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Judgment: approved by the Court for handing down | *Delivered:* **19/03/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

_____

THE QUEEN

–v-

MICHAEL PATRICK CLARKE and STEPHEN PAUL McSTRAVICK

_____

McCLOSKEY J

I INTRODUCTION

[1] The Defendants are jointly charged with the six offences specified in the Bill of Indictment. These consist of one count of robbery, three counts of false imprisonment and two counts of kidnapping. Collectively, the alleged offences disclose a *soi-disant* "tiger kidnapping" scenario. In a reserved judgment delivered on 1st February 2010, following the discharge of the jury, I ruled that, in the exercise of the power contained in Section 46(3) of the Criminal Justice Act 2003 ("*the 2003 Act*"), this trial should continue before me alone. Permission to appeal against this ruling was granted. On 12th February 2010, the Court of Appeal dismissed the appeal. Subsequently, permission to appeal to the Supreme Court was refused. Following some delay, brought about by reasons upon which I need not dilate, the trial resumed and was eventually completed on 12th March 2010.

II THE INDICTMENT

[2] The Defendants are jointly charged with six offences, all alleged to have occurred on 28th May 2008.

> **First Charge**: It is alleged that both Defendants robbed Brinks Ireland Limited of £85,000 in cash on 28th May 2008 at Duncrue Road, Belfast.
>
> **Second Charge**: It is alleged that both Defendants falsely imprisoned **JL** on 28th May 2008 at the 'L' family home in County Down.

Third Charge: It is alleged that both Defendants kidnapped **EL** on 28th May 2008 at the same location.

Fourth Charge: It is alleged that both Defendants kidnapped **ML** on 28th May 2008 at the same location.

Fifth Charge: It is alleged that both Defendants falsely imprisoned **EL** on 28th May 2008 at a house on the Ravenhill Road, Belfast.

Sixth Charge: It is alleged that both Defendants falsely imprisoned **ML** on 28th May 2008 at a house on the Ravenhill Road, Belfast.

[3] It is alleged by the prosecution that these offences were committed at three separate locations, in the following sequence:

(a) The 'L' family home in County Down.

(b) A house on the Ravenhill Road, Belfast.

(c) Premises at Duncrue Road, Belfast.

As portrayed by the prosecution, these are interlinked locations, where certain inter-related events occurred. In brief summary, in framing their case against both Defendants, it is asserted by the prosecution that the entire operation was the work of a well organized gang, of which the Defendants were members. It is said that the Defendants participated in a **joint enterprise**. It is alleged that both Defendants committed all six charges in pursuance of the central plan and purpose of this criminal gang, whose other members are not before the court, which was to rob Brinks Ireland of a large sum of money.

III THE EVIDENCE

[4] What follows in this section of the judgment is a *summary* of the evidence adduced by the prosecution. The text of paragraphs [7] – [40] was distributed to all counsel prior to the formulation of the parties' final written submissions. This résumé of the evidence had been prepared for the purpose of charging the jury. Following the discharge of the jury and the ensuing decision under Section 46 of the 2003 Act, I determined to take this step mainly because in the no-jury environment which had materialised there would not be an opportunity to submit requisitions to me, thereby enabling material omissions or errors to be corrected. Following distribution of the text, as aforesaid, the written submissions of the parties were prepared and a final hearing was convened for the purpose of closing arguments. At this stage, the parties acknowledged that paragraphs [7] – [40] (*infra*) were accepted as an adequate and accurate digest of the evidence adduced at the trial.

[5] The evidence presented by the prosecution to the jury had a series of components, which belonged to particular events and phases. There was also scientific evidence and evidence of how both Defendants responded during interviews by the police, after they had been arrested and cautioned. Furthermore, the evidence included a substantial quantity of visual and auditory aids – photographs, maps/plans, CCTV recordings and video recordings and in particular:

(a) **Exhibit No. 36**: A map depicting the route from the 'L' family home through parts of County Down to the greater Belfast area.

(b) **Exhibit No. 53**: A map of a town/area in County Down – including the home of the second Defendant.

(c) **Exhibits Nos. 20 and 37**: A mapping overview of various materials locations throughout the greater Belfast area.

(d) **Exhibits Nos. 23 and 40**: One of the very large maps – depicting, *inter alia*, a total of eighteen Spar retail outlets; a house on the Ravenhill Road, Belfast; and the Anchor Lodge Filling Station and Spar on the Ravenhill Road.

(e) **Exhibit No. 38**: Depicts various relevant locations on the Ravenhill Road.

(f) **Exhibit No. 35**: Depicts the house on the Ravenhill Road.

(g) **Exhibit No. 39**: Depicts the Portside Bar and certain adjoining buildings on the Duncrue Road, Belfast proximate to its location with the Dargan Road – to include the car park area to the rear, incorporating details of refuse bins and a salt bin.

(h) **Exhibit No.** 1: The 'L' household in Co. Down.

(i) **Exhibits Nos. 4 and 5**: The house on the Ravenhill Road, Belfast.

(j) **Exhibits Nos. 13 and 16**: "Video stills" of certain events and images at the Anchor Lodge Filling Station and Spar, Ravenhill Road, Belfast on 28th May 2008.

(k) **Exhibits Nos. 8 and 10**: The burned out white Renault Traffic Van [location - Iris Close, in West Belfast].

(l) **Exhibit No. 6**: The burned out red Volkswagen Golf [location - Ben Eden Green, in North Belfast, not very far from the Duncrue Road location mentioned above].

(m) **Exhibit No. 15**: The silver Vauxhall Astra vehicle.

(n) **Exhibit CA1:** The checkout/till receipt from the Anchor Lodge Spar BP Filling Station (see paragraph [12] *infra*).

(o) **Exhibit CA6:** A photographic compilation of certain events at the aforementioned retail premises on 28th May 2008 (see paragraph [36] *infra*).

[6] I would preface the résumé of the evidence which follows with the explanatory observation that, in the events which occurred, the entirety of the evidence (with the exception of some limited documentary materials presented on behalf of the Defendants) was adduced prior to the discharge of the jury and the subsequent completion of the trial before me, as judge alone. Following the unsuccessful appellate challenge to the order under Section 46 of the 2003 Act, both Defendants declined to give evidence and no witnesses were called on their behalf.

Evidence of the Victims – JL

[7] JL has been employed by Brinks Ireland for around three years. This is a major security firm, engaged in the safe keeping and transfer of cash for commercial entities. At the material time, his partner was **EL** (she is now his wife) and their son is **ML**, then aged four years. JL worked as an ATM Team Leader. On the evening of 27th May 2008, he secured all doors and windows of the family home in Co. Down. At around 2.10am, the dog awakened JL. He saw five figures at the bedroom door. There was a general commotion and he was in a state of complete panic. The five figures were wearing balaclavas, covering their faces except for eyes and mouths.

[8] The witness described as "the boss" a person of small build, very authoritative and aggressive. Next, there was a younger captor, who was "cheeky". There was a lot of shouting and aggression. JL was in fear of everyone's lives. The "cheeky" one produced a sawn-off shotgun, raising this in a striking position. EL and ML were removed from the bedroom. A pillowcase was placed over JL's face/head. He was questioned about various matters, - including ATMs, ATM runs, routines, procedures and personnel. He protested that he had nothing to do with any of these matters in his duties. They accused him of lying. They said they had been in the family home on previous occasions. The "boss" grabbed JL by the neck, slapped him on the head and pressed the sawn-off shotgun into his head. JL mentioned "KM", while the captors spoke of "Stevie" a vault supervisor. The blows were slaps with the open palm to JL's head. A pistol was put to his head at one point. JL said he would be attending a meeting at work the following morning, when KM would be carrying out ATM van duties. The "cheeky" captor said that they would take photographs of JL. The "boss" retorted "*No he's getting a bullet*". JL heard the pistol being cocked. A round of ammunition was handed to him. The captors said there were two other rounds – for EL and ML. JL was instructed to tell KM about getting the money. Then EL and ML were taken from the home.

Afterwards, JL overheard mobile telephone conversations – "*Yes boss… no boss … we have arrived …*" etc.

[9] JL got dressed. His instructions were to speak to one person only – KM and to show him the bullet if necessary. KM was to drive the ATM van, with the money in black bags and reverse the van to a yellow salt box positioned at the rear of the Portside Inn, placing the bags inside. No one was to see him doing this. The instructions to him were very exact and constantly repeated. The captor's instructions did not specify any precise sum of money. They said that JL's family would be released. There would be telephonic communication. On leaving his house, the captors accompanying him were the "boss" and the "nervous" individual, who had a weapon. JL believed that there were two handguns and one sawn-off shotgun. He observed that the rear patio door had been prised open. The captors used an abrasive cleaning agent to clean the bedroom light switch. On leaving his house, JL observed a parked white van. He drove to work in his car. He was unsure whether he was followed. He was the first employee to arrive at work that morning. Stephen Pollock, a vault supervisor, arrived and JL explained everything to him. JL remained in the managing director's office the whole day, until around 7.00pm. He suffered some redness of his neck and psychiatric injuries. The Brinks premises and the Portside Inn premises are both located on Duncrue Street, on different sides of the road, separated by a distance of 100 yards.

EL

[10] This witness recounted events at the family home in Co. Down during the early hours of 28th May 2008, in similar terms. She observed a sawn-off shotgun and two handguns. The "cheeky" captor was ranting and raving. Her husband was very upset and afraid. The witness was in a state of shock. She was allowed to take their son into another bedroom, where they were supervised by an armed masked man. The "line" consistently taken was that if JL played the game no one would get hurt. This witness equipped herself with warm clothes, toys, toilet tissue and food. The "boss" was wearing cream/green gardening gloves. All of the captors were wearing balaclavas.

[11] This witness and her four-year-old son were escorted outside, to a white Renault Transit van. They brought JL's prepared packed lunch with them. They were placed inside the rear of the vehicle and told to lie on the duvet they had brought. The registration number, according to her recollection, was "REZ …1…7". Dawn was breaking. There were two captors in the front of the vehicle and one with them in the rear. They changed drivers twice en route to their destination. In the rear, they were unrestrained. The vehicle was driven erratically. They reached their destination and were brought into an unknown house. They had a cool bag, a duvet and pillows. They were escorted to a cold upstairs bedroom which had wooden flooring. Then they moved to a more comfortable room which had a carpet and curtains, at the rear of the premises. The curtains remained closed throughout the day. The captors remained outside this room, on the landing. There were several

mobile phone conversations. In the bathroom the witness saw blue "Regal" cigarettes and a Nokia mobile phone.

