Neutral Citation No. [2010] NICC 45 | *Ref:* **McCL7999**

Judgment: approved by the Court for handing down | *Delivered:* **12/11/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

Sitting at Belfast

_____

THE QUEEN

-v-

GARY JONES

_____

JUDGMENT

_____

McCLOSKEY J

I THE INDICTMENT

[1] The Defendant is charged with one count of doing an act with intent to cause an explosion and a further count of possession of an explosive substance with intent to endanger life, contrary to Sections 3(1)(a) and 3(1)(b) respectively of the Explosive Substances Act 1883 ("*the 1883 Act*"). The offences are alleged to have occurred in the area of Monaghan Street, Newry on 21st July 1998. The allegation at the heart of the prosecution case is that the Defendant was the driver of a van from which an unsuccessful mortar bomb attack on Corry Square Police Station was launched. The history of this prosecution is as follows:

(a) On 27th October 2006, following a trial before Morgan J, the Defendant was acquitted of attempted murder (then the first count on the indictment) and convicted of causing an explosion, contrary to Section 2 of the 1883 Act [no longer alleged - substituted by the two new counts outlined above]. He was sentenced to 14 years imprisonment.

(b) In a reserved judgment delivered on 5th July 2007, the Court of Appeal allowed the Defendant's appeal and ordered a retrial.

(c) The Defendant's first re-trial was aborted, with no outcome. As a result, this is his second re-trial.

(d) On 28th May 2010, the court (Hart J) conducted a pre-trial review. On that occasion, it was represented that there were no outstanding applications and both prosecution and defence were ready for trial. A fresh trial date in June 2010 was allocated.

(e) The scheduled retrial of the Defendant did not proceed in the event and a new retrial date of 7th September 2010 was allocated.

[2] At the outset of the trial, an application was made on behalf of the Defendant that I should recuse myself as trial judge largely on the basis that I had become privy to the Defendant's initial conviction and certain aspects of the judgment of the first trial judge as a result of having become familiar with the judgment of the Court of Appeal, which ordered a retrial. I refused this application: see MCCL7936. Next, following the conclusion of the prosecution case, I refused an application for a ruling that the Defendant had no case to answer: see MCCL7960. Subsequently, I dismissed the Defendant's application for a stay of the indictment on the ground of abuse of process: see MCCL7986.

[3] It is appropriate to record, at this juncture, that one aspect of the stay application related to a complaint of inadequate disclosure by the prosecution. A particular feature of this complaint related to the existence or otherwise of certain CCTV recordings. An initial PPS assertion that such recordings had existed but had been destroyed was later retracted. This resulted in the court becoming proactively involved in the outworkings of the late disclosure of the recordings. In due course, these became available to the defence in a satisfactory form and an adjournment was granted to facilitate the retention of an expert witness for the Defendant. Ultimately, there was no enduring complaint of substance about this discrete issue and the Defendant duly testified on his own behalf. However, the handling of this disclosure issue was most unsatisfactory and was the cause of significant disruption and delay in the trial process. The reality appears to be that notwithstanding the protracted history of this prosecution, summarised above, disclosure issues of real substance simply did not receive proper attention on the part of the legal representatives concerned until the trial had commenced. I highlight this since, sadly, it is a far from isolated occurrence.

II THE PROSECUTION CASE

[4] The prosecution case revolves around the conduct of the Defendant and the activities of a white Ford Transit van on 21st July 1998 in the vicinity of Monaghan Street, Newry. It is alleged that after 4.30pm on this date the van was driven into a laneway which separates Nos. 25 and 27 Monaghan Street and provides access to a makeshift car park. Upon turning into this access the van had a minor collision with

a parked vehicle. The van then adopted a parked position in the area of waste ground. A male person, whom the Crown say is the Defendant, was seen coming from the area of the van. He was challenged by another male, Mr. Lennon, who had observed the collision. When the Defendant refused to stop, Mr. Lennon attempted to restrain him physically. During the ensuing struggle, the Defendant wriggled out of his jumper and denim jacket and left the scene hastily.

[5] The minor vehicular collision was the impetus for a call to the police and certain officers attended the scene. A police vehicle drove into the waste ground and two officers disembarked, in close proximity to the parked van. One of them noticed something peculiar about its roof. At this stage, there was a bang akin to an explosion, emitting an object through the roof of the van which came to rest on the ground a short distance away. This object did not explode. There were no casualties.

[6] The prosecution say that the Defendant drove the van into the waste ground and parked it there, with a view to launching a mortar attack on the nearby police station, which is separated from the waste ground by a wall. The van was positioned accordingly. In the event, the attack failed. While the explosive device was duly launched from the van, it travelled a very short distance only and did not detonate. It is claimed that this was a viable device which, on detonation, was capable of endangering life or causing serious damage to property. It is suggested that both the van and its number plates had been stolen during previous days.

[7] The prosecution case also rests on forensic evidence the focus whereof is the aforementioned white jumper. It is alleged that on 13th December 2004 (over six years after the event), buccal swabs were obtained from the Defendant following his arrest (which was, sequentially, the second of his three post-incident arrests). These were matched against a blood stain found on the jumper, giving rise to the analysis that the chances that the DNA contained in both did not originate from the Defendant are less than one in a billion. It is further highlighted that the Defendant failed to make any response when questioned during interview and when confronted by material items of physical evidence, giving rise to an invitation to the court to make an inference adverse to him.

III THE EVIDENCE

[8] This chapter of the judgment is not designed as a verbatim rehearsal of all the evidence adduced. Rather, its purpose is to highlight and summarise the salient features thereof. Bearing in mind that this is a trial by judge alone, both prosecution and defence were given an opportunity to address the court on the question of whether the contents of this chapter have any material omissions or errors. A draft was provided to the parties for this purpose and the Chapter was finalised subsequently.

Civilian Witnesses

[9] **Finbar Lennon** gave evidence that in July 1998 he worked as an office manager in premises abutting both Monaghan Street (Newry) and an entry providing access to an area of waste ground, which he described as "*full of crap all the time*". During a meeting with a client inside the office premises, he was alerted by a noise from outside and went out to investigate. He encountered an irate man complaining about his car having been struck. Mr. Lennon wondered whether the gate positioned at the entrance to the entry (for which his firm was responsible) had been in some way involved. He confirmed that he did not see any other vehicle, nor did he recall seeing any vehicle either entering the waste ground or positioned therein.

[10] Some five to ten minutes later, Mr. Lennon and others were attempting to retrieve their cars from the waste ground. However, they were not permitted to do so, on account of a cream or white coloured parked van. He saw no one in the vicinity of the van. Continuing, he recounted that he spoke to "*a young lad*". He described this person as "*a cub … a young fellow*", aged between seventeen and nineteen years, wearing a monkey hat and a hard hat. Mr. Lennon testified that *he* is now aged forty-two years (and was, hence, aged thirty at the material time). When asked whether this other male person was of the same age, he replied "*certainly not*". The other male person's height was five feet, six inches to five feet, eight inches and he was of slim build. He did not recognise this person. He "*supposed that he got a look at his face.*" The hard hat attire suggested to Mr. Lennon that he was one of the firm's workers, who frequented this area thus attired.

[11] Mr. Lennon testified that he confronted this young male person. Where did this encounter occur? Mr. Lennon testified that the "*young lad*" was "*coming through the entrance on to Monaghan Street*". He "*thought*" that he spoke to him "*just to the left hand side of the gate*". He was unable to say from where the other person had come. Mr. Lennon, upon confronting him, asked him whether he had "*hit the car on his way into the yard*". This elicited no reply. The other person did not stop and kept walking. Mr. Lennon "*thought*" that he repeated his question. Then, he "*thought*" he grabbed the other person and he "*thought*" that he was "*left with a coat*". This occurred in the vicinity of what he described as "*the amusement arcade*": with the assistance of Photograph No. 3, he appeared to indicate the brown coloured frontage to the left of the yard entrance. I interpose the observation that this is located on the public footway, rather than inside the yard entrance. He testified that the coat was dropped to the ground, but did not specify precisely where this occurred. He did not recall being "*left*" with anything else.

