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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

JAMES SEALES AND STEPHEN CHARLES McCAUGHEY

____

Before: COGHLIN LJ, GILLEN LJ and DEENY J

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GILLEN LJ (delivering the judgment of the Court)

Introduction

[1] The two applicants, James Seales and Stephen McCaughey were convicted at Belfast Crown Court on 14 May 2013 by Weir J, sitting with a jury, of the murder of Philip Strickland ("the deceased") on 11 January 2012 and of possession of a firearm with intent to endanger life. Seales was convicted unanimously on both counts. McCaughey was convicted of the murder by a majority of 10 to 2 and of possessing the firearm by a majority of 11 to 1. Seales was sentenced to life imprisonment with a minimum term of 15 years for the murder and 12 years determinate custodial sentence for the firearm offence. McCaughey was sentenced to life imprisonment with a minimum term of ten years for the murder and eight years determinate custodial sentence for the firearms offence.

[2] The applicants renew their applications for leave to appeal which were refused by the Single Judge.

[3] Mr McCartney QC appeared on behalf of Seales with Mr Quinn. Mr O'Rourke QC appeared on behalf of McCaughey with Mr McCreanor.

Mr McCollum QC appeared on behalf of the prosecution with Mr McDowell QC. We are grateful to counsel for their painstaking skeleton arguments and helpful oral submissions

Factual background

[4] On 11 January 2012 William Gill, who lived on a farm on the Ballydrain Road between Comber and Castle Espie, had been contacted by Jason Weir concerning the sale of a motor vehicle. After meeting at the farm, Philip Strickland arrived in a blue Citroen Saxo. Mr Gill recalled Jason Weir then leaving the farmyard. After Gill and Strickland had been speaking for 5-10 minutes, according to him three cars namely a Subaru, a Mercedes and a Peugeot arrived in the farmyard. Jason Weir and Ian Weir then pulled Philip Strickland out of the car, with Ian Weir holding him whilst Jason punched and kicked him. Mr Gill recorded that Jimmy Seales, who is the father of Jason and Ian Weir, was standing at the front passenger wing of the Saxo holding a shotgun. He then said that Jimmy Seales told him "you have seen nothing, get up to the fucking house or we will be back to kill you and your family". Gill then gave evidence that he ran up to the house and heard nothing further until a Mr Thompson arrived in his tractor looking help for an accident out on the road. Gill then accompanied Mr Thompson on to the Ballydrain Road and as they approached the Citroen Saxo another small car that was parked alongside reversed away at speed. He, his sister and Mr Thompson attempted to help the deceased who had been shot and whose trousers and underwear had been pulled down to his ankles.

[5] Gill did not tell police of what had occurred at the farmyard until he attended Bangor Police Station together with his solicitor 48 hours later, claiming his delay was out of fear.

[6] In the course of his evidence he said he did not see anyone other than Jason Weir, Ian Weir and Jimmy Seales taking part in the attack on the deceased. He also accepted that the Subaru and Peugeot could have come from the direction of Castle Espie while the Mercedes came from the Comber direction albeit they arrived within seconds of each other.

[7] Ian Weir, who had already pleaded guilty to the murder of the deceased, was a prosecution witness. He claimed:

- He had gone up to Gill's yard that night with his brother Jason and Stephen McCaughey for a fight with Strickland.
- Jason had picked him up, driven him to Gill's farmyard and on the way Jason had spoken to McCaughey by telephone.
- Jason was already fighting with Philip Strickland whenever his father Jimmy Seales arrived up in the Mercedes.

- He was standing at the passenger side of Strickland's car and as Strickland approached his father, there was a loud bang and Strickland fell to the ground. He began to walk towards the Mercedes at which point he heard a second loud bang.
- He got into the driver's side of the Mercedes, his father came to the driver's door, and got into the driver's seat with Ian climbing into the passenger's seat. His father had handed him the shotgun. They then drove off in the direction of Raffrey and Ian Weir telephoned his sister and told her to bring them clothing.
- That when he asked his father about what had happened his father replied that Philip Strickland had previously beaten and urinated on him as he lay on the ground. His father told him to go home to Derryboye, telephone the police and tell them he had just seen masked men trying to climb over the gates to the house.
- He returned home and made that telephone call as instructed.

[8] Under cross-examination Ian Weir:

- accepted that he had been smoking cannabis on the day in question and could not remember how many joints he had smoked,
- accepted he had asked other people to give him a false alibi saying that he had been in his house all night,
- agreed he consistently lied when interviewed by police for three days,
- accepted there had been a falling out between him and his father Jimmy Seales,
- asserted that Gill had been telling lies about what happened in the yard because he had never been fighting with Philip Strickland and Gill was standing beside him when the first shot was fired,
- claimed that McCaughey was telling lies when he said that Weir had fired the final shot out in Ballydrain Road because McCaughey left after the first shot was fired,
- asserted that he and Stephen McCaughey were merely there for backup and did not take part in the incident in any way,
- claimed it was Gill and not Jason Weir who had put the deceased into the boot of the Saxo after the first shot,
- asserted that it was his father Jimmy Seales and not Jason who had driven the Saxo out into the Ballydrain Road and that Jason had driven the Peugeot back to Raffrey where Stephen McCaughey then drove off in it.

[9] Jimmy Seales, the first applicant, gave evidence that:

- He had been viciously assaulted in September 2011, four months before the murder, by four men who, after causing a fracture to his arms, urinated on him. Graffiti had also appeared in the Comber area alleging he was a police informant about this time.

- On the night in question he had gone to bed but had been disturbed by dogs running up the side of his house. When he looked out he saw what might have been a Volkswagen car in the yard with three men in it. Upon the cars then driving off he had contacted the police after 10.00 pm. He said he later drove to Derryboye to see his son Ian and spoke to the police again at 2.50 am.
- He denied going to the Gill farmyard or having any part in the events of that night.

[10] Stephen McCaughey, the second applicant, gave evidence that:

- On the night of the murder Jason Weir had contacted him by telephone telling him that he could end up in a bit of a scuffle and needed a hand. McCaughey agreed to provide backup and accompanied Weir to Gill's farmyard at Ballydrain Road,
- he parked in a layby and received a further phone call from Jason Weir who then arrived in a Subaru car on his own. McCaughey said that Strickland's name was not mentioned,
- he then followed the Subaru into a yard, parked about one metre in off the road, and having seen another car in the road with two men, he next witnessed Jason Weir get out of his car and start wrestling with one of the men. He admitted shouting at Gill that it had nothing to do with him and he was to stay out of it,
- Jason Weir and Philip Strickland had not been fighting for very long when a Mercedes driven by Ian Weir pulled lengthwise into the driveway blocking in his car. Jimmy Seales got out of the Mercedes carrying a shotgun and said to him "This is nothing to do with you, McCak, stay out of this",
- he was not aware that Jason had also called Jimmy and Ian for help and he would not have agreed to help Jason if others were also helping,
- Jason and the deceased stopped fighting whereupon Jimmy Seales and the deceased started walking towards each other. Seales shouted something about "pishing on him" and there was then a bang from the gun and the deceased fell to the ground,
- Gill was still standing there when the shot was fired. Jason Weir and Ian Weir then started beating Philip Strickland as he lay on the ground,
- Jimmy Seales went over and said something to William Gill who turned and walked up to the house. Jimmy Seales then instructed Jason Weir to put the deceased into the boot of the Citroen Saxo,
- Jimmy Seales told him to help Jason, but he did not and merely remained standing at the front of his own car. He said he then got into his car, Jason Weir got into the Saxo, Ian Weir got into the Subaru, Jimmy Seales got into the Mercedes. All four cars exited the yard and drove along the Ballydrain Road with McCaughey at the rear with the Saxo immediately in front of him,
- the Saxo came to a halt and Jason Weir got out but appeared to be throwing punches into the car. The Mercedes then reversed back to the Saxo, Ian Weir

got out the shotgun, walked to the driver's door of the Saxo and fired a shot into it,

- Ian disappeared somewhere and Jimmy Seales and Jason Weir began arguing after Jimmy told him to drive the Saxo again. Jimmy and Jason then got into the Mercedes and drove off,
- he pulled out around the Saxo and drove in the same direction. The Mercedes then stopped and McCaughey stopped too. Jason got out of the Mercedes, walked to McCaughey's car and told McCaughey they were going back to burn the Saxo. McCaughey claimed he refused to do this whereupon Jimmy came over and told him to burn this Saxo. McCaughey claimed he did not want to argue with Jimmy so said nothing and simply climbed over the into the passenger seat whereupon Jason Weir then got into the driver's seat of the car and drove the two of them back to the Saxo,
- at the Saxo Jason tried to set fire to it while he remained in his own car. He then saw vehicle lights approaching so Jason got back into the driver seat, reversed back and drove the two of them to Raffrey. Jason then got out of the car and McCaughey drove home,
- when he returned home, he asked his mother's boyfriend to act as an alibi for him. The next day he had his car valeted and then met up with Jason in order for Jason to buy a new phone,
- when Jason was arrested later that day, McCaughey had gone into hiding for a couple of days before handing himself into police accompanied by his solicitor.

