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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NOTHERN IRELAND

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-v-

SEAMUS MARTIN KEARNEY

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Before: Girvan LJ, Coghlin LJ and Weatherup J

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WEATHERUP J (delivering the judgment of the Court)

[1] On 28 November 2013 His Honour Judge McFarland, Recorder of Belfast, sitting without a jury, convicted the appellant of murder and possession of a firearm with intent to endanger life. On 6 December 2013 the appellant was sentenced to life imprisonment with a minimum term of 20 years in respect of murder and a concurrent sentence of 20 years' imprisonment in respect of possession of the firearm. On this appeal Mr Harvey QC and Mr Duffy represented the appellant and Mr Murphy QC and Mr Russell represented the prosecution.

[2] The offences relate to events at the carpark at Mid-Ulster Hospital Magherafelt on 14 September 1981 when John Proctor, a 25 year old police constable, sustained multiple gunshot wounds from which he died. Mr Proctor arrived at the hospital carpark at 6.45 pm that evening to visit his wife in the maternity wing, she having given birth to their son some days earlier. He left his wife and child at about 8.50 pm to return to his car in the carpark. While he was in the carpark shots were fired hitting Mr Proctor and his vehicle. A white Ford Escort sped out of the carpark and was recovered by police later that evening. The white Ford Escort had been taken from the owners by force earlier that evening.

[3] The centre of the carpark was laid out in 28 parking bays, being two rows of 14 parking bays. Tyre marks were found in the area described as bay 27 where the white Ford Escort had been parked. Thirteen spent bullet casings were found in bays 25 and 26. Two cigarette butts were marked by Constable Cunningham of the police mapping section as located in bay 26. Two cigarettes, one marked cigarette

butt and the other marked cigarette tip, were recovered by Constable Cairns, the Scenes of Crime Officer, in bays 26 and 27.

[4] The bullet casings had been discharged from a Colt AR15 self-loading rifle. Test firing from two sample AR15 rifles established that the shell casings were ejected to the right and behind the rifle with the majority falling between 1.5 and 4 metres to the right and between 2.5 and 5 metres behind. These results placed the person firing the rifle in bays 24 or 25. The deceased had parked his vehicle in bay 6 which was diagonally across from the firing position.

[5] The trial judge found that there were three cigarette butts at the scene. The first was that recorded by Constable Cunningham as a first cigarette butt in bay 26. The second was that recorded by Constable Cunningham as a second cigarette butt in bay 26, which was found by the trial judge to be the same item as that noted by Constable Cairns to be a 'cigarette tip' in bay 26. The third was that noted by Constable Cairns to be a cigarette butt in bay 27. Only the two items noted by Constable Cairns were removed from the scene.

[6] There was no evidence that the cigarette butts had been examined in 1981 but as a result of the intervention of the Historical Inquiries Team the cigarette butts were examined in 2009 by Dr Ruth Griffin of the Forensic Science Laboratory. One of the cigarette butts, described by Dr Griffin as butt A, yielded a full DNA profile which was compared with the DNA profile obtained from a bucal swab obtained from the appellant on 19 July 2010. Dr Griffin found a match between the two profiles such as would be expected to occur in less than one male in one billion unrelated to the defendant. There was insufficient material to obtain any profile from the other cigarette butt, described by Dr Griffin as butt B. It was not established which of the two cigarette butts recovered from the scene was butt A.

[7] The cigarette butt with the appellants DNA profile was located close to the position where the white Ford Escort had been parked in the car park. Constable Cunningham's first butt was approximately 8 feet 9 inches from the nearside tyre mark and his second butt was approximately 3 feet 8 inches from the nearside tyre mark. Constable Cairns other cigarette butt, while not recorded by measurement, was adjacent to the off-side tyre mark.

[8] On 8 November 1982, at Swatragh, shots were fired at a UDR patrol vehicle. The appellant was apprehended in the vicinity adjacent to a Heckler Koch G3 rifle. Spent bullet cases later attributed to the Colt AR15 rifle used in the shooting of Mr Proctor were also found at the scene. On 21 December 1984 the appellant was convicted of attempted murder and possession of the Heckler Koch G3 and the Colt AR 15 with intent to endanger life.

