot wounds, one to each ankle. He stated he had been shot by what he thought was an automatic pistol. Approx 10 metres from where he was a trail of blood led to an area on the grass …*
>
> *Ambulance crew arrived at same time as ourselves and gave first aid. A female who ID herself at* [LD, date of birth …] *was also there. She had received a blow to back of her head. She stated that approx 5/6 males had entered their home in [X] and transported them in what she thought was a white transit van described as [fairly] new at around 20-21.00 hours on 23/4/07. They then had been held in a house approx 15-20 minutes away from [Y in Londonderry]. Once at [Y] they had been told to get out of the van – two males described as early thirties medium build 5 feet 9 inches Northern accents had taken them through the alley. The van left and a short time later* [BC] *was shot. Both males then left in separate directions.*"

[53] Constable Tosh testified that he and two other police officers arrived at the scene together. The ambulance arrived within a matter of thirty seconds. He, in the company of Constable Reid, spoke to LD shortly afterwards, in a police vehicle. He agreed that he was attempting to uncover what had occurred. He was asked about his description of BC *in his written statement* as "*quite lucid*". He testified that BC was "*not raving*", though he could not comment on the extent of his shock. BC was suffering from significant visible facial and ankle injuries. The ambulance crew gave BC first aid. He did not observe LD receiving first aid. He described his verbal exchange with BC at the scene at brief.

[54] Whereas the notebook entry of Constable Tosh unequivocally attributes to LD the description about events at their home in X and subsequently, this is not replicated

in the witness's written statement, where all of this is attributed to BC. The constable was unable to provide any satisfactory explanation for this incongruity. He was vague about when he had made the entry in his notebook, suggesting that he may have drawn on the command and control log when doing so. He asserted that when making his witness statement (five days later) he was assisted by his notebook entry only and nothing else. He made a distinction between the information provided at the scene by the two injured parties, claiming that only LD had mentioned the white Transit van.

[55] When recalled, the evidence of this witness with regard to the material passage in the witness statement of Garda McDonnell was to the same effect as that of Sergeant McClarence. The officer was questioned again about when he had compiled his notebook entry. He suggested that this occurred at some stage between 04.55 and 07.00 hours, while at the scene *or* shortly afterwards. He was clearly uncertain about this matter. He did not recall making any radio transmissions. He arrived at the scene in police vehicle ND70. He suggested that he may have drawn on the Command and Control Log for the purpose of documenting data such as dates of birth. He had no recollection of speaking to Detective Constable Blair that night. He accepted the *possibility* that someone may have said what is documented in Garda McDonnell'

<u>Constable Gillian Dixon – Notebook Entry</u>

[56] The notebook entry records that this police officer arrived at the scene at 05.05 hours. There she observed a "*distressed*" female person. At 05.15 hours, an injured male person was transported from the scene by ambulance. The entry continues:

> "***05.25***
>
> *Went in ambulance with female to hospital. Asked her if she remembered anything – house taken to end of terrace. No driveway. Long walk from van to door. Put in bedroom had child's book and crucifix on dresser clock beside crucifix. Had to walk through sitting room and then go round to right to bedroom. Cushions on sofa were brown/orange in colour. No cover on mattress in bed. Man put her duvet on it which they had taken from her house. There were two or three young guys early thirties, one grey hoodie. Older men (1) forties heavy, 6 feet, black short hair, possible moustache. (2) Mid forties, 6 feet, slimmer, light brown short hair.*".

[57] This officer confirmed that she had not been with LD in a police vehicle prior to the ambulance journey to hospital. Nor had she seen LD in a police vehicle. She agreed that she was trying to assemble information about the events, including any

information about possible suspects. She reiterated that LD was distressed. Her only conversation with LD occurred in the ambulance, en route to hospital. She reiterated that she had no direct dealings with LD at the scene.

[58] When recalled, Constable Dixon testified that if LD had said anything about armed and masked men, she would have recorded this in her notebook and communicated it accordingly. She testified that her only interaction with LD occurred in the ambulance, in transit from the scene to hospital. She agreed that the times accompanying various entries in her notebook are very specific. She suggested that she would have checked her watch when documenting these times. She remained at hospital in the company of LD most of the time, until, 06.50 hours, when she was relieved from duty. She had arrived at the scene in police vehicle GD71.

Detective Constable Giles' Journal Entry

[59] This is the most comprehensive of the contemporaneous records. This officer testified that be began duty at 09.00 hours on 24th April 2007, when he was instructed to go to the Altnagelvin Hospital to speak to LD and BC. His record initially makes brief reference to an earlier entry in the command and control log and then documents the personal particulars of the two injured parties. It then documents an account provided by LD between 10.30 and 11.15 hours. I would describe this as a reasonably structured and fairly detailed account, recorded in chronological sequence. With reference to the X to Londonderry "phase", it contains the following material passage:

> "*I reckon drive for a couple of hours before made a stop – I think I recognised man getting as Mervyn Canning – he got into the back of the van – one of the men got out. Heavy set, black hair – he also spoke to me – 'Keep the towel down, keep the towel down'. I know him as he hangs about with SW – he came to [X] – work in the [same industry as BC].*"

This is the only reference to the Defendant in this account, which also ends with the following entry:

> "*Prior to this – phone calls from SW were constant – texts – calls to mobile.*"

[60] Detective Constable Giles testified that he compiled the entry in his journal as he went along. As LD provided her account, the officer would have requested clarification and/or elaboration where considered appropriate. He agreed that he was keen to elicit from her as much information as possible. He was unaware at this stage that the Defendant had been arrested. He described LD's condition as obviously nervous, possibly in a state of shock, someone who had clearly experienced a

traumatic incident. This was not a formal interview of LD. In places, the record is a verbatim account of LD's words. This officer was to have no further role in formally interviewing LD. This officer accompanied Sergeant McSharry to the hospital.

Sergeant McSharry Journal Entry

[61] This record documents that the officer visited the Altnagelvin Hospital at 10.30 hours on 24th April 2007. There he spoke to BC and compiled the entry as the discussion unfolded. The account recorded describes the three phases of the events in compact terms. With reference to the middle phase, it states:

> "*There was no talking in the van total silence. Mervyn Canning phone went; when he answered I recognised his voice. I have had dealings with him in the past. Three in front of van. Two in rear. One of the men in the back spoke with a strange accent. He appeared well educated.*"

The witness statement of this officer, dated 14th January 2008, contains the following passage:

> "[BC] *stated that he was able to identify two of the males as Mervyn Canning and SW from Sligo.*"

Whereas the journal entry mentions the former (viz. the Defendant) it contains no reference to the latter.

[62] Sergeant McSharry testified that prior to travelling to the hospital he received, alone, a briefing from Detective Sergeant Holland, which included information about the Defendant's arrest. Then he and Detective Constable Giles went to the hospital. He agreed that the purpose of speaking to BC was to gather as much information as possible. No one else was present during their discussion. BC had undergone an operation. He was in a "*traumatic condition*", his injured eye was weeping and he kept saying that he needed morphine. When pressed about why he had not questioned BC further about the Defendant, the sergeant replied that he knew BC would have to undergo a "ABE" interview, on account of the serious nature of the offences and his medical condition. He further asserted that, with knowledge of the Defendant's arrest, he was anxious to find out about *other* gang members. His journal entry was compiled as the exercise progressed.

[63] Sergeant McSharry was asked about the following passage in his witness statement, dated 14th January 2008:

"[BC] *stated that he was able to identify two of the males as Mervyn Canning and SW from Sligo.*"

He agreed that this is not replicated in his journal entry, where (a) the concentration is on the Defendant alone and (b) the "identification" of the Defendant is confined to voice recognition. The sergeant was asked about the first substantive entry in his journal:

"*SW* [age] *lives in Sligo*".

He agreed that this was probably the first concrete piece of information conveyed to him by BC and duly recorded in his journal. He further agreed that everything that follows in the journal records all of the events in chronological sequence, beginning with the time spent by BC and others in the public house and ending with the shooting incident. Towards the end of the journal entry, there are four names, including that of SW. The last words in the record are:

"*Canning married to Martin McGuiness.*"

Thus the Defendant is mentioned twice in the journal entry.

Constable Reid Notebook Entry

[64] The evidence of this officer was that at 04.55 hours on 24th April 2007, he attended Y in Londonderry , accompanied by Constables Dixon and Redmond. At 05.10 hours he escorted LD into a police vehicle, awaiting medical attention. He described her as emotionally stressed, with an apparent injury to the back of her head. He attempted to calm LD and obtain as much information as possible from her about events. His notebook entry recites, in material part:

"*Female injured party taken from scene. Injury to rear of head and very shaken …*

Initially reporting 5-6 males entered her and her [partner's] *house at 8-9pm 23/4/07. One of these males believed to be SW from County Mayo. Both hooded and taken in van to single storey house some 15-20 mins from Derry.* [LD] *reports hearing* [BC] *being beaten and questioned in different room for 1-2 hours. Still hooded I/Ps taken to [Y in, Londonderry]. Told to walk way down alleyway and keep head and hands against wall. Van that brought them left. Two males remained both Northern Ireland accents.* [LD] *told to go out alleyway and around corner then heard two bangs. I/Ps*

stripped in second house and dressed in disposable boiler suits."

[65] Constable Reid confirmed that LD was the sole source of the information documented in his notebook. If the Defendant's name had been mentioned he would have noted it. The import of his evidence was that there was limited spontaneous disclosure by LD. Rather, information was elicited from her by questions. This exercise was of some five minutes duration. LD was "*overwhelmed*" by what had occurred. The officer was attempting to obtain an overview of events. The advent of the ambulance signalled the end of their exchange. The officer believes that he then reported to Sergeant McClarence. He recalled that he did not make his notebook entry until shortly afterwards.

[66] Constable Reid was the last of the police witnesses who were recalled to give evidence. He testified that his notebook entry and evidence to the court were based on what had been conveyed to him by LD at the Creggan scene. He asserted that LD had made no mention of "*armed and masked men*" and maintained that, had she done so, he would have recorded this and communicated it to other police. He made clear that he could not account for what LD might have said to *other* police officers.

Constable Graham

[67] This police officer accompanied BC to the hospital. He gave evidence in accordance with his witness statement:

> "*At approximately 6.00am this date …* [BC] *informed me that he knew one of his assailants both by sight and by voice. He said this assailant was called either Marvin or Mervyn Canning and that he knew him to be a native of Londonderry*".

