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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

JOHN MURPHY

_____

Before: Morgan LCJ, McCloskey LJ and McAlinden J

_____

McCloskey LJ (delivering the judgment of the court)

Preface

This appeal against conviction arises out of a Diplock trial and, thus, does not require the leave of this court.

Introduction

[1] On 31 July 2020 at Belfast Crown Court following a non-jury trial John Thomas Murphy ("*the appellant*"), aged 33, was convicted of the following offences, all alleged to have occurred on 11 June 2017.

(a) Possession of ammunition without a certificate, contrary to Article 3(2) of the Firearms (Northern Ireland) Order 2004 (the "*2004 Order*").

(b) Possession of ammunition in suspicious circumstances, contrary to Article 64(1) of the 2004 Order.

(c) Possession of an imitation firearm with intent by that means to cause any person to believe that unlawful violence would be used against him or another person, contrary to Article 58(2) (a) of the 2004 Order.

[The second, third and fourth counts of the indictment]

The appellant was acquitted of one further count (the first in sequence), namely possession of a quantity of ammunition with intent by that means to endanger life or cause serious damage to property or to enable another person to endanger life or cause serious damage to property, contrary to Article 58 (1) (a) and (b) of the 2004 Order. In our description of the first and fourth counts of the indictment we have intentionally employed the precise statutory language, for reasons which will become apparent.

[2] By this appeal the appellant challenges all three convictions. On 11 November 2020 he was sentenced to a commensurate term of three and a halfyears imprisonment, being the aggregate of three concurrent sentences, equally divided between custody and licensed supervision. There is no appeal against sentence.

Trial and Conviction

[3] The prosecution of the appellant arose out of a police search of a dwelling house at 17 Beechmount Close, Belfast ("*the premises*") on 11 June 2017. The appellant and three other persons were present. The search of a bedroom uncovered a holdall containing *inter alia* an imitation firearm, five containers of ammunition, bullets, black armoured gloves, armoured gloves, latex gloves, a cool bag and a knuckle duster.

[4] The defence statement consisted of a blanket denial, with two exceptions namely the appellant's acceptance that (a) he was residing at the premises at the material time and (b) he would have made normal use of their facilities and amenities. When the trial began the court was presented with an extensive schedule of agreed facts, which was in the following terms:

1. *The defendant was resident at 17 Beechmount Close, Belfast on 11 June 2017.*

2. *He provided the NIHE with 17 Beechmount Close as his permanent address on 30 January 2017.*

3. *The police searched the said property on 11 June 2017 in or around 11am.*

4. *The search of 17 Beechmount Close, Belfast was as a result of an intelligence led operation. Detective Inspector Griffin had provided a Briefing on Saturday 10 June 2017 regarding the premises to be searched - see Statement of Detective Constable McVicar at page 10.*

5. *A further Briefing was given to Police involved on the morning of Sunday 11 June 2017 at Dunmurry PSNI Station at approximately 10:15 hours and Police thereafter searched the above-named address at 17 Beechmount Close and 82 Beechmount Avenue.*

6. *The following people were present in the property, 17 Beechmount Close, at the time of the search:*

   (a) The defendant;
   (b) The defendant's partner, Colleen Mateer;
   (c) The defendant's step-brother, Pol (Paul) Liggett;
   (d) The defendant's brother's partner, Shannon Marley.

7. *The Defendant John Murphy was arrested as the occupier of 17 Beechmount Close and his brother Ciaran Murphy was arrested elsewhere that same day.*

8. *The police were searching under munitions and wireless apparatus warrant.*

9. *After entering the premises the police questioned the defendant, as recorded in the Search Log at 11:08, as to whether there was anything or anybody in the house which he could not account for the accused replied ... "Not, that I know of". A second question concerning whether there were any illegally held munitions or wireless apparatus in his possession in the dwelling house the accused replied ... "No".*

10. *On the arrival of police at 17 Beechmount Close the appellant enquired whether this search had anything to do with his brother stating ..." he was always landing me for this sort of thing" and ..."he always gets stopped and gives this address" and ..."this is all because of him".*

11. *The property contains a number of bedrooms.*

12. *Police found the following items in the bottom right side of a wardrobe in one of the bedrooms at the rear of the house.*

    (a) BMcA 1 – imitation firearm;

    (b) BMcA 2 – control bag;

    (c) BMcA 3 - black armoured gloves;

    (d) BMcA 4 – blue latex gloves;

    (e) BMcA 5 – black ('Karrimor') holdall;

    (f) BMcA 6 – red and black cooler (cool bag);

    (g) BMcA 7 – ammunition in a bag;

    (h) BMcA 8 – ammunition in a bag and boxes;

    (i) BMcA 9 – bullets in a sock;

(j) BMcA 10 – black knuckle duster;

(k) BMcA 11 – ammunition in a bag;

(l) BMcA 12 – ammunition in a (Bob Marley) tin box;

(m) BMcA 13 – ammunition in plastic boxes;

(n) BMcA 14 – special bullets.

13. *The ammunition was in contained in a number of bags, boxes, a tin and a sock, all of which were in a black 'Karrimor' holdall. The holdall was in the wardrobe.*

14. *The imitation firearm, the armoured gloves, the latex gloves and the knuckleduster were all in a "cool bag". The cool bag was in the wardrobe.*

15. *The defendant's partner told police that is the bedroom in which the defendant sleeps. [We can include the entire contents of the p9 statement if you prefer]*

16. *There was a letter from the Social Security Agency addressed to the defendant on the bedside table. The letter was dated 2 June 2017.*

17. *There were two bank statements in the defendant's name for dates contemporaneous to the search in the room (see the photographs).*

18. *The defendant was arrested at the property on 11 June 2017 and made no reply to his Article 3 caution.*

19. *The defendant is forensically connected to the following items listed above.*

    (a) A fingerprint is located on the top of one of the clear plastic bags with a locking mechanism (BMcA 11). That bag contained two similar transparent bags, which both contained ammunition.