[9] On 18 February 1986 at Hillhead Road between Toomebridge and Castledawson a Colt AR15 self-loading rifle was recovered. Forensic tests established that the bullet casings recovered from a test firing of the Colt AR15

matched the bullet casings recovered from the car park at the Mid-Ulster Hospital on 14 September 1981.

[10] At police interviews the appellant made no reply to questioning. The appellant did not give evidence at the trial.

[11] The trial judge's written judgment referred to there being three matters relied on by the prosecution, namely the appellant's DNA on one of the cigarette butts removed from the scene, the appellant's bad character arising from the 1984 convictions and the adverse inference drawn that the appellant had no innocent explanation for the presence of his DNA at the scene, arising from the appellant's failure to give evidence,

[12] The trial judge referred to the evidence of Constable Cairns that the two cigarette butts seized were very fresh and clean and concluded that the cigarette butts were both fresh and clean as described by Constable Cairns. The trial judge asked what inferences were to be drawn from the presence of a fresh and clean cigarette butt bearing the appellant's DNA profile adjacent to the assumed firing position and the assumed position of the getaway car. The first inference was that the cigarette had been smoked by the appellant and discarded by him in the carpark. The second inference was that the cigarette butt had been deposited timeously to the shooting incident, that is, that it had been lying at the location for only a short period of time.

[13] The trial judge admitted evidence of the appellant's convictions on 21 December 1984 as evidence of the appellant's bad character relevant to an important matter in issue between the appellant and the prosecution under Article 6(1)(d) of the Criminal Justice Evidence (Northern Ireland) Order 2004. The evidence was admitted to show the appellant's propensity to take part in attacks of the type that gave rise to the charges.

[14] The trial judge concluded that it was not unreasonable to expect the appellant to give an explanation as to how the butt of a cigarette recently smoked by him was found adjacent to the place where a gunman had fired shots and a getaway car had been parked, in the light of his propensity to take part in attacks of that type on members of the security forces.

[15] Consideration was given to whether the passage of time would have prejudiced the appellant in recalling his movements and it was decided that that was not the case. Accordingly the trial judge concluded that the appellant's failure to give evidence could only sensibly be attributed to him having no answer to his DNA being found on the cigarette butt at the scene of the murder or none that could stand up to cross-examination.

[16] As a result of the findings on the presence of the cigarette butt and the bad character evidence of the appellant's 1984 convictions and the adverse inference

drawn from the absence of explanation from the appellant the trial judge was satisfied beyond reasonable doubt as to the guilt of the appellant.

[17] The appellant's grounds of appeal related to the three areas relied on by the trial judge in convicting the appellant. The first area concerned the trial judge's treatment of the evidence of Constable Cairns in relation to the cigarette butt and in particular its condition and length of time at the scene, the second area concerned the admission of the bad character evidence of the appellant's convictions on 21 December 1984 and the third area concerned the adverse inferences drawn from the appellant's failure to give evidence.

The evidence concerning the cigarette butts.

[18] The appellant challenged the finding of the trial judge that the cigarette butts seized by Constable Cairns were both fresh and clean. The appellant contended that, in the light of the totality of Constable Cairns evidence, there was no evidential basis for such a conclusion on the condition of the cigarette butts or the length of time they were present at the scene. In particular the trial judge did not refer to Constable Cairns concession in cross-examination that he had no recollection of the condition of the cigarette butts.

[19] Constable Cairns had no notebook entry in relation to the condition of the cigarette butts and had no copy of his contemporaneous statement to the investigation team. In direct examination Constable Cairns stated that the cigarette butts were very clean and appeared to be very fresh. In cross-examination he stated that the cigarette butts were obviously clean and fairly fresh and on being asked why he so described them he replied that it would have been discussed with CID at the time, although he had no recollection of doing so. Constable Cairns then proceeded to 'suggest' that the cigarette butts were clean and regular and in close proximity and that would have been why they were lifted. While making that suggestion he conceded that he really had no recollection of what condition the cigarette butts were in at the time they were recovered.

