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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

JAMES ALEXANDER SMITH

Mr Taylor KC with Mr Halleron (instructed by Madden & Finucane Solicitors) for the Applicant
Mr McCollum KC with Mr McDowell KC (instructed by the Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Treacy LJ and Fowler J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This application for leave to appeal follows the judgment of this court of 5 May 2023 [2023] NICA 31 wherein the court dismissed a Criminal Cases Review Commission ("CCRC") reference following a conviction for murder, attempted murder, and two offences of possession of a firearm with intent to endanger life. The court dismissed the reference which was based on *R v Jogee* [2016] UKSC 8. The court did not consider that this was truly a *Jogee* case. In any event , the court stated at para [87]:

> "[87] … The facts of this case are particularly stark and must dictate the outcome. The crime was a crime of planned violence which involved the use of weapons. The inference of participation with an intention to cause really serious harm is very strong. Put simply, in this case, if it is a *Jogee* case, we are entirely satisfied that no substantial injustice arises by virtue of the change in the law."

[2] We will not repeat further the reasons given for dismissal which are contained within the judgment. However, in relation to any further appeal points arising the court also stated at para [88]:

> "If no substantial injustice arises thus far what remains is an attempt to re-open an appeal which has already been determined by the Court of Appeal. That court was entirely satisfied as to the safety of the convictions. The circumstances in which such an appeal will be entertained are heavily circumscribed as we have discussed above. If pursued, we will consider the remaining application for leave to appeal on paper or orally after counsel has had an opportunity to consult and consider our ruling on the CCRC reference."

[3] The applicant has since indicated his intention to seek leave to argue two of the four further grounds of appeal originally advanced (described as grounds 5 and 6) and has sought an oral hearing which we permitted.

[4] The further grounds of appeal which are pursued challenge the safety of the conviction on two fronts, based upon a critique of the following evidence which was adduced at trial:

(a) Photographic evidence, namely images of the person contended to be the applicant:

  (i) in Mountcollyer Avenue on 12 May 2011; and

  (ii) from the ANPR camera on Belvoir Road at 12:50 on 13 May 2011; and

(b) DNA evidence in respect of a glove recovered from Peter Greer's address at 60 Mountcollyer Avenue.

[5] The amended grounds of appeal now read as follows:

> **"Amended Ground 5: Photographic evidence: Fresh expert evidence relating to the photographic evidence relied on by the Crown at trial (Hindsight): [Raymond Evans]**
>
> (1) That the jury could not safely conclude that the man alleged by the Crown to be the appellant in:
>
> (a) The recordings from the CCTV camera in Mountcollyer Avenue on 12 May 2011 at around:

(i) 12:26; and

(ii) 17:35.

(b) The still from the ANPR in Belvoir Road at 12:50 on 13 May 2011 [Fig 06] was the appellant.

(2) That, consequently, the jury could not rely upon the evidence in (1)(a) and (b) as part of the circumstantial evidence against the appellant.

(3) It is further submitted that it is in the interests of justice that this fresh expert evidence should be admitted by the court under section 25 Criminal Appeal (Northern Ireland) Act 1980.

Amended Ground 6: DNA Evidence: Fresh expert evidence relating to the DNA evidence found on a glove at Greer's address: [Professor Syndercombe Court]

The appellant will seek to rely on the expert report from Professor Syndercombe Court dated 22 June 2019, that clarifies and significantly undermines the evidence of Miss Beck, the DNA expert called on behalf of the Crown at trial, who stated that the appellant could not be excluded as being a minor contributor to the DNA profile found on the right glove discovered in Greer's wardrobe in Mountcollyer Avenue.

It is submitted that Miss Beck's evidence on this point was highly prejudicial and misleading and should have been excluded under Article 76 Police and Criminal Evidence Northern Ireland Order 1989 [sic], or subject to a strict warning by the trial judge as to its limitations.

