Neutral Citation no. [2007] NICC 12 | *Ref:* **HARC5803**

Judgment: approved by the Court for handing down | *Delivered:* **4/5/2007**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

v

JOHN HUGH BRADY

ICOS No 06/100913

HART J

[1] This application raises number of separate issues, the first of which is a novel point, namely whether, notwithstanding the words of Section 2 (4) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 (the 1969 Act), an application for a "No Bill" can be entertained by the Crown Court after the defendant has been arraigned and pleaded not guilty. Mr John McCrudden QC (who appears on behalf of the defendant with Mr O'Rourke instructed by Kevin R. Winters & Company) also submits that the continuation of the prosecution in such circumstances would amount to an abuse of the process of the court on the basis that there insufficient evidence to justify the accused being put on trial.

[2] The defendant was returned for trial at a preliminary inquiry which concluded on 21 December 2006. It is common case that prior to the resident magistrate returning the defendant for trial, an application was made to him by counsel for the defendant that there was insufficient evidence to justify the defendant being returned for trial. This application was supported by written argument and was opposed by counsel for the prosecution. Having heard full argument the resident magistrate committed the defendant to the Crown Court for trial, thereby concluding under Article 37 (1) of the Magistrates' Courts (Northern Ireland) Order 1981 "that the evidence is sufficient to put the accused upon trial"

[3] The defendant was arraigned on 29 January 2007 before His Honour Judge Burgess, the Recorder of Belfast. No application was made to the Recorder for the entry of a No Bill. I am informed that the reason for that was that, although the defendant continued to be represented by Kevin R. Winters & Company, a decision was made to instruct different counsel on behalf of the defendant. This change took place on the Friday before Monday 29 January. Notwithstanding that detailed argument had taken place before the Magistrates' Court, no application was made to the court for a No Bill on 29 January, the accused was accordingly arraigned and pleaded not guilty. The case was then transferred to a High Court Judge by direction of the Lord Chief Justice and came before me for review on 9 February 2007. A number of matters were dealt with on that occasion, but there was no reference to the No Bill issue until a letter dated 14 March 2007 including the skeleton argument in relation to this matter was sent to the court by the defendant's solicitors.

[4] Section 2 of the 1969 Act provides that:

> (3) The Judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of "No Bill" in the Crown book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that the depositions or, as the case may be, the statements mentioned in subsection (2) (i), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented.
>
> (4) Where an entry of "No Bill" is ordered under subsection (3), the entry shall be made before the person against whom the indictment is presented is required to plead to the indictment and upon the making of such entry that person shall be discharged without further answer being required of him by the court but such discharge shall not prevent or prejudice any other indictment (whether or not founded on the same facts or evidence) being presented against him at any other court thereafter held which has jurisdiction to try the offence or offences charged in that other indictment.

[5] The wording of Section 2 (4) is clear and requires the court to consider whether or not a No Bill should be ordered before the accused pleads to the indictment upon arraignment. The language used is clearly mandatory. It is logical that that should be the case because the defendant's plea in answer to the count or counts contained in the indictment is the point at which he takes

issues with the prosecution and sets in train the trial process by the nature of his plea, whether it is a plea of guilty or not guilty. If a No Bill is entered, then the proceedings are terminated at that point, and there is no arraignment, although it is possible for the prosecution to proceed again in the future, although in practice this never happens.

[6] In R v. Campbell [1985] NI at p. 363 Lord Lowry LCJ described the relevant preliminary stages of criminal proceedings on indictment in the following passage.

> For present purposes the first relevant stage consists of the committal proceedings. It is the magistrate's duty to hear the prosecutor's evidence, or to receive it, so far as it consists of written statements, then to hear the defendant, if he wishes to say anything, and his witnesses, if he wishes to call any, and finally either to discharge the defendant or, if he finds a prima facie case, to commit him to the Crown Court for trial.
>
> Formerly at Assizes the next step was to prefer a bill of indictment before the Grand Jury, which had the duty (after hearing at least one witness) to ignore the Bill (by finding "No Bill") or to find a True Bill and present an indictment, on which the defendant was then arraigned.

As Lord Lowry went on to point out, whilst grand juries were abolished at Assizes by the 1969 Act, and, as he pointed out at page 365, grand juries had ceased to exist at quarter sessions since 1926, thereafter the judge presiding at quarter sessions had the power under Section 5 (1) of the Jury Laws Amendment Act (Northern Ireland) 1926 to enter a No Bill in respect of any indictment if he was of the opinion that a grand jury "would have been justified in finding No Bill on such indictment, and provided also that such entry shall be made before the accused is required to plead to such indictment." It is therefore clear that since 1926 in this jurisdiction it has been necessary for the judge to enter a No Bill before the defendant is required to plead to the indictment. As the decision of a grand jury to return a True Bill had to be made in order for there to be a valid indictment to which the defendant had to plead, it was and is logical for the finding of a No Bill to precede the defendant's plea. I am unaware of any decision, nor were counsel able to point to one, which would permit the decision to be postponed until after arraignment, or for an arraignment to be set aside to enable the matter to be argued later.