[20] Dr Griffin gave evidence as to the condition of the cigarette butts in 2009. She had noted that they were clean and dry when examined at that time. There was no forensic record of their condition in 1981. That the cigarette butts were described as dry in 2009 is as nothing considering that they were in an evidence bag for 28 years. There was no evidence as to the weather conditions around the time of the shooting, save that one witness described conditions in the car park as dry at the time of the incident. Nor was there evidence of the effects of weathering on the cigarette butts.

[21] The appellant contended that the unwarranted finding that the cigarette butts were clean and fresh was then used by the trial judge in reaching his conclusion that the presence of DNA had come from the saliva of the defendant when he was smoking the cigarette, a conclusion that was also said to be an unwarranted step

from an earlier statement that the DNA arose from smoking or handling the cigarette. Further these unwarranted findings were also said to have led to the trial judge's inferences first that the cigarette butt had been smoked by the defendant and discarded by him in the carpark and secondly that the cigarette butts had been deposited timeously to the shooting incident and had been lying at the location for only a short period of time. In addition the unwarranted findings were said to have led to the trial judge's conclusion that it was not unreasonable to expect the appellant to give an explanation for the presence at the scene of the cigarette butt recently smoked by him.

[22] The trial judge referred to Constable Cairns attendance at the scene as a crime scene officer who had decided to seize the two cigarette butts based on his assessment of the scene and he concluded that Constable Cairns must have been of the view that the cigarette butts were in such a state and location as to be relevant. The appellant criticised the approach of the trial judge in that he based his findings in this regard on his own view of Constable Cairns assessment of the situation rather than Constable Cairns evidence.

[23] The trial judge was entitled to conclude that the cigarette butts were in such a state and location as to have been considered by the investigating police to have been relevant to the incident. That they were removed from the scene by the scenes of crime officer indicates as much.

[24] Separate consideration will be given to the trial judge's finding that the cigarette butts were clean and that they were fresh. In light of the evidence of Dr Griffin the trial judge was entitled to conclude that the cigarette butts were 'clean'. It would be a reasonable inference from the cigarette butts being in such a condition that they had been discarded at a time that was relatively recent to their recovery, namely on the day of or the days preceding their recovery.

[25] By referring to the cigarette butts as 'fresh' it is apparent that the trial judge meant to convey that they had been deposited close to the time of the shooting. When consideration was given by the trial judge to whether any adverse inference should be drawn from the absence of explanation by the appellant for the presence of a cigarette butt, the cigarette butt was described as having been 'recently smoked' by the appellant. When consideration was given by the trial judge to possible prejudice to the appellant in having to remember events of 30 years before, those events were described as involving a 'near miss'. By this the trial judge meant that, having recently smoked the cigarette, the appellant must have been in the carpark at a time close to the shooting and almost must have been caught up in the incident. In such circumstances the trial judge considered that the appellant would have been likely to have remembered the incident and be able to put forward an explanation for his presence in the carpark.

[26] Nothing in the evidence or any inference that might reasonably be drawn from the evidence would be inconsistent with the cigarette butts having been

discarded immediately prior to the shooting. Equally it would be consistent with the evidence and any inference that might reasonably be drawn from the evidence that the cigarette butts had been discarded earlier on the day of or on the days before the shooting.

[27] Thus the trial judge was entitled to conclude that the cigarette butts were in such a state and location as to have been considered by the investigating police to have been relevant to the incident. He was entitled to conclude that the cigarette butts were 'clean'. He was entitled to find that the appellant's DNA arose from the appellant smoking the cigarette and then discarding the butt in the carpark. He would have been entitled to make the finding that the condition of the cigarette butt that had been smoked and discarded by the appellant would have been consistent with that having occurred immediately prior to the shooting and equally consistent with that having occurred earlier on the day of, or the days immediately preceding, the shooting. Nor was it necessary for the trial judge to make a finding that the cigarette had been smoked and discarded by the appellant very close in time to the shooting. Thus a conclusion that the recovery of the cigarette butt with the appellant's DNA at the scene of the shooting was consistent with it being smoked and discarded immediately prior to the shooting was evidence to be taken into account in considering whether to admit the bad character evidence and whether it was reasonable to expect an explanation from the appellant.