Constable Graham did not make any entry in his notebook or any other contemporaneous record. Rather, he conveyed this information by radio transmission to Sergeant McClarence and, on this open airway, he heard the sergeant instruct that this be recorded on "the log". The latter viz. the command and control log contains, *inter alia*, a message from ND 16 (the sergeant's call sign) bearing the time 06.07 hours. This documents some information about BC's injuries and continues:

> "*The I/P also states that he recognises the voice of one of the males involved as being a Mervyn or Marvin Canning from Derry*".

In his evidence, Constable Graham maintained that BC had said that he knew the Defendant both to see and by his voice. He could not explain why the first element of

this recognition/identification is not replicated in the log entry. He agreed that BC did *not* say that he had seen the Defendant during the material events. Constable Graham testified that he made his written statement approximately one-and-a-half hours later, at Strand Road Police Station. He claimed to have been constantly in BC's presence at the hospital, until 7.00am, with the exception of the period when BC underwent an x-ray. He did not recall BC being admitted for an operation. He timed BC's statement at 6.00am on the basis that he checked his wrist watch at this time. No one else was present at this moment.

[68] When recalled, the officer testified that if BC had made any mention of his assailants being armed or masked, the officer would have included this in his radio transmission and in his statement of evidence. Elaborating, he explained that prior to his assignment to the scene, he had been engaged in case file preparation and like duties. This was confirmed by the entry at 23.00 hours on 23rd April 2007 in his notebook. He further testified that he was carrying his notebook at all material times. His arrival at the scene materialised after that of the initial crews. He could not recall the other officer/s accompanying him. He accepted that his recollection of the finer details of the events was poor. As he was carrying a weapon, he was not the driver of the relevant police vehicle. He understood that his role would be to provide "*outer cover*" to other officers attempting to establish a scene. However, immediately upon arrival, he was instructed to accompany BC by ambulance to hospital. Sergeant McClarence gave this instruction. At least two police crews had arrived before him. He had no reason to make any radio transmission.

Constable Fawcett

[69] This officer became a prosecution witness, under the aegis of a further Notice of Additional Evidence, following the initial eruption of the disclosure controversy noted more fully in paragraph [87] *infra*, which plagued the smooth and efficient transaction of this trial.

[70] He testified that, on the night in question, he was one of two police officers performing duties in the Communications Room at Strand Road Police Station. The other was the constable identified as 'W001851' [this officer's identification number being 'P018790']. He testified that he was specially trained as a communications officer. There are two entries attributed to this officer, bearing the time 05.22 hours. They are the following:

> "*Garda Letterkenny performing BCPS …*
>
> *Garda [in X] briefed on* [phone number] *and are moving to preserve the scene*".

The witness confirmed that he is the author of both entries in the log. He suggested that the first may have originated from a telephone call made by his fellow communications officer. He testified unequivocally that he is the officer who contacted Garda McDonnell by telephone. The telephone number had been secured via the telephone call to Letterkenny Garda Station. He suggested that, in the particular circumstances, he was performing multiple tasks. The main priority was to preserve a crime scene at the relevant address in X.

[71] Constable Fawcett further testified that he was the person who telephoned Letterkenny Garda Station. He acknowledged that there would probably have been a delay of some couple of minutes in recording the relevant actions in the log. Following the initial act of logging on, both his Force identification number and the times of the log entries would have been recorded automatically. He was not the author of the longer entry bearing the time 05.22 hours. However, the contents of this entry were conveyed by this witness to each of the Garda Stations telephoned by him. He had no recollection of any description of the captors as "*armed and masked*". He acknowledged this as a possibility. Transmissions to the Communication Room would have been by either radio or telephone, from other police officers. At the material time, all radio communications were audible to the officers on duty in the Communications Room. In contrast, telephone communications were personal to the individual Communications Officer receiving them. The witness suggested that the lengthy entry at 05.22 hours had probably been received by radio, by virtue of the documenting of the relevant police vehicle as 'ND16'.

VI SCIENTIFIC EVIDENCE

The Transit Van Rubber Seal

[72] On 2nd May 2007, Garda Walsh went to the home of SW in County Mayo. There, a silver Ford Transit van was found and removed for examination. The officer opined that the original bodywork floor had been covered by another protective layer of flooring. Visual inspection of the lateral passenger door identified blood staining on the upper part of the rubber seal, proximate to the roof. The whole of the rubber seal was extracted and placed in an evidence bag. This was duly tested at the Forensic Science Laboratory at Garda Headquarters in Dublin. Dr. McBride, Forensic Scientists, found smeared blood staining in one area of the rubber seal and submitted a sample for DNA profiling. Dr. O'Dowd, another Forensic Scientist, reported as follows:

> "*DNA was extracted from the swab taken from the rubber seal … and from the reference blood samples of* [LD] *and* [BC]. *DNA profiles were then generated and compared.*

> *The DNA profile obtained from the swab taken from the rubber seal of the door … matched the DNA profile of* [BC's] *blood sample. I estimate the chance that a person unrelated to* [BC] *would have this profile is less than one in a thousand million.*"

The Blue Denim Jeans

[73] On 24th April 2007, MGH (of an address in Londonderry) was arrested at the Defendant's home in Londonderry, more or less at the same time as the Defendant's arrest there. When cautioned, he made no reply. He was interviewed subsequently. MGH is now deceased. On 4th May 2007, a pair of blue denim jeans attributable to MGH was submitted to FSNI for examination. The report of Mr. Craig, Forensic Scientist, records the following outcome:

> "*Blood spots (staining created from airborne droplets of blood) and smears (created by contact with a source of wet blood) were present on front, extending from below the waistband down to the knee of the right leg and right down to the bottom of the left leg. Blood staining was also present on the right hip, the back of the hem of the right leg and on the lower inside front of the right leg. Five samples of the blood staining were taken for DNA analysis …*
>
> *Partial minor DNA profiles matching* [BC] *were obtained from mixed DNA profiles from blood staining on the jeans attributed to* [MGH]. *The major profiles within these mixtures came from an unknown male …*
>
> *A calculation based on NI population survey data shows that the combination of characteristics observed in the two partial minor profiles would be expected to arise in fewer than one in 4.4 million and one in 22 million males unrelated to* [BC]."

[74] In short, the examination-in-chief of Mr. Craig, as per his report, was to the effect that there was a scientific link between BC's blood and the jeans worn by MGH, who had been arrested with the Defendant at the Defendant's home in Londonderry. In cross-examination, however, Mr. Craig retracted his evidence. His retraction was based on an acknowledged error in the "DNA Profiling Results" table annexed to his report. He agreed that this error was, in his words "*extremely fundamental*". He was unable to explain how it had occurred. He testified that the effect of the error was that the conclusion in his report should be rewritten:

> "*Partial minor DNA profiles* ***not*** *matching* [BC] *were obtained from mixed DNA profiles from blood staining on the jeans attributed to* [MGH]".

[My emphasis].

As a result, his "empirical population data" comment no longer survived and he withdrew it.

[75] On the following day of trial, the court acceded to an application on behalf of the prosecution that Mr. Craig be recalled. This application, the grounds upon which it was based, the parties' respective arguments and the court's reasoned conclusion are all contained in a separate ruling . Something of a hiatus ensued and the trial then resumed over one week subsequently. Mr. Craig was duly recalled and was cross-examined at length. Three new, associated statements of evidence, all emanating from FSANI personnel, were read to the court by agreement. Throughout this phase of the trial, the Defendant's legal representatives had the benefit of the attendance of their expert witness, Professor Krane , by live link mechanism.

[76] The further evidence of Mr. Craig essentially had two components. The first, bolstered by the other witness statements read by agreement, related to his retraction of the withdrawal recorded in paragraph [74] above, accompanied by an elaborate explanation of how an asserted basic error had occurred. In short, a transcription error was attributed to the supervisor, Mark Holmes, in the testing and recording process. Whereas the primary analysis and second analyst had correctly recorded the figures 17/18, Mr. Holmes incorrectly transcribed and recorded 17/17. Mr. Craig, in turn, reproduced this transcription error in the DNA results table appended to his main report/statement. He affirmed trenchantly that 17/18 is the correct finding and, based on this premise, he once again aligned himself fully with the opinion and commentary contained in his report.

[77] During this phase of the trial, a witness statement of a Mark Holmes, a forensic scientist employed by FSNI, was read to the court, by agreement. This records that both the GT1 operator and the GT2 operator labelled the relevant results as '17, 18'. Mr. Holmes' function was to review and, if required, to edit the results. His statement explains:

> "*I edited the results to 17, 17. On 24/06/10 I reviewed the results for this test and now consider that the results should have been labelled 17, 18. As a result I now consider the original labelling to have been made in error and believe that this has arisen as a result of a typing error*".

[78] The second main component of Mr. Craig's further evidence may be summarised thus. He testified that the table appended to his report contains three basic elements: scientific data, the analysis of such data and some expert interpretation thereof. He agreed that in his compilation of this table he had excluded certain possibilities, relating to the minor contributor, in consequence whereof BC was linked to the operative samples. In terms, he dismissed these possibilities as flimsy or theoretical. He maintained strongly that they were not "*sound scientifically*", based on the scientific data, his analysis of such data and his expert interpretation thereof. In short, the cornerstone of his defence of the table was his qualifications and credentials as an expert in this field. I would highlight two factors, in this respect. Firstly, there was no challenge to Mr. Craig's experience, credentials or expertise. Secondly, no competing scientific data, analysis of such data or expert interpretation thereof were put to him. In particular, the scenario of two respected experts espousing differing opinions and disagreeing did not materialise at this stage.

VII ARREST AND INTERVIEW OF DEFENDANT

[79] The Defendant was arrested shortly after 9.30am on 24th April 2007 at his home in Londonderry. He replied "*No*" when cautioned. On 24th and 25th April 2007, he underwent a total of six interviews by the police. In brief compass, he provided particulars about his background and denied having anything to do with the alleged offences. He asserted that on 23rd April he had spent most of the day at home, except for a period when he went out for something to eat. He claimed to have gone to bed at around 2.00am on 24th April. He described MGH as a friend who had arrived at his house during the early hours of that morning and then spent the night there.

[80] As regards the two injured parties:

(a) The Defendant asserted that while he had heard of BC through the building trade, he had never met him.

(b) He did not know and had never met LD.

He further claimed that he did not know and had never met SW or PT. He claimed that he had not been present at any of the crime locations and denied having attended any meetings at the relevant hotel or public house in X. He accepted that he knew one "R" who lived in Ballina and was involved in the building trade. He acknowledged that the items recovered from the washing machine in his home, including a cord style jacket, were his. He stated that Martin McGuiness was married to his sister.