[12] Mr. Lennon attested to his belief that the damaged parked car was positioned to the right hand side of the gate. Again, he was vague about its precise position. He was unaware of any other access to or egress from the waste ground. He mentioned a link fence situated on the left side of the waste ground (viewed from the street entrance). Later that evening, he made a statement in the police station.

The possibility of an identification parade was at no time canvassed. He would have willingly participated in such an exercise.

[13] The witness statement of **Leo O'Neill (now deceased)** was read to the court, pursuant to a hearsay order made under the Criminal Evidence (Northern Ireland) Order 2004. This contains the following salient passages:

> *"It was about 17.00 hours when I was walking along Monaghan Street when at the entrance to Dunne's old car park I saw a van turning into the car park and heard a crunch. I realised the van had struck an Escort parked at the roadside. I saw the van drive up and turn into the right at the top. There was a big man with a mobile phone there but I am not sure if he saw the crash. Anyway I then noticed a man wearing a yellow hard hat, jeans and maybe a denim jacket with a light coloured jumper or something underneath came walking down from the back of the car park. The big man with the phone tackled this man when he came onto the street. I had told the man with the mobile phone that the van had hit the Escort car. The big man grabbed the fella wearing the hard hat and a struggle ensued …*
>
> *During the struggle the man's jacket and jumper came off and his yellow hat fell off. This man then ran off down Monaghan Street…*
>
> *A small man came out of the Post Office, Savages and I understand it was his Escort car that was hit."*

Mr. O'Neill was aged eighty-eight years at the material time.

[14] The evidence of **Kevin Matthews** was also read to the court. He recounts that on 21st July 1998, he was in the premises of Messrs. Lovell and McAlinden, Monaghan Street, Newry where he was talking to Mr. Lennon. Both went outside upon hearing a loud noise. This witness observed a damaged Ford Escort vehicle. He then recounts the following:

> *"As I looked up into the car park I saw a man walking down towards us. I could not see a Transit van. As far as I could see he looked frightened. He was wearing a blue denim jacket, jeans and shoes. I could see he wore goggles and I believe some sort of scarf under a hard hat. Although this hat subsequently fell off him and is yellow I thought my first impression was that it was red. Anyway Finbar tackled him asking what was going on as he approached. The man then made to run off but was caught by Finbar. There was a brief struggle and the man wiggled out of his jacket, got free and*

ran off past Savages Post Office. I was standing inside the car park entrance at this time …

Other than the clothes I have described I can only add that the man from the van wouldn't be very tall maybe five feet nine inches and skinny. Also I did not hear any bang from an explosion whilst at the car park".

[15] **Michael McAnulty** gave evidence that on 21st July 1998 he parked his Ford Escort on Monaghan Street, close to the "Dunne's Yard" entrance. [The appellation "Dunne's Yard" clearly equates with the waste ground/makeshift car park in question]. Then he joined a queue inside the nearby Post Office. Next, he heard "*a bit of a thump*" and went out. He observed that the front driver's side of his vehicle had been damaged. A small crowd gathered and police drove into the yard, following which they began dispersing members of the public. There was a man on a mobile phone. Then he heard a small bang.

[16] **Thomas Conlon** gave evidence that on 20th July 1998 he made a report to police of the theft of a new Izuzu Trooper jeep and number plates from his premises at Loughbrook Industrial Estate, Newry, where he operated a commercial vehicle hire business. He was uncertain about the purchase and provenance of this vehicle. It was recovered by the police in Craigavon some months later.

Police Witnesses

[17] **Constable Rennie** testified that at 17.05 hours on 21st July 1998 he entered the waste ground in question, accompanied by three other constables. The witness was positioned "*out towards the street entrance*". There he observed a white Transit van, parked in the bottom right corner a short distance from a wall separating the waste ground from Corry Square RUC Station, towards which the vehicle was pointing. His view of the vehicle was unobstructed. Constables Hazlett and McAnespie were positioned closest to it. Very quickly after their arrival, there was a muffled explosion, the roof of the van opened and a gas canister was emitted. He believed that this was a mortar attack. In due course, he departed the scene at approximately 6.40pm. He saw no photographer or mapper arrive. He had no log keeping duties and could not say whether any log was compiled.

[18] **Constable Hazlett** testified (in common with Constable Rennie) that the advent of the police at the scene was precipitated by a "hit and run" accident report. This witness noted the presence of broken glass on the roadway, in line with the aforementioned entrance. He entered the waste ground and observed a white Transit van there. Something unusual about its roof caught his attention. He was standing about five feet from the van, positioned on the ledge of the police vehicle, where from he could see that the roof had been altered. He also observed a covering of tinfoil on each of the van's rear windows. Next, a "*tube*" came out of the roof, travelling in the direction of the adjacent police station car park. It traversed the separating wall and landed in the station car park. He entertained no doubt about

this. He believed this to be a mortar bomb. The van was *not* in the position depicted in the album of photographs adduced in evidence [photographs 3 and 4 in particular].

[19] Constable McAnespie gave evidence that he and Constable Rennie attended the aforementioned scene on 21st July 1998, at around 4.55pm on 21st July 1998. A white Ford Transit van was parked at the rear of the waste ground, facing Corry Square RUC Station. As he approached the van, there was a loud explosion and he observed a large mortar launch from its rear, landing unexploded a short distance away. He believed this to be a mortar bomb. In the aftermath, he seized and retained a yellow builder's helmet, a blue denim jacket and a white jumper [exhibit PMcA 3]. These items were positioned to the left hand side of the yard entrance, against the wall, viewed from the perspective of Monaghan Street. They were definitely inside (i.e. beyond) the gate, close to the white wall sign visible in one of the photographs [No. 3 - I interpose that this sign is plainly located some distance beyond the span of the entrance gate in its open position]. Upon returning to Ardmore RUC Station, he conveyed these items to a civilian scenes of crime officer, Mr. Wilkinson. On Mr. Wilkinson's instruction, the constable prepared a white control nylon bag [PMcA 6].

[20] The evidence of Robert Wilkinson, scenes of crime officer, was read to the court:

> "*On 21st July 1998 at 19.10 hours I received the following items from Constable P McAnespie, they were bagged and labelled as: PMcA 1 – one yellow builder's helmet, PMcA 2 – one blue denim jacket, PMcA 3 – one white jumper, PMcA 4 – pen removed from denim jacket, PMcA 5 – tissue removed from denim jacket, PMcA 6 – control nylon bag for items PMcA 1 – 5*".

As appears from the outline of the Crown case – paragraph [7], *supra* – exhibit **PMcA 3,** the white jumper, is the critical item.

[21] Andrew Jones, a civilian mapping officer, gave evidence that on 22nd July 1998 he prepared a map of the area in question [Reference No. 367/98]. This was duly proved in evidence. He could not recall the precise time of his attendance or whether anyone else was present. He was unable to say whether the white van was visible from outside the Monaghan Street entrance. He agreed that the position of the van depicted in photograph No. 1 differs from the depiction in his map. He did not fully inspect the perimeter of the waste ground. Thus he could not say whether it had any *further* means of access/egress. His map also depicts the position of a gas cylinder, adjacent to the white van. The album of photographs [exhibit GS1] was proved by Gordon Steele, who testified that they were taken by him on 22nd July 1998.