Possession of the rifle as indirect relevant circumstantial evidence.

[28] At the trial the prosecution sought to rely on the evidence of the events in Swatragh in 1984 for two purposes. In the first place reliance was placed on the fact of the appellant's possession at Swatragh of the rifle used in the carpark shooting as admissible evidence in respect of the offences charged. Secondly the prosecution relied on the circumstances of the 1984 convictions as bad character evidence relevant to the issues of the propensity of the appellant, to the identity of the offender and to rebut innocent explanation for the presence of the appellant's DNA at the scene of the shooting in the carpark.

[29] Evidence may be admissible that is relevant to the issue of the identity of the offender or to rebut a defence relied on by the defendant or to counter what might be claimed to be a coincidence arising in the other evidence. In the present case the appellant's DNA was found on a cigarette butt at the scene of the shooting and in close proximity to bullet casings discharged from a rifle in the joint enterprise possession of the appellant at a later date. These matters were relevant to the identity of the offender, to whether the appellant was present at the scene with the cigarette, to whether the appellant was present at the scene with the rifle and to whether the presence at the scene of both the cigarette butt, connected to the appellant by DNA, and the bullet casings from the rifle, otherwise connected to the appellant by his later possession, was a coincidence. This amounts not simply to an instance of evidence of possession of a weapon on one occasion being used as

evidence of possession on the occasion of the offence charged, which, by itself, would not be permissible. This amounts to an instance of evidence of possession of a weapon on another occasion, when that weapon was used in the offence charged and there was DNA evidence placing the person in possession on the other occasion at the scene of the offence. In those circumstances possession of the rifle used in the carpark shooting on another occasion was indirect relevant circumstantial evidence on the charges faced by the appellant.

[30] The admissibility of such evidence was well established in the days before the introduction of the bad character legislation, when a defendant's criminal record was generally inadmissible, provided there was a relevant connection between such evidence and the offence and the defendant. In Thompson v The King [1918] AC 221 the House of Lords dealt with charges of gross indecency against boys where the defendant denied that he was the offender. Evidence was admitted that on arrest the defendant was in possession of powder puffs and that a search of his rooms uncovered indecent photographs of boys. The House of Lord held that the evidence was admissible on the issue of the identity of the offender. While some of the language in the judgments would not be used today the statements of principle on the admissibility of evidence remain. Lord Sumner stated that while proof of guilt of a particular crime does not arise from proof of a general disposition to commit that crime, evidence was admissible to prove guilty knowledge or intent or a system or to rebut an appearance of innocence. For items connected to the defendant to be admitted as evidence going to the identity of the offender and not merely as items going to bad character, for which purpose they would not have been admitted, it was necessary to establish a connection between the items and the circumstances of the offence. In the present case the connection is between the appellant's DNA found on the cigarette butt among the bullet casings ejected from a rifle used in the shooting and the appellant's later possession of that rifle.

[31] An example of the use of such circumstantial evidence since the introduction of the bad character legislation arose in R v Wallace [2007] EWCA Crim 1760. The defendant was convicted of offences arising out of four instances of armed robbery, the evidence being circumstantial and related to the common features of the offences implicating the defendant. The defendant contended that the evidence should have been admitted as bad character evidence and the prosecution had not applied to do so under the legislation. The Court of Appeal in England and Wales asked whether the evidence was bad character evidence going to the disposition to commit offences or, as was found to be the case, more accurately described as indirect relevant circumstantial evidence. The Court of Appeal concluded that the important matter was not the propensity to commit such offences as were charged but whether the circumstantial evidence linking the defendant to the offences pointed to his participation in and guilt of each offence. At the same time the evidence fell within the broad definition of misconduct in the bad character legislation and it was concluded that any application made by the prosecution under the legislation would inevitably have been granted.

