

BILL 13/039673

BELFAST CROWN COURT

THE QUEEN

-v-

SEAMUS MARTIN KEARNEY

His Honour Judge McFarland
Recorder of Belfast

1. The defendant was returned for trial on Bill No 13/039673 on the 6th June 2013. He faced two counts, first a count of murdering John Proctor on the 14th September 1981 and secondly possession on that day of an Armalite AR15 rifle and ammunition with intent to endanger life. He pleaded not guilty to both counts. The Director of Public Prosecutions has certified the case for trial without a jury under the provisions of the Justice and Security (NI) Act 2007. The trial commenced on the 11th November 2013 with Mr Murphy QC and Mr Russell appearing for the prosecution and Mr. Harvey QC and Mr Duffy for the defendant.

Evidence

2. John Proctor (or Johnny to his family) had been married to Kathleen Proctor in September 1977, and on the 9th September 1981 she was admitted to the Maternity Wing of the Mid-Ulster Hospital in

Magherafelt, giving birth to a boy about 10.30 am. John Proctor had visited his wife in hospital on three occasions that day, and he continued to visit her and his son on the subsequent evenings of the 10th, 11th, 12th, and 13th September 1981. On the 14th September 1981 he again visited his wife and son in the hospital. He drove his Chrysler Sunbeam DIW 9966 (this vehicle was sometimes referred to as a "Talbot Sunbeam" in the evidence), arrived about 6.45pm and parked it in the car park in the hospital grounds adjacent to what was Townparks Special Care School and is now the Magherafelt Adult Centre.

3. The car park is rectangular in shape and runs in a roughly north-east/south west direction. The entrance and exit is in the north-west corner and the road then runs between hospital buildings before joining Hospital Road. On exiting the hospital grounds a left turn leads to Magherafelt town centre, and a right turn leads to the B42 Magherafelt - Tobermore Road. Parking bays are painted out in the car park, around the edge and with a central section holding 28 parking bays in two rows of 14. For ease of reference I will allocate these bays numbers (although there is no such numbering at the location). Starting from the west, the bays on the northern section will be numbered 1 - 14, and on the southern section they will be numbered 15 - 28. Of particular significance are bay 6 where John Proctor parked his car, bay 7 where the police later found blood and a set of keys, bays 27, 12 and 13 where the police later found tyre marks, and bays 25 and 26 where the police later found shell casings. Two cigarette butts were also recovered. The exact location of the cigarette butts is uncertain as two butts were recovered from three possible locations, but the three locations were in bays 26 and 27.
4. John Proctor stayed with his wife and child until about 8.50 pm and he then departed to return to his car. After saying goodnight within the ward, Kathleen Proctor then proceeded within the building to a window closest to the car park to exchange a final farewell through the window.

As he left her, she noted that her husband was alone and he disappeared from view. She then remained at the window in the hope of catching a glimpse of him driving past. A short time later she heard the sound of gunfire.

5. Malachy McElhone had also been visiting his wife that evening and was leaving about the same time. He noticed John Proctor (who he did not know) speaking through the window to a lady he assumed was his wife. They then walked together the short distance to the car park with John Proctor saying that it was strange that they had not been "chased" earlier as Sister Woods was on duty. Malachy McElhone was driving a Morris Mini vehicle also parked in the car park. He describes John Proctor saying "goodnight" to him. He then got into his vehicle and heard a series of cracking sounds for about 2 seconds. He looked over his shoulder and saw smoke and damage to the Proctor vehicle. Then he noticed what he described as a white Ford Escort with a black roof "screaming past me" with tyres spinning. He was unable to see how many people were in the vehicle, and had not seen it in the car park before then.
6. Doreen Herron had gone with her sister Sarah Scott to visit their aunt in hospital that evening. They parked their vehicle in the car park. Sarah Scott was driving and Doreen Herron was the front seat passenger. Doreen Herron observed a man walking a couple of steps across from a vehicle holding a rifle. He then crouched down but did not place the gun to his shoulder. He then stepped back towards the car he had come from. She noticed the driver's door was open. She ducked down, and heard the discharge of shots. She described the man as being 5 feet 7 or 8 inches in height, unmasked, dark hair, medium build and wearing dark clothing. She estimated his age as between 20 and 30. Her sister noticed a man with a gun to her left and walking towards a car which had two people in it and the driver's door open. She described the gunman as about 5 feet

10 inches with a brown jacket and brown hair. Sarah Scott (now deceased) made her statement on the 14th September 1981. Nine days later on the 25th September 1981 she contacted police stating that she thought the gunman might be X. (X's name was given in evidence at the trial but there is no need for me to repeat it in this judgment.) She also said that the man's father or mother was in the hospital at the time. The police officer receiving the oral statement from Sarah Scott has stated his scepticism as Sarah Scott was unable to give a description of X, stating that she did not know X, and further that Sarah Scott's husband had been murdered, with X being the suspect.