[22] Evidence was given by **Detective Inspector Forde** and **Detective Constable Young** about the arrest and ensuing police interviews of the Defendant, on 24th March 1999. [This was the first of three separate arrests of the Defendant, spanning a period of some six years]. The evidence of these two witnesses and that of Detective Chief Inspector Williamson, *infra*, materialised in the context of the Defendant's unsuccessful application for a stay of his prosecution on the ground of abuse of process, noted in paragraph [2] above. The subject matter of the Defendant's initial arrest was his suspected involvement in a mortar attack on Corry Square RUC Station, Newry. Mr. Forde had a supervisory role. He testified that the officer with overarching responsibility was Detective Chief Superintendent McBurney, with whom he liaised. Another male person, Eamon Magill, was arrested simultaneously. The "on the ground" responsibility for taking fingerprints and samples from the two arrested persons – or not doing so, as the case may be – rested with Mr. Forde.

[23] Evidence was also given about the **second** arrest of the Defendant almost six years later, on 13th December 2004. **Detective Chief Inspector Williamson** testified that this was precipitated by a review of the various outstanding terrorist cases initiated by him in his role of Newry and Mourne District Crime Manager, in October 2003. This particular incident was brought to his attention by Detective Superintendent Baxter, senior investigating officer in the Omagh Bomb case. Police gave consideration to the possibility of a link between the two incidents, concluding that no direct link existed. He suggested that there had been no earlier review of this incident following the Defendant's initial arrest and release. He asserted that he had sought and obtained legal advice, due to some uncertainty about the legality of rearresting the Defendant. He recalled that a planned rearrest of the Defendant was cancelled for some operational reason. He agreed that on 2nd February 2004, the Defendant's residential premises were searched, but no arrest was effected. He did not challenge the suggestion that when the Defendant was rearrested on 13th December 2004, he underwent only one interview, of 25 minutes duration. Detective Sergeant McGregor had responsibility for operational matters pertaining to the Defendant's rearrest. This witness was transferred to another post in late 2004.

[24] During the Defendant's **second** arrest, on 13th December 2004, two buccal swabs were taken from him. On 22nd December 2004, these were delivered to the Forensic Science Agency ("FSA") by **Constable Robinson**. On 17th February 2005, the same officer collected exhibits PMcA 1 – 5 from FSA. On 23rd February 2005, this officer brought these exhibits to Antrim Serious Crime Suite. The exhibits were shown to the Defendant during interviews (following his third arrest).

[25] Evidence about the Defendant's **third** arrest was given by **Detective Constable McKee**, who interviewed the Defendant on 22nd February 2005. During interview, the Defendant provided his name, stated that he was not a member of any illegal organisation and said nothing else. The witness referred to the corresponding custody record, in this context. He confirmed that this contained a description of the Defendant as being five feet, ten inches tall with a date of birth of 14th April 1967.

During interviews, a DNA profile match was put to the Defendant. The witness confirmed that the Defendant had no criminal record at that time.

Bomb Analysis and Forensic Evidence

[26] **Captain Saunders** attended the scene at around 6.55pm on 21st July 1998. When he arrived, the white van was not visible from the street. ["IED" denotes "Improvised Explosive Device"]. The IED Incident Report relating to his attendance and inspection was adopted as part of his evidence, without objection. The text of this report includes the following passages:

> "*EOD action recovered a MK15 improvised mortar system consisting of the following:*
>
> *(a) MK 19 timing and power unit …*
>
> *(b) Propulsion unit …*
>
> *(c) Mortar baseplate and launch tube …*
>
> *(d) Launch platform …*
>
> *(e) MK 15/3 type mortar bomb. The mortar bomb consisted of the following components:*
>
> *(i) Bomb body … constructed from two gas cylinders welded together.*
>
> *(ii) Main filling. Approximately 79 kg of probable HME, possible ANS.*
>
> *(iii) Booster charge. Consisted of a length of steel pipe …*
> *A length of approximately 1488 mn improvised cord detonating was secured to the body of the booster with adhesive tape. It was fed through the centre booster tube and was connected to the fuze.*
>
> *(iv) Fuze. A standard MK 10/4 improvised percussion fuze was fitted. It contained a point 22 RF cartridge and a possible commercial CIL plain detonator. The detonator was taped to the improvised cord detonating. Approximately 2500 m of steel cable was attached between the pin of the fuze and the mortar baseplate.*"

[27] Elaborating, Captain Saunders explained that this was an unexploded mortar bomb. His task was to render it safe by removal of the fuse and contents. This included removing the home made explosive substances from inside the ejected gas

cylinder. The explosive substance was possibly ammonium nitrate based and he placed this in plastic bags. He described this as "*a viable device*", adding that the "*explosive train*" was complete. The fuse was improvised and relatively simple in nature, designed to detonate the explosives. This type of fuse had been used in other bombing incidents. The timer power unit was also in common usage. The dismantling operation occupied some fifteen hours in total. He opined that the bomb had failed to explode due to a defect in the propulsion unit and/or the expenditure of energy required to pierce the roof of the vehicle and/or the angle of impact between the bomb and the ground.

[28] **Gordon McMillen**, a Principal Scientific Officer of the FSA, testified that on 22nd July 1998 the FSA received certain items from Constable Johnston and Mr. Wilkinson. These included exhibit PMcA 3, consisting of one white jumper. This item was to be examined for the purpose of ascertaining whether it exhibited any explosive residues. This particular examination did not involve this witness (see the evidence of Ms Boyce, *infra*). The two reports compiled by this officer concentrate mainly on the explosive device. His analysis of and commentary upon its various components largely mirror that of Captain Saunders. Both of Mr. McMillen's reports were adopted as his evidence in chief and read to the court. The second report contains the following passage:

> **"***The detonator … was of commercial origin …*
>
> *I have no reason to doubt its viability …*
>
> *No detonating cord was received at this laboratory, however photographs show this to be present in the device. See Nos. 7, 8 and 33 in album RVH 1121-06 …*".

[29] Elaborating, Mr. McMillen testified that all of the components required for a viable, fully functioning explosive device were present. In particular, the explosive substance contained the requisite combination of ammonium nitrate (i.e. fertilizer), calcium carbonate and sugar. The three photographs highlighted in Mr. McMillen's second report (see the excerpt quoted above) were not proved by him or any other witness. During the presentation of the prosecution case, in the context of cross-examination, a defence exhibit was received. This is an album consisting of 40 photographs and bearing on its cover the inscription "RVH 1121-06". In cross-examination, this witness confirmed the following:

(a) The items received by FSA did not include a detonating cord.

(b) Absent a detonating cord this type of device is not viable.

(c) The van was not examined for explosive traces.

(d) The inside of the Fiat car was swabbed, with negative results.

[30] **Brian Irwin** a Registered Forensic Practitioner employed by FSA, gave evidence about the scientific examination and testing of exhibit PMcA 3 (the aforementioned white jumper) which, together with a buccal swab attributed to the Defendant, was received from Detective Constable Robinson on 22nd December 2004. Mr. Irwin's report was adopted in his evidence in the conventional manner viz. by uncontentious leading questioning in examination-in-chief and was read to the court. The purpose of his examination was "*… to seek evidence by way of DNA profiling which might help support or refute*" the Defendant's suspected involvement in the Monaghan Street bombing incident. His report concluded:

> "*A full* [SGM plus] *profile was obtained from the jumper sample. Full* [SGM plus] *profiles were obtained from the reference samples submitted and each could be distinguished from the others. The test results from the bloodstain on the jumper matched those obtained from the sample attributed to Jones. A calculation based on NI population survey data shows that the combination of characteristics observed in the staining on the jumper would be expected to arise in fewer than one in a billion males unrelated to him*".