[12] ML became hungry, but declined to eat the sandwich which they had brought with them. EL requested the captors to get ML a plain ham sandwich. One of the captors departed. He returned with a Spar plastic bag, containing:

(a) A "Spar Just Ham" sandwich, price £2.49.

(b) A carton of "Suki" orange.

(c) A hexagonal tube of "Smarties".

(These items are identifiable in **Exhibit CA1,** which is the checkout/till receipt of the Anchor Lodge Spar BP Filling Station, Ravenhill Road, generated at 11.50am, 28th May 2008). ML ate everything, except the crisps (which apparently formed part of JL's packed lunch). EL was instructed to put all of the wrappings back into the bag, which she then returned to the landing, where it was seized by a captor. Later that day, she realised that they were on their own. She described how she and ML then escaped from the house, unchallenged.

[13] Elaborating, EL explained that at their home most of her dealings had been with the stocky captor, followed by the cheeky member of the gang. Whilst in her son's bedroom, she became aware that one of the captors possessed an English accent. The captors who remained with them throughout the day were neither the stocky one nor the person with an English accent. Their identities remained concealed by black woollen masks. The only freedom of movement enjoyed by the captives was use of an upstairs bathroom.

The Rescue of the Captives

[14] Evidence was given by Constable Russell about the police encounter with the captives in the vehicle of one Mrs. McIlhill, who had encountered them in a distressed state on the Ravenhill Road. EL stated that two of the males spoke with Liverpool accents, while the captor apparently in charge had a broad Belfast accent. She was speaking generally about events that day. She said this spontaneously. Another police officer (Constable Glendinning) described EL as "*visibly upset and shaken*". She was escorted by police along the Ravenhill Road, where she identified the house where they had been held captive. This was a detached house on the Ravenhill Road, exhibiting a UPS "To Let" sign, advertising a six month rental.

The White Renault Van

[15] The white Renault Traffic van was reported stolen by its owner to the police on 26th May 2008. After the events in question, it was recovered at a location at Iris Close, in West Belfast, having suffered extensive fire damage. The registration

number displayed was false. EL identified this as the vehicle in which she and ML had been transported from their home in Co. Down to a house on the Ravenhill Road, Belfast.

The Red Volkswagen Golf Vehicle

[16] This vehicle was discovered at Ben Eden Green, Belfast at around 6.00pm on 28th May 2008, where it was on fire. The evidence was that, normally, stolen vehicles are set on fire at the location where they are abandoned.

Search of the McStravick home, Downpatrick

[17] This is the home of the Defendant Stephen McStravick, where he resides with his wife and their children. The search of their home began at 9.25am on 31st May 2008 and lasted almost five hours. Various items/articles were seized during the search – mobile phones and a sim card, together with certain items found in a wheelie bin at the rear **[exhibit JH6].** These were contained inside a standard shopping bag which was tied with a double knot. The bag was close to the top of the bin, which was full of rubbish. Situated directly below this plastic bag, inside the wheelie bin, was an empty packet of Pampers Baby Wipes [**exhibit DB7**]. Inside the premises, the following items were recovered:

(a) A pair of green/yellow gardening gloves, in a clear plastic bag.

(b) One opened box of blue vinyl powdered gloves.

(c) A DVA Application Form – re vehicle registration number KJ05HNY [**exhibit DB5**].

(d) A green coloured male jacket, with one used "wipe" in the right pocket.

Events at the Anchor Lodge Spar/BP Filling Station

[18] These premises are situated at No. 318 Ravenhill Road, Belfast, in reasonably close proximity to where EL and ML were held captive. Evidence was given by Ms Ballantine, who is employed there as a checkout operator. This witness, in giving evidence, observed the CCTV compilation. When first interviewed by the police, she had a specific recollection of the sale of the "Pampers" item, on account of its price. She recalled that, at the checkout, she had informed the purchaser of the availability of a better sale offer – the purchaser retorting that it didn't matter, these were designed for his mate to use in cleaning the car.

[19] Evidence was also given about the till receipt [**exhibit CA1**]. This is dated 28/05/08 and timed 11.50 hours, identifying Ms Ballantine as the vendor. The contents were as follows:

(a) One pack of "Pampers" travel wipes [24].

(b) A "Spar Just Ham" sandwich.

(c) A carton of Dale Farm "Suki" orange.

(d) One "Smarties" hexatube.

(e) One 10 pack of "Regal" filter cigarettes.

[See **Exhibit CA1**].

This evidence may be considered in conjunction with the CCTV compilation **and** the associated CCTV photographic stills [**Exhibits 13 and 16].**

[20] The CCTV compilation was based on the recordings of four different security cameras:

(a) Camera No. 3 – garage forecourt, 11.54am – 11.57am.

(b) Camera No. 1 – shop entrance, 11.55am – 11.57am.

(c) Camera No. 6 - the dairy products aisle, 11.55am.

(d) Camera No. 7 - the checkout/till area, 11.55am – 11.58am.

In May 2008, the opening hours of the premises were 6.00am – 12 midnight. The premises are equipped with around 21 CCTV security cameras. Outside, there are eight "rows" (or aisles) for vehicles to park for "refuelling" purposes. The CCTV compilation depicts the second row away from the building.

The Spar "Family" of Retail Outlets and South and East Belfast

[21] This aspect of the prosecution case was presented to the jury through the medium of some twenty-two witness statements, which were read. The series of individual "Spar" retail premises which this evidence encompassed is depicted in **Exhibits 23 and 40,** encompassing 18 retail outlets in total, all situated, in general terms, in the areas of South and East Belfast. All of this evidence had a certain orientation, or thrust. It was designed to establish the unique characteristics of the sale/purchase transaction at the Anchor Lodge Spar/BP retail establishment shortly prior to midday on 28th May 2008 [**Exhibit 11/CA1**]. This included the evidence of Mr. Nickels, a retail technology support manager employed by the Henderson

Group. This chapter of the prosecution evidence is encapsulated in the following extract from his witness statement:

> "*Overall based on my searches of the data for all the* [other] *stores … I cannot find a transaction where all five items for a transaction of three involving the Spar Just Ham Sandwich, Suki orange juice and hexatube of Smarties were purchased together in a single transaction apart from …* [the transaction] *on 28th May 2008 at 11.50 hours at the Spar Store at 318 Ravenhill Road, Belfast.*"

The Pampers 24 Pack

[22] The evidence under this heading included the witness statement of Mr. Abraham:

> "*I can confirm that the Anchor Lodge Service Station at 318 Ravenhill Road, Belfast received …* [deliveries of the Pampers packs] *… on 30th April and 14th May 2008 …*
>
> *Nowhere in Downpatrick Town received the* [same product]*…*"

A further batch of witness statements was read to the court, to the effect that this particular product was not available for sale in various retail outlets, including certain filling stations, in Downpatrick. Dr. Gillian Marsh gave evidence about the manufacture of this product. It is exclusive to the manufacturer "Proctor & Gamble". The empty "Pampers" packaging, and the bar code [see **Exhibit DB7**]: are traceable to production in Germany in January 2008, with a shelf life until July 2010. The relevant consignment was shipped to the northwest of England on 17th April 2008, arriving on 21st April, followed by a further shipment to Hendersons, Mallusk, County Antrim on 24th April. Hendersons would be considered a wholesale distributor.

Mr. McStravick's Movements on 27th and 28th May 2008

[23] Evidence was given by **Laura Carter,** a female companion of this Defendant. Mr. McStravick visited Ms Carter at her home in Downpatrick between 11.30pm and 3.30/3.40am approximately on 27th/28th May 2008. Evidence was also given by **Eamon McCullough** who lives in West Belfast. Mr. McStravick visited him from around 11.30am until "*after about*" 3.00pm. This occurred some time between 27th and 29th May 2008. He admitted that his memory of this was rather vague. This was not a memorable occasion for him. He could not really remember whether Mr. McStravick had left the house to go and purchase chips.

[24] This was followed by the evidence of Lorraine McMenamin, who lives at the same address as the last-mentioned witness. This lady was equally vague in matters of detail. She purported to recall Mr. McStravick's visit to the house, but not the date. According to her, the visit began around lunchtime/early afternoon,

continuing until some unspecified time later. She cleaned up in the kitchen after him – a plastic bag and some cups. He was a regular visitor there. His nickname is "Beano". Finally, there was evidence from Mr. **McMenamin,** a building contractor who is a former employer/acquaintance of Mr. McStravick. He testified that Mr. McStravick worked for him from time to time – the last occasion being prior to Christmas 2007. He further testified that in his business, the workers use latex gloves all the time for health and safety reasons, to avert dermatitis. The gloves are supplied in boxes. These can be found in the vehicles of employees.

Forensic/Scientific Evidence

[25] This particular species of evidence was presented by Mr. Logan, forensic scientist. The tools available to him were:

(a) The empty "Pampers" packaging [**DB7**].

(b) The tied plastic bag containing various plastic drink containers, one pair of latex gloves, one potato crisps packet and one chocolate bar wrapper [**JH6**].

[The above items emanating from the wheelie bin at the home of Mr McStravick].

(c) The DNA Buccal (mouth) swabs taken from each Defendant.

Forensic Findings

(a) The "Pampers" packaging – no handling marks were found i.e. there was nothing capable of yielding DNA traces.

With regard to the contents of the plastic bag:

(b) On the neck and inside the tops of the three Coca Cola bottles – there was a single major male profile with DNA traces, matching the DNA profile of McStravick. There was also a minor profile – at too low a level for any meaningful comparison.

On the neck and cap of the Montgomery Mineral Water bottle there was a major single male DNA profile, matching that of Clarke together with a meaningless low profile.

(c) On one of the two latex surgical gloves examined, there was a major single male DNA profile, matching that of Clarke, together with a meaningless minor profile.