It is further submitted that the court should consider the impact of the proposed fresh evidence on the safety of the convictions in the context that, for the first time in these proceedings, the Crown has conceded that the evidence of Miss Beck on this point "was not of any significance in the case against Smith." It is submitted that this is a recognition by the Crown of the weaknesses in the DNA evidence now identified by Professor Syndercombe Court, and that the failure to communicate this concession to the jury renders the convictions unsafe.

> It is submitted that it is in the interests of justice that this fresh expert evidence should be admitted by the court under section 25 Criminal Appeal (NI) Act 1980."

[6] Each of these two grounds is predicated upon an application to adduce fresh evidence which the defence submit undermines the safety of the convictions. Self-evidently, the two grounds do not actually raise new issues in one sense as the photographic evidence and DNA issues were examined during the trial. However, for the purposes of this exercise as the new expert reports were not part of the original trial, we use the designation fresh evidence for the purpose of this exercise.

The fresh evidence

[7] The fresh evidence comprises a report from Professor Denise Syndercombe Court on the DNA aspect of the appeal. This report is dated 22 June 2019. There are also two reports from Raymond Evans on the photographic evidence aspect of the appeal dated 28 June 2019 and 17 April 2023.

[8] Professor Syndercombe Court is a professor in forensic genetics at King's College, London. In her report she deals with one aspect of the DNA evidence given at trial that related to gloves found at 60 Mountcollyer Avenue which we summarise as follows. One pair of gloves provided a strong forensic link to the co-accused Mr Greer. The evidence at trial was that in relation to the DNA profile the applicant could not be excluded as a minor contributor. Whilst there was other DNA evidence against the applicant from the gloves found in the footwell of the Golf, this is the only part of the evidence now under attack.

[9] The opinion of Professor Syndercombe Court is on a discrete point which we summarise as follows. She states that the evidence of Ms Beck at trial that the applicant's DNA "could not be excluded as a minor contributor" is a subjective opinion. She states that such evidence was regularly given by forensic scientists at the time of the applicant's trial. However, in the light of advances in forensic science and statistical analysis of mixed DNA profiles she states that this is no longer deemed best practice or reliable. Accordingly, Professor Syndercombe Court points out that the Forensic Regulator now considers such qualitative evaluations should only be presented "as investigative opinions for intelligence purposes, rather than as evaluative opinions" and so should not appear today in a witness statement.

[10] Mr Raymond Evans is an imaging expert. Previously the defence had the benefit of an imaging expert at trial, Mr McDowell, however he was not called to give evidence. As an aside, we note that Mr McDowell's expertise is now impugned by Mr Taylor. In any event Mr Evans was subsequently instructed. He first produced a report in 2019 which examined the ANPR imaging which was said to show the applicant in the Golf with Greer on a dry run and the applicant's clothing which was said to be distinctive. Paras [14] and [15] from the first report sets out Mr Evans's summary and conclusions as follows:

"**14. Summary**

57. This report is based on all of the photographic and video material made available for me to examine.

58. The image captured on ANPR camera (ANPR.1) is of poor resolution and has been taken at some distance from the subject. The view is further obstructed by glare on the windscreen, the front of the garment is obscured by the items on the windscreen, by the front, left pillar of the vehicle and by the left-wing mirror. Only the upper body of the passenger can be partially seen.

59. The individual appears to be wearing a pale-toned t-shirt with darker patches on the chest. The shapes are of a roughly similar 'size' and general location to the graphic design seen on Item 2 DMcCG but they do not appear to be identical as in the same expected place.

60. While there are a small number of broad similarities between these two items of clothing, the apparent differences in the placement of the dark patches, unless satisfactorily explained, means we cannot categorically state that the garment in the ANPR camera is the same as that worn by the defendant.

61. The footage displayed in (Clips A-Z) are of poor resolution and have been taken at a significant distance from the subject.