7. Roger Moles had been at a shop on the Hospital Road at the time and he heard shots from the grounds of the hospital. He was approaching the entrance when he heard the noise of a vehicle driving quickly and he had to take evasive action by swerving. He described the vehicle as a white Ford Escort RS2000 with what appeared to be two people in the front seats. A short time later Shirley Pickering saw what she described as a white Ford Escort travelling at a very fast speed along Main Street in Tobermore. Later that evening the police found a white Ford Escort RS2000 abandoned adjacent to the junction of Forgetown Road and Weddell Bridge Road, off the Tobermore - Draperstown Road. The Ford Escort belonged to Damien Donnelly and had been taken from him at gunpoint from his home on the Derrynoyd Road on the western outskirts of Draperstown at 8pm that evening when he, his wife and two friends had been threatened by a man with the gun. They were told that the vehicle would be returned in an hour.
8. All the relevant locations are in the south Derry area with the distance between Derrynoyd Road and the hospital about 12 kilometres and a similar distance between the hospital and Weddell Bridge Road.
9. John Proctor was 25 years of age at the time. He was in good health. He had suffered multiple gun shot wounds. Of particular significance were

the wounds to his chest and abdomen. One bullet had entered the left side of his upper back and had then passed downwards fracturing his spine and lacerating the spinal cord before severely lacerating the right lung. Another bullet lacerated the large intestine. He was declared dead minutes later, and the cause of death was stated to be gunshot wounds to the chest and abdomen. Dr John Purse, assistant State Pathologist stated that "Some of the bullets or bullet fragments appeared to have come from his right whilst others appeared to have travelled downwards and so probably struck him as or after he collapsed onto the ground". This opinion is supported by the evidence of Roger Moles (the driver on Hospital Road) who heard two distinct bursts of gun-fire and by the observation of Constable Cairns of bullet strike marks on the ground before the area of blood and the assumed location of John Proctor's body.

10. All this evidence was given during the trial by the reading of statements made to the police. It is abundantly clear that a number of individuals had murderous intent that evening. The number involved was definitely two and possibly more. They must have been aware of the movements of John Proctor and that he would be in Magherafelt Hospital that evening. They took the Ford Escort RS2000 for the purpose of transporting the gunman and the rifle to the hospital and then used it as a getaway car. They came armed to kill, and they executed their plan. The man firing the rifle was clearly guilty of murder. I have considered the role of any occupants of the Ford Escort car. There was at least one, the driver, and I cannot discount the possibility there may have been more, as Sarah Scott has said that there were two in the car, in addition to the gunman. I discount any possibility that a person could have been in the car at the car park for an innocent purpose, or a criminal purpose short of intending to kill John Proctor with the rifle. The gunman was there to fire the weapon, the driver of the car was there to remove the gunman and the weapon from the scene, and any other occupant of the car would have been there

to provide support for either the gunman, the driver, or both. All the occupants of the car are guilty of murder. The issue in this case is whether the prosecution have proved beyond reasonable doubt that the defendant was one of the people in the car.

The car park scene

11. The police were able to examine the scene at the car park immediately after the shooting. Constable Cunningham, from the police mapping section, has marked the scene on his notes (Exhibit 39). Tyre marks were found starting at bay 27 (5 feet 4 inches on the near side and 6 feet 4 inches on the off side from the southern edge of the bay), with the pair of marks travelling in a north-westerly and then as a single tyre track, left by the offside tyres, in the direction of the car park exit and towards Hospital Road. At the commencement of the tyre mark the near side tyre appears to be 1 foot 11 inches from the line dividing bay 27 from bay 26. The writing on the notes is not particularly clear but the distance of 1 foot 11 inches appears to be confirmed as other distances within the width of the bay are 1 foot and 4 feet 5 inches, making a total of 7 feet 4 inches against an approximate bay width of 7 feet 8 inches (as recorded for bay 22).
12. In bays 25 and 26 there were 13 spent bullet casings, 4 in bay 25 and 9 in bay 26. Two cigarette butts were also marked by Constable Cunningham as located in bay 26. Their locations are shown on Exhibit 39 using measurements along the line at the entrance of the bays and the line between bays 25 and 26. One (marked (i)) is located 5 feet 10 inches from the entrance and 1 foot 9 inches from the dividing line. The other (marked (ii)) is located 8 feet 5 inches from the entrance and 6 feet 10 inches from the dividing line. It is clear that butt (ii) is shown on Exhibit 1 photograph 6. The photograph has a title - "Photograph showing spent