    (b) The defendant was the major contributor to the mixed DNA profile on the mini tapes taken from the black armoured gloves (BMcA 3) found in the cool bag with the imitation firearm.

    (c) The defendant was the major contributor to the mixed DNA profile on the swabs taken from the latex gloves (BMcA 4), also found in the cool bag with the imitation weapon.

    (d) The defendant was the major contributor to the mixed DNA profile on swabs taken from the zip of the cool bag (BMcA 6).

20. *In respect of the DNA findings described at (b) to (c) above, a calculation made with reference to Northern Ireland population survey data shows that the DNA profiling*

evidence I at least a billion (1,000,000,000) times more likely to arise if the DNA originated from John Murphy rather than an unrelated male chosen at random.

21. *In relation to DNA findings, Ms Beck (FSNI DNA expert) says at page 31 of the Depositions:*

    (a) *Unresolvable mixed DNA profiles were obtained from the mini tapes from the knot of the sock (item 11 BMCA9), the swabs from the strap of the cool bag (item 18 BMCA6) and the swabs from the grip (item 4 EJ2).*

    (b) *John Murphy could not be excluded as being a contributor to the mixed profiles from the knot of the sock (Item 11 BMCA9) and the strap of the cool bag (Item 18 BMCA6).*

    (c) *Ciaran Murphy is excluded as a significant contributor to the mixed profile from the mini tapes from the knot of the sock.*

    (d) *Ciaran Murphy could not be excluded as being a contributor to the mixed profile from the strap of this cool bag.*

    (e) *In respect of Ms Beck's findings at (a) to (d) above, the findings are stated to be of limited evidential value AS OTHER COMBINATIONS of DNA can give rise to the same result and I am unable to provide a statistical evaluation of these findings.*

    (f) *John Murphy and Ciaran Murphy are excluded as being contributors to the mixed profile from swabs of the grip (Item 4 EJ2).*

    (g) *Mixed DNA profiles obtained from the mini tapes from the [black armoured] gloves (Item 15 BMA3), the swabs from [blue latex] gloves (Item 16 BMCA4) and swabs from the zips of the cool bag (Item 18 BMCA6). It was possible to determine the major contributor to each mixed profile. An identical male profile matching that of John Murphy was obtained.*

[5] The prosecution case was advanced on the basis that it was circumstantial in nature. It sought to attribute to the appellant guilty knowledge by inference, sufficient to establish beyond reasonable doubt that he, as a matter of law, had possession, namely control, of the offending articles.

[6] The central ingredients of the prosecution case were the following: the premises were the appellant's home; the offending articles were found in his bedroom; they were contained in two separate repositories, namely a holdall and cool bag; they were of considerable bulk and weight; the appellant's DNA was found on the zip of the cool bag; his DNA was also found on two items inside the cool bag, namely the armoured gloves and the latex gloves; his DNA was found on a transparent bag containing ammunition, inside the holdall; none of the other three adult occupants of the premises was forensically linked to any of the offending

items. Furthermore, as Mr Henry, representing the Crown, reminded the court, there was also unchallenged evidence in the search record that the appellant was both the owner of the premises and residing therein. This may be juxtaposed with certain aspects of the agreed facts reproduced in [4] above, which included the appellant's intimation to NIHE some four months previously that the premises were his permanent address.

[7] The prosecution case had a further dimension, namely that an inference adverse to the appellant should be made arising out of his silence when interviewed by police and his failure to testify at the trial. In the written submissions of Mr Philip Henry of counsel this was formulated in these terms:

> "*… The prosecution suggest that the evidence was such as could reasonably expect an explanation because the circumstantial evidence is compelling – in particular on the issues in and around access to the wardrobe and how and when his forensic links were placed on the offending items, given that the links are to different items containing and next to offending items, which were all located in his bedroom …*
>
> *The prosecution submission is that this is a case that clearly calls for an answer and that the only sensible explanation for him failing to do so is because he has none that would bear examination.*"

Neither the appellant nor any witness on his behalf gave evidence at the trial. An application for a *Galbraith* direction was refused and the trial was completed by the receipt of written submissions from prosecution and defence.

Judgement of the Trial Judge

[8] In a reserved judgment, as noted in [1] above, the appellant was acquitted of the first count and convicted of the remaining three counts.

[9] The judge noted it to be common case that the central issue was the appellant's "*knowledge for the purpose of being in possession of the items ….*" He then rehearsed the agreed facts (*supra*). Next he noted that the defence cross examination of the prosecution witnesses focused on three main issues:

> "*Firstly, the statements of the Defendant at the search. Secondly, the inability to date, time or assign the Defendant's contact with movable items found and lastly the contention that the Defendant's brother was some way implicated.*"

The judge illuminated the third of these three issues thus:

> "*From the agreed evidence … the Defendant denied any knowledge of any items found in the house. In addition, the Defendant made remarks in the hearing of police officers concerning the agency or actions of his brother Ciaran.*"

Those remarks, in paraphrased form, were:

> "*… the search is probably over* [Ciaran] *because he is always getting stopped and giving this address and he's always landing me for this sort of thing other than to exculpate his mother ….*"

In cross examination it was established that Ciaran:

> "*… had been questioned about the find at 17 Beechmount Close and that he had stored items there and was believed to be the Quartermaster of the New IRA.*"

[10] The judge then noted that the defence case regarding the forensic evidence consisted of three main propositions, which may be summarised in these terms:

(i) The height of the forensic evidence of the appellant's left thumb finger print on the "snap seal" polythene bag was that he had touched this item at some time; the vintage of the resulting impression could not be established; the item was movable and ubiquitous in nature; and there was no forensic link between the appellant and the ammunition, the imitation firearm or the knuckle duster.