<u>The Application for leave to appeal by James Seales</u>

[11] Mr McCartney commendably reduced his grounds of appeal to six in total which we shall deal with in turn.

<u>Ground 1</u>

[12] Ground 1 of the appeal was that having regard to the serious nature of the case and the relationship between this applicant and the principal prosecution witness, Ian Weir, there was a real possibility that the jury in all the circumstances could have been prejudiced by repeated allegations made against this applicant in the course of the trial. In essence this case was that the learned trial Judge had failed to warn a crucial Crown witness, namely Ian Weir, not to continue to make allegations against this applicant that were irrelevant and grossly prejudicial. It was contended that the learned trial Judge, perhaps inadvertently, set a tone to the proceedings which encouraged the witness Weir to answer questions in whatever way he liked irrespective of whether the questions were prejudicial or relevant.

[13] Mr McCartney instanced a number of occasions when he alleged this occurred which included the following:

[14] First, during the course of Mr McCartney's cross-examination of the witness about the fact that he had lied to the police for 4 days concerning his involvement in this murder and his drug use at that time, the following exchange occurred:

> "Q: So just to summarise so far you lied to the police over 4 days, isn't that right?
>
> A: Yeh.
>
> Q: And then you'd gone into the prison protesting your innocence: isn't that right?
>
> A: That's correct and I still do today.
>
> Q: And then approximately 4 weeks later … you then agree to go along to the police and given them the version of events that you have supplied the jury with today?
>
> A: That's correct. That, I was under so much pressure, in the jail.
>
> Q: Was that because you were coming off Marijuana at the time?
>
> A: That's correct. But I was .. before I went and made the statement I was asked for a drug test and I passed the drug test, I was completely off it.
>
> Q: Yes?
>
> A: As I have done 12 drug tests since I have been in which I have already stated.
>
> Q: So you have said?
>
> Mr Justice Weir: Now, Mr McCartney, I won't tell you again. When the witness is speaking, you keep quiet. When you are speaking, he'll keep quiet.
>
> Mr McCartney: I am happy to do that My Lord.
>
> Mr Justice Weir: Now I have said that four or five times, Mr McCartney. I shouldn't have to keep repeating it.

> Mr McCartney: No, Your Lordship is quite right. Your Lordship is quite right. I have no problems with that My Lord. But it is nothing to do with the question I have asked.
>
> Mr Justice Weir: Well, Mr McCartney, sometimes when somebody asks a question they get an answer which it is not the answer that they either require or expect.
>
> Mr McCartney: Yes yes.
>
> Mr Justice Weir: But the way we work here is that people are allowed to give their answers. Now you know that.
>
> Mr McCartney: I do so My Lord and I hadn't intended to cut across the witness."

[15] Mr McCartney contended that this set an unfortunate and unacceptable tone for the continuation of the cross-examination.

[16] Secondly, during Mr McCartney's cross-examination of Weir, counsel put to the witness that he was alerted to the fact that one of the co-accused had told the police that it was he who fired the fatal shot that killed Mr Strickland. The following exchange occurred:

> "Weir: I do know; I did know about it.
>
> Q: Yes?
>
> A: But did you know that there was … hearsay going about that my father had given Stephen money to make that statement.
>
> Q: Well that's the first time I have heard about that Mr Weir?
>
> A: Well that's been put about."

[17] Counsel contended that this was one of a number of instances where the learned trial Judge ought to have been more proactive and intervened to warn the witness that he must not give such hearsay and damaging evidence unless it was in direct answer to a question. This allegation had never emerged in the papers before and so counsel had thought there was an element of safety built into his question, not expecting this response.

[18] A third instance where allegedly the Judge failed to intervene according to Mr McCartney occurred when he was questioning Weir about his visits to a nurse for treatment whilst in hospital. After reciting injuries from his medical records indicating that he had been misusing large quantities of cannabis the following exchange occurred:

> "Q: Do you remember telling the nurse that?
>
> A: Yes I do remember. It was due to stress.
>
> Q: Well were you, at that time, hearing voices coming out of the television?
>
> A: Yes it was due to stress and the pressure I was under.
>
> Q: Well …
>
> A: The amount of pressure that my father was putting me under, to go and change my statement, to go and do this, do that. The amount of stress as my family was breaking up around me. My mother tried to overdose and kill herself".

[19] Mr McCartney cited this as another example of the witness being allowed by the Judge to stray from relevant evidence and introduce material which was grossly prejudicial to the accused.

[20] A further such example cited by Mr McCartney occurred when he was cross-examining Weir about the entry in his medical notes which recorded that the witness had spent £40,000 on drugs over a relatively short space of time and incurred debt over this time. The witness had previously informed the jury that the £40,000 represented payment over a 12 year period. The following exchange occurred:

> "Q: You tried to persuade this jury some moments ago that the £40,000 represented payment (by you) over a 12 year period?
>
> A: Well, it was 2008. Back in 2008.
>
> Q: And it linked to an occasion when you suffered an Os Calcis fracture when you were aged 18; isn't that right?
>
> A: That's correct. I jumped out of the window because my father was going to break my legs. So I run out the

stairs and jumped out the bedroom window to get away.
…"

[21] Mr McCartney conceded that his allegation about the squandering of the £40,000 had been on the instructions of the applicant. He had no idea that the witness was going to make the allegation that his father was going to break his legs. Mr McCartney characterised this as yet another "rogue answer" that he relied on the Judge, with his experience, to ensure did not occur.

[22] Mr McCartney submitted a further failure to control the witness, coupled with an unwelcome judicial intervention, occurred when counsel was cross-examining Mr Weir on the basis that the witness had paid for his drug addiction by stealing cash from his father and that on one occasion he had actually stolen a figure of up to £60,000 off him in option fees. The following exchange occurred:

> "Q. You see, are you telling the jury under oath that all the cash receipts, all the cash you were paid and entrusted with, you always handed it dutifully over to your father. Is that what you're telling the jury under that oath you took?
>
> A. Yes. I never took nothing off him.
>
> Q. You never …
>
> A. Maybe 20 quid here and there but that was it.
>
> Q. Maybe 20 quid here and there?
>
> A. But nothing that's … nothing in that range there. And I want to ask you a question.
>
> Q. You see, I ask you questions. Do you remember that?
>
> A. Well, I want to say something to the court then.
>
> Q. Well do you want to ask it …
>
> Mr Justice Weir: Well now Mr McCartney please.
>
> Mr McCartney: Well My Lord I am entirely in the court's hands.

Mr Justice Weir: You are exactly. Now just let him say what he wants to say please. He keeps saying he wants to ask you a question. What he really means is:

> 'I want to say something.'

Now I'll be the Judge of whether of what he says is or is not appropriate. We can't have you cutting him off in mid-stream, any more than I can have him cutting you off in mid-stream.

Mr McCartney: All right My Lord, all right.

Mr Justice Weir: It's two way street.

(To the witness) Now what do you want to say?

The witness: Well if I'm a thief, why is it my father took £400,000 on my mother last year, or the year before, before we were arrested? Where did it go to, if I'm meant to be the thief?

Mr Justice Weir: .... Right now ..."

[23] Mr McCartney's submission was that not only was this intervention by the Judge unwelcome and unfair, but it was another instance of this witness being allowed to say whatever he wanted without the Judge making it crystal clear to him that he must only answer questions and not stray beyond those questions/answers.

[24] Mr McCartney, the following day, raised with the learned trial Judge two of these incidents namely the suggestion that his client had given money to Mr McCaughey to say that Weir had fired the fatal shot on the night in question and that Seales had stolen £400,000 from his mother. Counsel submitted to the learned trial Judge that these were answers which bore no relationship to the question asked and that the learned trial Judge should discharge the jury. The learned trial Judge found no substance in this application indicating that this type of cross-examination can be a double-edged sword and that in any event he intended to "say to the jury that a lot of the matters have been canvassed in this case which they would do well to ignore because they have got nothing whatsoever to do with the question in the case".

[25] Counsel contrasted the approach that the learned trial Judge adopted in the case of Seales with that which he adopted during the course of Mr O'Rourke's cross-examination of Mr Weir. He instanced, in the course of Mr O'Rourke's cross-

examination of the witness on the issue of Jason Weir texting Ian Weir if they were allegedly in the same car, the following exchange:

> "Q. If you were in the car with Jason why is he texting you?
>
> A. Maybe he sent a message to the wrong number.
>
> Q. He might have sent a message to the wrong number?
>
> A. Yeah sure that's easy done. Have you not done it yourself, no?
>
> Mr Justice Weir: Now, try and resist, Mr Weir, the temptation to debate with Mr O'Rourke. Mr O'Rourke just like Mr McCartney yesterday, has the job of asking you questions and you have the job of answering his questions.
>
> The witness: I understand that.
>
> Mr Justice Weir: This is not the Nolan Show.
>
> The witness: I understand that.
>
> Mr Justice Weir: Now, please, just confine yourself."