62. I am able to compare with only limited confidence, the images of the defendant's clothing to some of the clothing worn by the individual in (Clips A-Z)

63. The passenger in these clips, appears to be wearing trousers of a pale-tone and loose fit from waist to ankle which is broadly similar to the disputed garment and in all but one clip, we are not able to see dark stripes on the sides of the trousers. This apparent difference could be due to them not being

there, or the resolution of the image is too poor to show this level of detail.

64. In one clip at approximately 16:37 (actual time around 17:37), we are able to see that the trousers worn by the male has a dark-toned vertical stripe along the right leg, but not the detail of the stripe, i.e. if it is a single stripe or multiple stripes.

65. Only the most general characteristics can be observed in Clips A-Z, and due to the lack of medium or fine detail, we cannot categorically state that the garment is the same as that worn by the defendant.

15. Conclusions

A. Identification of Clothing worn by passenger in silver Golf and on ANPR 1

66. There appears to be a difference in the placement of the dark patches between the clothing Item 2 DMcC6 viewed in (ANPR) and the disputed garments. Acknowledging that there are broad similarities in that there are light-tones and dark patches on the front of the upper garments (tee-shirt), nonetheless, these broad similarities cannot be construed as being identical.

67. While there is a lack of a unique characteristic to conclusively link the two, the material lends at best, limited support to the assertion that the items are one and the same.

B. Identification of clothing worn in Clips A-Z

68. It is acknowledged that there are broad similarities in the tone and shape of the garments.

69. Given the poor quality of the footage and the lack of characteristic or unique detail to conclusively link the clothing viewed in CCTV Clips A-Z with the disputed t-shirt Item 2 DMcC6, and there being an apparent difference in the detail of the trouser leg stripes seen on CCTV and the disputed trousers Item 1 DMcCS, the material lends no conclusive

support to the assertion that the items are one and the same."

[11] Mr Evans filed a second report for this appeal in 2023. In this report Mr Evans provides a different arguably stronger conclusion. The following summary is found in para [14] of the second report:

> "**14. Conclusions**
>
> 52. There are broad similarities in general tonal values and shape of Exhibit DMcC5 with footage of the individuals in grey trousers seen from distance on Mountcollyer Avenue on the 12th of May 2011. We are not able to positively include or exclude them from being the same garment.
>
> 53. Based on the improved close-up CCTV footage of **Person X** walking along Mountcollyer Avenue on the 12th of May 2011, the difference in stripe feature on the trousers tends to exclude them from being the same as Exhibit DMcC5, but the exact details are somewhat inconclusive.
>
> 54. Regarding the shoes worn by all the individuals and **Person X**, they lend limited level support to being the same footwear.
>
> 55. Regarding the comparison of the T-shirt worn by passenger in Silver Golf on ANPR on Belvoir Road on 13th of May 2011 at 12:49:57 against clothing item Exhibit DMcC6. As per my initial report. Although there are broad similarities between the two garments, these are not identical. There are apparent differences in the placement of the design on the front of the garments, these apparent differences may be due to poor resolution and difference or indeed, be actual differences. If actual differences, it would tend to exclude them from being the same and so lend no support.
>
> 56. As I could see no additional detail in the ANPR image of the car from Belvoir Road, this material lends at best, limited support to the assertion that the Exhibit DMcC6 and the T-shirt seen in the car are the same."

[12] Pausing at this point we must acknowledge that the import of fresh evidence of this nature has been considered by the CCRC. At paras [135] to [137] of the Statement of Reasons, the CCRC stated:

> "135. The CCRC take the view that the additional reports relating to the CDR (Mr Boyce), the photographic evidence (Mr Evans) and the DNA (Prof Syndercombe Court) do not amount to new evidence but that the way these matters were addressed in the original trial provides support for the argument that the original prosecution case was weak.
>
> 136. By this, the CCRC means it was accepted that neither defendant could be identified from the photographic evidence. In addition, Ms Irwin (the prosecution expert) accepted at trial that the CDR was very weak support for the Crown case.
>
> 137. Similarly, the most that could be said of the DNA was that Mr Smith could not be excluded as a major contributor."