(ii) While the appellant was shown to be the major contributor to the DNA profiles on a black armoured glove, a latex glove and the zip of a cool bag he was the major, but not the sole, contributor with the result that other persons had been in contact with these items; these were movable items; there was no evidence that the appellant had ever worn either set of gloves; there was no evidence of the circumstances of the appellant's contact with any of the relevant items; he was at most one of three human contributors to the DNA profiling on the strap of the cool bag; he was at most not excluded as being a significant contributor to the mixed DNA profile on the knot of the sock; he was not connected directly forensically to any ammunition or the imitation firearm; generally there was no evidence of the contents of any of the items with which the appellant was forensically connected or the date of the contact or the circumstances in which it had occurred.

(iii) There was a reasonable possibility that the holdall and the cool bag were in the wardrobe without the knowledge of the appellant. In

particular, in addition to the facts and factors already highlighted above, these were movable items and were unconcealed.

[11] The judge professed himself satisfied beyond reasonable doubt of the following facts:

(a) The appellant had been residing at the premises for around six months prior to the search.

(b) The bedroom in question was habitually used and occupied by him.

(c) The two bags would have been obvious to any person habitually using this bedroom.

(d) The appellant was positively connected to the exterior zip of the cool bag by his DNA.

(e) The appellant's thumb print was located inside the transparent polythene bag containing two other transparent bags of ammunition, inside the top opening flap of the cool bag.

(f) The appellant's DNA was found on the armoured gloves and the latex gloves.

[12] The judge expressed his overarching conclusion in the following terms:

> "*Each individual thread of the circumstantial case may well be incapable of providing a conclusion beyond reasonable doubt. However, when taken together they support a compelling conclusion acknowledging and considering the limitations of each evidential component with regard to the timing of any contact, the movable nature of the items and the aging or dating of forensic evidence. I have examined the circumstantial threads in this case and I am firmly convinced that they support a compelling conclusion that the Defendant was in possession of the materials discovered* [and] *that he had the required knowledge and ascent* [sic] *to control necessary* [sic] *and accordingly I am satisfied beyond all reasonable doubt that he was in possession of the material at the time.*"

The judge then asked rhetorically whether there were any "*points made by the defence with regard to the Defendant's brother which are circumstances which would constitute a circumstance pointing away from the Defendant*". He answered this question in the negative having noted the appellant's oral statement at the beginning of the search, the contemporaneous search of his brother's address, the questioning of his brother and the non-exclusion of his brother from the DNA profiles. The judge stated:

> "*None of that deflects or detracts from the compelling nature of the circumstantial evidence against the Defendant himself. In addition, the Defendant choose when called upon in the usual terms not to give evidence to support or add to the assertion.*"

[13] Next the judge addressed the discrete issue of the appellant's failure to give evidence, with the introductory words "*If I am wrong in my conclusions above …*". Having rehearsed in full the standard jury direction on this matter the judge continued:

> "*I am satisfied that the circumstantial evidence as set out by me above is compelling with regard to the issue of the possession. If I am wrong in that I make the following clear. I am satisfied that the strength of the prosecution evidence and the circumstances of the find were such that they clearly called for an answer and that the only fair and proper conclusion is that the Defendant did not have one or one that would bear scrutiny. Therefore, although I have not found it necessary, I make clear that I would have drawn an adverse inference against the Defendant had I viewed it as required.*"

[14] Turning to the indictment, the judge pronounced himself not satisfied beyond reasonable doubt that there was a necessary or compelling inference that the appellant had the intention necessary to convict in respect of the first count of the indictment (noted in [8] above). He then pronounced guilty verdicts in respect of the second count (possession without a certificate) and the third count (possession in suspicious circumstances). With regard to the fourth count, the judge was clearly alert to the specific intent which must be established beyond reasonable doubt in order to found a conviction. He stated:

> "*It seems to me that on any proper analysis …. The intention required is a more generalised and lesser intent than at count one and I am satisfied that that intent can be established upon the evidence in this case and accordingly I convict him of count four.*"

Grounds of Appeal

[15] The grounds of appeal may be paraphrased thus:

(i) The first and second grounds merge to form the single complaint that the judge failed to give the appellant a good character direction.

(ii) The convictions in respect of all three counts are unsustainable having regard to (a) the total absence of any direct DNA or finger print

evidence linking the appellant to the firearm or ammunition, (b) the movable, ubiquitous and non-sinister items to which the appellant was connected by DNA or finger print evidence and (c) the absence of any evidence of the vintage of the DNA or finger print evidence or the circumstances in which the appellant had come into contact with these non-sinister items.

(iii) The judge's finding that the offending items were situated in a place which "*… would have been obvious to anyone habitually using that room*" is unsustainable as (a) it failed to take adequately into account the poor condition and state of disarray of the wardrobe and bedroom in question, (b) it incorrectly assumed that the items had been present for a prolonged period of time, (c) it failed to recognise that they were readily movable and (d) it failed to acknowledge that "*… a real possibility existed that they were in transit.*"

(iv) The judge's professed disregard of any inference adverse to the appellant in finding the three charges proved against him was inconsistent with his statement, when making his conclusion on the issue of possession, that the appellant had failed to give evidence.