[26] Later in Mr O'Rourke's cross-examination, in the course of questioning on the issue of whether or not the witness's father had been driving the Saxo car the following exchange occurred.

> "Q. I am suggesting to you, you say your father was driving the Saxo, I am suggesting your father …
>
> A. No, you suggested that Jason was driving the Saxo, that's what I said.
>
> Q. Yes, isn't that right?
>
> A. No, my father was driving the Saxo. I would just like to state, before you go any further, are you going on your client's statement that he made in November 2012?

> Q. I think, Mr Weir, you have been told often enough in the course of this case ….
>
> A. But I'm just asking the court.
>
> Mr Justice Weir: I'm sorry, it's not the way these things are done. I'm sorry now, just listen to me.
>
> The witness: Yes.
>
> Mr Justice Weir: Because we are not going to make great headway unless you do. Mr O'Rourke asks the questions, or other counsel when it's their turn, and you're a witness and you answer the questions.
>
> The witness: Yes, but I have something that I would like to state to the court.
>
> Mr Justice Weir: Well, you are not here to state things, you are here to answer the questions.
>
> The witness: But it would be important to the case but.
>
> Mr Justice Weir: Well I'm sorry, you may be able to say whatever it is you want to say in answer to some question, but you are not here to make statements.
>
> The witness: Right.
>
> Mr Justice Weir: And I won't have them. And I am sorry to have to keep interrupting, because it's slowing the whole thing down but I'm going to have to interrupt every time you move away from what I have told you. And all I am telling you, Mr Seales, is what happens day in and day out in these courts. And I have been around them for a long time. So you may take my word for it."

[27] Mr McCartney submitted that this is precisely the attitude that the learned trial Judge ought to have adopted with him when he was cross-examining Mr Weir. By failing to do that, he had allowed the witness complete licence to stray and to have greater credence with allegations which were made against Mr McCartney's client without the intervention of the Judge to prevent it happening.

Conclusions on Ground 1

[28] We find no substance in this ground for the following reasons. First, if counsel considers that the interventions of a Judge are inadequate, unfair or unwelcome, there is an obligation on counsel to make an appropriate submission to the Judge concerning his fears. There is a strong tradition of independence at the Northern Ireland Bar and if counsel considers that the court is not acting in the interests of justice it is crucial that such a submission be made. That did not happen in this instance. We find that there was no attempt to raise the objections that have now been raised during the course of the hearing save for the one intervention that was made as outlined in paragraph [24].

[29] Blackstone's Criminal Practice 2015 at D13.64 states:

> "Where the accused is represented by counsel and prejudicial matters are accidentally disclosed, it would seem that counsel must take the initiative and apply at trial for the jury to be discharged. If he fails to do so, any appeal is liable to be dismissed, even if the circumstances were such that, had an application for discharge been made, it would probably have been granted."

[30] The case cited in support of that proposition is R v Wattam [1942] 1 All ER 178. A careful reading of that case affords only scant authority for that bold assertion. Nevertheless whilst it is the view of this court that silence on the part of counsel is not the voice of complicity and the absence of interventions, or for that matter requisitions, does not necessarily rule out the validity of any such point on appeal, it is important that counsel provide appropriate assistance to the court. Failure to raise matters during the trial or at the conclusion of the summing up may well serve to dilute, perhaps even substantially, the strength of such a point. It can, and in this case probably does, evince an innately retrospective view on the part of counsel which does not reflect the feel of the case as it unfolded.

[31] Secondly, it seems to this court that in virtually all of the instances cited by Mr McCartney, counsel must have been aware of the possibility of the witness making a robust response to the strength of the allegations against him. Properly, in the exercise of his duty, Mr McCartney was making serious allegations against the witness Weir e.g. suggesting that he had fired the fatal shot, that he had stolen money etc. During the trial, in the absence of the jury, there had been considerable debate between counsel and the learned trial Judge about the extent to which potentially collateral issues could be raised with witnesses on the issue of credibility. Presciently the learned trial Judge at one stage during this debate had said:

> "I think Mr McCartney would need to careful about that himself because sometimes you can get more than you bargain for when you ask these questions. …. You open Pandora's box, you never know what comes out of it."

[32] Accordingly counsel must exercise caution when cross-examining witnesses on such serious matters and bear in mind that he may elicit a very robust angry response the full contents of which neither counsel nor the trial judge can possibly anticipate. We are not persuaded that the responses cited were beyond what could have been expected in the circumstances of the cross-examination and the learned trial judge in the event had no warning of the precise content that was to emerge.

[33] Thirdly R v Renda [2006] 1 WLR 2948, cited with approval in R v Lawson [2007] 1 Cr. App. R. 11 at [44], is authority for the assertion that a crucial feature in cases such as these will always be the feel of the trial Judge for the way that the case is developing, the way evidence is given and the conduct of cross-examination. With some measure of perspicacity the learned trial judge in the instant case had anticipated with counsel the potential for dangerous answers in cross-examination and accordingly when they emerged he had to make a value judgment how to deal with him. Whilst arguably a sterner approach to Weir's digressions might at an earlier stage have produced some dividend, we are satisfied it is impossible to fault the learned trial Judge in the overall manner in which he approached this matter. We find nothing in the tone of his interventions which contributed to the impugned answers.

[34] Even if some of this material emanating from Weir was potentially inadmissible R v Brown [2006] 2 Cr. App. R (S) 699 is authority from the Court of Appeal in England that an assessment of the consequences of the jury hearing inadmissible material, whether by oversight or deliberate employment, does not start with the presumption that the jury should be discharged.

[35] The principles to be applied were set out by Auld LJ in R v Lawson [2007] 1 Cr. App. R. 20 (cited with approval by the Privy Council in Mitcham v The Queen [2009] UKPC 5). Lawson's case concerned the improper admission of potentially prejudicial evidence. Auld LJ said at paragraph [65]:

> "Whether or not to discharge the jury is a matter for evaluation by the trial Judge on the particular facts and circumstances of the case, and this court will not lightly interfere with his decision. It follows that every case depends on its facts and circumstances, including:
>
> (i) The important issue or issues in the case;

> (ii) The nature and impact of improperly admitted material on that issue or issues, having regard, inter alia, to the respective strengths of the prosecution and defence cases;
>
> (iii) The manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant;
>
> (iv) The extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed. We repeat, all these matters and their combined effect are very much an evaluative exercise for the trial Judge in all the circumstances of the case. The starting point is not that the jury should be discharged whenever something of this nature is put in evidence through inadvertence. Equally, there is no sliding scale so as to increase the persuasive onus on a defendant seeking a discharge of a jury on this account according to the weight or length of the case or the stage it has reached when the point arises for determination. The test is always the same, whether to continue with the trial would or could by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction."

[36] Applying those principles to this case, we are not persuaded that there were any grounds to discharge the jury. The issues raised were peripheral to the main issue in the case bearing in mind the strength of the prosecution case against this applicant. We have earlier adverted to the circumstances in which these assertions emerged and the role counsel's questions played in eliciting them.

[37] We are satisfied that the learned trial judge took appropriate steps to remedy any impropriety. He specifically told the jury during the course of his charge that they should not pay attention to these matters. An illustration is found in the very early part of his charge where he said:

> "You have to decide this case only in the evidence that has been placed before you in court. There has been a good deal of talk at various stages in this case about suggestions of people taking people's money,

> laundering diesel, having something to do with the UVF, taking money, my advice to you is to forget all that, that is not what you are here about. You are here to decide what the situation is about the events of 11th and 12th."

[38] Later in the charge the learned trial Judge returned to the issue of theft by Seales when he said:

> "Then he countered this (an allegation that he had stolen money from his father) by making this allegation which I have told you to ignore because you are not here to talk about who took the money from this person or that person. The only reason I am mentioning the suggestion for Mr McCartney was because Mr McCartney says the theft of the money, as he says from Jimmy Seales caused Jimmy Seales to fall out with Mr Ian Seales. You will have to decide to what extent you think Mr Jimmy Seales and Mr Ian Seales had fallen out by 11 or 12 January. But just completely disregard this suggestion about Mr Jimmy Seales stealing anything, there is no evidence about it, has nothing to do with this case and it is of no help to you in deciding it, ignore it entirely."

[39] Finally the learned trial judge specifically warned the jury about the dangers of Ian Weir's evidence e.g.

> "I want to warn you to exercise particular caution in deciding what you can believe of his evidence unless there is evidence from other witnesses that you regard as reliable to back up what he says."

[40] In all the circumstances therefore we are content that there is no real possibility that the jury could have been prejudiced by the repeated allegations made against this applicant and there were no grounds to discharge the jury. We therefore refuse the application and reject this ground of appeal.