[7] It is salutary to recall that in this jurisdiction the power of the judge to enter a No Bill prior to the defendant being arraigned provides an additional

opportunity at which it is open to the defendant to seek to persuade the court that there is insufficient evidence to permit the case to proceed to the next stage of the criminal process. The first stage at which this point may be argued is at the committal proceedings before the magistrates. The third stage is that a similar application may be made at the conclusion of the prosecution case at the trial. Both have their equivalents in England and Wales, but there is no power in England and Wales equivalent to the No Bill procedure. Lord Morris of Borth-y-Gest pointed this out in Connelly v. DPP (1964) AC at page 1300 when he referred to R v. the Chairman of County of London Quarter Sessions ex parte Downes (1954) 1 QB 1.

> In that case Lord Goddard said that he knew of no power in the court to quash an indictment because it is anticipated that the evidence would not support the charge: indeed, the only ground on which the court can examine the depositions, before arraignment, is to see whether (in a case where there is a count for which there has not been a committal) the depositions disclose the offence covered by that count.

I am satisfied that there is no justification for ignoring the clear words of Section 2 (4) of the 1969 Act to permit the defendant to revisit the question of whether there is a sufficient case to justify his being put on trial once he has been arraigned and pleaded not guilty.

[8] Mr McCrudden also argued that it was possible for this object to be achieved by permitting the accused to vacate the plea he entered at arraignment. The basis for this submission was a suggestion to that effect in the prosecution's skeleton argument. I do not consider that it is open to the court to permit such a step. The authorities indicate that the power of the court to allow a change of plea is limited to (a) circumstances where the defendant can persuade the court to permit him to vacate his plea of guilty and substitute for it a plea of not guilty, or (b) where the defendant, upon his application, is permitted to change his plea from not guilty to guilty upon re-arraignment. See Archbold 2007 at 4-186 and 4-187. There is no authority for the proposition that a defendant may be permitted to vacate his plea of not guilty in order to argue, as in the present case, that there is insufficient evidence to justify him being put on trial. In the event that he was permitted to take that course and the court ruled against him then one might anticipate that the defendant would again enter a plea of not guilty at a subsequent arraignment. Indeed, Mr McCrudden frankly accepted that were the defendant to be permitted to reargue the point and the court held against him that it was exactly what would happen in the present case. I consider that such a course would simply be a device to evade the clear words of the statute and is unsupported by authority. I am satisfied that the parties cannot by agreement confer upon the court a jurisdiction which it does not have.

[9] Mr McCrudden sought in the alternative to argue that it would be an abuse of process for the trial to proceed by permitting the prosecution to rely upon a technicality because of the failure of the defendant to apply for a No Bill. I can deal with this argument shortly. As Mr Russell for the prosecution pointed out, the prosecution played no part in that situation and cannot be said to have manipulated the procedures of the court in any way.

[10] If, however, I am wrong in holding that the court does not have power to permit the defendant to vacate his plea of not guilty in order to seek to argue that a No Bill should be issued, I am satisfied that it is a matter for the discretion of the court whether he should be permitted to do so. Here the defendant made detailed submissions to the resident magistrate that there was insufficient evidence to justify committing the defendant for trial. The matter was not argued before arraignment as it should have been because of a late change of counsel, but not of solicitor. Finally, the matter was not raised for an appreciable period of time after the first review subsequent to arraignment. In those circumstances I am satisfied that it would not be correct to exercise any discretion I might have in favour of the defendant.

[11] Nonetheless, as this is the first occasion on which this point appears to have been raised, and in ease of the defendant, I have considered the evidence. The prosecution case is that at about 9.20 am on Friday 29 March 2002 an improvised explosive device was discovered underneath the car of Mr Lucas, a former member of the Royal Irish Regiment who was a civilian employee at Lisanelly army barracks in Omagh. It appears that the device must have been planted underneath his car some time after his return home the night before and before his departure for work the next morning.

[12] The foundation of the prosecution case is that a mixed DNA profile "which exhibits a distinct major component" was extracted from a swab of cellular material taken from item 3 RLH3, described at page 36 as the "unexposed/unravelled tape and wire joints (yellow/brown plus red/blue wires pooled). These were part of what was described at page 29 as:

> … an intact aluminium bodied electric detonator with red and yellow leadwires each approximately 18 cm in length. Two 27 cm lengths of wiring (one brown, the other blue) were connected to the leadwires, the joints being wrapped in black plastic adhesive tape. The detonator was consistent with a millisecond delay series type of Former Yugoslavian origin.