Mr. Irwin completed his testing on 7th January 2005, informed police verbally of his findings and compiled his report on the same date.

[31] **Margaret Boyce**, a FSA Senior Scientific Officer and forensic biologist gave evidence of biological examinations of exhibits PMcA 1-5 inclusive. Her examination-in-chief was conducted in the same way as that of Mr. Irwin. According to her report, these items were "*received on 22 July, from R. Wilkinson*". Her evidence focussed particularly on the forensic examination of exhibit PMcA 3 (the white jumper). The purpose of the examination was framed in the following terms:

> "*Biological examinations were carried out to determine whether or not there was any scientific evidence to indicate the circumstances surrounding the mortar attack in Newry on 21st July 1998*".

Elaborating, Ms Boyce explained that the examination was designed in particular to establish the identity of any possible wearer of the items of clothing concerned. Her report describes the outcome of the examination of the white jumper in the following terms:

> "*One small spot of blood was found on the inside left back of the collar of the jumper. The blood was removed and submitted for DNA analysis. The blood was of male origin and a full profile was obtained. It was added to the Northern Ireland DNA database. No hits have been obtained to date.*"

Thus the blood could not be linked to any person at that time. I would add the observation that, based on the evidence adduced, the absence of any DNA database "*hit*" remained the position for over six years subsequently, until the Defendant's second arrest in December 2004, when a buccal swab was taken from him.

[32] Ms Boyce acknowledged that the vintage of the blood spot could not be determined. It would be extinguished by normal machine washing. Thus it must have materialised subsequent to the last washing of the garment. In cross-examination and in response to questions from the court, the following scenarios were acknowledged by this witness as possible explanations for the blood spot on the collar of the garment:

(a) Primary contact between the wearer and the garment.

(b) Airborne transmission of blood, whether in the form of droplets or (insofar as different) a single drop, from a source external to the garment and making contact with same.

(c) Direct contact between the jumper and a bloodstained source, whether human or otherwise (in effect, two distinct scenarios).

(d) So-called "secondary contact" i.e. initial transmission of the blood from its original source to an intermediate point of contact, followed by further contact with the garment.

Ms Boyce described the last of these four scenarios as the *least likely*, given the very small amount of blood involved and the absence of any sign of smearing. She ranked the other three possible scenarios in terms of equal probability viz. she considered none of them to be more likely than the other. As will appear from the conclusions contained in the final chapter of this judgment, I consider the evidence of this witness to be of particular importance.

[33] The final piece in the evidential jigsaw of the prosecution case against the Defendant constituted the interviews of the Defendant following his second and third arrests. This evidence was presented in the form of edited interview notes, agreed between prosecution and defence. There were notes of one interview conducted on 13th December 2004 (his second arrest) and two further interviews held on 22nd and 23rd February 2005 respectively (his third arrest). The Defendant remained silent throughout all three interviews. The first of them was general and non-specific in nature, with no concrete evidence being put to the Defendant. The text confirms that the essential purpose of the second arrest seems to have been to obtain a sample of the Defendant's DNA, by buccal swab. As appears from the above résumé of the evidence, the relevant FSANI report followed and this stimulated the Defendant's third arrest. During the two interviews which this generated, the essence of the DNA evidence was put to him and his stance remained

unchanged. He declined to make any replies or to sign anything. He was then charged.

IV THE DEFENCE CASE

[34] The Defence Statement served under the Criminal Procedure and Investigations Act 1996 contains the following substantive passages:

> "*1. The Defendant denies all of the offences alleged in the Bill of Indictment.*
>
> *2. The Defendant states that he was not involved in the incident at Corry Square in Newry in July 1998.*
>
> *3. The Defendant states that if the DNA found on the jumper is his, it was transferred innocently thereto.*
>
> *4. The Defendant states that he has frequently donated clothing to charities and that this was his practice at or about the material time. These clothes were then sold by the charity shops to members of the public. He also worked for charities on occasion.*
>
> *5. There are a number of innocent ways his blood could have been transferred to the jumper.*"

Thus, in summary, the Defendant denies his guilt and asserts that there are explanations for the presence of his DNA on the garment in question which are consistent with his innocence.

[35] The Defendant gave evidence on his own behalf at the trial. He testified that, at this remove, he has no specific recollection of the date in question, 21st July 1998. He asserted that he first learned of the mortar bomb incident when he was initially arrested (viz. on 24th March 1999). He made the case that he had no involvement of any kind in this incident. He denied that he was the driver of the vehicle in question and further denied that he was the person who fled the scene.

[36] The Defendant testified that at the time in question he was a self-employed painter and decorator. The impression which his evidence created was that he worked intermittently, rather than constantly. He also worked part-time in the "Orana" Children's Home operated by The Sisters of Mercy in Newry. There his duties incorporated general maintenance, painting, decorating and various *ad hoc* tasks, which extended to hanging curtains and laying carpets. He had held this job for a couple of years before 1998. He worked there at least one day a week. During the previous ten years, he had also worked frequently in private houses. He asserted

that there were frequent "deliveries" of used clothes and toys to the children's home. The used clothes were not required. One of his tasks was to handle and bag these and take them to charity shops. The Defendant claimed that he himself tried on some of these clothes and, further, did likewise when seeking to make personal purchases at retail charity outlets. He further claimed that he frequently handled other people's clothing when working as a painter and decorator in private houses.

[37] The Defendant further testified that his arrest and charging turned his world upside down. He realised that the purpose of his second arrest (in December 2004) was to take DNA swabs from him, in circumstances where the police had in their possession a pullover containing a spot of blood. He was asked to account for his silence when interviewed by police pursuant to his second and third requests. In response, he laid the blame firmly at the door of his former solicitor. He testified that he had "*foolishly*" listened to what the latter had advised him to do. The advice had been to the effect "*go into the interview, keep your head down, this will go away, it's a load of rubbish …*". He testified that he trusted the solicitor and acted precisely in accordance with his advice. By adhering to this advice, he had brought "*turmoil*" on himself and his family. But for this advice he would have informed the police of the various circumstances (outlined above) in which his blood could have innocently contaminated the garment in question. Elaborating, he explained that the solicitor in question had not been the person who had previously acted for him and family members in the provision of legal services. Although he had "asked for" the "family" solicitor, he was unavailable. The thrust of his evidence was that the solicitor who duly represented him in the context of the second and third arrests was not his solicitor of choice and simply happened to be available.

[38] In cross-examination, the Defendant confirmed that he had been cautioned by police at the time of his second and third arrests and he had understood the caution. He further agreed that, at the time of his second arrest, he declined to provide his name to police. He did not have the services of a solicitor when this occurred. He testified that his second and third arrests were made at his home. He highlighted hat he had been released following his second arrest and pointed out that he had made no attempt to abscond between his second and third arrests. He was aware that his second arrest had been effected for the purpose of obtaining evidence against him. In contrast, following his third arrest, concrete evidence was put to him by the police in interview, arising out of the scientific testing.

[39] No other witness testified on the Defendant's behalf. A FSANI report dated 16th November 1998 was received in evidence by agreement, pursuant to Section 1 of the Criminal Justice (Miscellaneous Provisions) Act (NI) 1968. This records that a series of items and articles was examined for the purpose of ascertaining the presence of fingerprints. These consisted of the Ford Transit van in question, a yellow builder's helmet, certain items extracted from a denim jacket, various components of the mortar bomb device, brown packaging tape from the passenger's side rear window and reflective film sheet from the rear inside driver's door glass of

the vehicle. The contents of this report highlight that the prosecution do not make the case that the Defendant's fingerprints were found on any of these items.