cases". It shows 14 circled items, although one is difficult to see as it is very adjacent to a painted line.

13. Constable Cairns was the crime scene officer. He said that he prepared a statement at the time although this cannot be located. He then prepared a statement in October 2010 using his police notebook entries to assist him. Understandably his memory of the evening in question was sketchy, although he did state that he had some memory of the evening.
14. In his notebook he records "13 empty cases. Keys lying beside car. Blood 2 places. Tracks away." He had prepared a sketch plan in his notebook which shows the tracks or tyre marks, x's which presumably show shell casings (although only 12 are marked) and 2 cigarettes, one marked "cigarette butt" and the other "cig tip". When asked to explain this distinction he said that he would call a tip a filter which had some tobacco still attached and a butt as being smoked right down. The cigarette butt is shown in bay 27 near what would be the offside rear of where the car causing the tyre marks would have been parked, assuming the commencement of the marks indicates the stationary position. The cigarette tip is in bay 26, close to where Constable Cunningham has marked his cigarette (ii). Photograph 2 of Exhibit 1 does appear to show a white object in bay 27 which is roughly similar to the location noted in Constable Cairns' notes.
15. The spent bullet casings and the cigarette butts were recovered by Constable Cairns with the cigarette butts placed in a single exhibit bag. The cigarette butts were described in evidence as being very clean with the appearance of being very fresh. There is no mention of this in his notes. When asked about the possibility of there being three cigarette butts, Constable Cairns confirmed that whatever Constable Cunningham had observed and noted, the two cigarette butts he recovered were as shown on his notes.

16. Constable Cairns also confirmed that he had been responsible for the circling in chalk of relevant items, but could give no explanation as to why the cigarette butt adjacent to the tyre mark he recovered had not been specifically chalked out.
17. In bay 7, adjacent to John Proctor's vehicle were car keys, and an area containing blood staining. There were also strike marks on the ground in bays 7, 8 and 22. The car keys were marked by Constable Cairns in his notebook and by Constable Cunningham on his plan, and are clearly to be seen in photographs. Constable Cairns marked the blood and bullet strike marks on a second sketch in his notebook, and would appear to have chalked out the blood staining and bullet strike marks on the ground, They can be seen in photograph 11 (Exhibit 1). (There is an apparent, but insignificant, error in the sketch as strike marks 4, 5 and 6 are noted in bay 23 when they are photographed in bay 22.) The body had been removed by ambulance staff before the police arrived although Malachy McElhone described the body as lying near the rear of the Chrysler Sunbeam, and the blood stained area is at that location.
18. The Chrysler Sunbeam appeared to suffer seven bullet strikes and these were marked by Constable Cairns. Constable Cairns also confirmed that the VW Golf parked in bay 8 did not appear to suffer any bullet strikes.

The rifle

19. Four and a half years later, on the 18th February 1986 the police attended an incident at Hillhead Road between Toomebridge and Castledawson. At the scene Brian Thompson, a forensic officer recovered a Colt AR15 self-loading rifle adjacent to a pile of slates beside an outhouse. The weapon's serial number had been removed. It was in poor condition but was capable of firing bullets. At this scene he also recovered a FNC self-loading rifle. The FNC rifle has no relevance to this case.

20. Forensic tests were carried out on the Colt AR15 rifle and it was test fired. Jonathan Greer a forensic officer gave evidence that the bullet casings found in the car park matched the bullet casings test fired by the Colt AR15 rifle. This can be discerned from examination of the firing pin impressions, extractor and ejector marks on each casing. A rifle of this type will leave a 'signature' unique to the weapon on casings.
21. Through analysis of bullet casings recovered at three other crime scenes, another Forensic officer, Brian Thompson determined that the weapon was also used during an incident in Swatragh when shots were fired at a UDR patrol vehicle on the 8th November 1982, and at two other incidents both described as attempted murder incidents at Aughrim Road, Magherafelt on the 14th April 1985 and at Castledawson police station on the 9th December 1985. The defendant was in custody at the time of the 1985 and 1986 incidents and has no connection with them.