[13] The mixed DNA profile was the subject of a report from Dr Whitaker of the Forensic Science Service who expressed the opinion that

> the DNA profiling results provide extremely strong support for the assertion that DNA from Mr Brady is present on the tape and wire joints of the item 3 RLH3. This result is one I would expect to find if Mr Brady had handled this item such that his DNA had been transferred to the tape/wires.

[14] The case made by the prosecution is that the DNA is that of the accused and would have been found if he handled the tape and wires, and could be consistent with the final act of the bomber before the bomb was armed and placed under the car in question. Alternatively, it suggests that the defendant was engaged in making the bomb.

[15] In the course of interview the defendant initially declined to answer any questions. In due course however it was put to him that his DNA was present on the device and he was asked to explain how that could be. At page 156 of the interviews he answered as follows.

> I can't understand how my DNA would be on any of these items. The only thing that I can think of is what ye call it, M who I would have considered a friend who you have already stated during your interviews had problems with Mr Lucas, I let M use my house on numerous occasions, at [ ] Strabane, which I was not living in at the time. He was using it for to meet girls, etc, etc. The only thing I can think of here is that M removed some items from my house to use in this device as what ye call it, its been stated quite clearly in the court, openly in court that M's a suspected informer, he's been working for the police, who, it is believed was involved in setting, setting up my brother in November of 2003 by planting evidence in his house and that's the only reason other than it is a science, a science mistake at this stage, I cannot understand how, how my DNA is on anything.

[16] Mr McCrudden sought to argue that the DNA evidence could not be relied upon by itself, and/or that it was weak evidence because it is Low Copy Number DNA. It is not appropriate at this stage of the proceedings to attempt to resolve any criticism that there may be of the validity of Low Copy Number DNA. That is a matter for the trial when the evidence will be tested and the trial judge determines the strength of this evidence. I am satisfied that the evidence on behalf of the prosecution at present is sufficient to justify the accused being put on trial as it amounts to evidence upon which a tribunal of fact, properly directed, could convict the accused of the charges that he faces on

the basis that there is evidence to show that he was connected with the construction of this improvised explosive device.

[17] A further point which Mr McCrudden made in the context of the strength of the prosecution case was that there was no evidence on the committal papers to indicate the origins of the swab from the explosive device which had apparently been analysed for DNA purposes. His submission was that the evidence did not disclose where, by whom, or how, the profile which was analysed by Dr Whitaker had been obtained. It is correct that Dr Griffin's report at page 34 states that "this item has been examined with the assistance of scientific support staff" and that "DNA was extracted from the reference sample." However as her statement refers to the wiring and tape Item 3 RLH3 and a buccal swab from the defendant it is unclear whether both items were examined or merely the buccal swab. At page 38 Dr Whitaker prefaced his report by including the following statement.

> The items have been examined with the aid of Scientific Support Staff, details of which are noted on the Forensic Examination Record. This record is produced by me as Item JPW/1 and accompanies this statement. A full record of the work undertaken has been fully documented in records made at the time of the analysis. These records may be inspected, if necessary, at the laboratory.

Whilst the record JPW/1 has not been exhibited on the papers, I am satisfied that the identity of the person who extracted the DNA sample which was then analysed can be ascertained either from the records to which Dr Whitaker referred, or to the records to which Dr Griffin referred, as she said:

> A full record of the work carried out is contained within the case notes made at the time of the examination and these are available.

[18] It is correct that the law requires the primary facts upon which Dr Whitaker's opinion is based to be proved by him, or if not to be proved by the person who performed the appropriate analysis. See R v. Jackson [1996] 2 Cr.App.R. 420. Provision is now made by Article 31 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order) for matters of this sort to be proved, but no such statements are contained in the committal papers in the present case. No doubt it will be time consuming and expensive to produce a statement from each technician who carried out the appropriate test, and certainly it would be time consuming and expensive to call these witnesses for purely formal purposes. Given that I am satisfied that full records of the work carried out on the item in question are available to the defence for examination the point made by Mr McCrudden is without merit.

[19] In R v. Campbell at p. 380 Lord Lowry addressed the question of defects in the prosecution case for the purpose of a No Bill purpose in the context of irregularly admitted statements.

> Finally, if a presiding judge is in the future confronted with irregularly admitted statements, it would, in our opinion be open to him, if that is the sole defect to refrain from ordering "No Bill", because he can see that, when the hearing commences, the Crown will be able to present a case: admittedly, as we have been, the defectively completed written statements could not themselves be put *in evidence*. Alternatively, the Crown could serve notice, when the defect is discovered, of intention to give evidence in the terms of the statements. The repeal of the endorsement provision should also be considered. Even before arraignment, a defence application based on this defect ought to be pointless, since the Crown could counter this move with an application under Section 2 (2) (e) of the 1969 Act or an indictment under Section 2 (2) (f), provided the requirements as to delivery of the statements and the indictment to the office of the Chief Clerk and service on the accused had been complied with.