V GOVERNING PRINCIPLES

[40] I remind myself that the onus rests on the prosecution to establish the Defendant's guilt beyond reasonable doubt. Thus the Defendant can be convicted only if I am firmly convinced of his guilt. Being satisfied beyond reasonable doubt is a requirement which relates to the material facts which must be proved in order to establish the Defendant's guilt. Any findings adverse to the Defendant enshrined in the remainder of this judgment are the product of the application of the aforementioned onus and standard of proof. I bear in mind that the Defendant is presumed innocent and has no burden to discharge.

The Criminal Evidence (Northern Ireland) Order 1988

[41] Article 3 of this statutory measure provides:

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

of which notice of transfer has been given under Article 4 of that Order); and
(c) the court or jury, in determining whether the accused is guilty of the offence charged,
may-
(i) draw such inferences from the failure as appear proper.
(2A) Where the accused was at an authorised place of detention at the time of the failure, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in paragraph (1).
(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.
(4) This Article applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in paragraph (1) "officially informed" means informed by a constable or any such person.
(5) This Article does not-
(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this Article; or
(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from this Article.
(6) This Article does not apply in relation to a failure to mention a fact if the failure occurred before [15 December 1988]."

This is the first rule enshrined in the legislation. The second rule, contained in Article 4, focuses on events at the trial and is concerned with cases where the Defendant does not testify on his own behalf. This rule is not engaged in the present case.

[42] The court's entitlement to draw such inference as it considers proper arises *only* where, following arrest and caution, the Defendant "*… failed to mention any fact relied on in his defence …*". The "*fact*" must be one "*… which in the circumstances existing at the time the accused could reasonably have been expected to mention …*". The discrete issue of reliance arose in ***The Queen –v- Walsh*** [2002] NICA 1, where the question was whether, at his trial, the Defendant had relied on a suggestion that another person was present in the vicinity of the alleged discovery of an explosives device by military personnel. Carswell LCJ stated (at p. 7):

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

[My emphasis].

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

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

Thus it was considered inappropriate for the prosecution to comment adversely on the Defendant's silence in custody in its opening speech since, at that stage of the trial, it "*… did not yet know what fact or facts would be relied on by the defence*". In consequence, this ground of appeal succeeded. In ***R –v- Nickolson*** [1999] Crim. L.R 61, the Appellant, in response to a question at the trial, ventilated a *theory* about the cause of seminal staining on the complainant's nightdress. The Court of Appeal held that since this did not constitute *a fact*, an inference adverse to him arising out of his failure to mention it during police interviews was not appropriate.

[43] In ***Averill –v- United Kingdom*** [2001] 31 EHRR 36, the European Court of Human Rights, in holding that there had been no infringement of Article 6(1) arising out of adverse inferences being drawn from the Applicant's silence, simultaneously concluded that the denial of access to a solicitor during the first twenty-four hours of the Applicant's detention contravened Article 6(3)(c), in conjunction with Article 6(1). The following passage is also noteworthy:

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

The emphasis on a common sense evaluation is noteworthy. I mention this decision for the further reason that it underlines the importance of the factor of legal advice in

the context of Article 3 of the 1988 Order. This discrete issue has featured in other reported cases, which I shall now consider.

[44] In ***R –v- Argent*** [1997] 2 Cr. App. R 27, where the equivalent English statutory provision – Section 34 of the Criminal Justice and Public Order Act 1994 – arose for consideration, Bingham LCJ suggested that there are six formal conditions which must be satisfied before an inference is permissible. These are:

(a) There must be proceedings against a person for an offence.

(b) The alleged failure to mention a fact must occur before the Defendant is charged.

(c) This alleged failure must occur during questioning under caution by a police officer.

(d) The police officer's questioning must be directed to trying to discover whether or by whom the alleged offence had been committed.

(e) There must be a failure by the Defendant "*to mention any fact relied on in his defence in those proceedings*".

(f) This failure must occur in circumstances where the Defendant could reasonably have been expected to mention the fact when questioned.

[See pp. 32C – 33C].

This approach was adopted by the Northern Ireland Court of Appeal in ***R –v- Haughey and Others*** [2001] NICA 12.

[45] The specific question of an accused person's silence during police interviews allegedly induced by legal advice has been considered in other cases. In ***Argent*** [*supra]* Lord Bingham CJ stated, at p. 35G/36B:

> "*The second observation we would make is that, under Section 34, the jury is not concerned with the correctness of the solicitor's advice, nor with whether it complies with the Law Society Guidelines, but with the reasonableness of the Appellant's conduct in all the circumstances which the jury have found to exist. One of those circumstances, and a very relevant one, is the advice given to a Defendant. There is no reason to doubt that the advice given to the Appellant is a matter for the jury to consider. But neither the Law Society by its guidance nor the solicitor by his advice can preclude consideration by the jury of the issue which Parliament has left to the jury to determine.*"

In ***R –v- Hoare and Pierce*** [2005] 1 WLR 1804, this issue was considered extensively by the English Court of Appeal. Auld LJ formulated the issue in these terms:

> "*[38] The issue … is whether, when a Defendant has remained silent in a police interview on the advice of his solicitor, the test for a jury when deciding whether to draw an adverse inference from his silence is subjective or objective, that is whether it is sufficient to preclude an adverse influence that he genuinely relied on it as a reason for silence or whether it is only so if, in the circumstances at the time, he could reasonably have relied on it as a reason for silence.*"

The court reiterated its approach in an earlier decision in ***R –v- Condron***, which endorses two principles. The first is that legal advice cannot *per se* prevent the drawing of an adverse inference. The second is that legal advice is a "*very relevant*" circumstance to be weighed in deciding whether the Defendant could reasonably have been expected to mention the fact/s in question during interview. Having considered the decisions in ***Condron –v- United Kingdom*** [2001] 31 EHRR 1 and ***Averill –v- United Kingdom*** [*supra*], the court approved the formulation of Kay LJ in ***R –v- Betts and Hall*** [2001] EWCA. Crim 254:

> *"53. In the light of the judgment in* ***Condron v. United Kingdom*** *it is not the quality of the decision [not to answer questions] but the genuineness of the decision that matters. If it is a plausible explanation that the reasons for not mentioning facts is that the particular appellant acted on the advice of his solicitor and not because he had no, or no satisfactory, answer to give, then no inference can be drawn.*
>
> *54. That conclusion does not give a licence to a guilty person to shield behind the advice of his solicitor. The adequacy of the explanation advanced may well be relevant as to whether or not the advice was truly the reason for not mentioning the facts. A person, who is anxious not to answer questions because he has no or nor adequate explanation to offer, gains no protection from his lawyer's advice because that advice is no more than a convenient way of disguising his true motivation for not mentioning facts." [the Court's emphasis*]"

Auld LJ observed:

> *"[46] Thus, as Kay LJ made plain in the second half of the last sentence in paragraph 53 and the whole of paragraph 54, however sound the advice in law or as a matter of tactics, a defendant is not entitled to hide behind it if, at the time, the*

> *true reason for not mentioning the facts was that he had no or no satisfactory explanation consistent with his innocence to offer.*
>
> *[47] The European Court of Human Rights, in Beckles v. United Kingdom (2002) 36 EHRR 13, EctHR, in paragraphs 64 - … of its judgment, implicitly approved Kay LJ's formulation and that reflected the guidance in paragraph 5 of the current specimen direction …*
>
> *[51] As we have said, it is plain from Kay LJ's judgment that, even where a solicitor has in good faith advised silence and a defendant has genuinely relied on it in the sense that he accepted it and believed it and that he was entitled to follow it, this does not preclude that a jury may still draw an adverse inference if it is sure that the if true reason for his silence is that he had no or no satisfactory explanation consistent with innocence to give.*"

Auld LJ continued:

> "*[52]The critical test, which all three judgments underscore, is that as formulated in section 34, namely whether a defendant failed to mention in interview a fact "which in the circumstances existing at the time … [he] could reasonably have been expected to answer". What is reasonable in the circumstances, as Lord Bingham CJ indicated in* ***Argent****, is a matter for the jury "in the exercise of their collective common-sense" – an objective test, but by reference to the circumstances of the case, including those known to the defendant. The Judge's direction to the jury that they should consider in the case of each appellant whether it was reasonable for him to rely on his solicitor's advice to remain silent, or whether he had no adequate explanation to give and simply latched on to that advice as a convenient shield, is just how Kay LJ put the matter in* ***Betts & Hall****, and accords with the observations of Laws LJ in* ***Howell*** *and* ***Knight****. The direction is also consistent with paragraph 5 of the current JSB specimen direction, and with the dicta, so far as they went on this issue, of the European Court in* ***Condron*** *and* ***Beckles****.*"

As the judgment notes in the ensuing paragraph, the philosophy (indeed, an assumption) which underpins Section 34 is that a truly innocent Defendant who is in a position to provide accounts or explanations pointing to his innocence will do so following arrest, at the earliest stage. Where the Defendant makes the case that he remained silent pursuant to legal advice, the crucial enquiry relates to his *reasons* for doing so. Thus a Defendant may, conceivably, genuinely believe in his entitlement

to remain silent – but it does not follow that his reason for doing so withstands scrutiny, applying the prism of Article 3 of the 1988 Order. The correct approach for the court is encapsulated in the following passage:

> *"[55] The question in the end, which is for the jury, is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because had no or no satisfactory explanation to give. For this purpose, but only for this purpose, section 34 in its provision for the drawing of an adverse inference, qualifies a defendant's right to silence. However, it is still for the prosecution to prove its case, section 38(3) of the 1994 Act ensures that a finding of a case to answer or a conviction shall not be based solely on such an inference."*

Circumstantial Evidence

[46] The judgment of the Northern Ireland Court of Appeal in ***R –v- McClean and McCready*** [2001] NICA 32 rehearses *in extenso* the governing principles:

> *"[5] The judge adopted a statement of the law concerning the evaluation of circumstantial evidence which I expressed at pages 34 and 35 of my judgment in* ***R v Caraher and others*** *(1999, unreported), and which we consider suitably conveys the proper approach:*
>
> *"Circumstantial evidence has to be evaluated with the correct amount of circumspection. Where it points in one direction only, it can be a highly convincing method of proof, but it is necessary to beware of the possibility that it may be laying a false trail. It is incumbent upon the Crown to establish that the evidence points beyond doubt to one conclusion only, and in the process to rule out all reasonably tenable possibilities which may be consistent with the evidence. The individual pieces of evidence making up a case based on circumstantial evidence may each be of greater or lesser weight, but what matters is the conclusion to which the combination of circumstances leads. This was graphically illustrated by Pollock CB in* ***R v Exall*** *(1866) 4 F & F 922 at 929:*
>
> *'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but this is not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be*

in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a reasonable suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.'

[6] I would also refer to two quotations from Commonwealth decisions, approved and adopted by the Court of Appeal in ***R v Meehan*** *[1991] 6 NIJB 1 at 32-34. The first is from* ***Thomas v The Queen*** *[1972] NZLR 34 at 36, where the trial judge Henry J stated in charging the jury:*

'*... the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find a verdict of guilty by this process of reasoning ... Now whilst each piece of evidence must be carefully examined , because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive judgments on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect. It is a consideration of the totality of the circumstances that is important.*'

[7] The second is from ***Cote v The King*** *[1942] 1 DLR 336, where the Supreme Court of Canada said:*

'*It may be, and such is very often the case, that the facts proven by the Crown, examined separately have not a very strong probative value, but all the facts put in evidence have to be considered each one in relation to the whole, and it is all of them taken together, that may constitute a proper basis for conviction'.*"

In ***R –v- Young*** [2006] NICA 30, where the prosecution case rested on circumstantial evidence (and, in passing, bears some similarities with the present case), the Court of Appeal recorded, uncritically, the trial judge's rehearsal of the governing principles:

"*[3] At paragraphs [60] to [64] of his judgment he set out the principles governing such a case, stating at paragraph [64] that a court or jury should have at the forefront of its mind four matters. 'Firstly, it must consider all the evidence; secondly it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is*

> *reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together'.*"

[47] The proposition that cases where the prosecution is based on a single circumstance, or piece of evidence, are to be distinguished from those in which there are several ingredients seems to me uncontroversial. This is the essence of what Lord Slynn stated in ***Murray –v- DPP*** [1994] 1 WLR 1, in the context of an appeal involving the proper interpretation and scope of **Article 4** of the 1988 Order, at p. 11g:

> "*In the present case, if the only evidence relied on was that relating to fibres in hair, on the clothing and in the car, it might well not be enough to justify an inference that the Defendant was guilty beyond a reasonable doubt.* [However] *the cartridge residue on the jeans, thumb print on the mirror and mud on the trousers, the evidence that he was not at home during the night, clearly taken in combination, call for an explanation if there was one*".

Interestingly, Lord Slynn recorded that while there some five pieces of forensic evidence, all circumstantial in nature, linking the Defendant with the vehicle and offence in question, these "*could, but did not necessarily*" establish the requisite nexus [see pp. 6 – 7]. Thus the invocation of the 1988 Order by the prosecution was *in support of* the circumstantial evidence adduced. Finally, circumstantial evidence can found a conviction only where the tribunal of fact takes two steps. The first entails acceptance of the evidence tendered. The second involves drawing an appropriate inference from it. (See Murphy on Evidence, 11th Edition, paragraph 2.3.1). In considering whether both steps are appropriate, the court must bear in mind what was said in ***R –v- Courtney*** [2007] NICA 6:

> "*[31] …. In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case.*"

VI <u>THE MAIN ISSUES</u>

[48] The arguments of Miss McDermott QC and Mr Mulholland (of counsel) on behalf of the Defendant highlight that the prosecution case is based on a single piece of circumstantial evidence viz. the scientific finding of a small spot of the

Defendant's blood on the inside left rear collar of a jumper which, the prosecution alleges, was worn by the driver of the bomb vehicle on 21st July 1998. This gives rise to the following discrete, core submissions:

(a) Having regard to Ms Boyce's acknowledgement of various plausible scenarios explaining the presence of the Defendant's blood on the garment – see paragraph [32] *supra* - the prosecution case is fatally undermined. In the terms of counsel's written submission:

> "*It is the defence submission that … Ms Boyce's proper concessions set at nought the weight that can legitimately be attached to this piece of evidence against the accused. Ms Boyce admits, in her evidence, of two scenarios in which it is a reasonable possibility that a small spot of the accused's blood came to be present on PMcA3, with the accused being the wearer of the garment … the Crown has not, and cannot, exclude either reasonable possibility and cannot therefore discharge, to the requisite standard, the burden placed upon it*".

(b) Any suggestion that the male person with whom Mr. Lennon grappled was the driver of the van – see paragraphs [9] – [12], *supra* – is merely speculative.

(c) Mr. Lennon's evidence described a coat (rather than a jumper) and omitted the identification of any garment to Constable McAnespie. Further, the latter did not describe any such identification to him.

(d) There is a significant conflict between the evidence of Mr. Lennon and Constable McAnespie: the former described an altercation with the unknown male in Monaghan Street, whereas the Constable testified that he collected items of clothing *inside the gate*.

(e) Further, Mr. Lennon testified that the car park was always littered with sundry items, undermining still further the suggestion that the offending garment originated from the unknown male.