[32] The bad character legislation recognises the difference between evidence of the facts of the offence charged and evidence of other misconduct. The definition of bad character in the 2004 Order relates to evidence of, or of a disposition towards, misconduct, other than evidence which "has to do with" the alleged facts of the offence with which the defendant is charged. Thus, to the extent that the appellant's possession of the rifle one year later "has to do with" the carpark shooting, it is not bad character evidence within the 2004 Order.

[33] Evidence that "has to do with" the facts of the offence need not have an immediate temporal connection with the incident giving rise to the offence. In Sahid Sule v The Queen [2012] EWCA Crim. 1130 the Court of Appeal in England and Wales dealt with a murder conviction where evidence had been admitted of three earlier gun attacks which had taken place some months before the offence charged and which were alleged to be part of a feud for which the murder was a reprisal. The trial judge found that the three incidents were highly relevant and had to do with the alleged facts of the offence with which the defendants were charged. The defence contended that such facts had to have a nexus in time with the alleged offence and the facts in question were said to have no such nexus. The Court of Appeal stated that the legislation includes no express or obviously implicit temporal qualification and agreed that the evidence of the three incidents was evidence that had to do with the alleged facts of the murder in question. Two of the incidents were alleged to have created the motive for the offence and it was stated that where the evidence was reasonably relied on for motive it would be irrational to introduce a temporal requirement. The third incident was said to be part of the pattern. It was stated that some evidence may fall to be admitted either as "to do" with the offence or as bad character evidence under a statutory gateway.

[34] The evidence of the appellant's possession of the rifle one year after the shooting in the carpark was admissible evidence on the issue of the identity of the offender and evidence to rebut the defence that the appellant was not present when the rifle was discharged and to combat an innocent explanation for the presence of the appellant's DNA on the cigarette butt recovered at the scene of the shooting. The weight to be attributed to that evidence once admitted is a different matter. The trial judge did not rely on the evidence of the appellant's possession of the rifle as evidence that had to do with the facts of the offences charged.

The 1984 convictions as bad character evidence

[35] The circumstances of the 1984 convictions were admitted by the trial judge under the bad character legislation. The appellant described the prosecution case as weak and speculative. It was contended that there was no reliable evidence as to the condition of the cigarette butts or the time at which they had been deposited at the scene. That being so there was said to be no sufficient basis for the admission of bad character evidence. It was noted that on a previous occasion Weir J had granted a No

Bill application when the prosecution had not relied on the bad character evidence. Accordingly the appellant contended that the cigarette butt evidence, together with such inferences as might be drawn against the appellant by his failure to offer an explanation for the presence of his DNA on a cigarette butt at the scene, were not sufficient to resist a No Bill application. Further it was contended that R v Clarke [2010] NICC 54 and R v Rogers [2013] NICC5, referred to by the trial judge, were instances where no innocent explanation could have been offered for the presence of traces that placed the defendants at the scenes of the crimes.

[36] The scheme of the bad character evidence provisions in the 2004 Order relating to an important matter in issue between the appellant and the prosecution, may be summarised as follows –

> The defendant's bad character is admissible if it is relevant to an important matter in issue between the appellant and the prosecution (article 6(1)(d)).
>
> The Court must not admit such evidence if it would have an adverse effect on the fairness of the proceedings (article 6(3)).
>
> In considering the exclusion of such evidence the Court must have regard in particular to the length of time between the matters to which the evidence relates and the matters which form the subject of the offence charged (article 6(4)).
>
> The matters in issue between the appellant and the prosecution include the question whether the appellant has the propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence (article 8(1)(a)).
>
> The appellant's conviction cannot be used to establish propensity if the Court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust to do so (article 8 (3)).

[37] The provisions introduce the propensity of the appellant to commit the kind of offence with which he is charged as an issue in the trial. However propensity is not the only matter in issue in respect of which the bad character evidence may be admitted. The prosecution sought to rely on the appellant's 1984 convictions to establish his propensity to commit the offences charged and to identify him as the offender and to exclude any innocent explanation there might be for his DNA being found on the cigarette butt recovered from the scene.

[38] The trial judge formulated three questions as follows:

> (a) Does the history of the Swatragh incident establish that the defendant/appellant had a propensity to commit a murder of a police officer?