VIII THE DEFENCE CASE

[81] The Defence Statement served under Section 5 of the Criminal Procedure and Investigations Act 1996 is framed in terms which reflect the pivotal importance of the evidence of BC and LD. It asserts that there are substantial inconsistencies and contradictions both in their accounts individually and between their respective accounts. It disputes "*the reliability, credibility and truthfulness*" of the purported visual and voice identification of the Defendant by both witnesses. It also highlights the unsatisfactory circumstances in which this recognition and identification allegedly unfolded. Finally, it asserts the absence of any independent corroboration of these witnesses' accounts and records the Defendant's denial of guilt.

[82] Evidence was given on behalf of the Defendant by Dan Krane, a Professor of Biological Sciences based at Wright State University, Ohio, USA. His credentials include membership of the Commonwealth of Virginia's Scientific Advisory Committee, a statutory organisation with functions of oversight and guidance vis-à-vis the Virginia Department of Forensic Science. Professor Krane has testified in around eighty criminal trials involving forensic DNA typing.

[83] The focus of Professor Krane's testimony was a document which formed part of the evidence of Mr. Craig of FSANI, entitled "DNA Record Sheet – Summary of Results – SGM+". The top horizontal column of this record begins with "D18" and ends with "TH01". There are ten headings of this kind. Professor Krane testified that each of these is a distinct polymorphic locus. The adjective "*polymorphic*" denotes that the locus is likely to take many forms and likely to differ from one person to another. Each locus was analysed by FSANI for the purpose of the DNA testing. In this context, Professor Krane referred to the X and Y chromosomes: where both are present, this indicates a probability of a male person, whereas the X chromosome indicates a female person. The crucial focus is on the Defendant's DNA and BC's DNA. In turn, the DNA profiling results of these two persons must be viewed in light of the DNA profiling results relating to (a) the front left upper sample and (b) the rear right cuff sample, both taken from the jeans recovered from the Defendant's home in the aftermath of the central events. Professor Krane observed that, in the test results, there are very few instances of coincidence between the Defendant's DNA profile and BC's DNA profile. This, he said, bears testimony to the strength and depth of this scientific testing methodology.

[84] Professor Krane noted that in respect of each of the aforementioned jeans samples, Mr. Craig had identified a major contributor and a minor contributor. In other words, he found mixed DNA profiles. As recorded in paragraph [73] above, Mr. Craig's evidence was that the scientific testing yielded partial minor DNA profiles matching BC from blood staining on the jeans attributed to MGH. The major profiles

within these mixtures were from an unknown male person. Professor Krane's starting point was that where there is a mixed DNA profile, viz. a combination of major and minor profiles, interpretation is more difficult than in the case of a single DNA profile. It is often not possible to make the separation between major and minor contributors. The central theme of Professor Krane's evidence is most readily and clearly understood by reference to the concluding paragraph of his main report:

> *"The interpretation of mixed DNA profiles is challenging – especially in circumstances where the contributions of the major and minor contributors to a sample are similar. In even the best of circumstances (where the contribution of the major contributor is more than three times that of the minor contributor) it can be very difficult to determine the DNA profile of the minor contributor unless the assumptions are made that there are only two contributors; that allelic drop out and drop in have not occurred; and that the quantity of DNA contributed by both the major and the minor contributor is within the range recommended by the manufacturer of the test kits used. The electropherograms for the two key evidence samples in this case clearly do not support the proposition that they arise from the best of circumstances and raise serious questions about the assumptions (including the mixture ratio and the number of minor contributors to the mixture) that must be made to determine the profile of a minor contributor. As a result there are a large number of viable alternative interpretations of the electropherograms that are inconsistent with the proposition that [BC] is a minor contributor to the sample. The test results do not lend clear and consistent support to any of the large number of alternative interpretations. It would be most appropriate to consider the DNA test results from the jeans to be inconclusive – we are in no better a position to determine if [BC] is included or excluded as a minor contributor to the samples after the tests have been completed than we were before they were performed"*.

Professor Krane did not question the propriety of the aforementioned three assumptions as a generally accepted scientific practice.

[85] A fully confident understanding of Professor Krane's testimony was somewhat complicated by his rather prolix and invariably highly technical responses to simple questions. Many of his replies were of bewildering and unnecessary length. As his evidence progressed, its thrust became somewhat clearer, particularly in response to questions from the court. Fundamentally, Professor Krane was advancing an expert

critique of the FSANI *interpretation* of the DNA sampling test results. His central criticisms were the following:

(a) The FSANI resolution of the test sample results into major and minor contributors was unreliable, because the disparity between the two contributors was insufficient. The Professor espoused a minimum "safe" ratio of 3:1 in this respect and suggested that, with regard to some of the *loci* the actual ratio fell below this threshold. In short, as per his main report:

> "*Both jeans samples show indications of being at or below the thresholds where they can be reliably interpreted*".

(b) As regards the front left upper jeans sample, Professor Krane criticised the FSANI interpretation that three of the *loci* could not be resolved into major and minor components (i.e. were inconclusive), suggesting that there were viable exculpatory interpretations.

(c) The Professor made the same criticism of four of the *loci*, in relation to the rear right cuff jeans sample.

(d) Reliable interpretation of the DNA test sample results was complicated still further by the phenomena of allelic "drop in" and "drop out". He suggested that these phenomena are more likely to occur in the case of smaller template DNA amounts.

For this combination of reasons, Professor Krane advanced the thesis that there is no reliable scientific evidence that BC is a minor contributor to the two jeans samples. This thesis is encapsulated in the concluding paragraph of the Professor's supplementary report (prepared during his cross-examination, following an adjournment arising out of certain questions from the court):

> "*The test results for these two samples do not lend clear and consistent support to any of the large number of alternative interpretations enumerated in this supplemental statement. Simply disregarding those loci that cannot be resolved into a single hypothetical major and minor contributor in this case would be unfairly prejudicial to the Defendant in that they support viable interpretations that are inconsistent with the prosecution's theory …*

> *The relatively small disparity in the contributions of the major and minor contributors to these samples is ultimately responsible for their being loci where more than one viable interpretation is possible. These problems are exacerbated with respect to determining the minor contributor to the mixtures (inferring the genotype of major contributors is generally less problematic). It would be most appropriate to consider the DNA test results from the trousers to be inconclusive*".

[86] I would observe that the nature of the contest between the expert evidence of Mr. Craig and Professor Krane was far from apparent at the conclusion of Mr. Craig's cross-examination. As noted above, during the relevant phase of the prosecution evidence Professor Krane "attended" by live link. It would appear that the Professor developed a substantial proportion of his theories and opinion subsequently. Notably, he acknowledged that he had taken no steps to correct or explain to the Defendant's lawyers Mr. Craig's initial retraction of his opinion, recorded in paragraph [74] above, while acknowledging that he was fully aware then that this retreat was founded on a basic error. Furthermore, in cross examination (but not earlier), Professor Krane explicitly abandoned and/or corrected certain aspects of his main report. Since Professor Krane's evidence remains incomplete at the stage of promulgating this ruling, I have formed no final views and further comment would be inappropriate.

IX ABUSE OF PROCESS

[87] Certain controversial disclosure issues became the impetus for an application on behalf of the Defendant for an order staying his prosecution as an abuse of the process of the court. At this juncture, it is appropriate to set forth the following chronology:

(a) This trial began on 14th June 2010, with an estimated duration of two to three weeks.

(b) The trial was adjourned on 8th July, at which stage the court was no longer available due to summer holiday arrangements.

(c) Between 14th June and 8th July, there were certain interruptions. None of these was extraordinary.

(d) The disclosure controversy first arose on 5th July 2010, at the instigation of the Defendant's legal representatives, who had secured Garda McDonnell's witness statement *(infra)*, which formed part of the Book of Evidence in the trial of SW in the Republic of Ireland.

(e) On the following day, 6th July 2010, a failure of disclosure was acknowledged on behalf of the prosecution. This was followed by the service of a Notice of Additional Evidence and amended Non-Sensitive Disclosure Schedule.

(f) When the trial was adjourned for the summer vacation (belatedly), on 8th July, the prosecution case had not closed and, at that stage, the prosecution were not in a position to adduce any further evidence. Mr. Hunter QC informed the court, in terms, that continuing and unexhausted efforts and steps were in hand which had the aim of securing the full discharge of the Crown's continuing disclosure obligations. The court was given to understand that any further disclosable materials would emanate from the authorities in the Republic of Ireland.

(g) The trial resumed at the beginning of the next legal term, on 6th September 2010. When the trial resumed, the outworkings of the disclosure issue remained unresolved. It was represented to Mr. Hunter QC that two further categories of potentially disclosable documents had been identified. These were (a) certain records maintained at the Garda Station in X and (b) some unspecified computerised Garda records. These documents were in the exclusive possession of the Gardaí. As a result, they had not been considered by the prosecution and, hence, the test for disclosure had not been applied to them.

(h) A hiatus ensued. Having considered argument from both parties, the court acceded to an application by the prosecution to adjourn the trial, to enable all reasonable efforts to secure the relevant documents to be exhausted. The mechanism for doing so was to be a so-called "international letter of request" under the machinery of the Criminal Justice (International Co-Operation) Act 2003 and the European Convention on Mutual Assistance in Criminal Matters (1959). On 7th September 2010, the court adjourned the trial on a peremptory basis, with a projected resumption date of 27th September. It was accepted on behalf of the prosecution that the adjournment would have to be peremptory and could not reasonably be of any greater dimensions.

(i) The court declined to consider the Defendant's application for a stay at this stage. My reason for adopting this course was that an order staying any prosecution is an exceptional measure and should be considered only when the court is as fully informed as possible, subject always to the Defendant's right to a fair trial, including trial within a reasonable time. It seemed to me that the process initiated by the prosecution could

potentially yield materials or information informing the court's adjudication of the stay application. I also took into account that the unavailable materials were in the exclusive possession of the police force of another EC Member State. Bearing in mind the "*triangulation of interests*" articulated by Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577 (at p. 584), I acceded to the adjournment request on the terms indicated and deferred consideration of the Defendant's stay application.

(j) On the expiry of the peremptory adjournment period, the trial duly resumed and an application for a direction of no case to answer ensued. In a reserved ruling delivered on 29th September 2010 [MCCL7955] I refused this application.

(k) This was followed immediately by an abuse of process application, which entailed the receipt of detailed submissions and certain materials from both parties. The essence of the court's ruling [MCCL7903] was to permit the recall of BC and LD for further cross-examination, while deferring final determination of the application.