(f) The evidence of Kevin Matthews – paragraph [14] *supra* –omits any reference to a jumper.

(g) The evidence of Mr. O'Neill, read to the court – see paragraph [13] *supra* – is described as "*the single strand of evidence by which this aspect of the Crown case hangs*". It is contended that no weight should be attached to this evidence, on the ground that it was read to the court, unchallenged. In particular, the Defendant was deprived of testing the witness's evidence by reference to the testimony of other witnesses

and with a view to establishing whether Mr. O'Neill's evidence was based, to any extent, on what he had been told by others or otherwise had not observed personally. His age (88 years) and the uncertainty relating to precisely where he was at the material time are also highlighted.

(h) There is no evidence connecting the Defendants to the relevant vehicle, or vice versa.

(i) There is no evidence connecting prosecution exhibits PMcA1 – 5 (detailed in paragraph [20] *supra*), in particular the relevant garment, to the vehicle.

(j) The Defendant is connected to one of these exhibits only viz. the garment.

(k) There is no fingerprint evidence against the Defendant. In particular, none of the five fingerprints found on the yellow hard hat is attributed to the Defendant. Furthermore, there is no evidence that the fleeing male person was wearing gloves.

(l) Mr. Lennon's evidence about the estimated age and height of the fleeing male person conflicts with the custody record evidence about the Defendant age and height.

(m) Any inference adverse to the Defendant under Article 3 of the 1998 Order is inappropriate, having regard to his evidence concerning legal advice.

(n) With specific reference to the evidence of Mr. McMillen – see paragraphs [28] – [29], *supra* – it is submitted that there is no evidence of any detonating cord, giving rise to an unbridgeable gap in the proofs required to establish the factual basis for the first count and, as a minimum, the intent element in the second count.

(o) Finally, the Defendant is entitled to a "full" good character direction viz. his proven good character is capable of both enhancing his credibility as a witness and suggesting that he is not the kind of person to commit the offences in question.

[49] In my view, a combination of the evidence adduced in support of the prosecution case and the final submissions on behalf of the Defendant requires the court to address six central issues and to make appropriate findings and conclusions in respect thereof. These issues, individually, do not belong to hermetically compartments. Rather, they are cumulative and interlocking in nature. They are the following:

(i) Article 3 of the 1988 Order.

(ii) The fleeing male person.

(iii) The jumper.

(iv) The detonating cord.

(v) The Defendant's age and height.

(vi) Whether the fleeing male person was the Defendant.

I shall address each in turn.

VII FINDINGS AND CONCLUSIONS

(i) Article 3, 1988 Order

[50] I reject the argument that, in his evidence, the Defendant did not rely on "*facts*". As appears particularly from the summary in paragraph [36] above, *asserted facts* featured throughout the Defendant's evidence. Moreover, these were foreshadowed in the Defence Statement [see paragraph [34] above]. In his evidence, the Defendant was not canvassing theories: rather, he was unequivocally asserting facts – relating to who employed him, where he worked and what he habitually did in the course of his work. These are all, unequivocally, matters of a purely factual nature. While they were adduced in evidence for the purpose of ventilating an explanation, or theory, this purpose does not alter or detract from their essential character. I consider the suggested comparison with the Defendant in ***R –v- Nickolson*** (paragraph [42] *supra*) misconceived in consequence: whereas Mr. Nickolson canvassed a pure theory in response to a question enquiring whether he "*could think of*" any explanation for the presence of an incriminating piece of evidence, this Defendant, in contrast, unambiguously asserted facts in his evidence. In doing so, he brought himself within the ambit of Article 3 of the 1988 Order.

[51] In my view, the real issue thrown up by Article 3 of the 1988 Order in the present trial involves consideration of three core questions:

(a) When in custody following his second and third arrests, was the Defendant advised by his solicitor to remain silent?

(b) If "yes", did he act upon this advice?

(c) If "yes" to both (a) and (b), was it reasonable for him not to mention then the facts upon which he relied in evidence at his trial?

The Defendant's evidence – see paragraphs [36] and [37], *supra* – sounded on all three of these questions. I am satisfied that the first and second questions invite an affirmative answer, as I found the Defendant's evidence on these issues truthful and persuasive and undermined by nothing else. Furthermore, support for this aspect of the Defendant's evidence can be found in the edited interview records which formed part of the prosecution case. These edited records document the police interview of the Defendant on 13th December 2004, followed by two interviews consequent upon his third arrest, conducted on 22nd and 23rd February 2005 respectively. During the first of these three interviews, the Defendant's solicitor made a specific intervention ["*Could I just clarify at this time do the police have any evidence to … my client … in respect of this offence?*"] which, in my view lends some weight to the Defendant's claim. There is a second intervention to like effect later in the same interview. Furthermore, the Defendant appeared to me an uneducated man and it is common case that he had no criminal record at this time. Having regard to these factors, I find that (a) he was advised by his solicitor to remain silent throughout the interviews and (b) he acted upon this advice.

[52] Thus the third and final question must be confronted: was it reasonable for the Defendant during his interviews by the police not to mention the facts upon which he relied in evidence at his trial? On balance, I find that the court's determination of the third question should also be in the Defendant's favour. The reasons underpinning this conclusion are a mixture of the Defendant's clear slavish submission to his solicitor's advice; my finding that this advice remained constant and, in particular, did not alter when the incriminating evidence was ultimately put to the Defendant ; the passage of over six years prior to his second and third arrests, allied to my finding that the Defendant had no specific recollection of the date or incident in question ; the consideration that the facts upon which he ultimately relied at the trial are to be contrasted with, for example, a specific concrete exculpatory explanation such as an alibi or – in albeit contrasting contexts – an assertion of mistaken identification or provocative conduct by an injured party or self defence; and the basic harmony between the Defendant's evidence at the trial and the Defence Statement. This combination of factors impels to the conclusion that any inference adverse to the Defendant under Article 3 of the 1988 Order is unwarranted.

(ii) The Fleeing Male Person

[53] I have no hesitation in finding, by inference, that the fleeing male person described in the evidence of the civilian witnesses – Messrs. Lennon, O'Neill and Matthews, paragraphs [9] – [14], *supra* - was the driver of the bomb vehicle. The conduct and movements of the male person, as described by these witnesses, is pre-eminently compatible with the view that he had just driven the bomb vehicle to its terminal position and was engaged in precisely what one would expect of such a driver – a hurried departure from the scene, duly clad in attire tending to obscure his appearance and an obvious unwillingness to respond or dally when challenged

by Mr. Lennon. I find that there was a verbal challenge followed by a physical altercation during which two items of the male person's clothing and his headwear were discarded. Having regard to all the evidence, it seems to be inconceivable that this person was not the driver of the bomb vehicle. There is nothing in any aspect of all the evidence adduced to call into question the propriety of this inference and, realistically, no competing inference arises.

(iii) The Jumper

[54] I am mindful that, in his evidence, Mr. Lennon did not specifically identify a jumper and described, rather, a coat. I find this is unsurprising, bearing in mind that this evidence was given over twelve years after the incident and taking into account my clear assessment that Mr. Lennon was something of a reluctant witness. Furthermore, I consider any differences between witnesses relating to the exact position from which clothing and other items were recovered to be of little moment. Bearing in mind my observations above about Mr. Lennon, I accept that his focus was on the entrance in question and an area just outside the entrance. In the witness statement of Mr. O'Neill, it is suggested that the altercation occurred when the unknown male person "*came onto the* street". The witness statement of Mr. Matthews is unspecific about this discrete matter. Constable McAnespie testified that he recovered a yellow builder's helmet, a blue denim jacket and a white jumper from a point inside the yard entrance. The items of attire discarded from the fleeing male person are described by Mr. O'Neill as a yellow hard hat, a denim jacket and a light coloured jumper. Mr. Matthews describes them as a yellow hard hat and a blue denim jacket. These two statements were made within three days of the incident.