Forensic Conclusions – the Three Coca Cola Bottles

[26] These are encapsulated in the following excerpt from Mr. Logan's witness statement:

> "*A calculation based on Northern Ireland Population Survey data shows that the combination of characteristics observed in the profile obtained would be expected to arise in fewer than one in a billion males unrelated to Stephen McStravick".*

Forensic Conclusions – Montgomery Mineral Water Bottle and Latex Gloves

Mr. Logan's witness statement summarises these in the following terms:

> "*A calculation based on Northern Ireland Population Survey data shows that the combination of characteristics observed in the profile from the Montgomery Spring Water bottle and also on the surgical glove would be expected to arise in fewer than a billion males unrelated to Michael Clarke*".

Mr. Logan testified that there is no scientific evidence of **when** these DNA samples were deposited on the items examined, or **where** these deposits occurred. It is not unusual to find a mixed DNA profile on items of this kind. In principle, there can be "secondary" transfer of DNA traces – but none in this case. The analysis here shows a primary transfer viz. a transfer from the individual to the items examined. He further testified that the DNA profiles obtained from scientific examination in this case are "***complete, full and of good quality***". These are "***good strong profiles, indicative of the person who was last in contact with the items examined*".**

Michael Clarke: Arrest and Interview

[27] This Defendant's arrest was not effected until almost one year after the events, on 22nd May 2009, at an address in Dunmurry. He was cautioned in the usual way and made no reply in response. The following day, he underwent three police interviews, which culminated in charges being preferred against him.

First Interview

[28] This began with the caution. He confirmed that he understood this. The reasons for his arrest, incorporating the basic detail of the alleged offences, were put to him. His solicitor was present. Throughout the entirety of this interview, he made no response to the questions and other matters put to him. During the second part of the interview, the written statements of JL and EL were read to him. The interviewing officer testified that this was for the purpose of putting the available evidence to him and giving him the opportunity to comment. He made no response.

Second Interview

[29] This followed a pattern similar to the first interview – caution of the Defendant, solicitor present, extensive questions, no response by the Defendant. Various photographic stills depicting certain events adjacent to the Portside Inn were put to him. He made no response. He was also asked about the red Volkswagen Golf vehicle and its burned out remnants. Next, the police video recording of events adjacent to the Portside Inn was played. His responses to questions put were "*no comment*".

Third Interview

[30] Initially, the Defendant maintained his "no response" stance. Then he began to say a number of things, which are encapsulated in the following extracts from the record:

> "*That part was me …*
>
> *I had been in trouble with people … I owe money … I did not know what I was involved in* [or] *I would not have done it …*
>
> *I thought it was easy – go down, collect something and drop it off and away home and that was everything sorted out …* [**p. 51**] *… I have been assaulted by paramilitaries … I have been warned that my life is under threat … over the last eighteen months …*
>
> *I didn't know it was money …*
>
> *I jumped into the other car and drove up towards West Belfast … my end of the job … handed the money over to somebody … I didn't know it was money.*"

He declined to name any other person, protesting fear for himself and his family. He claimed that on the date in question he was initially picked up on the Antrim Road – then picked up a vehicle himself on the Whitewell Road, en route to the "collection" point. Eventually, he left the red Volkswagen vehicle at "Ben Eden" and was then transported in a **third** vehicle. He asserted that he had had no contact with anyone subsequently. He maintained that he had not been hiding during the intervening period. He made the case that he had no role in the kidnapping or false imprisonment.

[31] He acknowledged that he knew Stephen McStravick, but had not seen him for a while. He did not recall having been at McStravick's house. He had received a lift from McStravick once. On the relevant date, 28th May 2008, he was living with his mother and received a telephone call that morning. He followed instructions thereafter and received further telephone communications. He confirmed that he had been wearing gloves, provided to him. He left the mobile phone in the vehicle.

He was almost £15,000 in debt – this was designed to clear his debt to his creditors. Did he accept that he had played a part in any kidnapping? "*A small part … but I didn't do anything to them people* . A couple of days later, his creditors accused him of taking some of the money – and he received some "*treatment*". At the conclusion of the interview, he maintained that he had nothing to add to what he had already said.

Arrest/Interview – Stephen McStravick

[32] The arrest of ***Stephen McStravick*** was carried out shortly before 10.00am on ***31st May 2008*** at his home. This coincided with the search of his home. He was cautioned in the usual way and, in response, he confirmed that he understood the caution and he made no reply. Following his arrest, Mr. McStravick underwent a total of seven interviews by the police, on 31st May and 1st June 2008. He was accompanied by his solicitor throughout. At the beginning of each interview, the standard caution was repeated. Throughout his interviews, Mr. McStravick purported to answer questions and provide information.

First Interview

[33] Mr. McStravick claimed that his only knowledge about the robbery, false imprisonment and kidnapping was based on what he had learned from the news. He was questioned about his movements during the evening of **27th May 2008**. He maintained that he was at home all evening until approximately 12.30am, when he went to another person's house and remained for a couple of hours. He described the blue Vauxhall Astra vehicle driven by him. Next he was questioned about his movements during the morning of **Wednesday 28th May 2008**. He suggested that his plan was to visit his father in the Short Strand area of Belfast. He spoke about this in somewhat vague terms. He stated he left to go to Belfast at around 11.00/11.30am. Then he said he was in Turf Lodge until about 5.30pm. He described his route into Belfast as down the Ormeau Road, then back along the same road, en route to Turf Lodge, where he spent three to four hours in the company of "**Beano**" whom he knew from working for "ELnuel". He stated that he remained with his friend until around 4.00pm and then went to a chip shop, returning to the friend's house. He was back in his own home at around 7.30pm. He did not venture out again that evening.

[34] Mr. McStravick was asked questions about his home town and suggested he had last been there on **Monday 26th May**. When was he last on the Ravenhill Road, Belfast? He answered that it could have been today or maybe some other day, he did not really know. Then he stated that he might have travelled down the Ravenhill Road, then back along the Ormeau Road, on the Wednesday. He was alone in the car throughout. He last worked for Mr. McMenamin before the previous Christmas, in Carrickfergus. He had nothing to do with any kidnapping. He possesses a Samsung D500 mobile phone. His friend Eugene Burns telephoned,

asking him to go to Newry the previous Tuesday or Wednesday. He reiterated that his sole information about the kidnapping was based on a news report.

Second Interview

[35] His wife had a hospital appointment [Down Hospital] at 10.00am on Wednesday 28th May 2008. He had, but missed, a dental appointment. He drove to Belfast after 11.00am. He repeated his route – down the Ormeau Road and back along the Ravenhill Road. At his friend's house in Turf Lodge, they spent some time conversing in his car outside. He went to the chippy alone. He was seen by Lorraine and Theresa McMenamin at his friend's house. He had not stopped at any shop en route to his friend's house. He said he was trying to co-operate with the police as much as he could. He suggested that someone might have "*plated my car up*" citing a previous example. He was told of the police belief that his vehicle had been involved in the offences.

Third Interview

[36] Mr. McStravick repeated his denials of any involvement in the offences and his claim that his only information about them was based on the television news broadcast. He repeated that he was driving by himself on the date in question and also repeated his account of the route taken. At this juncture, he was shown **exhibit CA6,** which is a compilation of photographic stills deriving from the CCTV recordings at the Anchor Lodge Filling Station on 28th May 2008. This exhibit includes photographs of a blue Vauxhall Astra vehicle, registration number KJ 05 HNY, positioned adjacent to petrol pumps at 11.53am. He was asked whether this was his vehicle, responding:

> "*Well it looks like my registration …*
>
> *I don't know because I don't remember being in the garage like … I don't know whether its my car …*
>
> ['And you're quite sure you didn't stop anywhere?']…
>
> "*No cause I didn't need diesel … or nothing …*
>
> *I might have went in for a packet of fags or that but I just can't remember stopping at the garage … I don't remember being in the garage …*".

[**Pp. 120-122**].

He was adamant that his car was not involved in anything. There was no one else in the vehicle. He was asked about a yellow reflective jacket and gardening gloves and confirmed he was the owner – the gloves were supplied by Kingsway Building

Contractors. He confirmed that he was the owner of the Samsung mobile phone [**exhibit JH4**] – and which he carries all the time. He recognized the box of blue vinyl powdered gloves, from his kitchen at home – used for work purposes. He was asked again about whether he had been at the Anchor Lodge premises –

> *"I don't even remember being in the garage …I don't know. I definitely didn't go in there … I definitely didn't go in there for diesel or nothing, if I did go in there it was for a packet of fags …"*

[**P. 158**].

Fourth Interview

[37] Mr. McStravick repeated his driving route into Belfast and then to Turf Lodge on 28th May 200. He then stated several times that he did not enter the garage in question. He repeated this. Then he was again shown **exhibit CA6** (the video tape photographic compilation). This he said had nothing to do with him.

> *"I'm saying it looks like my car … I don't think, it wasn't me in the car. It wasn't me in the car."*

[**P. 180**].

He was asked several times whether he had given a lift to any passenger – he evaded any direct answer. Then he disclosed, for the first time, that he had known EL all his life. He acknowledged the missing hubcap and the Charles Hurst sticker on his vehicle. He claimed that he had last been in the Anchor Lodge Filling Station a couple of weeks previously. It had not entered his head, he claimed, to volunteer at an earlier stage that he knew EL.

Fifth Interview

[38] He confirmed his Turf Lodge friend's name as Eamon McCullough. He repeated that he knew nothing about the offences apart from what he had seen in the television report. On the night of 27th May 2008 he had made a Subway purchase in Downpatrick. He was unclear whether this was eaten the previous night or when he arrived at Turf Lodge – or perhaps he had eaten this in two separate portions. He spent most of the afternoon at Turf Lodge. He was questioned about the contents of the plastic bag of refuse from his wheelie bin [**exhibit JH6**]. He stated that he would purchase bottles of Coke, Ribena and potato crisps and that the latex gloves were used for domestic purposes.

[39] He was asked about **exhibit DB7** – the empty "Pampers" packaging taken from his wheelie bin. He replied that he might have purchased this product, suggesting that this was purchased by him on occasions at various retail outlets in Downpatrick , specifying two filling stations and two retail outlets - Gibney's Shop

and Murphy's Shop . Next he was questioned about the till receipt [11.50am, 28th May 2008, Anchor Lodge Filling Station]. Was he the driver of the Vauxhall Astra depicted in the video recordings? He replied in the negative. Then he stated that he had exercised control of his car throughout the day, lending it to no one. He reiterated that he was driving alone, without any passenger. He had nothing to do with the offences, in any way.