<u>Ground 2</u>

[41] The second ground of appeal was that the learned trial Judge had failed to properly and fully explain to the jury the dangers of relying upon accomplice evidence.

[42] Mr McCartney's arguments on this ground centred round his basic submission that the learned trial Judge had failed to adequately caution the jury in respect of three witnesses whom he described as accomplices namely Gill, the defendant McCaughey and Ian Weir.

[43] Counsel invoked the principles laid down in R v Makanjuola [1995] 1 WLR 1348 which was cited at length in the Northern Ireland case of R v Brown [2009] NICC 21 when dealing with witnesses alleged to be accomplices. Mr McCartney submitted that the judge had failed to specifically refer to them as accomplices, had ignored any detailed references to the benefits that they each gained by their version of events, overlooked what potentially motivated them and eschewed the need for corroboration in their accounts.

[44] In relation to Gill Mr McCartney drew attention to some of the following points:

- His inconsistencies throughout his evidence.

- The allegation that he was a member of the UVF.

- That a witness alleged that he had played a pivotal role by placing the deceased in the boot of the deceased's car subsequent to the first shot being discharged.

- His account to the police identifying Seales came at a late stage in his interviews with the police.

- He had familial links to a family who had been named as being involved in the severe beating of the accused's Seales in September 2011.

- That his account to police was motivated by self-interest, self-preservation.

- That he had lied to the police alleging that the gun had been put to his head and had admitted that this had been incorrect at trial.

- That he had taken four days before going to the police.

[45] In relation to Ian Weir, Mr McCartney submitted that the learned trial Judge had failed to warn the jury in respect of the reliability and credibility of his evidence and in particular:

- His admissions to repeated and casual lying and thefts.

- His admitted mental health sequelae.

- His disclosure to nursing staff of his inability to face a 15-20 year sentence for murder.

- His plea of guilty to murder on an agreed basis with the Prosecution Service including in relation to the appropriate tariff.

- His self-confirmed history of drug abuse and psychiatric intervention.

- His marital difficulties putting pressure on him.

- The pressure on him caused by being weaned off marijuana whilst in prison.

- The existence of several co-existing motives or factors to provide his accounts to the police and ultimately give evidence at trial.

- His knowledge that Stephen McCaughey had implicated him in the fatal shooting.

- The failure to direct the jury specifically in relation to the possibility and/or likelihood that his tariff would be further reduced i.e. above and beyond the credit for pleading guilty for giving evidence on behalf of the prosecution.

[46] In relation to the accused McCaughey the learned trial Judge had failed to adequately warn the jury sufficiently about the potential unreliability of this man including:

- His previous convictions for dishonesty.

- The contradictions in McCaughey's evidence and his differing account from that of Ian Weir and William Gill in several fundamental and important aspects. It was submitted that the differences between these crucial and central witnesses were not such that they could be adequately addressed by merely requiring the existence of independent corroborative evidence alone given the inherent dishonesty of these witnesses.

<u>Conclusions on Ground 2</u>

[47] We do not believe that this ground of appeal can withstand scrutiny for the following reasons.

[48] First, there is no algorithmic formula for distilling what has to be said by a Judge when charging a jury. It is a matter of discernment and judgment. Lord Bingham of Cornhill summed up the approach aptly in R v Rahman [2009] AC 129 at para [27] when he said:

> "There is, and can be, no prescriptive formula for directing juries. Having made clear the governing principles, it is for trial Judges to choose the terms most apt to enable juries to reach a just decision in the particular case."
>
> (See also Lord Taylor C.J. in Makanjoula at p. 472.)

[49] It must be remembered that the circumstances and evidence in criminal cases are infinitely variable and that it is impossible to characterise how a Judge should deal with them. The nature of discretionary warnings varies greatly and the extent of any warning, together with its strength and terms, given by a Judge must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised.

[50] Moreover as this court reiterated in R v Mitchell [2015] NICA 34 at paragraph [43], provided the Judge fairly reviews the essential features of the evidence, the structure of his summing up cannot be impugned simply because the defence would have preferred a different format. It is not essential that the trial Judge should make every point that can be made for the defence. The fundamental requirements are correct directions in point of law, an accurate review of the main facts and alleged facts, and a general impression of fairness. (See McGreevy v DPP [1973] 1 WLR 276 at 281 C-D).

[51] Doubtless Judges should have in mind the principles set out in R v Makanjuola [1995] 1 WLR 138 per Lord Taylor CJ at p. 1351 when dealing with potential accomplices. However it is pertinent to rehearse some of the principles that Lord Taylor set out namely:

> "(2) It is a matter for the Judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and on what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness' evidence.
>
> (3) In some cases it may be appropriate for the Judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness.

> This will not be so simply because the witness is … alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.
>
> (6) Where some warning is required, it will be for the Judge to decide the strength and the terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules."

[52] We are satisfied that the learned trial Judge followed these observations and his charge to the jury falls clearly within the spirit of them. Whilst he may not have employed the language of "accomplices", the warnings that he invoked about the nature of their evidence fully complied with the principles articulated in Makanjuola where they were relevant and he gave a full explanation of the dangers of these witnesses.

[53] Some extracts from the Judge's charge in relation to each of these impugned witnesses will suffice to illustrate this.

Gill

[54] First, at page 9 of his charge, the Judge went into detailed analysis of the principles in Turnbull with reference to Gill's recognition of Jimmy Seales as being the man who came to the yard with a shotgun.

[55] Secondly, between pages 24 and 32 he embarked on a detailed analysis of Gill's evidence including exhaustive recitation of the points that emerged in cross-examination.

[56] He concluded his summary of the evidence of Gill in the following terms:

> "With Mr Gill, just like every other witness, you have to evaluate their evidence and decide what is correct and what is not correct. For example, did Mr Gill see the first shot fired? And is he saying he didn't for some sinister reason or is it just to keep himself and his family out of the picture? …. Did he recognise Jimmy or is he making a mistake? …. You have to make up your minds about his and everybody else's evidence in this case and decide what parts are important to you and what parts are not. That is the job of a jury."

[57] At page 21 of his charge the learned trial Judge said:

> "Another point may be, …. that in some cases people are trying to play down their own part in what happened or in what they saw. Either if they weren't directly involved, it may be to keep themselves out of what they think might be future trouble…..you may think Mr Gill falls into that category or if they were involved, to minimise their own part……. "

[58] It must be remembered that Gill had never been charged with any offence arising out of this matter and the prosecution had not accepted that he was guilty of any improper action on the night in question. The evidential basis for suggesting that he was unreliable to any material degree was very slim and that he was an accomplice to the murder was virtually non-existent. This was clearly not an instance that merited a full blown Makanjuola type direction. We are satisfied that given the role that he was alleged to have played, peripheral at best, the caution about his evidence described by the Judge as set out in paragraph [40] and [41] above was more than adequate.

Ian Weir

[59] The learned trial Judge gave an extremely strong warning about the evidence of Ian Weir. At page 47 of his charge he said:

> "So it is the prosecution case against Jimmy Seales that Ian has been called to support because he was, as you have been reminded, a prosecution witness. Before you can decide if he does support the prosecution case and how he supports it, you first have to decide whether you believe all or part of what he said. I want to warn you to exercise particular caution in deciding what you can believe of his evidence unless there is evidence from other witnesses that you regard as reliable to backup what he says. He is an admitted party to the murder, he says he didn't fire the fatal shot and that he is a secondary party. He has told you that he wants to minimise his time to be spent in prison – nothing surprising about that – so he has a personal motive for minimising his part in this affair, for example, he has given you explanations about where telephone calls were made, whose car he was in and when, what car he drove away in and when, which you may think are not always easy to reconcile with other

> independent evidence. You will have to decide what you make of this and other matters, but I suggest that you should be very careful before relying upon the evidence of Ian Seales against Mr Jimmy Seales unless there is adequate supporting material to reassure you that his evidence in any point is reliable."

[60] We are satisfied that the warning given in the case of Ian Weir was fulsome and comprehensive given the nature of the evidence he had given. It is difficult to conceive of a stronger warning for the need for independent evidence in his case than that given by the learned trial Judge and as such it fully complied with the spirit of a Makanjuola warning.

McCaughey

[61] Turning to McCaughey, in the context of this applicant the learned trial Judge said this in his charge:

> "The next matter is this, what Mr McCaughey told the police in his police interviews about Mr Jimmy Seales is not evidence against Mr Jimmy Seales. It is only evidence that can effect [sic] Mr McCaughey. Therefore don't take it into account at all when you are considering Mr Seales' case because it is not admissible against him."