Location of the gunman

22. Jonathon Greer was also asked to ascertain the likely pattern of casings ejected from an AR15 rifle. He test fired two sample AR15 rifles (neither being the rifle recovered on the 18th February 1986 although of a similar type). The results indicated that the shell casings were ejected from a AR15 rifle in a pattern to the right and behind the rifle. The two sample rifles gave a slightly different pattern but the majority fell between 1.5 metres and 4 metres to the right and 2.5 metres and 5 metres behind. I accept that this would be a typical pattern for the discharge of spent casings from any AR15 rifle. Jonathan Greer estimated that given the test fire results achieved, and the location of the shell casings located in the car park, the approximate location of the person firing the rifle was somewhere either in bay 24 or 25 (marked 'X' and 'Y' on Exhibit 41) or between these two marks. Jonathon Greer was of the opinion that the

shells could not have been discharged from the location of the vehicle which created the tyre marks as the line of fire would have been obscured by a parked car (the Volkswagen Golf). Support for this opinion is also found in the fact that there were no bullet strike marks noted on the Volkswagen Golf and the most forward strike mark on the Chrysler Sunbeam was in front of the handle of the driver's door. To avoid striking the Golf vehicle, the gunman must have been located as Mr Greer suggests.

Photograph 2 Exhibit 1

23. Before turning to the evidence relating to the cigarette butts, it is necessary to deal with one issue relating to photograph 2 in Exhibit 1. This shows the car park scene taken from the corner of bay 28 looking towards the Chrysler Sunbeam. Bays 25, 26 and 27 are taped off by tape lying on the ground. Other photographs show shell casings in bays 25 and 26 marked by chalk outlines, and the casings are clearly referred to in the notes taken by Constables Cunningham and Cairns. The photograph does show tyre marks in bay 27, which are also recorded by the other witnesses. However the photograph does not appear to show any shell casings or any chalked outlines. I can only put this down to the flash unit in the camera not picking up these items, or else it was taken after the items had been recovered. In any event, whilst this was a matter raised by the defence in cross-examination, I do not consider it to be of any substantial relevance to the issues in this case, nor would it raise any reasonable doubt in my mind in relation to findings at the car park scene.

Analysis of the cigarette butt evidence

24. Before beginning my analysis of this important evidence, I remind myself of two important matters. First the evidence insofar as it tends to

implicate the defendant is circumstantial evidence. Secondly this incident took place over 30 years ago, and as such it will have presented difficulties for the defendant.

25. Circumstantial evidence must be examined with great care for a number of reasons. First of all, such evidence could be fabricated. Secondly, to see whether or not there are any circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. The direction in the JSB Bench Book on directions to Juries suggests the purpose for this careful analysis "is particularly important because of the tendency of the human mind to look for and often to slightly distort facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant."
26. The test to be applied has been summarised by Higgins LJ in **R -v- Jones [2007] NICA 28** in the following terms - "In a case that depends on circumstantial evidence, 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."
27. As for delay, Girvan L.J. in **R -v- W [2013] NICA 6** emphasised that the counter-balance to the lack of any limitation period in the criminal justice system has to be the requirement for scrupulous care by the court in ensuring a jury appreciates the potential for unfairness to a defendant. In particular a jury must consider how a defendant may be prejudiced generally by the delay, and how a defendant may be prejudiced in relation to particular allegations in the specific context of the charges he faces.

Morgan L.C.J. in R -v- McK [2013] NICA 11 reinforced those comments by emphasising that a jury needs to be fully aware of any prejudice, both general and specific, that a defendant may have in defending himself and further that the delay, and the absence of witnesses or evidence, impacts much more on a defendant than on the prosecution. In the context of the analysis of the cigarette butt evidence, Constables Cunningham and Cairns have both said in evidence that they remember little of the night and are relying heavily on their notes. In addition issues arising about the management of the crime scene cannot be addressed due to the absence of potential witnesses and inability of witnesses to remember specific details. Finally Constable Cairns made a statement at or about the time of his examination and this is now missing.