I am satisfied from this passage that where there is a purely formal defect in the Crown case the judge has a discretion to refrain from ordering a No Bill, if that defect is one which can simply be corrected when the hearing commences by delivering a statement of additional evidence. I am satisfied that the proper exercise of my discretion in this case is not to order a No Bill when the matter can be put right, if required, by the service of a short statement of additional evidence from the relevant witness or witnesses, and where all of this material is, I have no doubt, available to the defence experts for examination. I therefore decline to enter a No Bill on this ground also.

[20] The prosecution seek to have evidence of the defendant's bad character admitted by virtue of the provisions of the 2004 Order, the relevant provisions of which are Articles 6 and 8.

> 6 (1). In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –

(d) it is relevant to an important matter and issue between the defendant and the prosecution,

(g) the defendant has made an attack on another person's character.

8 (1). For the purposes of Article 6 (1) (d) the matters in issue between the defendant and the prosecution include –

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where as having such a propensity makes it no more likely that he is guilty of the offence;

(2) Where paragraph (1) (a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of -

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

(4) For the purposes of paragraph (2) -

(a) two offences are of the same description as each other if the statement of the offence and complaint or indictment would, in each case, be in the same terms;
(b) two offences are of the same category of each other if they belong to the same category of offences prescribed for the purposes of this Article by an Order made by the Secretary of State.

(5) The category prescribed an Order under paragraph (4) (b) must consist of offences of the same type.

[21] Article 8 therefore defines for the purposes of Article 6 (1) (d) whether evidence of a defendant's previous convictions is admissible as showing that

the defendant has a propensity, that is a tendency, to commit offences of the kind with which he is charged, by limiting the offences which may be proved for this purpose to those which fall within either of two classes of offence. These may be described as either (a) "offences of the same description" or (b) "offences of the same category" with which he is charged. (a) In addition to being the same "kind" of offence, see Article 8 (1) (a), it has to be "an offence of the same description", see Article 8 (2) (a). "Description" is further refined by limiting the offence to an offence which "would, in each case, be in the "same terms" in the statement of the offence in the indictment, see Article 8 (4) (a). (b) Alternatively, it may be an offence "of the same category", see Article 8 (2) (b). (i) Offences are "of the same category as each other" if they belong to "the same category of offences prescribed for the purposes of this Article by an order made by the Secretary of State". (ii) By Article 8 (4) (b) a "category" prescribed by an order under paragraph 4 (b) "must consist of offences of the same "type", see Article 8 (5).

[22] Thus the offences which can be admitted for this purpose are variously referred to as being of the same "kind", "description", "category" and "type". As may be seen from the following definitions of each word taken from The New Shorter Oxford English Dictionary, the meaning of these words overlaps to a considerable degree, but as they have been used in distinction to each other one must assume that each is intended to bear a different meaning.

(a) "Kind" is defined as "a class, a sort, a type; a class of individuals or objects distinguished by common essential characteristics; a genus; a species; a sort, a variety".
(b) "Description" is defined as "the combination of attributes which defines a particular class or type; the type of variety defined; a sort, a kind, a class."
(c) "Category" is defined as "a class, a division."
(d) "Type" is defined as "a class of people or things distinguished by common essential characteristics; a kind, a sort."

From the deliberate use of these different terms it is apparent that, depending upon the class into which the offence relied upon falls, a narrower or broader definition of offence is applicable. The narrowest definition of offence is the first class as the offence has to be an offence defined in the same terms in the statement of offence in the indictment. It is not sufficient that it should be merely an offence of the same general nature. Rule 22 of the Crown Court Rules (Northern Ireland) 1979 defines what the statement of offence is to contain.

> The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the

> offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

[23] Although the offence has to be described in the same terms in the indictment, does this mean in exactly the same terms as the offence with which he is charged? In the present case the charges are attempted murder and various offences under the Explosive Substances Act 1883. The statement of offence of count one being–

> Attempted murder, contrary to Article 3 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common Law.

The second count is making an explosive substance with intent, the statement of offence being –

> Making an explosive substance with intent, contrary to Section 3 (1) (b) of the Explosive Substances Act 1883.

The third count is making an explosive device, the statement of offence being

> Making an explosive device, contrary to Section 4 (1) (b) of the Explosive Substances Act 1883.

The fourth count is possession of explosive substances with intent, the statement of offence being –

> Possession of explosive substances with intent, contrary to Section 3 (1) (b) of the Explosive Substances Act 1883.