[62] Later he said:

> "Mr McCaughey has given evidence that Mr Seales was involved in these events in the ways that he has described. You should examine that evidence with particular care because Mr McCaughey in saying what he did may have been concerned about protecting himself more than speaking the truth. Bear that in mind in deciding whether to believe what Mr McCaughey has said about Mr Seales' involvement is correct. Now regarding Mr McCaughey's ready admission to Mr McCartney that he has previous convictions for a number of offences of dishonesty … You have to decide whether that helps you to decide if Mr McCaughey has been telling you the truth in his evidence"

[63] It has to be remembered that McCaughey was not a prosecution witness but was a defendant. The learned trial Judge therefore had to exercise caution in dealing

with him to ensure that he was not occasioned unacceptable prejudice in the course of a balanced presentation of the case for and against him. We are satisfied that in these extracts the learned trial Judge struck the right balance in dealing with McCaughey and that nothing further in the nature of a Makanjoula charge was necessary.

[64] We therefore refuse the application and reject this ground of appeal.

Ground 3

[65] This ground centred on the submission that the learned trial Judge had failed to supply proper directions in relation to how the jury should have approached all the evidence of identification.

[66] The thrust of the argument by Mr McCartney focused on the failure of the learned trial Judge to give to the jury a direction consonant with the principles in R v Turnbull [1977] QB 224 in relation to the identification evidence of a Sergeant Hutton. The relevance of this aspect of the case was that it was part of the prosecution case that the applicant Seales had been witnessed driving a vehicle in the months prior to the murder. The applicant's case was that he had not been driving on the night in question because he was simply incapable of driving. Sergeant Hutton claimed that on 7th December 2011 he had been driving from Crossgar towards Killinchy when he had seen Seales driving his Hilux pick up at a road junction. Seales had turned right in front of him towards Raffrey. Hutton had known the applicant for some 20 years and was therefore well able to identify him. Seales denied it had been him. Accordingly it was submitted by Mr McCartney that this was an important part of the evidence and clearly merited a Turnbull direction which the learned trial Judge had failed to do in this instance.

Conclusions on Ground 3

[67] We consider this submission is untenable. There is no doubt that where a case depends wholly or substantially upon the correctness of identification evidence, Turnbull does require that a Judge should:

(a) Warn the jury of the special need for caution before convicting on that evidence.

(b) Instruct the jury as to the reason for such need.

(c) Refer the jury to the fact that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken.

(d) Direct the jury to examine closely the circumstances in which each identification was made.

(e) Remind the jury of any specific witnesses in the identification evidence.

(f) Where appropriate, remind the jury that mistaken recognition can occur even of close relatives and friends.

(g) Identify to the jury the evidence capable of supporting the identification.

(h) Identify evidence which might appear to support the identification but which does not in fact have that quality.

[68] A Turnbull direction requires no specific form of words provided the directions comply with the sense and spirit of the guidelines. We are satisfied that the learned trial Judge complied fully with this in respect of the identifications of the applicant Seales by Gill, Ian Weir and McCaughey.

[69] The identification of Hutton was in a different category. This was not evidence of any criminal conduct on the part of this applicant and it is clear that the case did not depend wholly or even substantially upon the correctness of the identification by Sergeant Hutton. It was entirely a collateral issue. Its strength was in any event entirely diluted by the fact that the applicant Seales had accepted in the course of his cross-examination that he did drive from time to time for example to go to a shop and hence the significance of the Hutton identification was substantially reduced.

[70] It must be borne in mind that the Judge, in the exercise of his discretion, clearly put before the jury that Mr Seales had denied that it was him that Sergeant Hutton had seen driving and that his Hilux at that particular time had been off the road. A short time earlier in the charge the learned trial Judge had already adverted to the dangers of identification, albeit in the context of the above-mentioned witnesses. There was therefore no need for a full blown Turnbull recitation in the context of this identification.

[71] Once again no requisition was made to the learned trial Judge on this matter and this reflects perhaps the lack of significance of this part of the evidence.

[72] We are satisfied that there is no foundation for this objection to the learned trial Judge's charge. We therefore refuse the application and reject this ground of appeal.

Ground 4

[73] Mr McCartney contended that the learned trial Judge had erred in failing to allow the charge of Assisting Offenders to be added to the indictment, and thus considered by the jury as an alternative charge in the case of Seales, particularly since it had been added to the Bill of Indictment in respect of Stephen McCaughey.

[74] The contrast between the approach adopted in the case of Seales and McCaughey is found, *inter alia*, in the charge of the learned trial Judge when he said:

> "If you were satisfied that Jimmy Seales fired the first shot in the yard but not satisfied that he fired the shot on the road and not satisfied when the shot on the road was fired Jimmy Seales was continuing to participate in a joint enterprise, then in relation to the shot that you are satisfied he fired which wounded Philip in the yard, you should find him guilty of the alternative count to murder which the law provides for in these circumstances, namely not guilty of murder but guilty of causing grievous bodily harm with intent. …. The second possible alternative verdict relates to Stephen McCaughey. If you were not satisfied that Stephen McCaughey was guilty of either of the charges against him, that is the first count or the second count on the indictment that we have been looking at, then you will have to consider whether you are satisfied that Stephen McCaughey knowing that that someone else was guilty of murder or possession of a firearm with intent to endanger life, firstly, without reasonable excuse, secondly, did an act, namely to drive back or allow his car to be driven back in order to set fire to Philip Strickland's car with intent to impede arrest or prosecution of the person he knew to be guilty, then you would have to find Stephen McCaughey guilty of the alternative charge of assisting an offender."

[75] Mr McCartney's submission was that by excluding the alternative offence of assisting offenders in respect of this applicant, it may have constrained the jury to a murder conviction only in respect of this applicant if they concluded that he had assisted or gave directions ex post facto the murder of the deceased i.e. including the directions to burn the vehicle etc.

Conclusions on Ground 4

[76] The concept of alternative verdicts was considered recently in this court in R v Lagan [2015] NICA. That case involved an applicant who had engaged in a series of sexual acts with a child aged 14 /15 years of age which amounted to various indecent assaults leading to full oral and vaginal penetration. The prosecution case was that all of the sexual activity had taken place without the child's consent and she had acted out of fear of the applicant. The defence case was that none of the alleged acts had taken place and that the applicant was lying. The learned trial Judge had decided to put before the jury the alternative verdict of sexual activity with a child.

[77] The court dealt with the leading authorities on this matter namely R v Coutts [2006] UKHL 39, R v Croome [2011] NICA 3 and R v Greatbanks [2013] NICA 70.

[78] The court cited what Lord Bingham had said in Coutts as follows:

> "[23] The public interest in the administration of justice is …. best served if in any trial on indictment the trial Judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative verdict which there is evidence to support. …. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal Judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a law breaker who deserves punishment. A defendant may quite reasonably from his point of view choose to roll the dice. But the interests of society should not depend on such a contingency."

[79] The court also cited R v Williams [1994] 99 Cr. App. R. 163 where Neill LJ said:

> "… There are other cases where the Judge's role is more complex. As has been pointed out by Mr Sean Doran of the University of Manchester in his article 'Alternative Defences: The Invisible Burden of the

> Trial Judge' [1991] Crim. L. R. 878, in certain cases 'the respective courses adopted by prosecution and defence present the jury with an incomplete picture of the range of options open to them in arriving at their final determination'. In these cases, the Judge may be under a duty to direct the jury on the version of the facts which neither the prosecution nor the defence has advanced."

[80] Applying those principles to the instant case, we are satisfied that the learned trial Judge correctly exercised his discretion to exclude any reference to an alternative count of assisting offenders in the case of this applicant. Adopting the wise words of Lord Bingham, he recognised the confines of the rule to alternative verdicts *obviously* raised by the evidence. In the present case there was no evidence to support such an alternative verdict. The case of the applicant was that he was simply not there. The Crown case was that he was there and had fired the fatal shot. Unlike the case of McCaughey, there was a complete absence of any evidence upon which the jury could have conceivably come to a conclusion that the applicant Seales had been assisting an offender. To have added such a count would have invited the jury to enter into the realms of pure speculation without any evidential basis.

[81] We therefore refuse the application and reject this ground of appeal.

Ground 5

[82] Mr McCartney contended that significant evidential material in relation to the degree of animus which Ian Weir had towards this applicant was not before the jury. In this context he drew attention to the fact that Ian Weir had been charged and convicted of possessing a weapon (and ammunition) which was forensically linked to an alleged attempted murder of this applicant on 24 September 2011. This issue arose out of a search on 13 January 2012 at Ian Weir's home where a gun and ammunition were found wrapped up with another imitation firearm and two balaclava masks inside a cushion cover hidden under a rock in a flowerbed in his garden. Ian Weir had made the case that he had been given the imitation gun by his brother and had found the functioning weapon in a skip whilst searching in it for scrap copper wire in December 2011 and had buried the items where they were found by police. The instant trial having occurred in January and February 2014, Ian Weir was prosecuted for these offences in 2015. Part of the evidence against him included a finding by a forensic scientist that the relevant gun was a functioning weapon and that the round of ammunition was live, in good condition and suitable to be fired in the gun. That gun was linked to the shooting on 24 September 2011 at Derryboye when the discharged bullet in that incident was recovered from the headrest of this applicant's land rover motor vehicle.