(b) Does the propensity make it more likely that the defendant was either the gunman who shot John Proctor or one of the people in the car seen driving from the scene?

(c) Is it unjust to rely on the Swatragh incident and will the proceedings be unfair if his conviction is admitted?

[39] The trial judge considered that there was no question but that the Swatragh incident showed that the appellant had the propensity to take part in attacks of this type targeting members of the security forces; that it showed motivation, willingness and ability to take part in and to press home such an attack; that the only issue was the fairness of the proceedings; that while bad character could never be used to bolster up a weak and speculative case, it was his assessment that the prosecution case could not be placed in such a category; that it would not be unfair to admit the evidence of the 1984 convictions. The trial judge referred to the two recent examples from Northern Ireland of the admission of bad character evidence in Clarke and Rogers.

[40] The Court of Appeal in England and Wales considered the equivalent bad character provisions in the Criminal Justice 2003 in R v Hanson [2005] EWCA Crim 824 and made some general observations in paragraphs [9] and [10].

> "There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare DPP **v** P [1991] 2 AC 447 at 460E to 461A). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.
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> In a conviction case, the decisions required of the trial judge under section 101(3) and section 103(3), though not identical, are closely related. It should be noted that the wording of section 101(3) - "must not admit" - is stronger than the comparable provision in section 78 of the Police and Criminal Evidence Act 1984 - "may refuse to allow". When considering what is just under section 103(3), and the fairness of the proceedings under section 101(3), the

judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are."

[41] A single previous conviction may show propensity where its circumstances demonstrate probative force in relation to the offence charged. The Court of Appeal in England and Wales had occasion to consider single previous convictions in R v Turner, Taylor and Others [2010] EWCA Crim. 2300. The defendants were convicted of murder arising out of conflict between rival biker gangs. The victim was shot while travelling on the motorway. At a meeting place of the defendants, a place where Taylor resided, the police recovered shotguns and live cartridges with Turner's fingerprints on the weapons and a live bullet capable of being fired by a weapon used in the shooting of the victim. Turner's previous conviction under s 18 of the Offences against the Person Act 1861 was admitted where he and another member of the biker gang threw petrol over the victim and stabbed him in a dispute over money owed to the other offender. The Court of Appeal agreed that there were significant features of the earlier offence, it being premeditated, involved a very considerable degree of ruthlessness, showed preparedness to use extreme violence, did not involve provocation or other activity emanating from the victim and there was no element of personal affront to Turner. These features, other than the shooting, were said to have a strong resonance with the circumstances of the offences charged. Taylor's previous convictions for burglary, criminal damage and possession of shotguns were admitted arising out of an incident where he and other members of the biker gang broke into premises to recover motorcycle insignia. Relevant features were the violent attack, premeditation and planning, a sizeable number of bikers in a biker related dispute with loaded shotguns, again demonstrating a strong resonance with the offences charged.

[42] The trial judge admitted the evidence of the Swatragh incident as bad character evidence, noting that it took place a year after the offence charged, there being similarities of geographic location, the targeting of members of the security forces and the use of the same weapon. The trial judge concluded that the appellant had the propensity to take part in such attacks targeting members of the security forces. Having adopted the statement in Hanson that bad character evidence can never be used to bolster a weak and speculative case he stated that the prosecution case could not be placed in such a category. The trial judge concluded that it would not be unfair to admit the evidence.

[43] The appellant asserted the weak and speculative nature of the evidence of the cigarette butts as an insufficient basis on which to admit bad character evidence. This proceeded from the appellant's contention for a rejection of the trial judge's finding that the cigarette butts were clean and fresh and had been discarded at the scene around the time of the shooting. However we have concluded that the trial judge was entitled to find that the cigarette butts were clean and had been smoked by the appellant and discarded at the scene and were consistent with the appellants DNA being left at the scene shortly before the shooting and equally consistent with that having happened earlier that day or on the days before. The appellant offered no explanation to police for the presence of the cigarette butt at the scene. The Court of Appeal in Hanson stated that if there was no or very little evidence against a defendant it was unlikely to be just to admit his previous convictions. This was not such a case. The circumstances of the convictions demonstrated probative force in relation to the offences charged.