[13] The above analysis is telling coming as it does from the specialist body which assesses miscarriages of justice, after their analysis of the case. However, on 23 May 2023, after the judgment of this court on the *Jogee* ground the applicant sought clarification from CCRC as to its statement of reasons for declining to refer the ground of appeal which is now pursued challenging the photographic evidence.

[14] The CCRC replied by e-mail dated 22 June 2023 which, *inter alia,* stated as follows:

> "The identification of the defendants by eyewitnesses was also considered at the first appeal and is addressed in paragraphs 41-46 of the court's first judgment *R v Smith & Greer* [2014] NICA 84. However, there the Court of Appeal did not consider the photographic evidence and it was wrong for the Commission to conflate the two. The issue can be resolved by deleting the text highlighted below:
>
> The CCRC has noted that the Prosecution attempted to identify Mr Smith and encouraged the jury to identify him from the photographic evidence. It was accepted at trial that this should not have occurred. This was addressed at paragraphs 41-46 of the appeal judgment and cannot therefore form the basis of a new appeal.

> The Commission confirms that this does not alter any aspect of the decision not to refer on the basis of the photographic material if considered."

[15] The CCRC quite properly provided the above clarification which was in relation to the Court of Appeal decision in 2014. However, we note that the CCRC did not alter its opinion on the photographic evidence aspect of this appeal. The applicant does not therefore have the support of the CCRC in putting forward an application for leave on the two grounds of appeal. In this regard we also note the significant cross over between ground 2 in the original grounds of appeal (which criticised the judges charge) and ground 5 now pursued. This is recognised by the applicant. We obviously cannot countenance a repetition of arguments having dismissed the *Jogee* appeal. To be clear we have already said that the judge's charge cannot be impugned as the first Court of Appeal held.

[16] Following on from what we have just said we reiterate what should be a well-known and uncontroversial principle to criminal practitioners ie, appeals cannot endlessly be brought on the same point and that there is a strong imperative for certainty in law. This is well expressed in *R v Foy* [2020] EWCA Crim 270. In that case Davis LJ said at para [50]:

> "One core principle relating to the good administration of justice is the need for finality in litigation. It is ordinarily the obligation of a party to advance his whole case at trial: and an appeal cannot simply be treated as a means of having a second go. There may be some exceptions to this general approach: but that remains the general approach. Were it otherwise, the whole trial process would stand to be subverted."

The applicable legal tests

[17] Section 14(4A) and (4B) of the Criminal Appeal Act 1995 states:

> "(4A) Subject to subsection (4B), where a reference under section 9 or 10 is treated as an appeal against any conviction, verdict, finding or sentence, the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference.
>
> (4B) The Court of Appeal may give leave for an appeal mentioned in subsection (4A) to be on a ground relating to the conviction, verdict, finding or sentence which is not related to any reason given by the Commission for making the reference."

[18] The effect of section 14(4A) is that subject to (4B), it prohibits an appeal on any ground which is not related to any reason given by the Commission for the reference. Section 14(4B) confers a discretionary power on the Court of Appeal to give leave to appeal on a ground which is not related to any reason given by the Commission for making the reference. Following from this statutory provision it was common case that notwithstanding an unsuccessful CCRC reference a further appeal could be brought pursuant to section 14(4B) but that leave was required.

[19] The effect of these provisions is that the Court of Appeal *may* grant leave to appeal on grounds unrelated to any reason given by the Commission for making a reference. The exercise of this discretion is not precluded even if the grounds for making the reference prove unsuccessful. The range of factors that the court can take into account in exercising this discretion are not spelt out. Plainly, the interests of justice will be at the forefront and in considering whether to grant leave in respect of unrelated grounds the court would at a minimum require to be satisfied that the additional grounds are arguable and may undermine the safety of the convictions. There is no explicit requirement to extend time as in a conventional appeal. This could lead to is the probably unintended consequence that an applicant may piggyback grounds of appeal long out of time which would not necessarily survive the rigorous tests for an out of time appeal summarised in *R v Brownlee* [2015] NICA 39. However, we see no reason why this court would not have regard to the *Brownlee* principles.