(v) The judge failed to attach adequate weight to the several items of evidence relating to the appellant's brother.

(vi) With specific reference to the third conviction, there was insufficient evidence to warrant a finding that the appellant intended others to fear unlawful violence. Secondly, this conviction is inconsistent with the judge's finding that the appellant did not have the requisite intent to convict him of the first count of the indictment.

The Possession Ground of Appeal

[16] This ground of appeal raises a single issue, namely possession as a matter of law, common to all three convictions. It focuses particularly on the "brother factor", which emerged by some measure as the main theme of the submissions of Mr Kieran Mallon QC (with Mr Sean Mullan of counsel). The appellant's brother is described as the "*one common factor*" to the intelligence-led search operation giving rise to the charges. The brother, who resides nearby, was arrested in light of what the search uncovered. The brother's DNA was present on several items contained in the bags seized by the police, the expert evidence being that DNA profiles either could not exclude the brother as a contributor or showed him to be a less than significant contributor to the mixed profiles. The forensic scientist testified, in terms, that this evidence would have been insufficient to establish the brother's guilt beyond reasonable doubt of any offence arising out of his contact with the items in question. The resulting submission developed was that, based on this

evidence, there was a real possibility whereby a jury could properly infer that some person other than the appellant had knowledge of and was legally in possession of the offending items.

[17] In *Campbell v HM Advocate* [2008] SCCR 847 the appellant was convicted of possession of a rifle which had been secreted inside a house to which he and others had previously had access. The rifle was found wrapped in black refuse bags and the appellant's finger and palm prints were identified on the bag. There was no evidence as to the time when the fingerprint was affixed or the location of the bag when it was affixed or any other related circumstances. While other fingerprints had been found on the bag these had no evidential significance. There was no evidence that the appellant had ever been seen with the rifle and his prints were not on the rifle. The High Court of Justiciary held:

> *"[20] … the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge and control of the rifle … In our opinion, the jury would be entitled to infer that the appellant had indeed come into contact at some time with the black plastic bag (a movable item) which had been used by someone to wrap up the concealed rifle…*
>
> *Thus some additional evidence would in our view be necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had been involved in handling or concealing the rifle and thus that he had the requisite knowledge of and control over the rifle."*

[18] On behalf of the appellant reliance is placed on *R v McLaughlin* [2020] NICA 58, which featured consideration of *Campbell (supra).* There the trial judge's rejection of a *Galbraith* application was framed in these terms:

> *"(2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. [our emphasis]*
>
> *(3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the*

> *prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."*

The appeal was allowed, the court stating at [23]:

> *"We are troubled by the fact that when the direction was sought the circumstantial evidence and forensic links presented by the prosecution, and taken at their height only put the appellant in contact with the bags in which the cache was found. There is no forensic evidence at all linking him to the content of these bags. Ubiquitous bags, whether paper or plastic, are precisely the kind of items that do get used and reused by many people over the course of many different transactions. Fragile threads do not make a strong rope. The jury would have been entitled to infer that the appellant had at some time come into contact with the bags which had been used to conceal the items. However, the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge and control of the items. As in Campbell some additional evidence would be necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had knowledge and control of the items. For these reasons, and applying the approach in R v Goddard & Fallick [set out at para [16] above], we consider that the trial judge erred in law in refusing the application for a direction of no case to answer and accordingly the appeal is allowed."*

[19] *Campbell* and *McLaughlin* are fact sensitive cases, each raising the two interrelated questions of the sufficiency of the prosecution evidence adduced and the sustainability of the inferences made therefrom by the court of trial. Neither ranks as an authority for any legal principle or proposition. The appellant's argument before this court is based exclusively on factual comparisons. We fail to see how comparing different fact sensitive frameworks with that obtaining in the present case advances the appeal.

[20] The judge was clearly alert to the "brother" issue, as our analysis of his judgment above demonstrates. The evidence pointing to physical connection between the appellant's brother and some of the offending items was considered by the judge. The case made on behalf of (not by) the appellant was that this established the real possibility that some person other than the appellant had knowledge of and was legally in possession of the offending items. We consider it clear from the judgment that the judge engaged with this case. His duty was to acknowledge this case and to balance it in his deliberations. More specifically, it was incumbent on the judge to consider whether this case gave rise to a reasonable doubt about the appellant's guilt in respect of any of the counts.

[21] The first two offences of which the appellant was convicted were possession of ammunition without a certificate and possession of ammunition in suspicious circumstances. In order to make these convictions the judge had to be satisfied beyond reasonable doubt that the appellant had the requisite guilty knowledge. As in *R v Whelan* [1972] NI 153 there was no evidence that the appellant was in physical possession of any of the offending articles. Thus, as observed by Lowry LCJ at p 154:

> "*… the Crown …. had to rely, therefore, on the surrounding circumstances. It is quite proper to regard those circumstances as consisting of what happens before, during or after the point of time to which the charge relates since what one is trying to ascertain is the mental attitude of the accused person.*"

We have summarised in [6] above the several links in the circumstantial chain on which the Crown case was based. We have also rehearsed in [11] and [12] above the judge's specific findings beyond reasonable doubt and his overarching conclusion. The judge considered the circumstantial evidence against the appellant to be "*compelling.*" We consider that this assessment was properly open to him. Furthermore, there was no flaw in any aspect of his self-direction. From this it follows that the judge's treatment of the "possession" aspect of these two counts cannot be faulted.