The fifth count is possession of explosive substances, the statement of offence being-

> Possession of explosive substances, contrary to Section 4 (1) of the Explosive Substances Act, 1883.

[24] One of the offences which the prosecution seek to rely upon is a conviction of the defendant for murder, and the question is therefore whether murder is an offence of the same "kind" as attempted murder? Were it the case that one was merely concerned with an offence of the same "kind", that is a "class" of offence, then attempted murder, or for that matter conspiracy to murder, could be said to be an offence of the same kind as murder because both involve murder. Yet they are distinct and different offences and would

not be described in exactly "the same terms" in the statement of offence in the indictment. That is also the position where the charges are brought under the Explosive Substances Act. As the statements of offence in the present case demonstrate, whilst the charges under the 1883 Act are of the same "kind" in the sense that they all involve the use of explosives, nevertheless they are distinct offences with different elements and are not described "in the same terms" in the statement of offence. The use of the words "in the same terms" appears to be designed to ensure that the offence has to be an offence described in terms which are in every respect identical, not merely some which are common and others which are specific to the offences under consideration. Were that not the case it would have been a simple matter to expand the class by using words such as "in similar terms", or by omitting the restrictive condition that the definition of the offence is to be decided by referring to the wording of the statement of offence.

[25] This construction draws some support from the wider ambit of the second class, that is "offences in the same category" with which the defendant is charged. A "category" is clearly intended to be a wider class than that of a "kind", and is only limited in breadth by the requirement under paragraph 8 (5) that the offences "must consist of offences of the same type".

[26] No category has been prescribed for offences of the type contained in the present indictment, but the Secretary of State has prescribed two categories in the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2006 (SRNI 2006 No 62). Part 1 of that Order prescribes categories of offences in the Theft Category and in the Sexual Offences (persons under the age of 17) category. Each category contains a list of offences and includes offences of aiding, abetting, counselling, procuring or inciting the commission of or attempting to commit an offence. That it was considered necessary to expressly provide that an attempt to commit an offence is to be considered within the same type of offence within Article 8 (2) (b) suggests that an attempt cannot be considered to be an offence of the same description as the substantive offence.

[27] One of the offences with which the defendant has been convicted in the past is the murder of a reserve constable of the RUC by an under car booby trap bomb. In the present case the defendant is charged with attempting to murder a former part time member of the security forces by means of an under car booby trap bomb. If the construction of these provisions I have suggested is correct it must follow that attempted murder is not an offence of the same kind as murder because the offences are not defined in the same terms in the statement of offence and so not within the narrower class. Equally, they are not within the broader class of "category" because no order has been made by the Secretary of State making attempted murder an offence of the same category as murder. Such a conclusion clearly gives rise to considerable anomalies. In the present case for example, as Mr Russell pointed out, if the prosecution was

limited to relying upon the offences under the 1883 Act it was hard to see how the trial judge would not be told that the reserve constable had died as a result of the booby trap bomb. Nevertheless, were the issue free from authority I consider that this construction of the statute would be an inevitable result of the highly prescriptive way in which the legislation has been drafted because Parliament has deliberately used language designed to limit the offences which can be admitted in evidence.

[28] This point was considered in R v Weir [2006] 2 AER at [7], pages 575 and 576 and rejected. The Court pointed out that words of the equivalent provision to Article 8 (2)

> …show that a defendant's propensity to commit offences of the kind with which he is charged can be proved in ways other than be evidence that he has been convicted of an offence of the same description or an offence of the same category. Unless that approach is adopted no proper weight is given to the use of the word "may" followed by the words in brackets…

Whilst the statute allows propensity to be proved without there being a conviction, as was possible at common law in cases where the "similar fact" principle could be invoked, as in Makin v AG for New South Wales [1984] AC 57 and R v Smith 11 Cr. App. R. 229 (the "brides in the bath" case), it is not easy to see why parliament created such complex provisions unless it was intended to limit offences (as opposed to matters where there had not been a conviction) that could be taken into consideration for this purpose to identical offences to those with which he is charged. The question for the jury is "whether the defendant has a propensity to commit offences of the kind with which he is charged", not a propensity to commit other offences of a similar kind which are distinct offences in law with different characteristics. If the decision in Weir is correct then one might ask what is the purpose of the elaborate provisions of Article 8 (2), (4) and (5)?

[29] Sitting at first instance I consider that I am bound to follow Weir as it is a decision relating to an identical criminal statute, and it is for the Court of Appeal to decide whether to follow an English Court of Appeal decision. I therefore rule that the defendant's previous conviction for murder is admissible under Article 6 (1) (d) to show a propensity on his part to attempt to murder part time members of the security forces, even though it is not an offence of the same description within the meaning of Article 8 (2) (a) of the 2004 Order. The prosecution are entitled in any event to rely under Article 8 (2) (a) for this purpose on the convictions for offences under Section 3 (1) (b) and Section 4(1) of the Explosive Substances Act 1883 as these are offences described in the same terms in the statement of offence. However, as will become apparent, this issue is somewhat academic because of the alternative application made by the

prosecution that the defendant's criminal record should be admitted under Article 8 (1) (g).