[20] We acknowledge that we are not bound by either the refusal of the CCRC to refer these grounds or the previous decision of the Court of Appeal. However, both are of relevance in assessing whether leave should be granted. That is because in assessing whether leave is to be granted, we have to take into account all the circumstances of the case.

[21] We adopt the dicta which has been relied upon by both the prosecution and defence provided by *R v Winzar* [2021] 4 WLR 2, where Macur LJ stated at para [3]:

> "… there is nothing in section 14(4B) that precludes us from considering an application for permission to pursue grounds of appeal arising from reasons which have already been considered and rejected by the CCRC in deciding whether to refer the conviction to this court, and equally that there was nothing in either the statutory provision, nor the authorities that requires the defendant to demonstrate "substantial injustice" in order to succeed, as is required in "change of law" cases. That said, we considered that the CCRC's inquisitorial role and its investigatory powers, demonstrably articulated in the comprehensive report before us, created a particularly high hurdle for the defendant to clear when suggesting that there is "fresh evidence" which provides a viable ground of appeal. Put shortly, the fresh grounds advanced

would need to effectively establish an error in the analysis already undertaken. (See *R v James (Wayne) (Practice Note)* [2018] EWCA Crim 285; [2018] 1 WLR 2749 at [38(vi), (vii)].)"

The test for admission of fresh evidence

[22] The admission of fresh evidence on appeal is governed by section 25 of the Criminal Appeal (NI) Act 1980. It states:

> "25 (1) For the purposes an appeal, or an application for leave to appeal, under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice-
>
> (a) …
> (b) …
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -
>
> (a) whether the evidence appears to the court to be capable of belief;
>
> (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[23] In *R v Pendleton* [2002] 1 Cr App R 34, the House of Lords considered the circumstances in which fresh evidence should be admitted. Lord Bingham said at para [10]:

> "The Court of Appeal will always pay close attention to the explanation advanced for failing to adduce the evidence at the trial, since it is the clear duty of a criminal defendant to advance any defence and call any evidence on which he wishes to rely at the trial. It is not permissible to keep any available defence or any available evidence in reserve for

> deployment in the Court of Appeal. Thus, the practice of the court is to require a full explanation of the reasons for not adducing the evidence at the trial: *R v Trevor* [1998] Crim LR 652. It is, however, clear that while the court must, when considering whether to receive fresh evidence, have regard in particular to the matters listed in section 23(2)(a) to (d), and while in practice it is most unlikely to receive the evidence if the requirements of (a), (b) and (c) are not met, the court has an overriding discretion to receive fresh evidence if it thinks it necessary or expedient in the interests of justice to do so."

[24] In a subsequent case of *R v Erskine* [2009] 2 Cr App R 29, Lord Judge CJ said at para [39]:

> "Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice. The considerations listed in subs (2)(a)-(d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore, if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied."

[25] Section 25(2) sets out four considerations from (a)-(d) that the court must have regard to when deciding whether the interests of justice test is satisfied. Those requirements are fourfold; whether the proposed evidence appears capable of belief, may afford a ground for allowing the appeal, would have been admissible at trial, and whether there is reasonable explanation for failing to adduce the evidence at trial.

[26] The authorities make clear that the failure to provide a reasonable explanation is not determinative of the interests of justice test. See *R v CCRC ex p. Pearson* [2000] 1 Cr App R 141, [13] per Lord Bingham.

[27] Further guidance is found in *R v Pendleton* [2002] 1 Cr App R 34. In that case the House of Lords considered how the appellate court should assess the potential impact of fresh evidence on the safety of the conviction. Lord Bingham emphasized the need for the appellate court to bear in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.