[22] Specific intent is not an ingredient of either of the first two offences of which the appellant was convicted. The third offence, however, stands in marked contrast. We have reproduced in [1] above the statutory language in full. The first ingredient of this offence is <u>possession</u>. The judge had to be satisfied beyond reasonable doubt that the appellant was in possession of the imitation firearm. Our analysis and conclusion in the immediately preceding paragraph, as regards the first two convictions, apply fully to this element of the third conviction. However, possession *simpliciter* was not sufficient in order to sustain this discrete conviction.

[23] Rather the prosecution had also to establish beyond reasonable doubt the requisite specific intent. It was incumbent on the judge to be satisfied beyond reasonable doubt that the appellant had the imitation firearm in his possession *with intent … by that means …. to cause another person to believe …. that unlawful violence …. would be used against him or another person.* The exercise of segregating the several ingredients in this way serves to draw attention to the very specific nature of the requisite intent and its multiple elements.

[24] We turn to examine the judge's treatment of the several elements of Article 58(2)(a) of the 2004 Order. The judge, to begin with, was correct in his recognition that this offence could be established only on the basis of the relevant circumstantial evidence (to include, of course, the scientific evidence). He was also correct to recognise that the necessary intent could be established only by inference. However, what follows in this section of the judgment is couched in rather lean terms and, duly analysed, gives rise to three main observations which are inter-related. First,

the judge glossed the statutory language. This *per se* is a cause of concern, given our forensic examination of what the statute says. Second, he did not engage with the individual ingredients of the offence. Third, his description of the requisite intent as "*more generalised and lesser*" than that required in respect of the first count does not bear scrutiny. Each of these two offences entails a specific intent framed in different terms. The statutory language in respect of each is in circumscribed and focused terms. The application of the prism of "*lesser*" or "*greater*" is not appropriate. Ditto that of more (or less) "*generalised*". In summary, the judge did not engage with the constituent elements of the Article 58(2)(a) count and conducted an exercise which we consider inappropriate, one which led him into error. It follows that the conviction in respect of the fourth count cannot be sustained.

[25] Pausing at this juncture, we turn our attention again to the convictions of the appellant in respect of the other two counts of the indictment. Having concluded that there is no flaw in how the judge dealt with the issue of possession, the remaining question is whether either of these convictions is unsafe on the basis of either, or both, of the other grounds of appeal.

The Adverse Inference Ground

[26] Articles 3 and 4 of the Criminal Evidence (NI) Order 1988 are reproduced in the Appendix to this judgment. As our resume of the judgment above makes clear, the judge's treatment of this issue had two elements. First, he considered that the prosecution evidence clearly called for an answer from the appellant. Second, he considered that the only fair and proper conclusion was that the appellant either had no answer to provide or had none that would bear scrutiny. The submission advanced is that it was not "*altogether unexpected*" that the appellant both refused to answer police questions about his brother's access to or connection with the premises and declined to submit himself to cross examination which would *inter alia* focus on this issue. This ground of appeal, in substance, challenges the judge's disinclination to accept this rationalisation.

[27] The 1998 Order being of some 30 years vintage, there is no shortage of guidance on the meaning and application of its provisions in the jurisprudence of this court. In the present context it suffices to highlight two of these decisions. First, in *R v McClernon* [1990] NIJB 91, a case involving the discovery of firearms at a house where the accused was present followed by silence during interviews and at trial, it was held that an inference adverse to him could properly be drawn under Article 3, per Kelly LJ at page 179. The decided cases further establish that the nature and strength of the inference to be made is a case specific matter. In *R v Murray* [1993] NI 105 it was held that where the Crown constructs a general circumstantial case there is no need for the judge to either spell out the exact inference which he draws or to specify which part of the Crown case it supports, a decision upheld by the House of Lords: see *Murray v DPP* [1994] 1 WLR 1.

[28] We consider it important to analyse the judge's treatment of this issue in the correct way. This was not an exercise in finding facts, thereby attracting the criminal standard of proof. It was not an exercise of the bright line variety such as, for example, the obligation to formulate the criminal burden and standard of proof in the necessary terms. Rather it was an exercise in evaluative judgement. In matters of this kind an appellate court must accord to the trial judge an appropriate degree of latitude, a discretionary area of judgement.

[29] Approached in this way, the real question must be whether it was reasonably open to the judge to reject the "not altogether unexpected" rationalisation, or theory - one which was crafted exclusively from the bar of the court, without any direct supporting evidence – and to espouse the different analysis for which he opted. In many cases this question will invite an affirmative answer, based on the consideration that the trial judge's approach clearly lay within the range of approaches reasonably available to him. We consider this to be one such case, having regard to the array of facts and factors associating the appellant with the presence of the offending articles in the premises. These are summarised in [6] above and do not require repetition.

[30] Turning to one of Mr Mallon's discrete submissions, we accept that there is a degree of ambiguity in the judgment as to whether the inference adverse to the appellant made by the judge formed part of his conclusion that the appellant's guilt in respect of the second and third counts had been established beyond reasonable doubt. We consider this to be a matter of no moment, for two reasons. First, insofar as this was one of the building blocks in the judge's aforementioned conclusion, we have held that the making of the adverse inference entailed no error of law. Second, insofar as the adverse inference did not form one of these building blocks (a) we consider that there was ample evidence to warrant the conviction of the appellant in respect of the second and third counts without the adverse inference and (b) the judge's approach to this issue on an alternative basis ("*If I am wrong in my conclusions above ….*") involved a perfectly legitimate exercise and one which he conducted without error of law.