[83] It was Mr McCartney's submission that had the jury been aware that Ian Weir was, in fact, guilty of possessing the handgun and of possessing ammunition in suspicious circumstances and that the handgun, recovered from his property by police, had been used to fire a bullet into this applicant's vehicle in September 2011 this may have provided the jury with compelling and relevant evidence demonstrative of the animus towards the applicant on behalf of Ian Weir.

Conclusions on Ground 5

[84] We find no foundation for this ground of appeal. There was no evidence at all that Ian Weir had discharged the weapon which resulted in the bullet being found in the headrest of Mr Seales' vehicle. Indeed it was never proposed by Mr McCartney that that was going to be put to the witness Ian Weir i.e. counsel never intended to put the case that Weir had been guilty of attempted murder of his father. The sole evidence is that a bullet had been found in the headrest of Mr Seales' car. There was simply no evidence as to how that bullet got there. In the event the only relevance of the evidence was that of bad character arising out of the presence of the gun in his garden and this was in fact put to the witness Ian Weir during this trial.

[85] In short, we find no significance in this point and it can have had no detrimental effect on the rights of this applicant at this trial. We therefore refuse the application and reject this ground of appeal

<u>Ground 6</u>

[86] Mr McCartney argued that the learned trial Judge had failed to summarise the defendant's case in a proper and balanced manner in a number of instances. The main points that he relied on were as follows. First that the learned trial Judge erred in directing the jury to accept as a statement of fact that the telephone exhibit referred to as the "514" telephone belonged to this applicant and by inference was therefore used by him on the night of the murder at the locations and material times as referred to by the prosecution cell site specialist Mr McNerlin. Counsel contended that the directions to the jury in respect of this evidence did not refer sufficiently to the concession by Mr McNerlin, in respect of the identity of the user of the phone, that others may have used it and that the telephone number appears to have been continued to be used even when the applicant was in police custody.

Conclusions on Ground 6

Conclusions on the "514" issue

[87] We are satisfied that there is no substance in this point. The 514 number was registered to Ian Weir of Comber Skip Hire but it was recorded in the telephones of his sons Ian and Aaron as "dad". It was Ian Weir's evidence that the telephone

ending 514 was his father's. The applicant had himself called the police using that number at 22.06 hours on the night of the murder. The telephone seized from him when he was unexpectedly re-arrested on 15 January was using that number. That was also the number he had given to the police when he was a victim of an assault in September 2011 and had previously called the police from the same number on 16 December 2009 and 21 May 2011. Mr McCollum drew attention to the fact that in interview he had repeatedly referred to "my phone" saying that his phone was "steady" with people phoning about various matters. In interview he said that he would take his telephone into the bedroom with him when he slept.

[88] There was no evidence of any other possible user of the telephone on the night of the murder. The people with access to it were his wife Alison, with whom he claimed to have been in bed on the night in question, and his sons Ian and Jason with whom the 514 number had been in contact on that night. That telephone had been shown to move away from the house where he alleged he was in bed and was located in the area of the murder scene.

[89] We are satisfied that there was an abundance of evidence to attribute the use of the phone to him on the night of the murder.

[90] Secondly Mr McCartney submitted that Mr Seales had been wearing arm bandages on his arrest. It was contended that those bandages were relevant evidence which the prosecution were under a duty to obtain and/or retain as evidence. The defence submitted that the failure to retain this evidence caused him to suffer prejudice because he had been deprived of the potential for adducing compelling exculpatory evidence in that there was high likelihood that CDR evidence would have been deposited on the bandages if he had discharged firearms on the night in question.

Conclusions on "bandages" ground

[91] We are satisfied that any failure to retain the arm bandages worn by Seales on his arrest was without significance in the case. There was no evidence before this court that he had been wearing these bandages when he allegedly shot the victim in question and the issue of the bandages first surfaced in the evidence when they were worn by him upon his arrest. Accordingly, it is understandable that they were not kept as part of the evidence in the case. We consider that this matter played no part in the conviction of this applicant.

[92] We were satisfied that the learned trial Judge had summarised this applicant's case in a proper and balanced manner overall. We therefore refuse the application and reject this ground of appeal

The Appeal of Stephen McCaughey

[93] Mr O'Rourke QC refined his comprehensive skeleton argument down to four essential points of appeal before this court. We shall deal with each of them in turn.

Ground 1

[94] Mr O'Rourke contended that the learned trial Judge had erred in failing to grant a direction of no case to answer on at least one half of the two pronged prosecution case against him. Counsel characterised the prosecution case against this applicant as having two alternative cores. First that he had not gone to the yard just thinking there was going to be a scuffle but he went there as part of a plan to kill or cause grievous bodily harm to somebody and he did not need to know the identity of the intended victim. Secondly, or alternatively that he joined into the plan to kill or cause serious bodily injury to the deceased at the point when the gun was produced in the Gill yard and he thereafter intended by his continued presence to encourage the other offenders and did so encourage them so that he too is guilty of the murder of Strickland when the second shot was fired out on the roadway. In other words, the trial Judge had separated the two shots into two joint enterprises.

[95] Counsel contended that there was no direct evidence at all that he had gone to the yard in the first place with such a plan in mind outside his own admission that it was purely to act as back-up for a scuffle. He submitted that there was no evidence to refute McCaughey's suggestion that he had not believed anyone other than Jason Weir was to attend, that he was unaware that Ian Weir or Jimmy Seales would attend and that he was unaware of the Seales family connection with the victim.

[96] Three questions which the learned trial Judge posed to the jury, with the agreement of counsel, echoed that two-pronged approach. The questions posed to the jury by the learned trial judge with reference to McCaughey and the murder charge, were as follows:

(i) If you are not satisfied beyond reasonable doubt that Stephen McCaughey participated in a joint enterprise to attack Philip Strickland, realising that a gun might be used with intent to kill or cause really serious injury, you must find him not guilty of both counts on the indictment.

(ii) When the shotgun was fired on the road are you satisfied beyond reasonable doubt that Stephen McCaughey was participating at that stage in a joint enterprise realising that Philip Strickland might be shot with intent to kill or cause really serious bodily harm? If you are so satisfied you must find him guilty on both counts.

(iii) If you are not satisfied in relation to question 2, are you satisfied beyond reasonable doubt that, when the shot was fired in the yard he was participating in a joint enterprise, realising that Philip Strickland might be shot with intent to cause really serious harm. If you are so satisfied you must find him not guilty of murder but guilty of causing grievous harm with intent and guilty on the second count.

[97] Mr O'Rourke prayed in aid of his submission the fact that that the prosecution had accepted pleas of guilty from Ian Weir and Jason Weir as secondary parties. Specifically Mr O'Rourke contended that the prosecution had accepted that Ian Weir's intention was to "rough up" and cause "serious injury but not to kill" Mr Strickland and that it accepted that he did not anticipate a firearm being used. Accordingly Mr O'Rourke submitted that the height of the prosecution case against the applicant was no greater than the prosecution accepted in respect of Ian Weir and that McCaughey may equally not have known of the intended use of the gun. We can deal with this point with some brevity. First the prosecution in the event clearly did not make the case that McCaughey was more than an accessory/secondary party. He was not depicted as a principal. Secondly the prosecution are entitled to accept a plea from an accused as a secondary party for a multitude of reasons and yet proceed against another accused, who has not pleaded guilty, as a principal. It is a regular occurrence in criminal trials.

[98] Counsel then pointed to the well-known test in R v Galbraith 73 Cr App R 124 and R v Shippey [1988] Crim LR 767. These authorities are to the effect that a submission of no case to answer should be granted –

- Where the Judge concludes that the prosecution evidence taken at its highest, is such that a jury properly directed could not properly convict on it.
- If there is no evidence that the crime alleged has been committed by the defendant.

[99] Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the provenance of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury.

[100] In the course of the skeleton argument, Mr O'Rourke submitted that the Judge should have granted a direction even on the second prong of the prosecution case on the basis that there was no evidence of physical participation by this applicant in the shooting to death of Mr Strickland and his mere presence at the scene was insufficient evidence of encouragement or assistance.

Conclusions on Ground 1

[101] We can deal with this ground in short compass without rehearsing in detail the submissions of Mr McCollum. We reject this ground for the following reasons.

[102] First, adopting the two-pronged approach suggested by Mr O'Rourke, we are satisfied that the Galbraith test was easily met at the direction stage of the trial based on a number of factual circumstances adduced by the prosecution.

[103] The key component of the prosecution case at this stage was whether there was evidence on which it could be inferred that the principal – Jimmy Seales on the Crown case – had killed Mr Strickland with the requisite intent. Had McCaughey intentionally encouraged the others knowing or contemplating as a real possibility that one of the others might act with the intention to cause grievous bodily harm or kill? Were the principal's acts fundamentally different to those contemplated by McCaughey in circumstances where the principal produced a weapon of which McCaughey did not know or which was more lethal than any weapon contemplated by McCaughey as being used or that the weapon had been used in a more dangerous manner than the sort of acts which McCaughey intended or foresaw as part of the joint enterprise?