(l) The pattern during the next phase of the trial consisted of persisting requests for further disclosure on behalf of the Defendant, express acknowledgements of further disclosure failures on behalf of the prosecution and the disclosure of certain additional materials to the defence. Initially, during this phase, the further materials disclosed by the prosecution consisted of Garda McDonnell's internal report dated 24th April 2007, a Garda Station in X computer generated record and the Constable Fawcett/Garda McDonnell radio transmission. At this stage, an issue arose about whether any persons other than the Defendant and MGH had been arrested arising out of the subject events. In response, it was represented to the court on behalf of the prosecution that there had been no other arrests.

(m) On the morning when the court was scheduled to pronounce its ruling on the Defendant's Abuse of Process Application (13th October 2010), the prosecution requested an adjournment for twenty-four hours, to which the court acceded. [In the interim, the evidence of the defence scientific expert commenced].

(n) The following day [14th October 2010], the prosecution accepted that two further failures of disclosure had been detected, relating to materials concerning the arrest and interview of two other suspects, (i) CC and (ii) EMF. The court was also informed that an independent Detective Chief

Inspector had been instructed to conduct a full review of disclosure. A further adjournment was granted at this stage.

(o) On the next two working days [15th and 18th October 2010], the court was not in session, on account of its commitment to a trial running in parallel.

(p) On the morning of the next day of trial [19th October 2010], Mr. Hunter QC informed the court that further disclosure had just been made by the prosecution and that the independent disclosure review was ongoing. The court received, without objection, a written statement of Detective Chief Inspector Harrison indicating that the Non-Sensitive Schedule contained 234 items at the commencement of his review and continuing:

> "*As a result of my review of the material available to me … I have identified an additional 177 items which I consider should be present on the Non-Sensitive Schedule … and I am of the opinion that additional items will be added …*".

(q) A one day adjournment ensued at this juncture. This was to enable the defence scientific expert to prepare further materials for presentation to the court.

(r) On the following day of trial [21st October 2010], the further disclosure developments outlined *infra* materialised.

[88] On 21st October 2010, the history of the Non-Sensitive Schedules served by the PPS on the defence was outlined to the court in the following terms:

(a) The first is dated 19th July 2007 and consists of 84 items.

(b) The second is undated and consists of 108 items.

(c) The third is dated 6th July 2010 – see paragraph 87(e) above – and consists of 277 items.

(d) The fourth is dated 23rd September 2010 and consists of 234 items.

(e) The fifth is dated 19th October 2010 and consists of 411 items: this was produced by Detective Chief Inspector Harrison in uncertified form, as his review remained uncompleted. This was followed by a certified version served one week later.

On this date, the defence invited the court to rule on the abuse of process application. The prosecution asked the court to defer its ruling until production of the final, certified Schedule and I duly acceded to the prosecution request.

The First and Second Tranches of Newly Disclosed Materials

[89] The late disclosed materials which can be related to the service of the third and fourth Non-Sensitive Schedules, documented in paragraph [88](c) and (d) above, are the following:

(a) A written "Statement of Evidence" of Garda John McDonnell (undated).

(b) A written statement made by PT (who had some involvement in relevant preceding events).

(c) The transcript of a Garda interview of SW, following this person's arrest in Dublin.

(d) A different statement of evidence of Garda McDonnell: while the form differs and this version bears the date 25th April 2007, its content is identical to item (a).

(e) A report dated 24th April 2007, compiled by Garda McDonnell and addressed to a detective sergeant in X.

(f) A computer generated record in printed form, consisting of less than 100 words. While this is probably an X Police Station contemporaneous report of the relevant incident, its precise genesis and authorship are unknown.

(g) The Constable Fawcett/Garda McDonnell radio transmission.

[90] It is common case that items (a) and (b) inclusive emerged through the industry of the Defendant's solicitors. They were sourced from the solicitors representing SW in the parallel prosecution in the Republic of Ireland (which lags behind this trial). Item (c) was disclosed by the prosecution to the defence just prior to the first main adjournment of the trial noted in paragraph [87](f) above. The next four items, (d) – (g), were disclosed by the prosecution to the defence following this adjournment. A significant feature common to all seven items is that they came into the possession of the Defendant's legal representatives (a) during the progress of the trial, (b) in piecemeal fashion and (c) after BC and LD had completed their evidence. This had

materialised into a central pillar of the stay application **prior to** the further significant developments in respect of disclosure noted in paragraph [87](n) *et sequitur* above.

[91] Some of the newly disclosed materials were brought to the attention of the court, while others were not. Subject to this observation, the significance of the newly emerging materials may be summarised thus. Each of Garda McDonnell's two written statements contains the following passage:

> "*I recall Tuesday the 24th of April 2007. I was employed in the Communications Room at…[the] Garda Station [in X], when at 5.13am I received a phone call from a male, who introduced himself as Constable John Fawcett of* [PSNI]. *I was informed by Constable John Fawcett that* [BC and LD] *… had allegedly been abducted by* ***a gang of six armed and masked men ...*** *some time between 8.00pm and 9.00pm on Monday 23rd April 2007".*

[My emphasis].

Garda McDonnell's corresponding report to the detective sergeant employs the same terminology. The fourth item, apparently a written statement made by PT to the Gardai, contains a passage which has been brought to the attention of the court, in the following terms:

> "*I have done nothing wrong and spend most of my time on the sites earning a living. The only incident I can think of happened in a bar on Sunday the 22nd of April just gone. I think it was the [CW] Hotel. I was drinking in there with some mates. BC, JG and another guy S were there too. Some of the lads were a bit drunk and at one stage S passed some comment to a woman as she passed by our group. I didn't hear what was said but I was told by the other lads that it upset her boyfriend and that he was going to get us, meaning he was going to assault us. I didn't see him at any stage and there was no incident in the bar at any case. I did nothing wrong. We all went home eventually and I thought nothing of it until I heard BC was shot.*"

As regards the fifth item, viz. the SW interview transcript, the court has been informed of a passage which suggests that when arrested at Connolly Station in Dublin SW was in the company of a male person from Derry. The sixth item, the computerised record, is unexceptional but for the reproduction of the "*six armed and masked men*"

terminology. The seventh item (the PSNI/Garda RT record) has not been provided to the court and its contents have not been canvassed in the stay application.

The Court's Initial Abuse of Process Ruling

[92] I refer to [MCCL7903]. As appears from the following passages, there are certain similarities between the circumstances prevailing when the earlier ruling was promulgated and the circumstances which have now eventuated:

> *"**[25]** It appears to me that there are three choices available to the court. The first is to accede to the Defendant's application for a stay. The second is to reject the application. The third possibility revolves around the question of whether any prosecution witnesses – in particular BC and LD – should be recalled at this stage of the trial.*
>
> ***[26]** When the court canvassed this latter possibility, the Defence submissions highlighted strongly the factor of timing and sequence. As I have already noted, the Defendant's legal representatives did not secure possession of any of the late disclosed materials until the evidence of BC and LD had been completed. Mr. Berry QC submits that any further cross-examination of either of these witnesses at this stage of the trial will not remedy the unfairness of which the Defendant complains. He draws attention to the lengthy, planned and structured nature of the cross-examinations which have already been transacted. He makes the further submission that any revived and extended cross-examination of BC or LD cannot adequately avail the Defendant in circumstances where there are enduring concerns about the fulfilment of the prosecution's disclosure duties.*
>
> ***[27]** Mr. Hunter QC informed the court, without challenge, that before the prosecution case was closed, the Defendant's legal representatives were advised that BC and LD were available for recall, should a request be made. No such request was made of the prosecution and no application to this effect was made to the court. This gives rise to the submission that the Defendant has had a suitable opportunity to deploy the late emerging materials."*

As appears from the ensuing paragraph – [28] – the two salient features of the late disclosed materials at that stage were (a) the recorded description of the injured party's attackers and captors as "*six armed and masked men*" and (b) an assertion in the

witness statement of PT about certain events in the CW Hotel, Dublin on the day preceding the abduction and implicating BC therein. The earlier ruling continues:

> "[29] As regards the first aspect noted above, the Defendant's legal representatives have had – and have availed of – full opportunity to cross-examine the relevant Northern Ireland police officers. Furthermore, the witness statement of Garda McDonnell was read to the court by agreement. However, due to the factor of sequence and timing highlighted above, there was no cross-examination of either BC or LD about this matter. As regards the second aspect, there has been no cross-examination of any prosecution witness. I agree with the defence submission that, ex facie, the witness statement of PT is significant for the twofold reason that (a) it contradicts BC's sworn evidence about his conduct on the day preceding the attack and abduction and (b) it raises the spectre of an assailant/abductor other than the Defendant, coupled with a motivation other than that suggested in the evidence of BC and LD. The further item which must be evaluated, in this context, is the SW interview transcript. While I decline to form any final view at this juncture, the suggestion that this too is a matter of substantial significance seems to me, at this stage, rather frail and speculative."

[93] Ultimately, the substance of the ruling emerges in the following passages:

> *"**[37]** As matters stand at present, neither BC nor LD has been further cross-examined on behalf of the Defendant, on the basis of any of the late emerging materials, because the court has made no recall order. It is argued on behalf of the Defendant that he has suffered prejudice which cannot be cured, or even diluted, by the recall of any prosecution witness. In considering this argument, it is important, in my view, to focus on the nature of the defence rights in play. These are properly characterised due process, or fair trial, rights. Further analysed, it seems to me that the specific rights engaged are the "courtroom" rights to confront one's accusers, to challenge their accusations and to seek to undermine the reliability and veracity thereof. These rights, of course, are subject to the relevant limitations imposed by the rules of evidence and professional ethics. The Defendant's argument is that his enjoyment of these discrete rights has been irredeemably impaired.*

[38] *I am conscious of the repeated injunction to the effect that where a court is determining an abuse of process application, the bulk of unfair trial complaints can be satisfactorily addressed and accommodated by the conduct of the trial. In the present context, the only concrete trial management mechanism to emerge, in this respect, is the recall of certain prosecution witnesses, particularly BC and LD. I consider that, properly construed and exposed, the Defendant's argument entails the proposition that his trial will inevitably be unfair, even if BC and LD are (or either of them is) recalled. To accede to this submission would, in my view, require a sure and confident prediction by the court. I consider that there is insufficient foundation for a prediction of this kind. I am not persuaded, at this stage, that an efficacious extended cross-examination of BC and/or LD is simply not possible. To conclude otherwise would entail a firm and unerring prediction on the part of the court which, in my view, is not warranted. Furthermore, I consider that the court's discretionary power to recall a witness is, in principle, designed to cater for precisely the kind of unexpected developments which have eventuated in this trial. Finally, with regard to the Defendant's right to a fair trial within a reasonable time, I take into account the representation to the court that both BC and LD are immediately available.*

[39] *I refer to the three possible outcomes enumerated in paragraph [88] above. Having regard to the reasoning expressed in the immediately preceding paragraph, I consider that the options of granting or refusing the abuse of process application should not be invoked at this stage. Rather, I have determined to exercise the court's power to recall BC and LD and, as a corollary, I consider that final determination of the abuse of process application should be deferred.*

<u>*Conclusion*</u>

[40] *To give effect to the reasoning and conclusions expressed above:*

(a) BC and LD are to be recalled.