The No Good Character Direction Ground

[31] The factual element of this ground of appeal is uncontentious: the judgment of the trial judge contains no self-direction pertaining to the appellant's good character. Nor can one be reasonably inferred. The appellant's submission is advanced in these terms. His criminal record consists of a single conviction in respect of an offence of criminal damage. Thus, it is contended, he was entitled to the benefit of a good character direction. The written submission continues:

> "*If he had chosen to give evidence then his evidence would be more likely to be truthful and he would be considered less likely to have committed the acts alleged. Further, the court should have regard to his responses to police at the outset.*"

[32] There is extensive guidance in *R v Hunter* [2015] EWCA Crim 631, wherein the Court of Appeal in England and Wales conducted a broad review of the law on good character directions. The court concluded that there was no presumption that a failure to give a good character direction should lead to finding that a conviction is unsafe, even where the appellate court believes one ought to have been given. The judgment highlights that there are two different limbs to good character: that a defendant with sufficient good character can be considered less likely, from a propensity perspective, to have committed the offence charged; and that a defendant with good character is more likely to have given a credible account. In shorthand, they could be referred to as the **propensity** and the **credibility** limbs. The judgment seeks to expose and correct some identifiable erroneous practices.

> *"66. The Vye and Aziz principles began life as good practice. Good practice became a rule of practice in R v Vye because the court needed a pragmatic solution to a problem of inconsistency and uncertainty.* ***The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction.*** *Yet, the principles in R v Vye and R v Aziz have now been extended to the point where defendants with bad criminal records (as in these appeals) or who have no right to claim a good character are claiming an entitlement to a good character direction. Many judges feel that, as a result, they are being required to give absurd or meaningless directions or ones which are far too generous to a defendant. Fairness does not require a judge to give a good character direction to a man whose claim to a good character is spurious (per Lord Steyn in R v Aziz [1996] AC 41 , 52 and Taylor LJ in R v Buzalek [1991] Crim LR 115).*
>
> *67.* ***Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend****."*

At paragraph [69] the court said:

> *"****69. It is also important to note what R v Vye and R v Aziz did not decide: (a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character; (b) that a defendant with previous convictions is entitled to good character directions; (c) that a defendant with previous***

convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged; (d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely on the previous convictions as probative of guilt; (e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction."

[33] The court then discussed the issue of the "wrong turn", particularly in respect of permitting defendants who do not have relevant records to receive a good character direction:

> *"70. It is clear to us that the good character principles have therefore been extended too far and convictions have been quashed in circumstances we find surprising. The decisions in R v H [1994] Crim LR 2005 and R v Durbin [1995] 2 Cr App R 84 are usually cited as justification but it is sometimes forgotten that the previous conviction in R v H was old, minor and irrelevant to the charge. The defendant H fell into the category of someone with an effective good character. His conviction was not simply irrelevant to the charge. Further, the court in R v Durbin, perhaps unaware of the decision in R v Buzalek, does not seem to have appreciated that the principle of giving a good character direction only applied where the defendant was of previous good character "in the proper sense". This led the court in R v Durbin to proceed on the false basis that a man with an undoubtedly bad character as far as propensity and credibility were concerned was entitled to the benefit of a good character direction. We are satisfied that the law thereby took a wrong turn.*
>
> *71. In any event, R v Durbin was decided before R v Aziz in which Lord Steyn stated expressly that judges should not be required to give absurd or meaningless directions. A good character direction on the facts of R v Durbin and, in our view, R v D (P) [2012] 1 Cr App R 448, would have been absurd and meaningless. Subsequent reliance on R v Durbin in cases like R v Gray (John) [2004] 2 Cr App R 498 and R v D (P) (in so far as R v D (P) relied on R v Gray) to extend the principles of good character to defendants who do not have a good character was therefore misplaced."*

The Court considered that defendants with irrelevant convictions can lay claim to no "right" to a good character direction:

> *"72. It may sound like a statement of the obvious but only defendants with a good character or deemed to be of effective good character are entitled to a good character direction. A defendant who has a record of previous convictions or has a bad character of some other kind is not entitled as of right to a good character direction; it matters not for this purpose who has adduced the evidence and whether the bad character evidence is relied on as probative of guilt. It does not follow from the fact that the bad character is not considered probative of guilt that a defendant is entitled to be treated as if he had a good character. Once evidence of bad character is admitted, a judge cannot ignore it and give directions to a jury which would make no sense. To the extent that decisions such as R v Payton [2006] Crim LR 997 suggest otherwise they were wrongly decided, no doubt in ignorance of the decisions put before us. Where a defendant has a bad character, a judge is not obliged to give a good character direction, s/he has a discretion."*

[34] At [74] the court observed that blemishes and reprehensible conduct falling short of convictions could also deprive a defendant of his good character. At paragraph [77] ff the court examined the different categories of good character. It explained what was meant by "*absolute good character*" and an accused person's resulting entitlement.