Final Interview

[40] A period of some three-and-a-half hours elapsed between the penultimate and final interviews. The latter was conducted at Mr. McStravick's request. At the outset, he recounted that he had collected a passenger, who did not say why he was going to Belfast. He conveyed him to Belfast. They drove down the Ravenhill Road. He stopped at the garage at the passenger's request. While driving back along the Ravenhill Road, the passenger said he was meeting someone. The vehicle stopped at traffic lights and the passenger disembarked. Mr. McStravick's replies to questions continued:

> "*I should have said it at the start but I was just scared because … I just thought he'd nothing to do with nothing and I thought he was just getting a lift up and I didn't want to jeopardize him in case it fell back on me that way …*
>
> *You showed me the photographs of being in the petrol station and it just made it harder for me* [to deny] …
>
> *I don't want nobody going near my kids …*".

In response to further questions, Mr. McStravick stated that he drove from Downpatrick to Newcastle and collected his passenger there, by prior arrangement. He admitted that the visual evidence showed his vehicle in the garage forecourt. He could not describe his passenger's attire. The passenger's name was "Ed" – that was all that he knew and he did not know where he lived. He had known him for five/six months. He had never spoken to him by telephone. He would receive "*a bit of a smoke*" for driving him to Belfast. The passenger had an English accent. He did not know what the passenger's business was in Belfast. He did not know where the passenger went after dropping him off. He would be wary of the passenger. He was offered £10 for diesel, but declined this. The passenger has a distinctive nose. He could not remember him wearing a hat. He was afraid. He had not been threatened. He could not remember whether the passenger was wearing gloves . He confirmed that he had told the truth about everything.

IV THE OFFENCES

[41] The offence of ***robbery*** is committed by a principal if he steals and, immediately before or at the trial of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force: see Section 8(1) of the Theft Act (Northern Ireland) 1968. Thus there must be a theft, coupled with the use or threat of force immediately before or at the time of the theft and for the purpose thereof.

[42] ***False imprisonment*** consists in the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular location [Archbold 2010, paragraph 19-331]. The offence of ***kidnapping*** has four constituent elements: the taking or carrying away of one person by another by force or fraud without the consent of the victim and without lawful excuse – the House of Lords so held in ***The Queen –v- D*** [1984] AC 778.

V GOVERNING PRINCIPLES

[43] From the perspective of legal principle, one of the most important features of this prosecution is that both Defendants are prosecuted as secondary parties and not principals. This gives rise particularly to a consideration of the *men rea* necessary to sustain a conviction to the criminal standard viz. beyond reasonable doubt. This question was considered by the Northern Ireland Court of Appeal in ***The Queen –v- Maxwell*** [1978] NI 42, where the role of the Appellant was as driver of a lead vehicle in a bomb attack at a public house. The central issue of law which arose for determination concerned the requisite *mens rea* of a secondary party. Lowry LCJ posed certain examples and then continued (at pp. 57-58):

> "*In each of these examples the accomplice knows exactly what is contemplated and the only thing he does not know is to which particular crime he will become an accessory when it is committed.* ***His guilt springs from the fact that he contemplates the commission of one (or more) of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime will be committed. In other words, he knows that the principal is committing or about to commit one of a number of specified illegal acts and with that knowledge he helps him to do so ...***
>
> *A different case is where the accomplice has only offence A in contemplation and the principal commits offence B. Here the accomplice, although morally culpable (and perhaps guilty of conspiring to commit offence A) is not guilty of aiding and abetting offence B. The principle with which we are dealing does not seem to us to provide a warrant, on the basis of combating lawlessness generally, for convicting an alleged accomplice of* ***any*** *offence which, helped by his preliminary acts, a principal may commit.* ***The relevant crime must be within the***

> ***contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque***".

[My emphasis].

[44] The Court of Appeal certified that a point of law of general public importance was involved in its decision, namely: *if the crime committed by the principal and actually assisted by the accused was one of a number of offences, one of which the accused knew the principal would probably commit, was the guilty mind which must be proved against an accomplice thereby proved against the accused?* The House of Lords held (See ***DPP –v- Maxwell*** [1978] 1 WLR 1350), dismissing the appeal, that knowledge on the part of the accomplice of the actual offence to be committed was not an essential requirement. Rather, it is sufficient if the accomplice contemplated the commission of one of a limited number of crimes by the principal and then intentionally assisted, possessed of such knowledge, ***or*** if he knew the type of offence to be committed or the essential matters constituting the offence. Referring to ***The Queen –v- Bainbridge*** [1960] 1 QB 129, Viscount Dilhorne stated at (p. 1356):

> "*That case establishes that a person can be convicted of aiding and abetting the commission of an offence without his having knowledge of the actual crime intended.*"

Lord Hailsham approved the formulation of Lord Parker CJ in ***Bainbridge*** (at p. 134):

> "*… there must be not merely suspicion but knowledge that a crime of the type in question was intended*".

He also quoted with approval the statement of Lord Goddard CJ in ***Johnson –v- Youden*** [1950] 1 KB 544, at p. 546:

> "*Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence*".

[At p. 1357].

Lord Edmund-Davies, for his part, unreservedly approved the judgment of Lowry LCJ (at p. 1359). The operation of the requisite state of mind in practice is illustrated in the following passage from the speech of Lord Fraser (at p. 1361):

> "*In my opinion it is clear that when the Appellant was ordered, as his part in the job, to lead another car to the Cross Keys Inn,* ***he must have contemplated that a violent attack of some kind***

> ***was to be made either on the inn itself or on some neighbouring place ...***
>
> *Although he is not proved to have known exactly what form the attack was to take – whether a murder or a bombing of the premises – he must have known that either or both of these (and any other form of attack which was practised (by the UVF) was to be expected as the plan for that night …*
>
> *If he did not know the particular type of operation planned when he took part in it, he must have intended to assist in any one or more of these types of operations, with all that it necessarily involved, while being content to leave the choice of the actual operation to others, perhaps members of the gang or some higher commander*".

[Emphasis added].

Lord Scarman formulated the applicable test in the following terms (p. 1363):

> "*The principle … directs attention to the state of mind of the accused … while ensuring that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several: and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable,* ***provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made***".

[My emphasis].

[45] Some reflection on what the familiar phrase "*joint enterprise*" connotes is appropriate, given that the Defendants are prosecuted as secondary, rather than principal, parties. Archbold offers the following reflections (at paragraph 18-15):

> "*Where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise. That includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise. However, if a participant in the venture goes beyond what has been tacitly agreed as part of the common enterprise, the other participants are not liable for the consequences of that unauthorised act. It is for the jury to decide whether what was done was part of the joint enterprise or was or may have been an unauthorised act … "*.

There must also be a sufficient degree of participation by the Defendant in the commission of the index offence by the principal/s. This is conventionally encapsulated in the time honoured formula of aiding, abetting, counselling or procuring. In the present case, the focus is on the concept of *assisting*, something which should plainly be given its ordinary and natural meaning, shorn of any legal technicality. In Archbold it is observed, at paragraph 18-9:

> "*It is submitted that the better approach is to give the words their natural meaning: thus an aider and abettor may be present giving active assistance to the principal; he may be some distance away (as in the case of a lookout who watches the householder whilst the principal, with whom he is in contact via a mobile telephone, burgles the house); or his act of assistance could be far removed in time and place (as in the case of the supplier of a gun who knows that it is required for the purpose of committing murder)*".

Consistent with this approach, the authors argue that there is no requirement for an accessory to be present at the scene of the relevant offence, a proposition with which I concur (see paragraph (18-13).

[46] Bearing in mind that both Defendants in this case provided an account of events when interviewed by the police, the principle enshrined in ***The Queen –v- Storey*** [1968] 52 Cr. App. R 334 falls to be considered. There Widgery LJ stated, at pp. 337-338:

> "*We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt and, indeed, in the end it is.* ***But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial***".

[Emphasis added].

Thus it is for the tribunal of fact to decide whether any such statement made by an accused person constitutes the truth, in whole or in part.

[47] With specific reference to the Defendant McStravick, the import of the decision in ***The Queen –v- Lucas*** [1981] QB 720 (and 73 Cr. App. R 159) must be considered. This is that where (as here) the prosecution rely on the asserted lies of

an accused person as evidence supportive of guilt (and not merely something which reflects on credibility) the tribunal of fact must be satisfied that (a) the lie was deliberate, (b) it relates to a material issue and (c) there is no innocent explanation for it. A judge, in directing the jury, should remind them that a person might tell a lie, for example, to fortify a just cause or out of shame or motivated by a desire to conceal behaviour of a discreditable nature. This has become known as a "***Lucas***" direction. See also ***The Queen –v- Goodway*** 98 Cr. App. R 11.

[48] The legal rules and principles bearing on the stance adopted by the Defendants during interviews by the police and the decision of both Defendants not to testify at the trial must also be considered. By virtue of statutory intervention, there are two basic rules, both contained in the Criminal Evidence (Northern Ireland) Order 1988 ("*the 1988 Order*"), to be considered. The first is enshrined in Article 3, which provides:

> *"3.- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused-*
>
> *(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or*
> *(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,*
> *being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.*
>
> *(2) Where this paragraph applies-*
>
> *(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;*
> *(b) a judge, in deciding whether to grant an application made by the accused-*
>
> *(i) under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); or*
> *(ii) paragraph 4 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application for dismissal of charge of violent or sexual offence involving child in respect*

of which notice of transfer has been given under Article 4 of that Order); and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,
may-

(i) draw such inferences from the failure as appear proper.
(2A) Where the accused was at an authorised place of detention at the time of the failure, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in paragraph (1).

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This Article applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in paragraph (1) "officially informed" means informed by a constable or any such person.

(5) This Article does not-

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this Article; or
(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from this Article.

(6) This Article does not apply in relation to a failure to mention a fact if the failure occurred before [15 December 1988]."

The second rule focuses on events at the trial and is contained in Article 4, which provides:

"4. - (1) At the trial of any person (other than a child) for an offence paragraphs (2) and (4) apply unless-

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but paragraph (2) does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this paragraph applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment conducted with a jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(4) Where this paragraph applies, the court or jury, in determining whether the accused is guilty of the offence charged, may-

(a) draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question;
(b) (repealed).