[30] Before I turn to Article 8 (1) (g) I should refer to Article 8 (3). This is in the following terms.

> Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

It will be necessary to consider the issues raised by Article 8 (3) when I come to consider the provisions of Article 6 (3) and (4) later in this judgment, and at that time I will consider the circumstances of the various offences and the length of time that has elapsed since the convictions relied upon.

[31] Before turning to the question of the admission of bad character evidence I must deal with a preliminary point taken by Mr McCrudden who submitted that it was inappropriate for a judge other than the trial judge to hear the applications for the admission of the defendant's bad character evidence, relying upon the decision of the Court of Appeal (Criminal Division) in R v. Jimmy Brima [2006]. In that case the application was heard by the trial judge who granted the application after hearing evidence from the witness identifying the defendant, and evidence in chief from another witness. However, I do not regard Brima as applicable in the circumstances of the present case. The defendant is charged with scheduled offences and his trial will therefore take place before a judge alone. Section 39 (1) (a) of the Criminal Procedure and Investigations Act 1996 (the 1996 Act) provides that a pre-trial hearing may take place. This is a pre-trial hearing under Section 39 (1) (a) because the defendant has been committed for trial and the application has been made before the start of the trial. As this is a scheduled case the start of the trial is defined as being before the opening of the prosecution case. See Section 39 (3) (a). Section 40 (1) (a) provides that a court has power to make pre-trial rulings as to any question of the admissibility of evidence.

[32] The application in the present case relates to the admissibility of evidence, and in many instances it may be appropriate to adjourn such matters to the trial judge to be determined, if possible, prior to the jury being sworn, or before the case is opened to the jury, so that the prosecution and defence can prepare their cases accordingly. In complex cases in particular it may be the case that only at that point are all of the necessary details available to enable the court to determine questions of admissibility of bad character evidence. However, Rule 44N of the Crown Court Rules requires a prosecutor to give notice of an application to adduce evidence of a defendant's bad character within 14 days from the date of committal, and a party who wishes to adduce

evidence of a non-defendant's bad character, or to cross-examine a witness with a view to eliciting such evidence under Article 5 of the 2004 Order, to give notice within 14 days from the date on which the prosecutor has complied, or purported to comply, with the requirement to make disclosure under Section 3 of the 1996 Act, or as soon as is reasonably practicable.

[33] The modern regime of active pre-trial case management therefore requires, in accordance with the Crown Court Rules where applicable, applications to be made as early as possible and, where the rules prescribe a time limit, within that time limit. In many cases it should be possible to determine these questions well in advance of the trial. Where the trial is a scheduled one and the matter is raised before the trial it is desirable that the matter be determined by a different judge to the trial judge, so that in the event that the application fails the trial judge has not been made aware of previous convictions of the defendant which might require him to discharge himself and direct that the trial recommence in front of another judge, thereby causing considerable disruption to the trial process. I therefore have conducted a pre-trial hearing, and the rulings which I make in the present application in relation to the admission of bad character evidence are pre-trial rulings for the purposes of Section 40 (1) (a) of the 1996 Act.

[34] The prosecution rely in the alternative upon the provisions of Article 6 (1) (g) on the basis that the defendant has made an imputation upon the character of someone at the time he was questioned. I should say that the original prosecution notice dated 21 December 2006 refers to Article 6 (1) (c), but this is clearly a typographical error and the argument proceeded on the basis that the application was made under Article 6 (1) (g). I have earlier quoted the defendant's response in interview to the allegation that his DNA was found on part of this device. As can be seen from this passage the defendant made a number of observations. He was unable to understand how his DNA could be on any of these items. He advanced a number of possibilities that would account for his DNA being found. (a) One was because of what he termed a "science mistake", i.e. a scientific error. (b) The alternative was "The only thing he could think of", "The only thing I can think of here is that M removed some items from my house to use in this device". He gave his reason for thinking that M could have done this was because M was involved in setting up the defendant's brother in November 2003 when he planted evidence in his house.

[35] This is either a suggestion that M constructed the device by using materials from the defendant's house, or deliberately incorporated the materials in the device in order to implicate the defendant. The allegation that M is believed to have planted evidence in the defendant's brother's house in the past is a further assertion of misconduct on the part of M.

[36] It remains part of the defendant's defence that his DNA may have been transferred to the items maliciously. Paragraph 3 (2) of his defence statement is in the following terms.