28. It is clear that forensic science has moved on in leaps and bounds from the early 1980s and the investigative role of the police at crime scenes has responded and evolved as well. It is easy to be critical of standards adopted as normal then when compared to what is undertaken now. However any deficiencies must be examined carefully to ensure that whatever forensic test results emerge, they are put into their proper context. If there are any gaps or deficiencies then the defendant must be given the benefit of any doubt when considering whether the prosecution have discharged its burden.
29. No evidence was given from an officer who was in charge at the scene, and it is clear that there was very little co-ordination between the crime scene officer, the mapper and the photographer. Each appears to have worked independently. As a result there is no specific photographic evidence of the cigarette butts.
30. The use by Constable Cairns of the expressions butt and tip is a little pedantic, and I do not consider it of much significance. I will deal with the forensic officer Ruth Griffin's evidence later, and she does refer to one butt examined having some cigarette paper attached to the filter. That

butt was the relevant butt to the DNA analysis, but the evidence would be too speculative to be certain that that butt was the butt described by Constable Cairns as 'cig tip' in his notebook.

31. I consider that both Constable Cunningham and Constable Cairns were diligent officers, and each has noted in contemporaneous records the location of two cigarette butts. I am satisfied beyond doubt that Constable Cunningham's cigarette butt marked (ii) is the same cigarette butt as Constable Cairns describes as 'cig tip'. I have no doubt that this is the item circled and shown in photograph 6 (see paragraph [12] above). I have come to the conclusion that there must have been three cigarette butts at the scene as this is the only rational explanation for the evidence of Constable Cunningham and Constable Cairns. The two officers were acting independently, and neither briefed the photographer, who in turn was acting independently. Both recorded cig tip/butt (ii), with Constable Cunningham recording a further butt (i) and Constable Cairns recording a further 'cigarette butt'. Some modest support for this conclusion is arrived at by consideration of photograph 2 and photograph 6, which both show white objects not unlike cigarette butts in locations where the respective officers have noted their second butts. However, in coming to that conclusion I consider that a finding of that fact is not critical to the consideration of this case. The relevance of the cigarette with the DNA profile is that it was found at a location close to the Ford Escort RS2000. Two butts were seized by Constable Cairns and they are likely to have been the butts recorded by him in his notebook. I cannot say which one has the DNA profile, but I can say that a butt with the profile was located by Constable Cairns at a location close to the position of the car. Doreen Herron and Sarah Scott observed this car in a stationary position. It is a reasonable inference to draw that the start of the tyre marks indicates the likely position of the rear tyres of the stationary vehicle. The location of Constable Cunningham's butt (i) was approximately 8 feet 9 inches from

the nearside tyre mark and butt (ii) was approximately 3 feet 8 inches from it. Constable Cairns' butt is not recorded by measurement, but is adjacent to the off-side tyre mark. Therefore all three butts are located at relevant locations.

32. I turn now to the consideration of the state of the two butts seized by Constable Cairns. He has given evidence and described them as being very fresh and clean. He makes no reference to this in his notebook. We do not know what he said in his initial statement in the investigation. His memory of the evening in question must have faded in the intervening years. However he attended the scene as a crime scene officer. He examined the scene, and he decided to seize two cigarette butts. I have no doubt that his decision to do that must have been based on his assessment of the scene, taking into account the tyre marks, the spread of the bullet casings, Proctor's car, the blood on the ground and the cigarette butts. Had the butts been damaged, weathered, or displaying any form of aging, they would not have been relevant to the investigation. Constable Cairns made the decision to seize them, and in coming to that decision, he must have been of the view that they were in such a state and location to be relevant. Some support for the proposition of their state is given by Ruth Griffin's evidence that the butts when opened and removed from the evidence bag in the late 2000s were clean and dry. I am therefore satisfied that the cigarette butts seized by Constable Cairns were both fresh and clean as he has described them.

33. The two cigarette butts recovered by Constable Cairns were sealed in an evidence bag, marked and delivered to the Forensic Science Laboratory, then in Newtownbreda. Ruth Griffin gave evidence about her understanding of what happened and the subsequent history of the exhibit. She was not employed by the Laboratory at the time. Due to scientific techniques at the time a decision had been made not to sample the butts as such an examination would be of little purpose. Ruth Griffin

stated that the exhibits would have been retained on the Laboratory file. The file consisted of the typical light card back (A3 in size folded in half) with papers contained within it. The file itself would have been placed in an envelope capable of holding A4 sized papers and marked with its file reference. It would then be stored with other files running sequentially. A bomb explosion in 1992 severely damaged the Laboratory. The procedure undertaken was to remove all files, stack them into cases and then move them to secure storage before movement to the new location of the Laboratory.