(5) This Article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(6) For the purposes of this Article a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless-

(a) he is entitled to refuse to answer the question by virtue of any statutory provision, or on the ground of privilege; or
(b) the court in the exercise of its general discretion excuses him from answering it.

(7) Where the age of any person is material for the purposes of paragraph (1), his age shall for those purposes be taken to be that which appears to the court to be his age.

(8) This Article applies-

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this Article;
(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after that commencement."

[49] The decision in ***The Queen –v- Cowan*** [1996] QB 373 is one of the earliest belonging to the jurisprudence generated by one of the equivalent English statutory provisions, Section 35 of the Criminal Justice and Public Order Act 1994, which mirrors Article 4 of the 1988 Order. The following propositions may be distilled from the judgment of Lord Taylor CJ:

(a) This statutory provision alters and was intended by Parliament to alter the law and practice applicable when a Defendant in a criminal trial does not give evidence.

(b) The right of silence remains, expressly preserved.

(c) The prosecution must establish a *prima facie* case before any question of the Defendant testifying arises.

(d) If an adverse inference is made, the Defendant cannot be convicted solely thereon.

(e) The burden of proving the Defendant's guilt beyond reasonable doubt remains on the prosecution, unaltered.

(f) Where a Defendant declines to testify, the tribunal of fact *may* regard the inference from such failure as "*a further evidential factor in support of the prosecution case*" [p. 379].

(g) There is no warrant for confining the operation of this new provision to exceptional cases.

(h) "*We accept that apart from the mandatory exceptions in Section 35(1), it will be open to a court to decline to draw an adverse inference from silence at trial and for a judge to direct or advise a jury against drawing such inference if the circumstances of the case justify such a course.* ***But in our view there would need either to be some evidential basis for doing so or some exceptional factors in the case making that a fair course to take***".

[P. 380, emphasis added].

(i) The only permissible inferences are those which appear proper.

(j) If having considered any suggested explanation of or justification for the Defendant's failure to testify the tribunal of fact concludes that "… *the silence can only sensibly be attributed to the Defendants having no answer or none that would stand up to cross-examination*", an adverse inference may be made [p. 381].

[50] In ***Cowan***, the English Court of Appeal concurred with the approach of Kelly LJ in a non-jury setting in ***The Queen –v- McLernon*** [1990] 10 NIJB 92, at p. 102:

> "[Article 4] … *is in the widest terms. It imposes no limitation as to when it may be invoked or what result will follow if it is invoked. Once the court has complied with the preliminaries in Article 4(2) and called upon the accused to give evidence and a refusal is made the court has then a complete discretion as to whether inferences should be drawn or not. In these circumstances it is a matter for the court in any criminal case (1) to decide whether to draw inferences or not; and (2) if it decides to draw inferences what their nature, extent and degree of adversity, if any, may be …*
>
> *It would be improper and indeed quite unwise for any court to set out the bounds of either steps (1) of (2). Their application will depend on factors peculiar to the individual case.*"

Kelly LJ further observed that in certain cases a refusal to give evidence could *per se* increase the weight of a *prima facie* case, transforming it to one proved beyond reasonable doubt. He also recalled his earlier statement in ***The Queen –v- Smith*** [1989, unreported] that the refusal of an accused person to give evidence could be explained by either sinister *or* innocent reasons. The appeal against conviction failed: see ***The Queen –v- McLernon*** [1992] NI 168, where the relevant passages in the judgment of Kelly LJ were quoted uncritically (from p. 173D to 176C). These passages included the learned trial judge's citation of the statement of Dixon J in ***Insurance Commissioner –v- Joyce*** [1948] 77 CLR 39 (a civil action), at p. 61:

> "*It is proper that a court should regard the failure of the Plaintiff to give evidence as a matter calling for close scrutiny on the facts on which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorise the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination.*"

[51] In giving the judgment of the Court of Appeal, Hutton LCJ stated (at p. 179B/C):

> "*It is clear … that at a trial the accused can 'rely on a fact in his defence' within the meaning of Article 3 even though he nor a witness called on his behalf has given evidence of that fact …* (for example)*… where defence counsel suggested a fact, which assisted the accused, to a prosecution witness in the course of cross-examination and the witness accepted it, In that instance we consider that the fact would be one relied on in his defence in those proceedings, even if no evidence was called on behalf of the accused*".

In that particular case, the court considered it clear that the accused was relying on his written statement, which he furnished to the police following completion of his interviews, after he had been transferred to prison. This contained a superficially innocent explanation for his presence at the relevant premises, prompting the Lord Chief Justice to observe (at p. 179I):

> "*Therefore, if the explanation contained in the statement were true, it is one which he could reasonably have been expected to mention when he was being questioned by the police in the course of the interviews…*
>
> *In these circumstances we consider that the trial judge was fully entitled to draw the adverse inference against the accused under Article 3 … namely that the account which he gave in his written statement was untrue and that he had, in truth, no innocent explanation for his presence at* [the premises]".

The court also recalled its earlier judgment in ***The Queen –v- Murray*** [unreported, 25th October 1991]:

> "*But where common sense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the prima facie case established by the evidence adduced by the Crown and for the drawing of this inference to lead on to the conclusion, after all the evidence in the case has been considered, that the accused is guilty.*"

As regards Article 4, the inference drawn by the trial judge from the Defendant's refusal to testify at his trial was one of guilty knowledge of the firearms and

ammunition. This ground of appeal was also rejected by the Court of Appeal, bearing in mind its judgment in ***Murray*** (*supra).*

[52] The discrete issue of reliance arose in ***The Queen –v- Walsh*** [2002] NICA 1, where the question was whether, at his trial, the Defendant had relied on a suggestion that another person was present in the vicinity of the alleged discovery of an explosives device by military personnel. Carswell LCJ stated (at p. 7):

> "*We do not consider that this fact was a matter upon which he relied as* ***an integral part of his defence*** *or that it was something which he could reasonably have been expected to mention when questioned*".

[My emphasis].

In consequence, the trial judge had erred in making an adverse inference under Article 3. The element of reliance also features prominently in the decision of the Irish Criminal Court of Appeal in ***The People (DPP) –v- Bowes*** [2004] 4 IR 223 where, with reference to Section 7(1) of the Criminal Justice (Drug Trafficking) Act 1996, Fennelly J stated, at p. 238:

> "*The Section does not relate to silence generally. In particular, it does not relate to the fact that the accused, in response to Garda questioning, exercised his right to remain silent and declined to answer any questions. There must be an identifiable fact relied on by the defence* ***at the trial*** *which the accused 'could reasonably have been expected to mention when … questioned'".*

Thus it was considered inappropriate for the prosecution to comment adversely on the Defendant's silence in custody in its opening speech since, at that stage of the trial, it "*… did not yet know what fact or facts would be relied on by the defence*". In consequence, this ground of appeal succeeded.

[53] In ***Averill –v- United Kingdom*** [2001] 31 EHRR 36, the European Court of Human Rights, in holding that there had been no infringement of Article 6(1) arising out of adverse inferences being drawn from the Applicant's silence, made the following general observation about the 1988 Order:

> "*[57] The court recalls that in its* ***Murray*** *judgment it noted that the scheme contained in the 1988 Order was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation …*
>
> *An accused is confronted at the beginning of police interrogation with a fundamental dilEL relating to his*

> *defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation*".

The court concluded that the denial of access to a solicitor during the first twenty-four hours of the Applicant's detention contravened Article 6(3)(c), in conjunction with Article 6(1). The following passage is also noteworthy:

> "*[49] …His failure to provide an explanation when questioned by the police … could, as a matter of common sense, allow the drawing of an adverse inference that he had no explanation and was guilty, all the more so since he did have daily access to his lawyer following the first twenty-four hours of his interrogation when he was again questioned about these matters under caution.*"

The emphasis on a common sense evaluation is noteworthy.

[54] Most recently, the provisions of the 1988 Order have been considered afresh by the Northern Ireland Court of Appeal in ***The Queen –v- O'Donnell*** [2010] NICA 1, where the decision in ***Cowan*** fell to be considered. The Lord Chief Justice stated:

> *"[14] The third ground of appeal related to the learned trial judge's charge to the jury on the issue of whether they should draw an adverse inference from the fact that the applicant did not give evidence. In support of this ground the applicant relied on the decision of the English Court of Appeal in R v Cowan and others [1996] QB 373 which dealt with similar provisions in the Criminal Justice and Public Order Act 1994. That was a case in which the appellant had resisted a direction that the jury could draw an adverse inference from the fact that the appellant had not given evidence on the basis that if he had given evidence he could have been exposed to cross-examination about his previous convictions. The court rejected that submission but highlighted certain essentials which such a direction should contain.*
>
> > *'(1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the*

> *judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference.'*

The JSB specimen direction was subsequently changed in England and Wales in 1998 to include a requirement that the jury must find that there is a case to answer on the prosecution evidence before drawing an adverse inference from defendant's silence.

[15] In this jurisdiction the JSB specimen direction does not entirely follow the Cowan direction. In particular it is left to the judge in each case to decide whether to direct the jury that they should consider whether the prosecution case is so strong that it calls for an answer. Further assistance on how to address this issue is set out at Note 4 of the relevant specimen direction.

> *'Where the judge has refused an application for a direction, or no application has been made, it is considered that it is normally inappropriate to state that the jury has to be directed to consider whether the defendant has a case to answer, despite the remarks of Lord Taylor CJ in R v Cowan & others [1996] 1 Cr. App. R.1. However, there may be circumstances (e.g. where the defence case is that the evidence against the defendant is so weak that it does not require an answer) where a direction along these lines may be appropriate.'*

[16] In this case the learned trial Judge followed the specimen direction meticulously but did not invite the jury to consider whether the prosecution case was so strong that it called for an

answer. That clearly reflected his view that this was not one of those cases where the evidence was so weak as to require such an approach. We have set out at paragraphs 2 to 6 above the substantial body of evidence which supports that view. We do not consider that the absence of this direction rendered the trial unfair or the conviction unsafe. This conclusion is similar to that reached by the English Court of Appeal in R v Chenia [2002] EWCA 2345 at paragraph 55 and R v Whitehead [2006] EWCA Crim 1486 at paragraph 47 despite the clear terms of the specimen direction applicable in each case …

[17] … We consider that there is force in the reasoning set out in Cowan and that it is now appropriate to amend the JSB specimen direction in this jurisdiction by adding a direction that the jury should not draw an adverse inference unless they consider that the prosecution's case is such that it clearly calls for an answer."