> If it is proven that the Defendant's DNA is on the items connected to the device the Defendant will maintain that his DNA may have been transferred to these items either by him innocently touching the items or by his DNA being transferred to the items either innocently or maliciously. It is impossible for the Defendant to say which one of these possibilities it could be. At trial the defence intends to explore the scope for these possibilities to have occurred.

The suggestion that his DNA may have been deliberately transferred to the items is an imputation of wrongdoing on someone's part, be it M or someone else. I consider that the allegations clearly amount to an imputation about the conduct of M or an unknown person within the meaning of Article 11 (1) (c) (i) of the 2004 Order. Allegations of this type in the past were regarded as amounting to an imputation that led to the defendant throwing away his shield under the provisions of the Criminal Evidence Act (Northern Ireland) 1923. See the cases cited in Murphy on Evidence, 9th Edition at pages 162 and at 163 note 59. Subject to the matters which I am about to consider I am satisfied that the defendant's reference to M amounts to an imputation on M's character, or on that of an unknown person, and that this results in the defendant's character being admissible under Article 6 (1) (g).

[37] Whether evidence of the defendant's previous convictions are admitted under paragraph (1) (d) or (g), Article 6 (3) and (4) are relevant. These provide:

> (3) The court must not admit evidence under paragraph (1) (d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse affect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

[38] As the defendant's previous convictions are admissible under Article 6 (1) (d) to prove propensity, Article 8 (3) is relevant to those matters. It provides:

> (3) Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

[39] There is a degree of overlap between the provisions of Article 6 (4) and 8 (3), although the latter makes no reference to "the matters which form the subject of the offence charged". Nevertheless it does provide that "for any other reason" that it would be unjust to apply paragraph 8 (2). In the circumstances of the present case I am satisfied that Article 8 (3) does not add anything to the test which the court is obliged to apply under Article 6 (3). In deciding whether to admit this evidence the court has to perform a balancing exercise in which the evidence sought to be admitted must be looked at carefully, see R v. Weir at p. 583b. As R v. Hanson [2005] 2 Cr.App.R., p.304 at [10] makes clear, the wording of Article 6 (3) – "must not admit" is stronger than the comparable provision in Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, which states that the court "may refuse to allow" evidence to be admitted. In Hanson at paragraphs [10], [11] and [12] the court identified a number of matters which should be taken into account when deciding whether or not evidence should be excluded under Article 6 (3) and 6 (4), and pointed out that-

> It will often be necessary, before determining admissibility and even when considering offences of the same description or category, to examine each individual conviction rather than merely to look at the name of the offence or the defendant's record as a whole.

[40] It is also clear that whilst a relevant consideration is the degree of similarity between the previous convictions and the offence charged, this does not mean that what used to be referred to as "striking similarity" must be shown before conviction becomes admissible. The court is also required to take into account the respective gravity of the past and present offences, as well as considering the strength of the prosecution case. If there no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are. Hanson at [11].

[41] The prosecution have placed before the court two separate sets of convictions. Those contained in Bill 553/87 are not supported by any evidence to explain the counts and I am therefore confined to the nature of the charge as inferred from the details of the certificate of conviction. The defendant was born on 31 January 1969 and is now 38. The eight convictions contained in Bill 553/87 appear to fall into four separate sets of offences.

(1) Charges 1 and 2 relate to the hijacking and destruction of an Ulsterbus by fire on 24 March 1987.

(2) Charges 3 and 4 relate to the possession and throwing of two petrol bombs between 22 February and 15 March 1985.

(3) Charges 4 and 5 relate to the collecting of information about the size, frequency and location of army foot patrols in the Strabane area between 1 April 1984 and 1 January 1987.

(4) Charges 7 and 8 relate to two offences of possession of a rifle with intent to endanger life between 1 February and 16 April 1987.

[42] Therefore he was found to have committed these offences between 1 April 1984 (when he was aged 15) and 16 April 1987 (when he was aged 18). Whatever may be said about the offences contained in (2) and (3), and possibly (1), as being due adolescent immaturity, the offences contained in (4) were much more serious and demonstrate involvement in offences of a particularly serious terrorist nature. Nevertheless these offences were committed 15 years ago, and given the defendant's youth at the time, if these were the only matters relied upon by the prosecution I would exclude them by virtue of Article 6 (4) in view of the passage of time and his youth at the time the offences were committed. However, as will be apparent, these are not the only matters upon which the prosecution rely.

[43] Bill 244A/90 shows that on 7 May 1991 the defendant pleaded guilty to a total of 29 counts covering nine sets of offences. These charges were based upon a three page written statement made by the defendant, and oral admissions made by him in a series of interviews, both of which are contained in the committal papers produced in support of this application. The offences cover a six month period between 28 February and 26 August 1989 whilst he was a member of the IRA. The circumstances of the individual charges can be summarised as follows.