> *"**(i) Absolute good character***
>
> *77. We use the term "absolute good character" to mean a defendant who has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven. We do not suggest the defendant has to go further and adduce evidence of positive good character. This category of defendant is entitled to both limbs of the good character direction. The law is settled.*
>
> *78. The first credibility limb of good character is a positive feature which should be taken into account. The second propensity limb means that good character may make it less likely that the defendant acted as alleged and so particular attention should be paid to the fact. What weight is to be given to each limb is a matter for the jury. The judge must tailor the terms of the direction to the case before him/her, but, in the name of consistency, we commend the Judicial College standard direction in the Crown Court Bench Book as a basis."*

The judgment continues at [79]:

> *"**(ii) Effective good character***

> *79. Where a defendant has previous convictions or cautions recorded which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character. It does not follow from the fact that a defendant has previous convictions which are old or irrelevant to the offence charged that a judge is obliged to treat him as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit an "effective good character" are afforded one. It is for the judge to make a judgment, by assessing all the circumstances of the offence(s) and the offender, to the extent known, and then deciding what fairness to all dictates. The judge should not leave it to the jury to decide whether or not the defendant is to be treated as of good character.*
>
> *80. If the judge decides to treat a defendant as a person of effective good character, the judge does not have a discretion whether to give the direction. S/he must give both limbs of the direction, modified as necessary to reflect the other matters and thereby ensure the jury is not misled."*

[35] At [82] the judgment highlights the discretion available to the trial judge. The essence of this is that there will be cases where a direction would be "*appropriate but not necessary*" and that the appellate court should have regard to the judge's discretion, which will include the advantage of having heard all of the evidence and dealt with all of the issues.

> *"82. In any event, a defendant with previous convictions or cautions to his name has no entitlement to either limb of the good character direction. It is a matter for the judge's discretion. The discretion is a broad one of the "open textured variety" referred to in R v Aziz [1996] AC 41, 53, whether to give any part of the direction and if so on what terms. It is not narrowly circumscribed. The judge will decide what fairness dictates. Fairness may well suggest that a direction would be appropriate but not necessarily. Where a judge has declined to give a modified good character direction to a defendant in this category, this court should have proper regard to the exercise of discretion by the judge who has presided over the trial."*

[36] The judgment then considers the interplay between a demonstrated erroneous failure to give a good character direction and the safety of an ensuing conviction. See [89]:

"89. "What if the judge does go wrong? The sole statutory test for the Court of Appeal (Criminal Division) is now one of safety of the conviction. There can be no fixed rule or principle that a failure to give a good character direction or a misdirection is necessarily or usually fatal. It must depend on the facts of individual cases. It follows that all the decisions put before us in which convictions were quashed as a result of a misdirection were entirely fact specific. They provide no guidance at all. As we have endeavoured to demonstrate, there are two lines of authorities not just the one put before the court in R v Hoyte [2013] EWCA Crim 1002. For every decision in which it has been held that the failure to give a direction or a misdirection was fatal to the safety of the conviction, there is likely to be another decision which points the other way.

90. The true guidance is to be found in Singh v State of Trinidad and Tobago [2006] 1 WLR 146 (per Lord Bingham of Cornhill, at para 30) to which we have already referred, and in R v Vye [1993] 1 WLR 471 (per Lord Taylor of Gosforth CJ, at p 477):

> *"Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case."*

91. ***We see force in the Crown's submission that this court has not always been slow to criticise and to intervene. It is sometimes forgotten that the extent to which a direction on the defendant's good character is likely to impact on a jury's deliberations is not the same in every case. More often than not the significance of good character is obvious. Members of a jury are more likely to believe the trusted employee example in R v Vye and can no doubt work out for themselves that he is less likely to have stolen. To our mind there is a tendency to underestimate the average juror, assuming that unless a judge endorses defence submissions to the full extent the jury will ignore them and relevant character evidence.*** *We prefer to assume that the jury can and should be trusted to bear the evidence in mind and to assess the weight to be placed on it.*

92. It would be wrong therefore to assert, as Mr Blaxland did, that if a defendant is entitled to a good character direction and the judge fails to give it in proper form, the conviction will be quashed as a matter of course."

[emphasis added]

[37] The decision in *Hunter*, though not binding on this court as a matter of precedent, has been applied by this court in previous cases. There was no suggestion that we should do otherwise in the present case.

[38] The appellant has a conviction for criminal damage for an incident in 2010 and a caution for disorderly behaviour relating to an incident in 2013. He is not a man of *absolute good character*, but may have been a person of *effective good character* for the purposes of his trial. Mr Henry, while acknowledging that the prosecution had not adopted any stance on this issue at the trial, submitted that if it had done so it would have accepted that that the appellant had, for the purposes of this case, effective good character, although any resulting good character direction ought to have expressly specified the disorderly behaviour caution in 2013 in the interests of accuracy.

[39] The decision of the English Court of Appeal in *R v Renda* [2006] 1 WLR 2948 was considered with approval in *Hunter*. Paragraphs [3] and [4] are pertinent:

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

[Our emphasis]

We consider that in principle there can be no distinction between "*an incorrect ruling or misdirection by the trial judge*" in the matter of a good character direction and an omission to consider it altogether, the present case being one of the latter species.

[40] We consider it clear beyond plausible argument that there was no issue about whether the appellant had given a credible account, his brief utterance at the scene of the search falling manifestly short of the notional threshold in this respect. Thus, a good character self-direction addressing the limb of credibility would plainly have been inappropriate. The next question is whether there should have been a good character self-direction regarding the propensity of the appellant to have committed any of the offences charged. It is not in dispute that the judge correctly directed himself on the issue of adverse inferences and we have endorsed this aspect of his decision above. We find it difficult to conceive how this direction could have harmoniously coexisted with a good character self-direction. In this respect the intrinsic limitations of the appellant's brief oral utterance at the scene of the search must be recognised. Furthermore, the DNA evidence adduced at the trial connecting him directly and physically to several of the items recovered was, as we have held, such as to call powerfully for an explanation through the medium of giving evidence in his own cause. Logically and sensibly a "*propensity*" good character self-direction does not fit into this framework.