It is appropriate to observe, at this juncture, that in the present case I refused an application by both Defendants for a direction of no case to answer following completion of the prosecution evidence.

VI THE PROSECUTION CASE

[55] The following paragraphs contain a distillation of the main submissions advanced on behalf of the prosecution. Bearing in mind the distinctive features of the prosecution case against the two Defendants, it is appropriate to segregate the submissions accordingly.

McStravick

[56] The arguments of Mr. Hunter QC and Mr. Russell, on behalf of the prosecution, take as their starting point the unmistakable evidence that McStravick was the driver of the Astra car on the forecourt of Anchor Lodge. He had brought there as a passenger the man who purchased the foodstuffs for ML, close by in the house in Ravenhill Road. He was at large in his car in Belfast during that day (28th May). He is connected forensically, in timeous proximity to the events of 28th May, to Clarke by virtue of the DNA evidence. There is strong circumstantial evidence that the "Pampers" pack found in the Wheelie bin at McStravick's home on 31st May 2008, in close timeous proximity to the events of 28th May, was purchased in the Anchor Lodge Spar shop at 11.50 am on 28th May. The retrieval by Clarke, with whom McStravick is linked as aforesaid, of the "Brinks money" was closely followed by the end of the false imprisonment of EL and ML, with which McStravick is linked as aforesaid. McStravick, it is argued, lied deliberately during his interviews.

[57] Continuing, prosecuting counsel highlight that McStravick did not give evidence during the course of the trial. The only accounts this accused has provided for his actions on the 28th May 2008 are those given during the course of his

interviews. His interviews are shown to be replete with untruths. The court is entitled to draw proper inferences from the accused's failure to give evidence. The evidence in respect of the accused's presence at the Anchor Lodge Filling Station in the company of a person who purchased items which were taken into the house on the Ravenhill Road a short distance away, his association with Clarke by way of the DNA findings, the presence of the Pampers bag in close proximity to those items from which emanated that DNA evidence, his knowledge of EL and his lies during the course of interviews with police are all matters which individually and collectively call for an explanation. This accused ought to be in a position to provide such an explanation, if such exists. The failure to provide same permits the court to draw the inference that there is no such innocent explanation.

Clarke

[58] The arguments of prosecuting counsel vis-à-vis this accused highlight, at the outset, the series of interviews by police which he underwent on 23rd May 2009. During a substantial portion of the interviews, he made no response to all questions put to him, including questioning in relation to his knowledge of McStravick, events at the Portside Inn and about the red VW Golf. He maintained this stance until shortly after he was shown the surveillance footage. This clearly shows Clarke picking up the "Brinks money" left on the instructions of those who had broken into the victims' home and kidnapped two family members. He initially made no response, but subsequently gave an account accepting that it was he who had collected the package but denying that he knew what he was involved in. He indicated that he in fact knew McStravick, that he had been in contact with him around May 2008 and that he would have been in his car at some time. He refused to name those who had asked him to pick up the package or who had driven him to or from the relevant locations. He claimed he was in substantial debt to those persons.

[59] According to the prosecution, this accused is forensically linked, in timeous proximity to the events of 28th May, to McStravick by the DNA evidence. That evidence emanates from the contents of the plastic bag, which in turn was found in close physical proximity to the "Pampers" bag in the wheelie bin. His retrieval of the "Brinks money" occurred at 17.44 on 28th May. Shortly thereafter, around 18.00, the captors left the house at Ravenhill Road in which EL and ML had been imprisoned.

[60] It is submitted that Clarke's failure to give evidence permits the court to draw proper inferences from that failure. The prosecution submit the proper inference in this case is that this accused is guilty of the offences charged. The evidence in this case clearly calls for an explanation which the accused ought to be in a position to give, if an innocent explanation exists. The failure by Clarke to give an explanation under oath at his trial allows the drawing of the inference that there is no explanation or at least no explanation which would withstand examination and that the accused is guilty.

[61] The accused Clarke has placed before the court his criminal record. On behalf of the prosecution, it is submitted that the court is entitled to draw from that record a number of inferences or conclusions:

(a) The accused when engaged in the present enterprise was not an "innocent abroad". He had previously engaged in extensive and serious criminal activity.

(b) In particular, this accused has previous convictions for attempted robbery, assault occasioning actual bodily harm and possession of a Class A controlled drug such offences having been committed on 24th January 2001 and 18th September 2007.

(c) The court can infer that the accused was aware, because of his previous dealings with the criminal justice system, of the significance of giving an account at the first opportunity when interviewed.

The court may, it is submitted, draw on the accused's record as one piece of evidence amongst others in inferring properly that the accused fully contemplated the nature of the enterprise in which he was to engage. [I record that this discrete submission is not contentious].

Generally

[62] The prosecution submit that the events of 28th May and the build up to those events display a well organised and professional criminal enterprise. The evidence demonstrates the following:

(a) The theft in advance of suitable vehicles to carry out the scheme.

(b) The identification and targeting of JL and his home.

(c) The planned, armed entry into the home of JL.

(d) The removal of EL and ML to a prepared location.

(e) The instructions given to JL and the knowledge possessed.

(f) A number of persons were involved whose roles were coordinated and integrated.

(g) The arrangements made for the deposit and collection of the monies and the rendezvous with Clarke.

(h) The destruction of the two principal vehicles in the immediate aftermath of the collection of the monies and the coordination of those

events and the departure of the kidnappers from the house on the Ravenhill Road.

It is highlighted that most of these events occurred within a relatively compressed time frame, between the early hours and the early evening of one day, 28th May 2008.

[63] The prosecution submit that both accused were active and participating members of a criminal gang which had planned an operation and divided the tasks involved within that operation between members of the gang. As a minimum this involved an assault team, a team to hold the victims, a team to provide logistical support and deal with contingencies and a team to collect the proceeds. Both accused claim they were random and innocent participants. Clarke accepts he knows McStravick and both come from the Co. Down area close to the 'L' family home town. That such a sophisticated and organized criminal operation would be mounted and that its ultimate aim i.e. the seizure of a large sum of money should be wholly dependent on the pivotal role of a person (Clarke) who was ignorant of key facts, events and actors is, the prosecution argue, absurd.

VII THE DEFENCE SUBMISSIONS

Clarke

[64] On behalf of this accused, Miss McDermott QC and Mr. Campbell highlight the acceptance by the prosecution that there is no evidence connecting this accused with either the victims' home in Co. Down or the "kidnap" house on the Ravenhill Road, Belfast or the "kidnap" vehicle. Counsel summarise their submissions in the following way:

(a) There is no evidence that this accused knew of, or contemplated, the commission of the offences committed at either of the aforementioned locations.

(b) It would be improper to draw an adverse inference against this accused under Article 3 of the 1998 Order.

(c) It is incumbent upon the court to have regard to the contents of Mr. Clarke's interviews, in particular his admissions (see ***The Queen –v- Storey*** 52 CAR 334) and, in doing so, the court should accept the thrust of Clarke's account as the truth of what happened, from his perspective.

(d) Evidence of a connection between the two Defendants is insufficient to attribute to this Defendant the requisite knowledge or contemplation. It is no more than an inconsequential building block in the prosecution case. It is highlighted that during Clarke's interviews, the police did

not put the forensic evidence to him and did not ask whether he knew his co-accused. While it is acknowledged, at least tacitly, that the evidence establishes some fairly recent contact between the two Defendants and the likely provenance of the water bottle and latex glove from McStravick's car, nothing in the forensic evidence gainsays Clarke's account.

(e) The court should disregard the delay in effecting Clarke's arrest.

(f) The crucial evidence against this accused is the video recording of his conduct at the scene of collection of the monies [exhibit **HAC1**]. It is submitted that the fact of two unsuccessful collection attempts by Clarke and his apparent unawareness of the exact location of the money support the conclusion that he was not possessed of the requisite guilty knowledge. In particular, he was evidently unaware of the need to look inside the receptacle in question.

(g) The court is invited to conclude that the video evidence demonstrates a major breakdown in the communications between this Defendant and other gang members, indicative of a lack of guilty knowledge on his part.

(h) At a more general level, it is submitted that it is the practice of organized criminal gangs to minimise their membership; that the "collector" is engaged in the most visible, exposed and dangerous act in the whole sequence and is the most expendable of the participants; and that the collector is likely to receive only minimal information from the main members.

(i) This Defendant's criminal record (which was put in evidence on his behalf), it is argued, is indicative of a chaotic lifestyle, identifies him as the kind of expendable individual likely to be recruited by a gang as the collector and is supportive of his account in police interviews. It is further submitted that his criminal record in no way proves that he had the requisite state of mind.

I would interpose that the other documentary materials put in evidence on behalf of this accused were two Forms PB2/04, dated early 2006 and mid 2007 respectively, alerting him to police information to the effect that he was under serious threat from so-called "*Republicans*"

McStravick

[65] I do not propose to rehearse *in extenso* the very detailed written submission prepared by Mr. Pownall QC and Mr. McAlinden on behalf of this Defendant. I distil from this the following main contentions:

(a) It is incumbent on the prosecution to prove that this accused was a member of a team effort to kidnap, falsely imprison and rob – and they have failed to do so.

(b) Fundamentally, the evidence fails to establish beyond reasonable doubt that this Defendant was possessed of the requisite guilty knowledge viz. had the necessary state of mind, applying the ***Maxwell*** principles.

(c) At most, any assistance provided by this accused was inadvertent, adventitious and unaccompanied by the requisite state of mind.

(d) The prosecution case against this accused is circumstantial in nature and is insufficient to establish to the requisite standard that he had the necessary *mens rea*.

(e) There is no evidence linking this accused to either the victims' home in Co. Down or the "holding" house on the Ravenhill Road, Belfast.

(f) Nor is there any evidence connecting this accused with either of the destroyed vehicles.