[104] Whichever prong of the case as set out by the trial Judge is considered, we are satisfied that there was cogent evidence from which the jury could have drawn such inferences on either aspect. The jury members were not to be confined to looking at the circumstances of the overall crime in confined boxes. In concluding whether he knew or contemplated the presence of a gun to be used to cause serious bodily harm or to kill when he agreed to attend Gill's yard to offer backup or when he continued to offer such intentional encouragement for such use after the gun was produced and used and that the principal was encouraged by his presence, the jury were entitled to take account of, as submitted by Mr McCollum, the following matters:

- He had spoken at length to Jason Weir – at least three times on the telephone – before they got to the yard as well as when he pulled up beside him on the road.
- His reaction to the shooting in the yard was to remain where he was and make no attempt to disassociate himself from what had happened. This allowed an inference to be drawn that he was aware of the plan to use the firearm to cause serious bodily harm or to kill or was content to encourage its progress by his presence.
- After the shooting in the yard, he did not take the opportunity to leave the scene when he was the first to reverse out of the yard. Instead he travelled behind the other three cars including the Saxo—adding the weight of his presence and encouragement to the enterprise - in which he knew the wounded Mr Strickland had been bundled. He had every opportunity to turn in the opposite direction and drive back to Comber away from the scene.

- Not only did he follow these cars but tried to catch up with them to the extent that he had to break sharply to avoid the Saxo when it stopped.
- After the fatal shot, he again caught up with the Mercedes after it had sped away.
- There was no need for his car to return to set fire to the Saxo because at that stage again he could have distanced himself from other vehicles. He made no attempt to distance himself from the other miscreants at that stage.
- The following morning he met up with Jason Weir after arranging for his own car to be thoroughly cleaned and together they bought a new phone for Jason at the O2 shop in Ards Shopping Centre.
- He drove with Jason to Derryboye Road where police intended arresting Jason and Ian. He then proceeded to tell lies to the police denying that he was aware of the murder.
- Thereafter he evaded police until he was arrested on the evening of 17 January by arrangement.

[105] All of this evidence afforded the learned trial Judge ample and cogent evidence upon which he could conclude that a direction should be refused both aspects of the prosecution case.

[106] In coming to this conclusion we cite with approval the words of Hawkins J in R v Coney [1882] 8 QBD 534 at p557:

> "… The fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent it and had the power to do so, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question of fact for the jury whether he did so or not."

[107] Accordingly we refuse the application and reject this ground of appeal.

Ground 2

[108] Mr O'Rourke contended that the learned trial Judge had failed to give a direction to the jury along the lines suggested in R v Rahman [2009] 1 AC 129 and R v Mendez & Thompson [2011] 1 Cr App R 10.

[109] Before dilating somewhat on the basis of this ground of appeal, we set out now the basic tenets of a Rahman direction.

[110] At paragraph [68] Lord Browne set out the essence of the principles:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and a uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

[111] It is important to appreciate that the question is whether the accessory foresaw what the principal might do as a possibility, rather what his precise intentions were. Thus in R v Badza [2009] EWCA Crim 2695 it was enough that the accused knew that the principal had a knife and that he might use it in the course of their joint enterprise with intent sufficient for murder whether in the form of an intention to kill or an intent to cause grievous bodily harm.

[112] Notwithstanding the need to be satisfied that the accessory contemplated the principal acting with the *mens rea* for murder, if the act contemplated by the accessory is fundamentally different to that done by the principal, there can be no conviction of the accessory. Thus in R v Mendez & Thompson [2011] 1 Cr App R 10, where the deceased, having been chased by a group of young people, was stabbed to death by one of them, the Court of Appeal (Criminal Division) made clear that an accessory was not liable for the murder of the victim if the direct cause of the victim's death was a deliberate act by the principal which was of a kind which was:

(a) unforeseen by the accessory; and

(b) likely to be altogether more life threatening than acts of the kind intended or foreseen by him.

[113] Toulson LJ said at paragraph [48]:

> "This is not a difficult idea to grasp and it is capable of being explained to a jury shortly and simply. It does not call for expert evidence or minute calibration. In a case of spontaneous or semi spontaneous group violence, typically fuelled by alcohol, it is highly unlikely that the participants will have thought carefully about the exact level of violence and associated injury which they intend

> to cause or foresee may be caused. All that a jury can in most cases be expected to do is form a broad brush judgment about the sort of level of violence and associated risk of injury which they can safely conclude that the defendant must have intended or foreseen. Then they have to consider as a matter of common sense whether (the principal's) unforeseen act (if such it was) was of a nature likely to be altogether more life threatening than the acts of the nature of which (the accessory) foresaw or intended. It is a question of degree, but juries are used to dealing with questions of degree."

[114] Finally we note that Mr McCollum relied extensively on the speech by Lord Neuberger in Rahman's case. He analysed the argument raised in R v Gamble [1989] NI 268 that where A and B had expressly agreed and limited their purpose to a knee-capping, and a deviation by A, albeit with the contemplated weapon, from that purpose led to the victim being shot in the head, this might constitute an entirely or fundamentally different action from that which was foreseen or contemplated by V. Having concluded that such a defence must be rejected, Lord Neuberger said at paragraph [100]:

> "To my mind, the conclusion that B is guilty of murder … on facts such as those in R v Gamble (on the assumption that the victim was killed by shooting him in the head), can be justified on the basis of policy and principle. As to the principle I have already dealt with it: given that intention to cause serious injury is sufficient *mens rea* for murder, if B foresaw that serious injury will be caused to V by A using a particular weapon, he should not escape a murder conviction merely because A intended (or may have intended) to kill V when he attacked him with that very weapon.
>
> 101. As for policy, as already mentioned, it seems to me that the established principle is that, by embarking on a venture which he perceives involves A attacking V with a particular weapon with intent to injure him seriously, B is effectively treated as having accepted the risk of criminal responsibility for V's death as a result of A's attack on V with that weapon. If A remains motivated by an intention to cause V serious injury, B will be guilty of murder if A's attack unexpectedly or unintentionally leads to V's death as a result of A's mistake, mischance, A's excessive violence or V's unexpected vulnerability."

[115] In the instant case, it was Mr O'Rourke's contentions that:

- The learned trial Judge had expressly refused to provide a Rahman direction because it was too complicated in the context of this case.

- The learned trial Judge had failed to leave to the jury whether or not the action of shooting A in the yard or shooting him to death on the road was a fundamentally different act from that contemplated by McCaughey. It was for the jury to assess whether it was fundamentally different. Whilst McCaughey might have contemplated reasonably serious harm, the act that actually occurred, namely him being shot in the face when he tried to escape, was potentially fundamentally different and the jury should have been provided with a direction to that effect for them to decide.

Conclusions on Ground 2

[116] We are satisfied that the learned trial Judge properly addressed the jury in the course of his charge on the issues arising out of the factual circumstances of the two shootings for the following reasons.

[117] First for ease of reference we rehearse again the wise admonition of Lord Bingham in Rahman's case at paragraph [27] where he said:

> "There is, and can be, no prescriptive formula for directing juries. Having made clear the governing principle, it is for trial Judges to choose the terms most apt to enable juries to reach a just decision in the particular case."

[118] We consider that there is much merit in Mr McCollum's submission that the learned trial Judge was perhaps unnecessarily generous to the defendant when he separated the two shooting incidents into two joint enterprises, and, as Mr McCollum suggested, "required the jury to conclude that each defendant was allied to the joint enterprise at the time of the final shot on the road."

[119] Even without relying on Lord Neuberger's approach in Rahman, we have great difficulty seeing how once McCaughey witnessed the victim being shot in the yard and then was bundled into the boot of a car and driven off, he could possibly have failed to contemplate anything fundamentally different from that which eventually happened. There is much to be said for the argument that shooting him in the leg in the yard was not fundamentally different from him being shot in the face on the main road and that the jury could well have been left with this simple issue namely that once the gun had been produced and discharged into the victim's leg, did not anyone offering encouragement by his presence thereafter not

contemplate the future use of the gun with intent to cause grievous bodily harm or kill?

[120] In the event the learned trial Judge did not couch the matter in such terms but in essence, as revealed by the questions which he posed to the jury, separated the two shots into two joint enterprises requiring the jury to conclude that each defendant was allied to the joint enterprise at the time of the final shot (see questions 2 and 3).

[121] Early in his judgment the judge had expressly said:

> "Even if there was an agreed plan to say assault or use the expression that you have heard over and over again, the scuffle with somebody at Gill's yard, if what happened went beyond anything that Mr McCaughey had agreed or realised might happen then Mr McCaughey would not be guilty of murder because the plan or agreement was a scuffle and not a shooting".