34. As part of a review carried out by the Historic Enquires Team in the mid-2000s, this file was looked at again as being of interest. As a result, Ruth Griffin examined the butts on the 13th October 2009. She described them as being in a sealed evidence bag located in the file, and the bag did not appear to have been opened before. She allocated the letters A and B to the butts. She described both butts as being clean, dry and smoked down. They were very similar in length - about 25mm - and butt A had some white cigarette paper attached to the filter. She removed the part of each filter that would have been closest to the mouth of the smoker and subjected the filters to examination. She was able to obtain a full DNA profile from butt A but there was insufficient material to obtain any profile from butt B.
35. She was then asked to obtain a DNA profile from a buccal swab obtained from the inside the cheek of the defendant on the 19th July 2010 by Constable Miller. In her evidence she described the DNA from butt A and the buccal swab as a 'match', clarifying this by stating that using the Northern Ireland frequency data it was calculated that the characteristics of the full profile from butt A would be expected to occur in less than one male in one billion unrelated to the defendant.
36. I have carefully considered the evidence in relation to the cigarette butts and the later DNA profile contained on Ruth Griffin's butt A. I have

considered the possibility of deliberate fabrication or contamination at each stage. I discount any possibility that the butt was planted by Constable Cairns, any other police officer, or indeed any person who would have a malevolent view of the defendant. As forensic tests of this type were not being carried out at the time, it would not be a rational approach for anyone to take if they were minded to incriminate the defendant falsely. I am satisfied that the butt was properly recovered from the scene. I have considered the possibility of Constable Cairns accidentally contaminating the sample with the defendant's DNA as he recovered the butt. I discount this possibility. I have considered deliberate or innocent contamination of the butt within the Forensic Laboratory. The evidence bag was not opened for approximately 29 years. It was found to be intact by Ruth Griffin. The file had been in the Newtownbreda laboratory and was then moved. The original file was available to Ruth Griffin and she produced it in court. There was no apparent bomb or other damage to the envelope or file. I discount any possibility of contamination prior to the evidence bag being opened. I have considered innocent contamination of the butt after the evidence bag was opened but before it was examined. There is no evidence to show that any member of the forensic staff handling the butt was also handling at or about that time items that could have held a DNA profile of the defendant. I therefore conclude beyond reasonable doubt that the DNA profile found on Ruth Griffin's butt A was placed there when it was smoked or handled by the defendant. I am satisfied beyond a reasonable doubt that the presence of DNA had come from the saliva of the defendant when he was smoking the cigarette.

Bad character evidence

37. The prosecution sought to introduce evidence relating to the conviction of the defendant for offences relating to the Swatragh incident on the 8th November 1982 and mentioned in paragraph [21] above. A patrol of soldiers had been subjected to gunfire. After a search of the locality, the defendant was located in a dishevelled state adjacent to a Heckler Koch G3 rifle. Spent bullet casings, later attributed to the AR15 rifle used to kill John Proctor were also found at the scene. On the 21st December 1984 the defendant was convicted of attempted murder and possession of two firearms (the Heckler Koch G3 and the AR15) with intent to endanger life. His appeal against that sentence was dismissed on the 13th October 1986.
38. The prosecution seek to introduce this under Article (6)(1)(d) of the Criminal Justice (Evidence) (NI) Order 2004 as it relates to important matters in issue between the prosecution and the defence. The important matters are first the identity of the offender, and secondly it is evidence of the defendant's propensity to commit offences of the same kind with which he is charged. In the course of oral argument they advanced a further point, ancillary to their first, that it rebuts any innocent explanation for the presence of the cigarette butt at the murder scene. In relation to this, I note that at no stage, either during police interviews or at the trial has the defendant given any evidence or explanation as to how he believes that a cigarette butt bearing his DNA was found at the scene.
39. I decided to admit that evidence, and gave short oral reasons for doing so. I now expand on those reasons. The starting point for consideration of the admission of this type of evidence is the judgment of Rose LJ in **R -v- Hanson [2005] 2 Cr App R 21**. Hart J in **R -v- Clarke [2010] NICC 54** summarised the test derived from **Hanson** by posing three questions. I have formulated those questions in the context of this case as follows –

- a) Does the history of the Swatragh incident establish that the defendant had a propensity to commit a murder of a police officer?
- b) Does the propensity make it more likely that the defendant was either the gunman who shot John Proctor or one of the people in the car seen driving from the scene?
- c) Is it unjust to rely on the Swatragh incident and will the proceedings be unfair if his conviction is admitted?