(b) They will reattend court on 5th and 6th October 2010.

(c) While I decline to rule in exhaustively prescriptive terms at this stage, in principle the purpose of recalling both witnesses will be to make them available for further cross-examination on behalf of the Defendant.

(d) If the Defendant's legal representatives decide to avail of this facility, the basic scope of any extended cross-examination will be shaped by such of the late disclosed materials as they choose to deploy.

(e) In principle, the possibility of recalling other prosecution witnesses remains extant.

(f) I defer final determination of the stay application and there will be an opportunity for further argument in due course."

It is appropriate to highlight in particular subparagraph (f).

[94] The outworkings of the earlier ruling entailed the recall of both BC and LD, the extended cross-examination of these witnesses on behalf of the Defendant (focussing almost exclusively on the two matters highlighted above) and some further questions from the court. I refer to paragraphs [26] – [30] and [44] – [46] above.

The Most Recent Disclosure

[95] As appears from the foregoing, the outcome of the mid-trial independent review of prosecution disclosure was the production of a new Non-Sensitive Schedule (the fifth, in substance) duly certified by Detective Chief Inspector Harrison. In their renewed application to the court for an order staying the prosecution, the Defendant's legal representatives have brought to the court's attention the following freshly disclosed materials and further correspondence (in the sequence which follows):

(a) A fairly detailed manuscript record, evidently of a contemporaneous nature and prepared in the immediate aftermath of the "phase 3" events i.e. those which unfolded in the area of Y in Londonderry. It is represented by the prosecution that the author of this record is Detective Constable Anne Grehan. The record consists of the Detective Constable's discussions at the scene with a locus resident ("DH"). Part of the record

consists of a page of rough notes including the words "*I knew one of them*". The remainder takes the form of a witness statement in the first person. It recounts how DH was awoken from her sleep, looked outside and saw an injured male person in the alleyway. Having telephoned for an ambulance, she went outside. There she encountered a male person, a female person (presumptively BC and LD) and two other residents. The statement then contains the following passage:

> "*I was stunned [*semble*]. They were chit-chattering. The boy said 'I definitely know who one of them is.' She told him to 'fuck up, I don't want them back at my door'. I was getting the bits and pieces so they were talking in between. He said it wasn't a shotgun, but a revolver. He was very clear in what he was saying. He said it was a quick changeover of bullets …*
>
> *He said there was four or five of them and she would know better. She didn't want to know. I got the impression she didn't want to tell anybody anything, in case she got the knock on her door again.*"

In argument on behalf of the Defendant, this document is characterised as "*explosive*".

(b) In an exchange of correspondence about the discrete topic of LD's criminal record, there is a PPS letter dated 27th October 2010 stating:

> "*… As a result of the disclosure review exercise it is noted that a document was disclosed to you from An Garda Siochana detailing* [BC's] *convictions. In that same document it is stated that* [LD] *has no convictions. This is incorrect however no duty of disclosure arises*".

It is argued on behalf of the Defendant that this gives rise to a disputed disclosure issue which the court will have to resolve.

(c) There is a Form PACE 26A(i) relating to an arrested suspect ("EMF") which, it is argued, contradicts the representation in the PPS letter dated 19th October 2010 that this suspect "*… did not take part in any identification procedure*", thereby calling into further question the integrity of the disclosure process.

(d) There is an "Action" record dated 24th April 2007 recording contact between the PSNI and the Gardai and suggesting that the latter were in the process of "downloading" CCTV recordings from the relevant public house in X. The defence submissions draw attention to a later letter from the PPS (dated 16th December 2009) representing that certain video recordings had been "*taped over*". It is submitted that the court cannot repose confidence in this representation, in light of the "Action" record.

(e) Next, there is a completed Form PACE 26A(i) documenting an identification procedure in respect of another arrested suspect ("CC"). This record documents that "Witness No. 1" and "Witness No. 2" (evidently BC and LD) provided descriptions of their assailants. The descriptions relate to estimated ages, attire, physical build, colour of hair, facial appearance and accent. Within these descriptions, the assailants are divided into groups of 2/3 "*young guys, early thirties*" and two older men in their forties. This particular document repays careful reading. It contains, in my view, a wealth of detail which has obvious and rich potential for intensive cross examination of BC and LD.

(f) There is also a related Form PACE 26C(iii), the "Record of Video Identification Procedure" relating to the suspect CC. This documents that after viewing a DVD, BC was asked whether any of the persons depicted in the recording was (in terms) amongst his assailants and captors. He replied:

> "*Wouldn't be a hundred percent sure*".

The defence complaint is that neither of the last-mentioned documents was available to them either to inform earlier strategic decisions about the conduct of the trial *or* to be deployed in the two previous cross-examinations of BC and LD.

(g) Highlighting again newly disclosed document (a), there is a discrete complaint that the Defendant has been deprived of the opportunity to contact at least three residents of Y in Londonderry, to pursue an obvious and potentially fruitful line of enquiry.

(h) Also highlighted is a passage in a PPS letter dated 21st September 2010 concerning the earlier disclosure of a particular document which, it is contended, is illustrative of an inadequate and unreliable disclosure audit trail, a microcosm of the systemic disclosure infirmities asserted by the Defendant.

(i) Finally, the Defendant highlights the belated disclosure of the notes of interview of another arrested suspect, EMF, for the purpose of highlighting that one of the interviewing officers was Detective Constable McLaughlin, who is the Disclosure Officer in this case, thus underpinning the submission recorded immediately above.

[96] In describing each of the most recently disclosed documents above, I have summarised the associated arguments on behalf of the Defendant. The following additional submissions are advanced:

(i) Based on the most recent Non-Sensitive Schedule, the Defendant will be seeking production of a substantial quantity of individual items – including witness statements, notebook entries, messages, custody records, interview recordings, pre-interview disclosure, VIPER forms and records, serious crime logs, reports, notes and other miscellaneous items.

(ii) If the trial is to continue, it will be necessary for BC, LD and all of the police witnesses to be recalled.

(iii) Similarly, if the trial is to continue a potentially substantial number of police and civilian witnesses not previously on the Defendant's "radar" may be called to testify on his behalf. This would entail, in my view, quite intensive activity on the part of the Defendant's solicitor involving, *inter alia*, tracing and contacting certain civilian witnesses, interviewing them if available and willing, preparing proofs of evidence, possibly formulating further disclosure requests and related steps *at this stage.*

(iv) When BC and LD were cross-examined on behalf of the Defendant, tactical decisions were made not to ventilate and pursue two inter-related "lines". This decision would have been influenced by the earlier provision of the most recently disclosed materials. Furthermore, it is submitted that earlier disclosure would have stimulated cross-examination of both main witnesses of a different tone, intensity and content.

(v) Taking into account all of the above, any attempt to perpetuate the trial would involve a significant distortion of and departure from conventional trial procedures and process.

(vi) Given the history, the court can repose no confidence in the disclosure process. It is submitted that the prosecution have effectively been coerced into making a series of further enquiries and searches, culminating in

intermittent and fragmented supplementary disclosure of undeniably important materials long after the commencement of the trial.

[97] The arguments on behalf of the Defendant at this stage of the trial are conveniently encapsulated in the following excerpt from counsel's written submission:

> "*Further to the submissions previously before the Court, the Defendant asserts that he has not had a reasonable opportunity to present his case. This has been denied to him by the failure to provide the relevant material for cross examination in accordance with the law. The present conditions are in breach of the laws governing disclosure and place him at a substantial disadvantage. For example, had the complainants accepted the conversation that the unknown female recorded then it is difficult to say what impact this and other concessions might have had on the* ***Galbraith*** *application…….*
>
> *The Court is invited, in the exceptional circumstances of the litany of serious disclosure failures in the present case, and the prejudice that that has caused, to stay the proceedings.*"

[98] The essential thrust of the reply on behalf of the prosecution is that this most recent episode of belated disclosure does not compromise the fairness of the Defendant's trial and can be adequately accommodated by the trial process, specifically by the mechanisms of (a) the recall of certain prosecution witnesses for further cross-examination; (b) resort by the Defendant, if so advised, to Section 8 of the Criminal Procedure and Investigations Act 1996, being the mechanism whereby, duly seised of an application, the court adjudicates on disputed disclosure issues; (c) the calling of witnesses on behalf of the Defendant; and (d) if necessary, hearsay applications and the presentation of agreed documentary evidence to the court, in respect whereof the prosecution would be flexible and co-operative. It was further represented to the court that if the trial is to continue, the witnesses in question – BC, LD and a number of police witnesses – are all available to be recalled. It was accepted by Mr. Hunter QC that the recall of this substantial number of witnesses, for the purpose of further cross-examination, would be necessary. The suggestion that, arising out of the most recently served Non-Sensitive Schedule, further disclosure and the need for the court to adjudicate on new contentious disclosure issues could both eventuate was not vigorously challenged.

[99] Serious failures of disclosure by the prosecution, attributed to the non-transmission of relevant materials by the police to the PPS, were candidly acknowledged by Mr. Hunter QC. His primary submission was that the trial should continue, as recorded above. His alternative submission was that if the court should conclude that

the Defendant can no longer have a fair trial, the appropriate course would be that I discharge myself, thereby paving the way for a new trial before a different judge. This alternative course, it was submitted, would leave the indictment intact – whereas to accede to the remedy sought by the Defendant would entail staying the indictment.

X THE DISCLOSURE REGIME IN CRIMINAL TRIALS

[100] The prosecutor's disclosure obligations are contained, firstly, in the Criminal Procedure and Investigation Act 1996 ("*the 1996 Act*"). Section 2(4) defines "*material*" as "*material of all kinds and in particular … (information) and (b) objects of all descriptions*". The prosecutor has an initial duty to disclose, per Section 3 and a continuing duty of disclosure, per Section 7A. Notably, this latter duty endures to the stage of acquittal or conviction. Both the initial duty and the continuing duty relate to material –

> "*… which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*".