(g) The apparent involvement of this Defendant in the purchase of certain goods at the Anchor Lodge Filling Station is insufficient to attribute to him the requisite *mens rea*. This is indicative of a peripheral and inconsequential role, constituting at most inadvertent assistance to the protagonists.

(h) The use of this accused's vehicle was unnecessary for the provision of supplies to the "holding" house, situated less than 300 yards away from the filling station.

(i) There is no reliable association between the "Pampers" purchased at the filling station and the empty "Pampers" packaging recovered from this Defendant's home a couple of days later.

(j) This Defendant's voluntary description of the person identified by him as "Ed" and the conduct of the latter is consistent with innocence.

(k) There is a satisfactory explanation, via the evidence of Mr McMenamin, for the presence of latex gloves found in this Defendant's kitchen and wheelie bin in the aftermath of the offences.

(l) The DNA evidence pertaining to the co-accused, Mr. Clarke, is explicable by the claims that there was some previous, innocent association between the two men, as asserted by Clarke.

(m) There is no incriminating cell site evidence regarding this accused.

(n) Any dishonesty or reticence on the part of this accused during his earlier interviews is explicable by his reluctance to disclose an illicit extra-marital relationship and an understandable unwillingness to identify one of the perpetrators ("Ed").

(o) To draw an adverse inference from this Defendant's failure to testify at the trial would be inappropriate, in circumstances where during police interviews he provided a full account of events and his associations on the date in question, which has not been undermined by further police enquiries. His silence at the trial cannot bridge the gap between conjecture or suspicion and proof to the criminal standard.

VIII CONCLUSIONS

[66] The findings and conclusions which follow in the ensuing paragraphs relate to matters bearing on the involvement of both Defendants in the principal offences about which I am satisfied to the criminal standard i.e. proof beyond reasonable doubt. I remind myself that neither Defendant can be convicted of any of the charges preferred unless I am sure about the relevant Defendant's guilt, individually and separately. This requires me to be firmly convinced of guilt. Being satisfied beyond reasonable doubt is a requirement which relates to the material facts which must be proved in order to establish the guilt of the Defendants. In the following paragraphs, where I employ the terminology "*satisfied*" this denotes that I am satisfied beyond reasonable doubt. I bear in mind also that each Defendant is presumed innocent and has no burden to discharge.

Actus Reus

[67] It is noteworthy that the extensive submissions on behalf of both the prosecution and the Defendants have focussed very substantially on the topic of *mens rea*. This is a reflection of the reality of this case, which is one of asserted joint enterprise. From the perspective of *actus reus* viz. the conduct on the part of each Defendant, alleged to constitute aiding or abetting the commission of the principal offences, there has been notably little concentration and debate. Indeed, reflecting on the trial as a whole, this has emerged as a relatively uncontentious issue.

[68] As regards the accused Clarke, the relevant conduct concerns his collection of the sum of £85,000 on the date in question. In a criminal undertaking of the kind under consideration, it is trite that the collection of the money is a crucial element and it is plainly thus in the present case. I find without hesitation and am satisfied

that the conduct of this accused, as depicted in the video recording, constituted a vital and indispensable act of assistance to the principal parties in perfecting the robbery. Accordingly, the *actus reus* on the part of the accused Clarke is established beyond reasonable doubt. I further find that the *actus reus* of Clarke's offending is confined to this conduct. Insofar as it formed part of the prosecution case that Clarke engaged in other forms of criminal conduct within the ambit of the overall operation, I conclude that the burden on the prosecution has not been discharged.

[69] As regard the accused McStravick, the alleged conduct relates to two different, though inter-related matters. The first concerns the use of his vehicle during the morning in question. The second concerns the disposal of certain potentially incriminating items of physical evidence, arising out of the post-incident findings at his home. I am satisfied that this Defendant willingly transported a gang member in his vehicle during the morning in question. This gang member was closely associated with the captors. This accused further participated in the purchase by this person of certain retail goods which, excepting the cigarettes, were used exclusively for the purposes of the operation. The use of this Defendant's vehicle for these purposes was of obvious value and utility to the gang, providing assistance and support to other members and facilitating the overall operation. In this first respect, I conclude without hesitation that the *actus reus* is established beyond reasonable doubt.

[70] I am equally satisfied that the role of this accused had a second element, which entailed the disposal of certain important items of physical evidence in the aftermath of the kidnapping and false imprisonment. I find nothing coincidental about the items purchased at the filling station on 29th May and certain of the findings at the home of this accused two days later. It is clear from the evidence of EL that her captors were employing particular care to ensure that incriminating traces, in the form of physical evidence, were not left at the "holding" house. The forensic awareness of the captors also emerges from the evidence of JL about the use of an abrasive cleaning agent at the family home, at the outset of the saga. I find that the "Pampers" product was purchased to facilitate the conduct of the criminal operation, albeit in some unspecified way, though probably for the purpose of attempting to eliminate potentially incriminating tracks and traces. I further find a direct correlation between this purchase and the empty packaging recovered from this Defendant's wheelie bin three days later. This Defendant's explanation in interview I find wholly unconvincing and, further, it is confounded by the evidence rehearsed at paragraphs [21]-[22] above. The scientific evidence concerning the recovered latex glove connects this Defendant with his co-accused and, whatever it's provenance, invites the finding of deliberate disposal by this accused as it constituted potentially incriminating evidence. I conclude that this second element of the conduct attributed to this accused constitutes a further aspect of the *actus reus* of his offending.

Mens Rea

[71] The crucial question in this trial is whether the necessary *mens rea*, as explained in paragraphs [43] – [44] above, has been proved by the prosecution beyond reasonable doubt in relation to any, or all, of the offences for which the Defendants have been indicted. Fundamentally, this requires the court to make inferential findings about the state of mind of each Defendant. In considering this question, I remind myself of the importance of treating each Defendant separately and evaluating each of the offences contained in the indictment individually.

[72] I am satisfied, firstly, that the scientific evidence establishes a previous association between the Defendants indicative of close inter-personal conduct. I base this finding on the search and forensic evidence summarised in paragraphs [17] and [25]-[26] above. Furthermore, I find that this was recent contact, having regard firstly to the position of the plastic bag containing rubbish close to the top of a relatively full refuse receptacle. This would be consistent with the compilation of the contents of the plastic bag and its insertion in the receptacle in close temporal proximity to the main events. Secondly, the contents of the final interview of the Defendant Clarke lend some support to this finding. Thirdly, both Defendants were demonstrably involved in the relevant criminal operation, which supports the view that some previous contact between them would not be unexpected. Furthermore, there is nothing in the evidence suggestive of any coincidental or causal or otherwise innocent association between the two Defendants at this time. Rather, the evidence points firmly to this association being linked exclusively to the commission of one or more of the principal offences. I so find and I consider that this illuminates the question of each accused person's state of mind at the time of the conduct about which I have made findings above.

[73] My finding concerning the recent association and contact between the two Defendants is equally adverse to both of them. A second aspect of this finding which also reflects adversely on both Defendants is that neither has admitted that an association of this character viz. taking place in connection with the criminal operation occurred. Mr. McStravick did not admit any previous association between the two Defendants, while Mr. Clarke merely and vaguely acknowledged some very limited and innocuous previous contact. It follows inexorably from this finding that neither Defendant has provided the police with a true and complete account when interviewed. It will be necessary to consider the inferences, if any, which may properly be made in consequence and, particularly, how this bears on the application of the 1988 Order. I shall now consider each Defendant separately.

Mr. Clarke

[74] In endeavouring to establish that this accused acted with the necessary *mens rea*, the prosecution rely on the aforementioned association between the Defendants; the absence of any conceivable innocent explanation therefor; the interviews of this accused; his failure to give evidence; and his criminal record. Mr. Clarke's state of

mind is to be decided by reference to the evidence before the court , rather than what was , or was not , put to him during interviews.

[75] When this accused eventually provided an account of events during the latter stages of his interviews by the police, his story, in summary, resolved to one of unwilling and uninformed involvement. His decision to provide an account was plainly stimulated by the highly incriminating video recording of events close to the Portside Inn. In my view, much of what this accused then said in interview about his involvement and contact with persons unknown has a ring of truth. It tends to be supported by his criminal record and the documentary evidence of two threats to his life, both preceding the incident, emanating from "*Republican elements*", based on a belief that he was a police informant. I consider that this accused is the kind of person whom one would expect a criminal gang involved in a robbery of this kind to recruit for the purpose of performing the type of role which this accused plainly undertook. I accept the essence of his assertions about the terms and circumstances of his recruitment, the debt owed by him and his movements on the date of the offences. However, referring to my findings in paragraph [72] above, I conclude that he failed to provide a full and true account of his previous association with the co-accused, the obvious motivation for this failure being his anxiety to minimise the extent of his involvement and knowledge. Furthermore, what he did volunteer to his interviewers was , on any showing, incomplete. I have no doubt that his non-disclosures were deliberate.

[76] I consider that, given the collection role to be performed by him, this accused plainly had to receive certain essential information. Furthermore, taking into account the circumstances of his recruitment (as recounted by him – which I accept, broadly), the role to be executed by him and his criminal record (which he placed in evidence – and bears on his state of mind , rather than propensity to commit the alleged offences), the knowledge and understanding possessed by him plainly exceeded the information with which he was briefed by other gang members. Based on his own account, he must have known that he was actively involved in an elaborate and sophisticated operation which had the sole aim of securing a substantial benefit of a monetary kind. Realistically, a significant robbery was the most likely offence on the horizon. This operation, based on Mr. Clarke's account, had none of the trappings of (for example) a burglary or any other kind of unrelated or substantially lesser offence. In my view, from the perspective of this accused, the strong probability was that the item to be collected consisted of a substantial sum of money, related to a robbery. In interview, he made no attempt to suggest that, from his perspective, it might have consisted of drugs or some other form of illicitly obtained goods and I find no basis for assessing his state of knowledge in this way. I accept his claim that his role would eliminate for him a large debt [almost £15,000, he claimed] which also supports the finding of guilty knowledge about the fruits of a significant robbery.