40. The Swatragh incident took place approximately a year after the Magheraflet hospital incident, yet there are similarities, given the geographic locations, the fact that members of the security forces were targeted, and the fact that the same weapon was used. I accept the argument advanced by the defence that the weapon could not be seen as a personal weapon used exclusively by the defendant. His possession of it at Swatragh was as part of a joint enterprise and I can readily accept that weapons of this type would have been held by groups as part of their arsenal, and used by different individuals.

41. There can be no question that the Swatragh incident showed that the defendant had the propensity to take part in attacks of this type targeting members of the security forces. Further, it shows a motivation, willingness and ability to take part in and press home such an attack. The only issue is the fairness to the proceedings. Bad character evidence can never be used to bolster up what is a weak and speculative case. My assessment is that the prosecution case cannot not be placed in such a category. Although each case must be dealt with on its own facts, two recent decisions highlight how judges will approach the question of admissibility of such evidence. In Clarke Hart J admitted the evidence when the case relied on finger and palm print evidence on a door through which shots had been fired. Treacy J in R -v- Rodgers [2013] NICC 5 admitted evidence of a subsequent sectarian murder when the evidence against the defendant consisted of unexplained palm and finger prints in a

hijacked taxi used in the murder. In all the circumstances I considered that it would not be unfair to admit the evidence.

Defendant's failure to give evidence

42. At the conclusion of the prosecution evidence, I asked Mr Harvey QC if he had advised his client that the stage had now been reached at which his client may give evidence and, if he choose not to do so or, having been sworn, without good cause refused to answer any question, the court may draw such inferences as appear proper from his failure to do so. Mr Harvey replied that he had, and the defendant did not give any evidence.

Prosecution case

43. The prosecution case relied on three matters – first, the cigarette butt found at the scene, secondly the bad character, and thirdly the inferences to be drawn from the defendant's failure to give evidence. The prosecution must prove its case beyond a reasonable doubt.

44. The following extract from Pollock CJ's judgment in **R v Exall [1866] 4 F & F 922 at 929** is often used in directions given by trial judges to juries when they are considering circumstantial evidence – "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 that is not so, for then, if any one link breaks, 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 mere suspicion; but the three taken together may create a

conclusion of guilt with as much certainty as human affairs can require or admit of."

45. This advice is particularly relevant in this case. We have three cords. They cannot be assessed as equal cords as the cigarette butt evidence has to be taken as the principle cord. The bad character evidence and the inferences to be drawn from a failure to testify, have to relate to the strength of the cigarette butt evidence. If that cord is insufficiently strong enough to bear the weight, the trial process cannot allow the other two to bolster it up and somehow sustain the conviction. It may not have assumed the status of a link in Pollock CJ's imaginary chain, but care needs to be taken in the assessment of this evidence.
46. So what inferences can be drawn from the presence of a fresh and clean cigarette butt bearing the defendant's DNA profile adjacent to the assumed firing position of the rifle and the assumed position of the parked 'getaway' car? The first is that it was smoked by the defendant and discarded by him in the car park. I have carefully considered other possibilities. It is a very common feature of cigarette smokers to throw away the butts when they have finished. Some use ashtrays or other bins, but there is no evidence of any such bin in the vicinity. Some could use ashtrays in cars, and it is possible that they could then be deposited onto the ground, although in such circumstances it would be normal to find other cigarette debris in the vicinity. I therefore discount any possibility of the butt being deposited in the car park by any means other than by the defendant himself immediately after he had smoked it. The second is that the cigarette was deposited timeously to the shooting incident. The butt was clean and fresh when first observed at or about 10 pm when Constable Cairns arrived at the scene. This would infer that it had been lying at the location for only a short period of time, although it would be impossible to establish any certainty about the actual time of the deposit.