(1) Counts 1, 2, 3, 5, 10 and 11. These relate to the murder of Reserve Constable Black by a under car booby trap bomb on 27 June 1989. The defendant pleaded guilty to his murder; to causing an explosion contrary to Section 2 of the 1883 Act; to possession of the bomb contrary to Section 3 (1) (b) of the 1883 Act, and to membership of the IRA. In the defendant's notice of opposition to the application to have these matters admitted in evidence it is stated that he pleaded guilty upon the basis that he was the driver of the getaway car. It is correct that he did not admit that he had been involved in the construction or planting of the bomb that killed Reserve Constable Black, but in the oral admissions he described how he helped to bring it across a river, and he saw the bomb prior to its being used.

(2) Counts 12 and 13 relate to collecting information relating to the movements of police and army personnel between 28 February and 27 June 1989.

(3) Counts 14 and 15 relate to the hijacking and destruction of a lorry load of furniture on 7 April 1989.

(4) Counts 16 and 18 relate to the possession of two drogue bombs with intent to endanger life contrary to Section 3 (1) (b) of the 1883 Act between 28 February 1989 and 27 June 1989.

(5) Counts 20, 21 and 22 refer to a conspiracy to cause an explosion using a drogue bomb between 6 May and 10 May 1989 contrary to Section 3 (1) (a) and Section 3 (1) (b) of the 1883 Act.

(6) Counts 24, 25, 26, 28, 29 and 30 relate to a conspiracy to cause an explosion between 30 April and 9 May 1989. The accused was charged with conspiracy to cause an explosion contrary to Section 3 (1) (a) of the 1883 Act, possession of the device contrary to Section 3 (1) (b), throwing an improvised anti-armour hand grenade contrary to Section 3 (1) (a), possession of that grenade contrary to Section 3 (1) (b), as well as conspiracy to cause grievous bodily harm and attempted grievous bodily harm.

(7) Counts 32, 33 and 34 relate to 29 May 1989. The defendant was charged with attempted grievous bodily harm, causing an explosion by means of an improvised anti armour hand grenade, contrary to Section 2 and Section 3 (1) (b) of the 1883 Act.

(8) Counts 36, 38 and 39 relate to the possession of drogue bombs on three occasions between 28 February and 27 June 1989, contrary to Section 3 (1) (b) of the 1883 Act.

(9) Counts 40 and 42 relate to possession of two drogue bombs with intent in the Republic of Ireland contrary to Section 3 (1) (b) of the 1883 Act between 23 of July and 28 August 1989, and possession of 100 rounds of ammunition with intent to endanger life during the same period.

[44] The defendant's admissions establish that on some occasions he acted as the look out, but on one occasion he threw a drogue bomb at a land rover. He admitted helping to bring not only the under car booby trap bomb, but drogue bombs across the river, presumably in each case the River Foyle and so bringing them into Northern Ireland. He described throwing drogue bombs and undergoing weapons training.

[45] The probative effect of all of the convictions on both Bills is to show that the defendant was a dedicated terrorist for a substantial period of time, during which he was prepared to use explosive devices to murder members of the security forces when the opportunity presented itself. The charges relating to the murder of Reserve Constable Black show that he had previous knowledge of booby trap bombs as he had been involved in the use, though not the construction, of one. These matters render it less credible that there is an innocent explanation for the presence of a DNA trace linking him to the wires found in the device which is the subject of the present charges. It is correct that the last of these offences was committed more than 12 years prior to the offences with which he is presently charged, but, as Mr Russell in my view justifiably pointed out, for much of that time the defendant was detained in prison, and the passage of time is therefore of much less significance than it otherwise might be because the defendant did not have the opportunity to restore his character by rehabilitating himself in the community until he was released from prison. The case against the defendant based on the DNA evidence cannot be described as a weak one. I am satisfied that the balancing exercise that I am required to perform requires the admission of the defendant's previous convictions and I decline to exclude them under Articles 6 (3) or 8 (3).

[46] Earlier in this judgment I stated that the application by the prosecution to admit the defendant's bad character under Article 6 (1) (g) rendered the outcome of the discussion of the admissibility of certain types of offence under Article 6 (1) (d) academic. That is because, as was pointed out by Lord Woolf CJ in R v. Highton [2006] 1 Cr.App.R. 7, page 131, paragraph [10]–

> In the case of gateway (g) for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.

[47] I therefore grant the prosecution application to admit evidence of the defendant's bad character, and I admit the entirety of the defendant's record under Article 8 (1) (g). The effect of this ruling is that it is open to the trial judge to have regard to all of the defendant's convictions when considering the defendant's propensity to commit offences of the type with which he is presently charged.