[77] Furthermore, Mr. Clarke's role is properly described as pivotal and this must be balanced when considering the submission that the information conveyed to him

by other gang members would have been minimal. Self-evidently, such information had to be sufficient to ensure the successful performance of his role. I accept, having regard to the video evidence, that he required a total of three attempts to accomplish the collection of the money. However, this, in my view, can be attributed to a shortcoming or misunderstanding in instructions and it occurred in circumstances where this Defendant and other gang members would have had an obvious mutual interest in minimizing telephone communications. Furthermore, the evidence demonstrates that the yellow receptacle occupied a somewhat recessed position and, from certain angles, was entirely obstructed by large refuse containers and their surrounds. In addition, the coincidence of several containers, coupled with the profusion of black plastic bags - which would have featured in his instructions (recalling JL's evidence) - at this location, could well have contributed to some misunderstanding or confusion on the part of this accused, who would also have been in a hurried and anxious state. Taking these factors into account, I find that the need for three attempts at retrieval is not consistent with the uninformed state of knowledge asserted by this accused during interview and advanced in argument by his counsel.

[78] The court is invited to make an inference adverse to this accused under Article 4 of the 1988 Order. In this respect, I consider that there are obvious gaps in the account provided by this accused to the police and several pertinent questions arising there from. These relate to, *inter alia*, the full background to his involvement; the circumstances and terms of his recruitment; his knowledge of other gang members; the precise nature and timing of his previous association with his co-accused; and his exact conduct and movements throughout the date in question - beginning with his interaction with other apparent gang members, continuing through his actions before, during and following his visits to the collection point and ending with his post-collection interaction and communication with others. It is abundantly clear, in my view, that this accused provided a confined and selective account to the police. This is not altered by my finding that the essential thrust of such account is true. His opportunity to fill the gaps, answer the questions and complete the story arose at the trial. He declined to give evidence, in circumstances where I consider that the prosecution case clearly called for an answer from him. The adverse inference which the court is invited to make is that this accused has no explanation or elaboration to offer that would withstand critical scrutiny or satisfactorily counter the assessment about his state of mind which may legitimately be made based on the available evidence. I consider that it is proper to make an inference in these terms.

[79] As a pre-requisite to a finding of guilt against this accused, I must be satisfied beyond reasonable doubt that he knew the essential matters constituting the offence in question, bearing in mind that he did not necessarily have to appreciate the precise kind of offence being committed. Based on the findings and assessments set out above, I am satisfied beyond reasonable doubt that this accused had the necessary state of mind, by inference. The various ingredients in the evidence pointing to this conclusion are both cumulative and compelling. I find that this

accused must have known that his actions involved the retrieval of a substantial sum of money illicitly obtained from an unknown agency, in circumstances pointing quite strongly to a robbery. These are the essential matters in the present context.

[80] It follows that I find this accused guilty of the first count in the indictment, robbery. Based on the findings and assessments made above, I must then consider the remaining counts. It appears to me that the presentation of the prosecution case against this accused focussed very firmly on the first count and not the others. As regards the remaining counts, I conclude that the prosecution fails because there is manifestly insufficient evidence that this accused indulged in any conduct which provided material assistance to the principals who committed the offences of falsely imprisoning and kidnapping the members of the family concerned. The *actus reus* is plainly absent. In my view, his "radar", based on all the evidence, was at all times confined to the count of robbery.

Mr. McStravick

[81] With regard to this accused, I shall consider, initially, the first four counts in the indictment. In my view, the evidence fails to establish a sufficient nexus between this accused, as secondary party, and the commission of these offences by the principal parties. There is no direct evidence establishing a secondary role by this accused in the commission of these offences and insufficient evidence from which inferences adequate to support a finding of guilt to the criminal standard can be made. The prosecution have failed to discharge the burden of establishing an *actus reus* on the part of this accused vis-à-vis the first four counts.

[82] The critical question is whether the prosecution have established beyond reasonable doubt that this Defendant had the necessary *mens rea* in respect of the fifth and sixth counts in the indictment, viz the false imprisonment of EL and ML at the house on the Ravenhill Road. I must consider whether, by inference, this accused knew that offences of this kind were being committed and knew the essential elements of the offending in this respect. In deciding this question, I must give effect particularly to the principles outlined in paragraphs [43] – [45] above.

[83] I am satisfied that this Defendant had been recruited to act as a member of a criminal gang for the purpose of the operation in question. The terms of his recruitment would have made clear to him the nature and scope of his role. Having regard to the evidence adduced, I find that this role was one of providing driver support services on the date in question. It is clear from the evidence of EL, whose recollection of events was demonstrably clear and reliable, that the need to make the purchase in question arose unexpectedly and spontaneously. Furthermore, I infer from her evidence that the request to provide a plain ham sandwich for ML was met fairly swiftly. This accused was the driver of the vehicle which plainly conveyed the purchaser, another gang member, to and from the relevant retail outlet. It is appropriate to infer that this Defendant's services for an errand of this kind were readily available. I find that he was easily contactable and that his ready availability

ensured that this discrete operation was swiftly executed. All of this, though not decisive *per se*, gives some indication of his likely state of mind.

[84] This accused admitted that there was a passenger in his vehicle at a critical time on the date in question and I so find. I find further that this passenger was a member of the gang and that this was known to this accused, who must have known that his conduct was facilitating an unlawful operation. It is unnecessary to make any finding about either the precise time when or the exact location where the passenger was collected. It matters not, in my view, whether this gang member had been driven some distance to Belfast (as claimed by this accused) or became a passenger in some other circumstances. I am satisfied that the material conduct of this accused consisted of driving another gang member to the filling station, transporting the same person from the filling station to the "holding" house or a point closely adjacent thereto; and, in the aftermath of the operation, disposing of certain material items of physical evidence in the refuse receptacle at his home. It is simply not plausible to suggest that he did these things in some uninformed and innocent vacuum. My conclusion that this Defendant possessed the requisite guilty knowledge is reinforced by my earlier finding about the pre-operation association between the two Defendants. All of these acts are cumulative in nature and readily give rise to the inference of guilty knowledge.

[85] The submission on behalf of this accused is that his conduct occurred in an uninformed vacuum. In my view, while bearing in mind that no onus rests on him, this is manifestly unsustainable. I am satisfied that he must have known that a purchase of goods was being made at the filling station in connection with the unlawful restraint of one or more persons and that his passenger was directly and actively involved in such restraint. Moreover, the evidence establishes clearly that the conduct of the gang members throughout bore the hallmark of forensic awareness. I am further satisfied that this accused was responsible for the presence of the items recovered at his home three days later; that the "Pampers" packaging was connected with the aforementioned restraint; and that he was intentionally and knowingly attempting to dispose of this item, together with other articles scientifically linked to this accused and his co-accused and linking both accused with each other, with a view to cleaning the "trail".

[86] Next, I turn to consider the interviews of this accused. It follows from the findings made above that this accused failed to provide the police with a true and complete account of events. Having regard to my findings above, this accused lied repeatedly and extensively throughout the greater portion of his interviews. Furthermore, when he ultimately provided an account accepting some limited involvement, confronted by the insurmountable video and photographic evidence, he signally failed to provide a true and complete version of events. I reject his "Turf Lodge" claims as unconvincing and implausible, wholly unsupported by the manifestly frail and flimsy evidence of the two occupants of the Turf Lodge house, noted in paragraphs [24] and [25] above. His claims and assertions regarding his

reluctantly acknowledged passenger neither undermine the prosecution case nor advance his defence.

[87] Having regard to the ***Lucas*** principle, are his manifestly deliberate and significant lies susceptible of an innocent explanation? In my view, the answer is plainly "no". The asserted "innocent" reluctance of this accused to provide a truthful account and truthful answers during police interviews must, in my estimation, be confined to his conduct during a short time span during the previous evening/night (involving his girlfriend) and has no bearing whatsoever on his conduct during the critical period thereafter, on 28th May 2008. In short, I am satisfied that during his interviews this Defendant lied consciously and repeatedly about his conduct throughout the critical phase in relation to obviously material issues and without innocent explanation. This reinforces my conclusion that he possessed the requisite guilty knowledge at all material times.

[88] Next, I must consider the application of the 1988 Order to this accused. In common with his co-accused, the prosecution do not invite the court to make any adverse inference under Article 3. This seems appropriate, having regard to the "reliance" requirement. As regards Article 4, my approach to this accused does not differ significantly from how I have treated his co-accused. In short, I am satisfied that the account which this accused provided to the police was, in various ways and at various stages, mendacious, unreliable and incomplete. The willingness of this accused to acknowledge *some* limited involvement in the offences was stimulated by the video recording of events at the filling station. However, I find that the answers and explanations which he provided thereafter gave rise to a series of gaps, questions and doubts. These relate to the entirety of his conduct on the date in question, the minute details of what he actually did, the sequence in which he acted, the presence and provenance of the items recovered during the search of his home three days later, the circumstances in which these came into his possession and the nature, purpose and timing of his previous association with the co-accused. All of these matters of undeniable importance could have been addressed – and undoubtedly would have been critically probed – if this accused had elected to give evidence. In common with his co-accused, he declined to do so and I make the same inference viz. that this accused was unable to provide any expanded account or answers or explanations capable of withstanding critical scrutiny, in circumstances where the Crown case demanded an answer.

[89] Based on the findings and assessments set out above, the conclusion that this accused had the necessary guilty knowledge, in the sense and to the extent explained in paragraphs [43]-[45] above, follows inexorably and I am thus satisfied beyond reasonable doubt. Accordingly, I find this accused guilty of the fifth and sixth counts in the indictment.

IX POSTSCRIPT

[90] It is evident that the primary perpetrators of the offences to which both Defendants were secondary parties are not before the court. It seems to me that, from the outset of the trial, there was an unspoken premise in the prosecution script that the leading gang members have escaped detection to date and are not before the court in consequence. This accords with the assessment of the court. This does not sound on the conclusion of the court that the prosecution have established the guilt of both accused beyond reasonable doubt in respect of some of the counts in the indictment. However, it may be of some importance at a later stage when, in determining the sentence appropriate for both Defendants, the court evaluates matters of culpability, retribution and deterrence.

[91] Finally, it is appropriate to acknowledge and applaud the courage displayed by the two principal victims, JL and EL, in co-operating fully with the police and testifying on behalf of the prosecution. Without their evidence, which proved beyond reasonable doubt (and with little real challenge) certain key elements of the relevant offences, it would not have been possible to convict either of the Defendants. They are to be commended accordingly.