[44] In any event this was not a weak and speculative case as the appellant contended. While the issues in a trial may include the propensity of a defendant to commit offences of the kind charged, proof of such propensity is not proof of guilt. Ultimately the prosecution must prove the ingredients of the offence charged against the defendant to the requisite standard. In a jury trial it should be made clear to the jury that previous convictions admitted as evidence of propensity to commit the kind of offences charged are not of themselves proof of guilt. In Hanson at paragraph [18] it was stated -

> "Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. *Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant.* In particular, the jury should be directed; that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions; that, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case."

[45] In stating that evidence of bad character cannot be used to simply bolster a weak case or to prejudice the minds of a jury against the defendant the Court was stating a general observation in relation to evidence of bad character admitted to

show propensity in the context of the trial judge summing up to the jury and warning the jury against placing undue reliance on previous convictions. It seeks to ensure that by appropriate directions the judge will put the bad character evidence in its proper setting and achieve a proper balance between the significance of the propensity as shown and the other evidence adduced in the case in reaching a conclusion as to the guilt or otherwise of the defendant.

[46] Of course the same approach applies to a trial conducted without a jury. The trial judge was clearly alert to this consideration. Evidence of propensity does not of itself establish guilt. The totality of the evidence must establish beyond reasonable doubt against the defendant the ingredients of the offences charged. We agree with the trial judge that the present case could not be described as weak or speculative. We agree with the reasons given by the trial judge for the admission in evidence of the 1984 convictions. The convictions demonstrated probative force in relation to the offences charged. Having regard to the circumstances, including the length of time between the two incidents, the trial judge was correct not to exclude the bad character evidence as having an adverse effect on the fairness of the proceedings. Further, the trial judge was correct to find that it would not be unjust to admit the evidence to establish propensity, whether by reason of the length of time since the convictions or for any other reason.

Adverse inferences.

[47] The presence of a cigarette butt containing the appellant's DNA in close proximity to the ejected shells from the weapon used in the shooting called for an explanation from the appellant. The appellant gave no explanation to the police or to the Court. Again the appellant contended that the weakness of the evidence on the cigarette butts was such that adverse inferences should not be drawn. We restate the conclusions on the trial judge's findings on the cigarette butts as set out above.

[48] It is of importance to recognise that delay from the date of the offence charged may be to the great prejudice of a defendant from whom it might otherwise be reasonable to expect an explanation. This has been reiterated by the Court of Appeal in R v W [2013] NICA 6 and R v McK [2013] NICA 11. In the present case the delay was over 30 years from the shooting to the trial.

[49] The trial judge was clearly mindful of this potential prejudice. He set out his consideration of whether the passage of time could have prejudiced the appellant in providing an explanation. There was no evidence that the defendant had difficulties with memory, that the hospital grounds were used as a general thoroughfare, that the defendant was associated as an employee of the hospital or as a regular visitor or had been attending for medical treatment. The appellant contended that, after 30 years, the appellant could not reasonably be expected to remember where he was on the night of the shooting. However, whether he had an alibi or memory of his

whereabouts at the time of the shooting, more particularly, was there an explanation for the presence of the appellant's DNA?

[50] In addition, the trial judge stated that, had the appellant been in the car park at or about the time of the shooting and experienced a near miss of the shooting incident, he might have been expected to remember any innocent reason for his presence at the scene.

[51] The trial judge concluded that the appellant's failure to give evidence could only sensibly be attributed to having no answer to his DNA being found in the cigarette butt.

[52] Leaving aside the element referred to as the near miss of the shooting incident, there was no basis for concluding that the passage of time would have prejudiced the appellant in offering an innocent explanation. In the circumstances, again leaving aside the element referred to as the near miss, it was reasonable for the trial judge to draw an adverse inference from the appellant's failure to provide an innocent explanation.

[53] We are satisfied that the appellant's convictions are safe. The appellant's appeal against sentence was withdrawn. The appeal is dismissed.