[55] Mr. Lennon describes a "*coat*" only. In my judgment, this description does not *per se* preclude a finding that the fleeing male person also discarded a jumper. Taking into account my assessment of Mr. Lennon, I find that his evidence does not undermine the written evidence of Mr. O'Neill and Mr. Matthews. I readily infer that the "coat" described by him is the denim jacket described by the other two witnesses. Furthermore, the "coat" was plainly the outer garment and the thrust of the evidence of all three witnesses is that the shedding of the fleeing male person's garment/s was a single act. I observe further that there was nothing in the evidence of Constable McAnespie to suggest that the three items recovered by him were separated from each other in any material way. While the descriptions provided by the four witnesses in question of the "terminal" position of the fleeing male person's clothing do not equate precisely with each other, I consider these differences to be of modest dimensions at most and I am mindful that both Mr. Lennon and Constable McAnespie were attempting to recall events which occurred some twelve years ago. In addition, while no one specifically "identified" any of the relevant items of clothing to Constable McAnespie, I consider it appropriate to evaluate all of this evidence in the round. Having done so, I readily infer that the white jumper was discarded from the fleeing male person during his physical altercation with Mr. Lennon. I further find that this garment was duly recovered in the aftermath by

Constable McAnespie, in the vicinity of the entrance, and that it is unequivocally connected to the Defendant by the DNA evidence.

(iv) The Detonating Cord

[56] The evidence of Captain Saunders – paragraph [26] *supra*, - described, *inter alia*, (a) a detonator, which (b) was taped to an improvised cord. As recorded above, his report states:

> "*The detonator was taped to the improvised cord detonating*".

He further testified that this was "*a viable device*" and that the "*explosive train*" was complete. His evidence about these matters was not shaken or diluted in cross-examination. Furthermore, his opinion evidence about the non-explosion of the bomb was not related to the detonating cord in any way.

[57] It is necessary to juxtapose and balance the evidence of Captain Saunders with the concessions made by Mr. McMillen in cross-examination: see paragraph [29] above. In short, he acknowledged that FSANI did not receive any detonating cord and that, absent such cord, this type of device is not viable. However, this evidence must be considered in its full context. Mr. McMillen's report, adopted in his examination-in-chief, contains the statement "*I have no reason to doubt its viability …*" and adverts to photographs confirming the presence of the detonating cord. As I have noted above, these photographs were not proved as part of the prosecution case. However, there is no suggestion that Mr. McMillen did *not* have them at his disposal when compiling his report and forming his expert opinion. In this respect, they are properly assessed as forming part of the materials considered by him. There is no contention that this aspect of his evidence was in any way inadmissible. Furthermore, he specifically testified that all of the components required for a viable, fully functioning explosive device were present. In my view, neither Captain Saunders nor Mr. McMillen could have expressed this view, either in their reports or their sworn evidence, if they were not satisfied about the presence of what they describe, respectively, as "*the improvised cord detonating*" and "*detonating cord*". There was no challenge to their expert credentials or expertise and I also take into account the absence of any qualification in their evidence about this discrete matter. In particular, it was not put to either of them that they could not stand over their reports or evidence and should retract same. For this combination of reasons, I reject the Defendant's argument recorded in paragraph [48](n) above.

(v) The Defendant's Age and Height

[58] While the Defendant's submissions also rely on the evidence relating to his age and height, highlighting an asserted inconsistency between the testimony of Mr. Lennon and what is documented in a custody record, I find this to be of no

assistance. Common sense dictates that evidence about a person's estimated age or height arising out of the most fleeting of encounters in fraught circumstances and where the subject was wearing a builder's hat is, realistically, likely to be of intrinsically limited value and I so find in the present case. Finally, the Defendant's evidence to the court contained nothing which would call into question the aforementioned finding and assessment.

(vi) Was the Fleeing Male Person the Defendant?

[59] Having regard to the findings and conclusions recorded above, this becomes the crucial issue in this prosecution. It is a matter central to the prosecution case and it must be proved beyond reasonable doubt. Thus, excluding merely fanciful or flimsy reservations, I must be firmly convinced of this fact. This is the exacting, indelible standard which the prosecution must establish.

[60] On one side of the scales there is the clear – and unchallenged – scientific evidence of the presence of a spot of the Defendant's blood on the inside left rear collar of the jumper in question. I consider that the one in a billion statistic establishes this fact beyond reasonable doubt. To this one must add my findings above relating to the white jumper which, in short, give rise to a direct nexus between the fleeing male and the Defendant's blood. But has it been established beyond reasonable doubt that the fleeing male was the Defendant?

[61] On the other side of the scales, I must take into account particularly Ms Boyce's evidence, rehearsed above; the absence of any evidence connecting the Defendant to the white van, or vice versa; the lack of any fingerprint evidence against the Defendant, following the testing of a series of items of material physical evidence (rehearsed in paragraph [39] above), in circumstances where there is no evidence either that the fleeing male person was wearing gloves or that gloves were found in the aftermath; and the "full" good character direction for which the Defendant qualifies. With reference to the latter issue, since the Defendant gave evidence at the trial I am required (a) effectively, to give him credit for his previous good character in assessing the credibility of his evidence and (b) to view him as a person who is less likely to commit the offences of which he is accused.

[62] At this juncture, I turn to consider the evidence of Ms Boyce, bearing in mind that it is the prosecution case that the Defendant was the wearer of the white jumper at the material time. This is the crucial allegation which must be evaluated. In assessing Ms Boyce's evidence, I acknowledge that *how* the Defendant's blood came to be present on this garment does not form part of the prosecution case. Her evidence and the ensuing defence arguments must be viewed in this light. In this respect, I refer to the various scenarios recognised by Ms Boyce, rehearsed in paragraph [32] above. The prosecution case rests on the first of these scenarios viz. primary contact between the wearer and the garment. The fourth of the scenarios viz. "secondary contact" was considered by Ms Boyce to be the least likely. The second and third scenarios viz. airborne transmission of blood to the garment and

direct contact between the garment and a blood stained source were considered by her to be just as plausible as the first scenario of primary contact. Ms Boyce gave this particular piece of evidence with no reluctance, hesitation or qualification.

[63] To this equation I must add the observation that primary contact between the Defendant and the garment is not *necessarily* incriminating of him, having regard to his evidence about the handling of second hand clothing in a variety of contexts, which I accept. While the Defendant bears no onus, given this finding his evidence to the court was of positive assistance to his defence. Although the Defendant's evidence may not have contained detailed and concrete particulars about his handling of clothing in a variety of circumstances, I am obliged to take into account the significant elapse of time since the subject incident and I repeat my observation in paragraph [52] that the Defendant's case is not based on any specific concrete exculpatory explanation.

[64] There is but a single piece of circumstantial evidence on which the prosecution seeks to establish the Defendant's guilt. In accordance with ***R –v- McClean and McCready*** (*supra*), I have evaluated this evidence with appropriate circumspection, taking into account those factors on the Defendant's "side" of the scales enumerated above. Having conducted this exercise, I conclude that this evidence does not point in a single direction. In my view, the prosecution have failed to establish that it yields one conclusion only viz. the finding that the Defendant was the fleeing male. Simultaneously, I conclude that this evidence does not exclude reasonably tenable possibilities – namely purely innocuous contact in the course of employment or daily living – consistent with the Defendant's innocence.

Conclusion

[65] For the reasons elaborated, I conclude that the prosecution have failed to establish the Defendant's guilt beyond reasonable doubt. Accordingly, the verdict must be one of not guilty.