[41] Furthermore, as regards the scientific testing of certain of the offending articles the DNA samples were mixed thereby implicating more than one person in physical contact with them. As noted in Blackstone's Criminal Practice (2021) at paragraph F19.31 even in cases where there is no dispute as to the source of the crime scene DNA this may not necessarily suffice to establish guilt beyond reasonable doubt. The accused may offer an innocent explanation, such as indirect or secondary transfer or contamination, for even the strongest DNA matches. Where this occurs any such explanation must be disproved, or rejected as inherently implausible, before the accused can be convicted.

[42] The correct approach to the question of whether a conviction based solely on mixed profile DNA found on a movable object at the crime scene is safe is one which has evolved somewhat in the jurisprudence of the English Court of Appeal. One of the leading decisions in the more recent case law is *R v Tsekiri* [2017] 1 WLR 2879. There the Court of Appeal held that there is no bar to a case being left to the jury where the only material evidence is that the defendant's DNA profile was found on a movable article recovered at the scene of the crime. No evidential or legal principle precludes this. In thus deciding the court made clear that its earlier decision in *R v Bryon* [2015] EWCA Crim 997 was no longer to be followed. The key passage is the following at [14]:

> "*In our view the fact that DNA was on an article left at the scene of a crime can be sufficient without more to raise a case to*

> *answer where the match probability is 1.1 billion or similar.* ***Whether it is will depend on the facts of the particular case****….*
>
> *The crucial point is that there is no evidential or legal principle which prevents a case solely dependent on the presence of the defendant's DNA profile on an article left at the scene of a crime being considered by a jury.*"
>
> [Emphasis added.]

We concur with this approach.

[43] Elaborating on the words in bold italics, the court suggested that the question of whether such evidence, on its own, raises a case to answer will depend on certain factors including the following: is there any evidence of some other explanation for the presence of the defendant's DNA on the item other than his involvement in the crime? For example, an apparently plausible account given in interview. Was the article apparently associated with the offence itself? How readily movable was the article? Is there evidence of some geographical association between the offence and the defendant? Where there is a mixed profile is the DNA profile matching the defendant the major contributor to the overall DNA profile? Is it more or less likely that the DNA profile attributed to the defendant was deposited by primary or secondary transfer? We take this opportunity to emphasise, as did the English Court of Appeal, that this is not designed to operate as an exhaustive checklist.

[44] The decision in *Tsekiri* reinforces our view that this was not an appropriate case for a good character self-direction on the part of the trial judge. The final answer to this ground of appeal is that if a limited good character self-direction should have been made the judge's failure to do so casts no shadow over the safety of the two convictions having regard to the potency of the prosecution case constituted by the various elements of physical, circumstantial evidence and scientific evidence accepted by the judge, coupled with his correct decision (in the alternative) to make an inference adverse to the appellant. We reject this ground of appeal accordingly.

The Inconsistent Verdicts Ground

[45] In *R v Durante* [1972] 3 ALL ER 962 the English Court of Appeal held that an appeal on this ground will succeed only where it is established that the verdicts under scrutiny were so inconsistent that no reasonable jury could have concluded that the verdicts could stand together (per Edmund Davies LJ at page 966b/E). To demonstrate mere inconsistency is insufficient. In *R v WM* [1999] 6 Archbold News 3 Bingham LCJ stated:

> *"… It is ordinarily for an appellant to show a logical inconsistency between the verdicts criticised and then to demonstrate that it is not possible to postulate a legitimate chain of reasoning which could explain the apparent inconsistency. The court will not interfere with the verdict of the jury unless those tests are satisfied."*
>
> (Quoted in *R v Ahmadazai* [2009] EWCA Crim 2031 at [15])

[46] In *R v H* [2016] NICA1 this court, having considered its previous decision in *R v McDonald* [2016] NICA 21, decided to follow the decision of the Court of Appeal in England and Wales in *R v Fanning* [2016] EWCA Crim 550 which, in substance, had reaffirmed the earlier approach of the cases noted above (*Durante* and *WM*). The effect of this was to reinstate the formulation of Devlin J in *R v Stone* [1955] Criminal LR 120, being the *fons et origo* of the appropriate test.

[47] We draw attention to these authorities purely as a reminder to practitioners. In the present case the complaint of inconsistent verdicts has been extinguished by our conclusion that the conviction (count 4) said to be inconsistent with the acquittal (count 1) must be quashed for the reasons given.

Conclusion

[48] By virtue of section 2 of the Criminal Appeals (NI) Act 1980 the single overarching question for this court is whether either of the convictions under appeal is unsafe. As confirmed by *R v Pollock* [2007] NICA 34, this entails the application of the test of whether this court has a sense of unease, or a lurking doubt, about the safety of the conviction under challenge. See [32], per Kerr LCJ:

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

[49] For the reasons given:

(i) The appellant's conviction in respect of the fourth count of the indictment, namely having in his possession an imitation firearm with intent by that means to cause any person to believe that unlawful violence would be used against him or another person is unsafe and must be quashed.

(ii) The court harbours no reservations about the safety of the remaining two convictions of the appellant, namely possession of ammunition without a certificate and possession of ammunition in suspicious circumstances.

Thus, the appeal succeeds to the limited extent indicated immediately above.

Appendix

"Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged, etc.

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 under

(i) 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;

Head (ii) rep. by 1996 NI 24

(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 the commencement of this Article.

Accused to be called upon to give evidence at trial

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 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, in the presence of the 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;

Sub-para. (b) rep. by 1996 NI 24

(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."

Paras. (9), (10) rep. by 1994 c. 33

…….