The prosecutor "**must**" disclose any material embraced by this description. By virtue of Section 23, the Code of Practice is designed to secure, *inter alia*, that all reasonable steps are taken for the purposes of every criminal investigation and all reasonable lines of enquiry are pursued; that information thereby obtained is recorded; that such records are retained; and that other materials are similarly retained.

[101] There is a clearly identifiable emphasis in the 1996 Act on the importance of *early and timeous disclosure* by the prosecution: see Sections 3-13 generally. As a general proposition, it is self-evident that disclosure may be of limited, or no, value to the defence if it is not made at a sufficiently early stage. This is reflected in the statutory regime. In summary, the scheme of the legislation entails primary disclosure, secondary disclosure, continuing disclosure and disclosure in compliance with any order of the court.

[102] The general scheme of the statutory Code of Practice is to impose specific and separate responsibilities on the investigator, the officer in charge of an investigation and the disclosure officer. The latter is defined as:

> "*The person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor*".

Paragraph 3.4 of the Code provides:

> *"In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide how many files on the computer it is reasonable to inquire into, and in what manner. "*

The basic duty to record information is framed in these terms:

> *"4.1 If material which may be relevant to the investigation consists of information which is not recorded in any form, the officer in charge of an investigation must ensure that it is recorded in a durable, retrievable or readable form (whether in writing, on video or audio tape, or on computer disk).*
>
> *4.2 Where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred as a true record to a durable and more easily-stored form before that happens."*

The duty to retain material is formulated thus:

> *"5.1 The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by him and is to be returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances …*
>
> *5,4A The duty to retain material where it may be relevant to the investigation also includes in particular the duty to retain material which may satisfy the test for prosecution disclosure in the Act, such as:*
> *- information provided by an accused person which indicates an explanation for the offence with which he has been charged;*
> *- any material casting doubt on the reliability of a confession;*
> *- any material casting doubt on the reliability of a prosecution witness. …*

5.6 All material which may be relevant to the investigation must be retained until a decision is taken whether to institute proceedings against a person for an offence.

5.7 If a criminal investigation results in proceedings being instituted, all material which may be relevant must be retained at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case."

[103] Section 6 of the Code of Practice regulates the interaction and relationship between the investigating police and the prosecutor. It is appropriate to highlight the first four provisions:

"6.1 The officer in charge of the investigation, the disclosure officer or an investigator may seek advice from the prosecutor about whether any particular item of material may be relevant to the investigation.

6.2 Material which may be relevant to an investigation, which has been retained in accordance with this code and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule.

6.3 Material which the disclosure officer does not believe is sensitive must be listed on a schedule of non-sensitive material. The schedule must include a statement that the disclosure officer does not believe the material is sensitive.

6.4 Any material which is believed to be sensitive must be either listed on a schedule of sensitive material or, in exceptional circumstances, revealed to the prosecutor separately. If there is no sensitive material, the disclosure officer must record this fact on a schedule of sensitive material."

The Code also regulates the circumstances in which a disclosure schedule must be prepared and the format of the schedule. All such schedules are to be provided to the prosecutor, per paragraph 7.1 and there must be appropriate certification by the disclosure officer, in accordance with paragraph 9.1.

[104] The primary legislation and the Code made thereunder are supplemented by the Attorney General's Guidelines, which are non-statutory in character. While these do not expressly extend to Northern Ireland, it is considered appropriate to have regard to them, as the 1996 Act applies in this jurisdiction: ***The Queen –v- McCrory***

and Others [2006] NIJB 219, paragraph [4]. The Guidelines enshrine a series of general precepts and principles, including these :

> *"12. Examples of disclosable material are material which casts doubt upon the accuracy of prosecution evidence, may point to another person, whether charged or not (including a co-accused) having involvement in the offence, may cast doubt upon the reliability of a confession, might go to the credibility of a prosecution witness, might support a defence raised by the defence or apparent from the prosecution papers, or which may affect the admissibility of prosecution evidence.*
>
> *13. Material not disclosable when viewed in isolation but several items together can have that effect…*
>
> *15. The trial process is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about further disclosure or further enquiries. It also helps in narrowing down the issues in dispute.*
>
> *16. A defence statement will be deemed to be given with the authority of the solicitor's client."*

Paragraphs 23-29 govern the duties of investigators and disclosure officers, paragraph 28 providing:

> *"28. Investigators must retain material that may be relevant to the investigation. If potentially relevant, is in fact incapable of impact, it need not be retained, although the investigator should err on the side of caution and seek the advice of the prosecutor as appropriate."*

XI GOVERNING PRINCIPLES

[105] The principles to be applied by the court in its determination of this application are well established. They are summarised, for example, in the recent decision of the Court of Appeal in ***Regina –v- McNally and McManus*** [2009] NICA 3, paragraphs [14] – [18]. I refer also to ***Regina –v- Murray and Others*** [2006] NICA 33, paragraphs [20] – [29] especially; ***Re Molloy's Application*** [1998] NI 78, per Carswell LCJ, p. 84f – 85f;

and ***Re DPP's Application*** [1999] NI 106, per Carswell LCJ, paragraphs [31] – [33] especially. The decisions in this series of cases are binding on me.

[106] I would highlight in particular what Carswell LCJ stated in ***Re Molloy*** at p. 85e/f:

> "*In our opinion these authorities lead to the conclusion that the resort by the prosecution to a procedure which does not have the effect of depriving the court of its statutory jurisdiction may nevertheless be regarded as an abuse of the process of the court* ***if, but only if, it operates to affect adversely the fairness of the trial****. It is necessary in every case to look at the circumstances of the case and it lies within the discretion of the court to decide whether the procedure operates against the interests of the Defendant to an extent which requires it to step in and stay the proceedings. Courts which are invited to exercise this power should also bear in mind the observation of Lord Griffiths in* ***Ex Parte Bennett*** *(at p. 63) that it is to be 'most sparingly exercised' and that of Viscount Dilhorne … that it should be exercised only 'in the most exceptional circumstances'*".

[Emphasis added].

In ***Re DPP's Application***, Carswell LCJ formulated three basic propositions, at paragraph [33]:

> "*1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons …*
> *2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.*
> *3. The element of possible prejudice may depend on the nature of the issues and the evidence against the Defendant. If it is a strong case and* ***a fortiori*** *if he has admitted the offences, there may be little or no prejudice …*".

[107] Most recently, in ***Regina –v- McNally and McManus***, the Court of Appeal stated:

> "[17] … *A judge should* ***never*** *grant a stay if there is some other means of mitigating the unfairness that would otherwise accrue. Where shortcomings in the investigation of a crime or in the presentation of a prosecution are identified which give rise to potential unfairness, the emphasis should be on a careful*

> *examination by the judge of the steps that might be taken in the context of the trial itself to ensure that unfairness to the Defendant is avoided …*
> [18] *It appears to us that this examination must be conducted at two levels. The first involves an inquiry into the individual defects in the prosecution case or the police investigation and the measures that might be taken to deal with each. The second entails the weighing of the impact of the various factors on a collective basis. It does not necessarily follow that, because some steps to mitigate each item of potential unfairness can be taken, the stay must be refused. A judgment can still be made that the overall level of unfairness that is likely to remain is of such significance that the proceedings should not be allowed to continue. It is to be remembered, of course, that* ***the judge must be persuaded of this proposition by the defence, albeit only on a balance of probabilities***".

[Emphasis added].

[108] The concept of fairness in the context of the modern criminal trial has been explained by Lord Steyn in ***Attorney General's Reference No. 3 of 1999*** [2001] 1 All ER 577, at p. 584, in a celebrated passage which bears repetition:

> "*The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests.* ***It involves taking into account the position of the accused, the victim and his or her family and the public.***"

[Emphasis added].

Moreover, fairness will always entail a contextualised evaluation, tailored to the specific features and circumstances of the individual trial. Equally, an evaluative judgment on the part of the trial judge is required. This judgment must be formed at the stage when a complaint of abuse of process is canvassed. Furthermore, given these considerations, there is obvious scope for differing opinions. This truism is noted in the commentary in the Criminal Law Review, following the digest of the decision in ***Regina –v- JAK*** [1992] CLR 30, at p. 31:

> "*Whether a fair trial is possible will depend on the circumstances of the particular case and it is also a question on which even experienced judges might sometimes form different opinions*".

[109] Finally, I take into account a passage from the judgment in ***Regina (Ebrahim) – v- Feltham Magistrates Court*** [2001] 1 WLR 1293 and [2001] EWHC (Admin) 130, paragraph [25]:

> "*(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the Defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*
> *(ii)* ***The trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded***".

[Emphasis added].

This passage was cited with approval by the Court of Appeal in ***McNally and McManus*** [*supra*], at paragraph [15], where it was described by the Lord Chief Justice as containing "*two important principles*".

Disclosure and Abuse of Process

[110] The court's jurisdiction to stay a prosecution on the ground of abuse of process is inherent in nature and, in my view, is in no way inhibited by the primary legislation, Code or Guidelines considered above. The impact of the disclosure regime in the realm of such applications has been the subject of previous judicial consideration. In ***Ebrahim*** (*supra*) there was an issue of destruction of videotape evidence. One of the Appellants was convicted of speeding in circumstances where the investigating police officers had destroyed a video recording of the relevant incident. In the second appeal, the Appellant was convicted of assault, in circumstances where a police officer had viewed a video recording and had satisfied himself that it contained nothing of relevance, with the result that the tape became obliterated in due course. The Appellant's complaints centred on the unavailability of the evidence in question, in the context of the obligations imposed on the police by the disclosure regime (*supra*). The Divisional Court decided that a complaint of this kind requires the court to undertake a two-stage enquiry:

> "*[16] When a complaint is made on an abuse application that relevant material is no longer available, the first stage of the court's inquiry will be to determine whether the*

> *prosecutors had been under any duty, pursuant to the 1997 code and the new guidelines, to obtain and/or retain the material of whose disappearance or destruction complaint is now made. If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other hand they were in breach of duty, then the court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse of process on that ground."*

There is a later passage of note in the Court's judgment:

> *"[27] It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence."*

In the speeding conviction case, the court concluded as follows:

> *"[53] Because we do not know why, despite the Staffordshire policy, the videotapes in the police car were reused, or what happened to the shift tape, if any, which ought to have been preserved for 12 months, and because the Crown Court appears to have been misled, it appears to us that the decision of that court cannot stand, and the case must be remitted for the appeal to be heard again by a differently composed court. The answers to the questions posed by the court are:*
>
> > *(i) In the light of the further evidence received in this court we do not know if a fair hearing took place or could take place. This must be a matter*

> *for a new court to decide in the light of the principles we have set out in this judgment.*
>
> *(ii) No. He was entitled to consider during the suspended enforcement period whether he wished to contest his liability in court, and the police were under a duty under the Code of Practice to retain the video tapes until after that period expired, at the very least."*

In the assault conviction case, the nub of the court's conclusion was that, with reference to the video recordings, the investigating police officer had acted reasonably in his investigations, thereby complying with the relevant legal duties : see paragraph [70].