47. I have considered the possibility of the defendant being present in the car park at 8.50 pm that evening, or at an earlier time but for an innocent purpose. Obviously any possibility of that being the case would raise a reasonable doubt as to his guilt.
48. He has not given evidence about his whereabouts that day. He is not required to give evidence, but he was warned about possible inferences that could be drawn from his failure to give evidence. I have considered whether it is reasonable to require him to give an explanation bearing in mind the weight of the prosecution case. I believe that it is not unreasonable to expect him to give an explanation as to how the butt of a cigarette recently smoked by him was found adjacent to the place where a gunman had fired shots and a 'getaway' car had been parked in the light of his propensity to take part in attacks of this type on members of the security forces.
49. I have particularly considered how the fact that 30 years has now passed could have prejudiced the defendant in that he may not be able to remember his movements at or about that time. If there was any possibility that that was the case then the defendant must be given the benefit of the doubt and no inferences could be drawn from his failure to give an explanation. There was no evidence before the court that the defendant had general difficulties with his memory, or specific details relating to this time. Taking into account normal fading of human memory over time, I have considered how this could have presented difficulties for the defendant, a man born in 1956, and therefore 25 in 1981, 54 in 2010 when he first became aware of the allegations against him, and now aged 57. No evidence has been given that the hospital grounds are used as a general thoroughfare and that people could be there other than when working in the hospital, there on business, or visiting it as a patient or as a visitor of a patient. On perusal of an aerial photograph (exhibit 23) and of the plan of the area (exhibit 27) there does not appear to be any sort

of thoroughfare actually, or able to be, used. The tributary of the Grange Water bounds the site on north-west side preventing movement to and from that direction. If the defendant was somehow associated as an employee of the hospital or a regular visitor for legitimate reasons, I am sure he would be able to remember that. If the defendant had been in hospital for treatment of a medical condition at the time, he would have some memory of that, and that could be corroborated from other independent records within his control such as his GP notes and records, or available through police investigation if suggested to them or court third party procedures if requested. Similarly if he was attending the hospital to visit a member of his family or friend he is likely to have some memory together with the ability to access independent records. In addition, I have no doubt that this incident was a particularly noteworthy event at the time and would have been reported as such by the media. Had he been in the car park at or about that time for another purpose other than as alleged by the prosecution, it is something that he is likely to have noted and remembered as it is a normal human condition to focus on and remember what would have been perceived as a type of 'near miss', i.e. being in the vicinity of a significant incident but not being involved in it. In the circumstances I do not believe that the delay in this case, although substantial, is something that will have had an impact on the defendant's ability to remember, or to put forward, an explanation for his presence in the car park at a time other than the time of the shooting.

50. I conclude that that in all the circumstances his failure to give evidence can only sensibly be attributed to him having no answer as why his DNA was found on a cigarette butt found at the scene of the murder, or none that could have stood up to cross-examination.

51. I consider that the defendant's undoubted propensity to kill members of the security forces and his failure to give an explanation for the presence

of a cigarette butt smoked by him at the car park add weight to, and support the prosecution case against him.

52. The cigarette butt places the defendant in the car park at the scene of the murder, associating him with the murder and the 'getaway' car. As discussed in [10] above, the gunman is guilty of murder as he clearly intended to kill John Proctor, and anyone in the car, be they the driver or the passenger, would have been part of a joint enterprise to commit the murder. This is not a case, for example, of a forensic finding connecting a defendant to a car which had been associated with a crime, such as would have been the case if the cigarette had been found in, or adjacent to, the car where it was abandoned. In such a case the exact role and intentions of the defendant could not have been determined and reasonable doubt would exist as to whether he was part of a joint enterprise to murder. Examples of this type of case are contained in the judgments of Carswell LCJ in R -v- Clarke [2003] NICA 43 at [14] (the defendant's fingerprint was on a bottle and his DNA was on a cigarette found in an abandoned car), Hart J in R -v- Duffy & Shivers [2013] NICC 1 at [58] (the defendant's DNA was on a seatbelt buckle and part of a latex glove found in an abandoned car) and Morgan LCJ in R -v- Shivers [2013] NICA 4 (the defendant's DNA was on matches found in an abandoned car). The circumstances of this case clearly differentiate it from these examples,
53. In all the circumstances I am satisfied beyond reasonable doubt that the defendant had smoked the cigarette and having finished smoking it discarded it at or about the time of shooting. Although it is not necessary for me to make a conclusive finding on the point, in all likelihood it was smoked when the defendant was waiting for John Proctor to leave the hospital. I am firmly convinced the defendant was either the gunman, the driver of the Ford Escort RS2000 or was an occupant of the car being present to provide support for the planned killing. In any event, he is

guilty of the murder of John Proctor and the possession of the AR15 rifle and ammunition that killed him.