[122] The learned trial Judge subsequently dealt with the discreet issue of the circumstances in the yard in the following terms:

> "The prosecution does not allege that McCaughey fired the gun, indeed nobody says that McCaughey fired the gun, however the prosecution say that you should conclude that he did not go there just thinking there was going to be a scuffle but he went there as part of a plan to kill or cause grievous bodily harm to somebody and he didn't need to know the identity of the intended victim. Nobody has given evidence that he knew of such a plan and he says that if there was such a plan he didn't know anything about it. He says he first knew of any firearm indeed any weapon was when Jimmy arrived with a shotgun. He says that all he did before the shotgun arrived was to warn William Gill to keep out of the scuffle between Jason and Philip Strickland that was going on up the yard and he says that all he did after the shotgun arrived was to watch what happened. He never spoke, he never did anything to encourage or support or assist whatever happened after the first shot was fired. He didn't help to put Philip in the boot, he refused to drive back to burn the car and he says that Jason then drove the car back and he did nothing, he didn't get out of the car. In short he says he never lent himself to either

> the shooting or any other activity after the gun was produced, he was a mere bystander.
>
> Now members of the jury, as I said earlier the law is that mere presence at a scene is not enough to establish guilt. The prosecution say that you should infer from the facts that he did not leave and drive off towards Comber as soon as he could get out, and there is a dispute about whether he could get out and how the Mercedes was parked … Why did he choose to follow the Saxo which he knew contained the injured Mr Strickland? The prosecution say why did he not pull out around the Saxo when it stopped and drive on towards Castle Espie?"

[123] The learned trial Judge went on to say:

> "The prosecution invite you to infer from those facts that he was in fact part of the joint plan to kill or cause grievous bodily harm either before he ever went to Gill's yard or that he joined into the plan at the point where the gun was produced and either intended by his continued presence to encourage the offenders and did so encourage them so that he too is guilty of the murder of Philip Strickland when the second shot was fired. You will have to consider all the evidence in relation to this, but only if you are satisfied that Mr McCaughey was part of the plan from the beginning or that he joined when the gun was produced and continued to be part of it until the second shot was fired, only then, only if you are satisfied could you find him guilty of murder".

[124] He repeated this theme again at page 17 of his charge.

[125] Whilst therefore the learned trial Judge did not express himself in the identical terms of Rahman, the thrust of what he said captured the spirit of that case insofar as he made it clear that if the jury was not satisfied beyond reasonable doubt that this applicant had participated in a joint enterprise to attack Philip Strickland, realising that a gun might be used with intent to kill or cause really serious injury, he was to be found not guilty. The concept of a plan possibly fundamentally different from what he knew or contemplated courses through this charge in these words that reflected the essence of Rahman. Moreover in the second question he set out to the jury, he specifically adverted to the need for the jury to be satisfied that when the shotgun was fired on the road, McCaughey was participating at that point in a joint enterprise realising that Strickland might be shot with intent to kill or cause really serious bodily harm. That again captures the spirit of Rahman insofar as it by

inference poses the question as to whether murder or serious bodily harm was within his contemplation after he had seen the first shooting.

[126] Accordingly we are satisfied that there is no foundation to this ground of appeal. We refuse the application and reject this ground of appeal.

Ground 3

[127] Mr O'Rourke contended that there was an insufficiency of evidence to found the prosecution case that the applicant began participating as an accessory to the murder upon the production of the gun.

[128] The factual basis upon which Mr O'Rourke based this submission was as follows:

- Mr Gill contended he had left the scene and was in his house prior to the first shot being fired. In his evidence he contended that up until the point he had left he had not identified the applicant as being present at the scene albeit there was another person who remained at the front of the vehicle but had not participated in any of the involvement with Mr Strickland.

- A principal Crown witness namely Mr Ian Weir had categorically denied that this applicant had any involvement in what happened at Gill's yard or subsequently. Weir's case was that his father had shot Philip Strickland in the leg and then Mr Gill at his father's insistence put him into the boot of the Saxo. Weir believed at that stage this applicant had left the scene and was not even present during the subsequent events. Even if this was factually inaccurate, as appears to be the case, it suggests that the applicant's continued presence went unnoticed by Mr Weir. This militates against participation by the applicant.

- McGaughey's arrival at the scene was indicated by Mr Gill to have come from a different direction from that of the miscreants Ian Weir and Jimmy Seales i.e. McCaughey's car came in from the Ballydrain direction whereas the Mercedes came from the Castle Espie direction.

- Notwithstanding the fact that he was following the vehicle containing Mr Strickland, there was no evidence that McCaughey participated in the subsequent events leading to the killing of Mr Strickland. In the absence of evidence of physical participation the most the prosecution could allege was that his presence at the scene encouraged others and was intended by him to encourage others. There was no support evidentially for this proposition.

Principles of presence and encouragement as aiding and abetting

[129] Mr O'Rourke helpfully drew our attention to an article by David Selfe found in Crim. Law (2010) 195.

[130] From that article, embracing as it does the leading authorities on this matter which include R v McCarry and Waters [2009] EWCA Crim. 1718, R v Coney [1881-82] LR 8 QBD 534, Wilcox v Jeffery [1951] 1 All ER 464, R v Allen [1965] 1 QB 130, R v Clarkson and Carrol [1971] 1 WLR 1402 and R v Bland [1988] Crim. LR 41, we derive the following principles on this issue:

(i) The general principle is that mere presence at the scene of a crime, without more, does not by itself make a person liable as a secondary party for another participant's principal offence.

(ii) For presence to constitute encouragement sufficient to amount to secondary liability, the jury must be satisfied that two interrelated criteria exist. It must be proven that the secondary party intended by his presence to give encouragement to the principal offender. And it must be proven that the principal offender gained actual encouragement from that presence. One of those criteria without the other is not sufficient to establish liability.

(iii) It is a question of fact for the jury in such cases to decide if such encouragement exists.

[131] In short, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. It is no criminal offence to stand by or be a mere passive spectator of a crime. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposefully present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had power to do so, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be satisfied in finding that he wilfully encouraged and so aided and abetted (see Hawkins J in Coney and Others).

Conclusions on Ground 3

[132] We are not persuaded by these submissions. There was ample evidence for the jury to conclude that at least from the first shot onwards if not before this applicant had joined in the venture which eventually led to the death of Mr Strickland. If he was there initially as backup for an assault arranged by Jason, when the firearm was produced and used in the yard, he took no steps to dissociate himself from the enterprise. On the contrary, as indicated in paragraph [103] of this judgment, he pursued the other vehicles with the knowledge that Strickland, already wounded, was in the boot of the Saxo and whilst knowing that a firearm was present and had been used. There was ample opportunity for him to leave the scene and

disassociate himself whereas not only did he follow but he attempted to catch up with the vehicles in front etc. as set out in paragraph [103] above.

[133] We consider that this evidence was entirely a matter for the jury and that there was ample material upon which the jury could properly infer and conclude that he intended by his presence to give encouragement to the principal offender and that his presence together with the others caused the principal offender to gain actual encouragement from that presence.

[134] The evidence of Weir in regard to McCaughey was clearly unreliable. Not only did he exculpate him to the point that he wrongfully removed him from the scene altogether, but he had motive for attempting to isolate his father to the exclusion of others as the main player in this enterprise. In terms Mr McCaughey's own evidence undermined that of Mr Weir by admitting that he had been present in the yard during these events.

[135] Accordingly we are satisfied that in this regard the second limb of the Galbraith test was easily met at the direction stage and that thereafter there was ample material for the jury to come to the conclusion at which they arrived. We refuse the application and reject this ground of appeal.

Ground 4

[136] Finally Mr O'Rourke contended that the conviction had been against the weight of the evidence.

[137] Counsel invoked the judgment of Widgery LJ in R v Cooper [1969] 1 QB 267, 53 Cr App R 82 where it was said:

> "It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. … We are … charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe. … This means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be

produced by the general feel of the case as the Court experiences it."

[138] In R v Pope [2013] 1 Cr App R 14 it was said that the application of the "lurking doubt" concept requires a reasoned analysis of the evidence or trial process, or both, leading to the inexorable conclusion that the conviction is unsafe; and that it followed that it would only be in the most exceptional circumstances that a conviction would be quashed on this ground alone, and even more so where the attention of the court is confined to re-examination of the material before the jury.

[139] Thus the test applied by the Court of Appeal is different to that applied by the trial Judge on a submission of "no case".

[140] Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in other cases. In 1995 the various grounds set out were replaced by the simple formula that the Court of Appeal should allow the appeal "if it thinks that the conviction is unsafe".

[141] In R v Pollock [2004] NICA 34, the Lord Chief Justice said at [32]:

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

[142] Applying these principles to McCaughey's case, we have no doubt that the jury verdict in his case was not against the weight of the evidence and, having reviewed the whole matter, we have no lurking doubt or sense of unease about the correctness of the verdict in this instance. We refuse the application and reject this ground of appeal.

[143] In summary therefore we reject the applications for leave to appeal in each case.