[111] In ***R v Sadler*** [2002] EWCA. Crim 1722, the Appellant was convicted of wounding with intent to do grievous bodily harm arising out of events occurring at a nightclub. The abuse of process application arose because of the destruction by the police of certain exhibits, being a broken bottle neck found at the club, the Defendant's shoes and socks and the victim's clothing. The trial judge rejected an allegation that the police had been acting in bad faith. Keene LJ stated:

> *"[19] It is true that there are dicta in the authorities to the effect that, even in the absence of bad faith, serious failings on the part of the police or prosecution may make it unfair to try an accused person. While there may be instances of such, it will in our judgment be rare for such cases to arise where there has not been serious misbehaviour on the part of those bodies as indicated by Lord Justice Brooke in the **Ebrahim** case at paragraph 19. He there describes the category of abuse of process to which we are referring as one where "the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment." All of this envisages, normally, conduct involving some degree of deliberate manipulation of the pretrial process by the police or prosecution. Certainly the negligent failings of the police in the present case, thoroughly reprehensible though they were, fell far short of making it unfair to try this man.*
>
> *[20] That means that the question is whether what happened prejudiced the defendant in such a way that he could not receive a fair trial - what has been described in argument as the first potential basis for an abuse of process ruling: see*

> *R v Derby* ***Crown Court ex parte Brooks*** *80 Cr.App. R 164 and the well known* ***Attorney General's Reference No. 1 of 1990*** *[1992] QB 630. It is of course for the appellant to establish that such a situation exists."*

The overarching test applied by the court was whether, in consequence of the late disclosure which had occurred, any "*real prejudice*" had been suffered by the Appellant: see paragraph [21]. The court answered this question in the negative:

> "*Putting all these matters together and treating them, as one should, cumulatively under this heading of abuse of process, this court cannot see that this was a case where a fair trial was not possible. It is quite wrong for the police to destroy exhibits, as happened here. The history of the late delivery and disclosure of certain items is one of considerable ineptitude. But in our judgment the learned Recorder was right to conclude that there was here no abuse of process. We can find no fault with her ruling on that topic.*"

[112] There are two relevant decisions of the Canadian Supreme Court in this sphere. These were considered in ***Re Glenn's Application*** [2002] NIQB 61, where, referring to the first, ***R –v- Carosella*** [1997] 1 SCR 80, Weatherup J observed:

> *"However it is apparent from the majority judgment in* ***R v Carosella*** *that the central feature of the case was the deliberate destruction of evidence. The Supreme Court stated (para 56)– 'The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the court. It is this feature of the appeal in particular that distinguishes this case from lost evidence cases generally'".*

The learned judge continued:

> *"[20] The approach of the Canadian courts to lost evidence cases generally appears from* ***R v La*** *(1997) 2 SCR at 860. The defendant was charged with sexual assault of a thirteen-year-old girl. The complainant's conversations were taped in preparation*

> *for a secure treatment application and not for any criminal proceedings. The police misplaced the tape. The Supreme Court of Canada refused a stay of proceedings. The approach of the Supreme Court was that where the prosecution lose evidence that ought to have been disclosed there arose a duty to explain the loss. If the trial judge was satisfied that the evidence has not been destroyed or lost owing to unacceptable negligence the duty to disclose would not have been breached. However if the trial judge was not so satisfied the right to present full answer and defence would be impaired and Section 7 of the Charter would have been breached. Further the loss of evidence may also amount to an abuse of process where there was deliberate destruction of material or other serious breach of the duty to preserve evidence and "in some cases an unacceptable degree of negligence conduct may suffice". In addition there may be "extraordinary circumstances" where the loss of a document may be so prejudicial that it would impair the right of an accused to receive a fair trial."*

[113] In ***R –v- Haddock and Others*** [2005] NICC 15, the essence of one of the Defendant's abuse of process application and the ground on which it succeeded are encapsulated in the following passage of the judgment of Hart J:

> *"[18] Not only am I satisfied that this was a serious fault on the part of the police, I am also satisfied that the absence of the tape seriously prejudices his ability to defend himself. Whilst he can still point to the evidence that he conducted a transaction that afternoon, he cannot now obtain evidence that would have established exactly when he was there. I am therefore satisfied that the defendant Millar has discharged the burden placed upon him of showing that "he will suffer serious prejudice to the extent that no fair trial can be held", in the words of Lord Lane CJ in* ***A G's Reference (No 1 of 1990)****. I consider that it would be an abuse of process to allow the prosecution against him to continue in those circumstances and I order that the charges be stayed against Millar."*

The decision of the European Court of Human Rights in ***Sofri –v- Italy*** [Application No. 37235/97, 27th May 2003] suggests that Article 6 ECHR adds little of substance to a Defendant's common law right to a fair trial in this field, while highlighting also the intensely fact-sensitive nature of this kind of complaint. While the Applicants complained about the unavailability and destruction of certain items of physical evidence, in the context of a murder trial, their application failed, as they were unable

to establish the relevance of an item of missing clothing, had access to forensic reports and photographs of certain articles compiled contemporaneously, were able to conduct computer analysis of the photographs and were uninhibited in their ability to challenge the main prosecution evidence. The Court, through the equality of arms prism, reasoned that both prosecution and defence were similarly afflicted by the unavailable evidence.

XII CONCLUSION AND FINAL RULING

[114] The centrepiece of this application is a complaint of unfair trial. I consider that where the court is invited to exercise its jurisdiction to stay a prosecution on this ground, it is essential to identify unfairness of a specific, concrete variety. Vague or speculative assertions of unfairness to the Defendant will not suffice. This is the clear theme of a recent pronouncement of some substance by the Northern Ireland Court of Appeal in ***R –v- Fulton*** [2009] NICA 39, where Girvan LJ stated:

> *"[56] Having regard to the fact that a stay for abuse of process must be fully exceptional and relate to some fundamental disregard of the rights of the defendant or some disregard of elementary principles of fairness properly established by the defendant, and having regard to the law's strong preference to allow a trial to proceed if a remedy short of a stay is just and proportionate, it is not surprising that the trial judge was extremely reluctant to grant a stay which would have had the effect of bringing the entirety of the proceedings to a conclusion, even in relation to the counts on which there was clear evidence of guilt apart from any surveillance evidence. The gravamen of the appellant's argument is that because the court concluded that the evidence of the police witnesses should be excluded from consideration on behalf of the Crown the court could repose no confidence in the integrity of the disclosure system in the trial and thus the defendant ran the risk of unfairness in the trial process. As* ***R v Martin*** *makes clear it is necessary for this court to stand back and review the safety of the appellant's convictions and consider whether in the light of the conduct of the whole trial the appellant has shown that the trial process was an abuse of process in fact. A theoretical possibility that the prosecution may have withheld some disclosable material which might possibly have assisted the appellant to defend the charges would be insufficient to show that the trial process was an abuse of process if on the evidence adduced proof of guilt was established beyond reasonable doubt."*

[115] A discrete aspect of every Defendant's right to a fair trial is a right to timeous disclosure by the prosecution. The fundamental purpose of this right is obvious: it enables fully informed decisions to be made *in advance of the trial* about the preparation and conduct of the defence. An important secondary purpose is to promote the expeditious and efficient running and disposal of the trial. In the recent decision of the Supreme Court in ***Allison –v- Her Majesty's Advocate*** [2010] UKSC 6, Lord Hope, having referred to various formulations of "*the golden rule*" stated:

> "*[28] These formulations should however be regarded as expressing what has been described as the golden rule in shorthand. After all,* ***they are describing a decision about disclosure which must normally be taken before the trial.*** *It is a decision which will be based on an assumption as to what may happen in the future. So the question the Crown must ask itself is what the possible effect would be likely to be if the material were to be disclosed. …*
>
> *It would be contrary to the principle of fairness for the prosecution to withhold from the Defendant material which* ***might*** *undermine their case against him or which* ***might*** *assist his defence".*

[My emphasis].

In the present case there are unambiguously acknowledged breaches of the prosecution's duty of disclosure. I remind myself of the importance of not simply viewing these in the abstract, rather assessing their impact on the fairness of the Defendant's trial. As Lord Hope recalled in ***McInnes –v- Her Majesty's Advocate*** [2010] UKSC 7:

> "*[19] Two questions arise in a case of this kind to which a test must be applied. The tests in each case are different and they must be considered and applied separately. The first question is whether the material which has been withheld from the Defence was material which ought to have been disclosed …*
>
> *The Lord Advocate's failure to disclose material that satisfies this test is incompatible with the accused's Article 6 Convention rights …*
>
> *[20] The second question is directed to the consequences of the violation …*

> *As Lord Bingham of Cornhill put it in paragraph 17* [of **Spiers –v- Ruddy** [2009] SC (PC) 1] *the Lord Advocate does not act incompatibly with a person's Convention right by continuing to prosecute after the breach has occurred.* ***A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed.***"

[Emphasis added].

[116] The proposition that neither non-disclosure nor late-disclosure by the prosecution *ipso facto* renders an accused person's trial unfair is, in my view, unassailable. It is necessary for the court to evaluate the consequences of such defaults in every case. In the context of the present trial, this entails the formation of an evaluative and predictive judgment. I describe this assessment as "evaluative" because it behoves the court to form an overall opinion, based on its intimate acquaintanceship with the prosecution of the Defendant and the course of the trial to date. The assessment is also correctly described as "predictive", in circumstances where the trial is incomplete. The defence case has begun (pursuant to my earlier ruling) and, at this juncture, incomplete evidence has been given by the defence expert, Professor Krane. The thrust of this evidence is to challenge the reliability of Mr. Craig's testimony about the DNA sampling and testing.

[117] Properly analysed, it seems to me that the defence submissions have three elements. The first consists of a demonstrated failure by the prosecution, characterised as one of grave proportions, to fulfil its disclosure obligations timeously. The second is a contention that the late emerging materials (irrespective of their provenance) cannot be fully and efficaciously deployed on behalf of the Defendant at this stage of the trial and have adversely affected pre-trial preparations and enquiries. The third is a suggestion that the court cannot be satisfied, even now, that the prosecution has discharged its disclosure obligations. Bearing in mind the governing principles (*supra*), these three elements interlock to give rise to a central submission that the Defendant's right to a fair trial has been irredeemably prejudiced and can be vindicated only by the remedy of a stay.

[118] I consider that there are three overarching principles to be applied. The first is that an order of the court staying any indictment is an exceptional remedy of last resort. The second is that this remedy is appropriate only where the court concludes that it is no longer possible for the Defendant to have a fair trial. The third is that in the majority of cases the trial process has the capacity to absorb and accommodate the complaints upon which abuse of process is asserted. At this stage of the trial, much of the argument has focussed on this latter consideration.

[119] In my final determination of this application, I take into account the following factors in particular:

(a) The net result of the initial late disclosure by the prosecution was that BC and LD were not initially cross-examined about two discrete factual matters, each of undeniable importance, at the normal stage of the trial.

(b) Following the court's ruling [MCCL7903] BC and LD were cross-examined further about the aforementioned matters as fully as the Defendant's legal representatives deemed appropriate, but outwith the normal sequence.

(c) The scheme of the 1996 Act is that late disclosure, even at an advanced stage of a criminal trial, is a possibility. The model established by the legislature clearly envisages this, particularly by virtue of the continuing nature of the duty imposed on the prosecution.

(d) However, late disclosure has occurred in this trial on a scale and in a manner which is probably (and hopefully) unprecedented.

(e) There is no convincing challenge to the contentions advanced by Mr. Berry QC and Mr. Devine that, in the wake of the latest further disclosure, there may exist other potentially new materials not yet provided; the court may have to entertain applications for disclosure orders; the two key prosecution witnesses – BC and LD – and a significant number of others would have been questioned about additional matters if there had been timeous disclosure; much of the latest disclosed material sounds on the crucial issue of the initial accounts and descriptions provided by BC and LD in the aftermath of the events; potentially important new witnesses have been identified for the first time; the defence has been conducted on the basis of *inter alia*, a tactical decision which entailed the conscious non-pursuit of two inter-related "lines" of questioning which would undoubtedly have been informed by the latest disclosed materials; and, finally, timeous disclosure would have stimulated further pre-trial steps and enquiries.

[120] As is clear from Chapters II and III above, visual and voice identification is a central plank of the prosecution case. The cogency and reliability of the evidence of BC and LD is crucial in this respect. It is clear that the new disclosure sounds on this pivotal issue. The importance of the newly disclosed materials is beyond dispute. If disclosed timeously, they would, in my view, undoubtedly have influenced pre-trial enquiries and preparations, strategic decisions about the conduct of the trial and the substance, tone and orientation of the cross-examination of the two main witnesses in particular, BC and LD. Each of these witnesses has already had two separate

opportunities to deal with questions relating to asserted discrepancies and inconsistencies in their accounts. The enjoyment of a third opportunity of this kind would probably be unprecedented. I am satisfied that the mechanism of recalling, for a second time, BC and LD, together with, potentially, a substantial number of other witnesses will not operate to cure this unfairness. The size of the Pandora's Box which has been opened is simply too great and it has the potential to swell further. Enough is enough and a line must now be drawn. In my opinion, the series of inter-related and persuasive submissions advanced on behalf of the Defendant tip the balance in favour of the conclusion that, as a direct consequence of the late disclosure to the Defendant of a substantial quantity of materials of undisputed significance and the fragmented sequence in which such disclosure has occurred in the course of the trial, the Defendant's right to a fair trial has been irredeemably impaired. Furthermore, from the unique vantage point of trial judge, my instinct is strongly against permitting this trial to continue. Having watched a lengthy series of inter-related events unfold, I am left with a series of lurking doubts and concerns about the fairness of the Defendant's trial.

[121] Finally, I take into account the probable future vista which a dismissal of this application would generate. I envisage that the trial would stagger on, punctuated by a series of interruptions and delays (some to accommodate the defence), contested disclosure applications, possible hearsay and other applications and further applications of the present variety, coupled with the recall of many witnesses for further cross-examination*, in circumstances where the prosecution case closed some weeks ago*.. Bearing in mind the history of this trial, this would plainly be inimical to the various interests in play, in particular the Defendant's right to trial within a reasonable time.

[122] I consider that what is required of the court where an application of this kind is made is a dispassionate, panoramic and evaluative judgment which takes into account the supreme importance of the Defendant's rights in the matter of disclosure and reflects a rigorous examination of all the letters and other materials brought to the court's attention, applying the overarching touchstone of the fairness of the trial. Having conducted this exercise and taking all of the above-mentioned factors into account, I conclude that the Defendant's present trial can no longer be considered fair.

XIII <u>DISPOSAL</u>

[123] The prosecution, while opposing the application for a stay, have invited me to consider discharging myself as trial judge, as an alternative to ordering a stay of the indictment. This invitation demands careful consideration, since the consequences flowing from a stay (on the one hand) and discharge of the trial judge or jury (on the other) seem to me significantly different. As a well established general rule, where a jury (and, by parity of reasoning, a judge alone) is discharged a fresh trial follows: see

Archbold, paragraph 4-262 and Valentine, Criminal Procedure in Northern Ireland (2nd Edition), paragraph 9.18. In this context, Section 5(2) of the Justice and Security (Northern Ireland) Act 2007 provides:

> "*Where a trial is conducted without a jury under this Section, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial had been conducted with a jury …* ".

The discharge of the tribunal of fact normally occurs only where some contaminating factor has intervened and the "high degree of need" test is satisfied. In the language of the English Court of Appeal:

> "*[65] … the test is always the same, whether to continue with trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction:*"

See ***R –v- Lawson*** [2007] 1Cr. App. R 20. It appears to me that this is the correct test irrespective of the nature of the contaminating factor. I also refer to the recent judgment in ***R v Jones*** [McCl7936].

[124] From my review of the authorities above, it seems to me that where a successful application for a stay of the indictment is grounded on non-disclosure and/or belated disclosure, a stay will normally be the appropriate remedy. I am conscious that a stay does not constitute an acquittal (see ***R –v- Griffiths*** [1981] 72 Cr. App. R307) and, further, this is *not* a situation where a verdict of not guilty is to be directed. Where a prosecution is stayed, it appears that it can conceivably be revived with the permission of the court, as noted in Choo, Abuse of Process and Judicial Stays of Criminal Proceedings (2nd Edition), p. 9. In this respect, there are parallels with a stay in civil proceedings. In both cases, it appears possible for the court to remove the stay upon subsequent application: see ***R –v- H*** [2006] NICC 5. It is not difficult to understand, in the abstract, why, giving effect to the "triangulation of interests" engaged in every criminal trial, an order staying an indictment can *in principle* be revisited at a later date (see Valentine, paragraph 10.45). A conclusion by the court that a Defendant's trial is, or is likely to be, unfair, thereby impelling to a stay of the indictment, does not *ipso facto* give rise to the proposition that any subsequent trial would also be unfair. Any forecast of this kind seems to me of questionable propriety particularly where, as here, the matrix continues to fluctuate. At this juncture, I do not venture beyond these general observations. Further consideration of this discrete issue, trespassing as it would into unpredictable and imponderable future events, potentially belonging to the domain of another tribunal, is plainly inappropriate.

[125] Properly analysed, if I were to accede to the prosecution's invitation this would entail dismissing the defence application for a stay and discharging myself. I am disinclined to embrace this alternative course mainly because I am of the opinion that there is absent from the present trial matrix the kind of irregularity or contaminant which normally warrants this step. There has been no inappropriate admission of prejudicial material or any comparable infecting factor. Rather, in simple terms, this is a case of extremely late and highly significant disclosure, with consequential marked prejudice to the defence. In my view, recusal is not appropriate in the circumstances prevailing. It is well settled that a stay of the indictment is an appropriate remedy where failures by the prosecution to properly and timeously discharge their disclosure duties give rise to the conclusion that the fairness of the Defendant's trial has been incurably jeopardised. This is the conclusion that I reach in the present case and I order, therefore, that the indictment be stayed.

Postscript

[126] BC and LD, the injured parties, suffered an appalling ordeal. In the case of BC, there were injuries with a real and permanent legacy. In co-operating actively with the police and the PPS and in testifying at this trial, BC and LD have displayed notable fortitude and courage and, further, have epitomised the public spirited and responsible citizen. Both are to be highly commended accordingly.

[127] As this trial has reached such an advanced stage, I consider it appropriate to add the following. Bearing in mind the special *corpus* of principles engaged where the prosecution case depends in whole or in part in voice recognition and/or visual identification evidence (rehearsed in my earlier ruling following the close of the prosecution case, McCL7955) and having anxiously and repeatedly reviewed all the evidence adduced, including the recordings of the injured parties' examination-in-chief, I would not have been satisfied beyond reasonable doubt about the Defendant's guilt on the basis of this evidence alone. While I found both BC and LD to be truthful witnesses, I consider that the exacting threshold in play would not have been overcome. Thus the court's resolution of the contest between Mr. Craig (for the prosecution) and Professor Krane (on behalf of the Defendant) in relation to the DNA evidence would have assumed critical importance. Furthermore, if the Defendant had chosen to testify, his evidence would also have been of manifest importance. Given the extreme lateness of the most recent disclosure developments, one simply does not know, of course, whether it would have been feasible for further evidence to be adduced on the Defendant's behalf from any of the several newly discovered witnesses all of whom were, on paper, potentially of substantial significance. While this ruling does not acquit the Defendant or otherwise proclaim his innocence, these further observations serve to illuminate the context in which it is made.

[128] Finally, the handling of disclosure throughout the history of this prosecution and trial is to be lamented and must be strongly deprecated. It reflects poorly and adversely on the police officers concerned and the police organisation as a whole. It has been the cause of enormous disruption and delay in the transaction of this trial, coupled with associated increased cost to the public purse in an era of acute economic stringency. The failures which have occurred are of some gravity and it is to be expected that the Chief Constable will ensure that their origins and causes are scrupulously investigated, with a view to correcting any weaknesses, cultural or endemic or otherwise, in the police system so as to ensure that there will be no comparable recurrence. I would further expect that the PPS can make a valuable contribution to any such exercise. For the avoidance of any doubt, I find no substance in the suggestion tentatively ventilated by the defence that bad faith has contaminated the disclosure process in this prosecution. On the basis of the information available to the court, it seems altogether more likely that the root causes are linked to considerations of skills, competence, training and systems.