[28] Recognising the limitations of an appellate court over a court of first instance Lord Bingham also established what has latterly become known as the jury impact test. He then concluded on this point as follows:

> "… The Court of Appeal can make its assessment of the fresh evidence it has heard but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

[29] The overarching test which is applied in this jurisdiction is found in *R v Pollock* [2004] NICA 34 per Kerr LCJ at para [32] which reads:

> "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."

[30] We have also been referred to a helpful synopsis of the approach to fresh evidence in appellate proceedings from *Valentine's Criminal Practice and Procedure* which reads as follows:

> "If it finds the new evidence conclusive in favour of the appellant it simply quashes the conviction. If after considering the new evidence plus the original trial evidence, it finds that a reasonable court of trial might have a reasonable doubt as to guilt, it quashes the conviction and then considers whether to order a new trial. If on all the evidence now available there is no reasonable doubt, the conviction should be affirmed. These principles have to be applied where the new evidence on both sides consists of expert opinion. If the original conviction was therefore based on a premise now shown to be unfounded and the evidence as a whole is such that a reasonable court of trial may resolve the conflict of fact and opinion in such a way as to find a reasonable doubt, the conviction must be quashed. The sole test is whether the conviction is unsafe, and this usually means that the court thinks that the evidence might have reasonably affected the jury's decision to convict: *Pendleton; O'Doherty [2002] NILR 263 per Nicholson LJ at 273c – 275b, e.*"

Discussion of the application for leave to appeal

[31] In considering the question of leave regard must be had to the characteristics of the particular case at issue and its history before the courts. The ultimate outcome in each case will inevitably depend upon the facts. Two core principles of law also bear repetition at the outset. The first is that matters of assessment and weight of the evidence are for the jury and not for the judge. The second is that in assessing a circumstantial case (such as the present), the court should have regard to all of the strands of evidence relied upon and consider the prosecution evidence as a whole – see *R v Courtney* [2007] NI 178 and *R v Meehan* (No.2) [1991] 6 NIJB 1.

[32] This court has recently considered the nature of circumstantial evidence in *R v Robinson* [2021] NICA 65, paras [7]-[9] as follows:

> "[7] The seminal decision in relation to circumstantial evidence is a decision of the House of Lords in *McGreevy v DPP* [1973] 1 All ER 503. There, this well-known passage from Lord Morris is found:
>
> > 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable

> doubt. This is a concept that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally, a jury can fully understand that if a fact which they accept is inconsistent with guilt or maybe so they could not say that they were satisfied of guilt beyond all reasonable doubt.
>
> In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt.'

[8] In this jurisdiction, the Court of Appeal has set out the correct approach when dealing with circumstantial evidence in *R v Kincaid* [2009] NICA 67 particularly at paragraph [22] as follows:

> 'The case against the appellant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well know passage from the judgment of Pollock CB in *R v Exall* 1866 4 F& F:

> 'What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved.'"

[9] The above analogy has been reiterated in our courts on numerous occasions. In *R v Meehan &* Ors [1991] 6 NIJB Hutton LCJ also said:

> 'Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength it should not be incorporated into the rope… We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and

> that, when woven together with other strands,
> it may constitute a case of great strength.'"

[33] Previously in *R v Wootton and McConville* [2014] NICA 41 citing with approval the decision of *R v Hillier* [2007] 233 ALR 63 the Court of Appeal also provided the following useful guide to assessing circumstantial evidence:

> "Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation of other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal."

[34] The facts of the present case bear some brief repetition here (drawing from our previous judgment) lest they are forgotten amid technical legal argument. At approximately 12:15 on 13 May 2011 two men wearing balaclavas, one armed with a handgun and one armed with a shotgun entered 6 Hazelbrook Avenue, Bangor. Two males named Duncan Morrison and Stephen Ritchie were present in the house. The male with the handgun fired three shots hitting Duncan Morrison twice and Stephen Ritchie once. Duncan Morrison died at the scene.

[35] Following this violent incident the two masked men made their getaway in a silver Honda Civic car which had been stolen in March 2011 in a creeper burglary that occurred in West Belfast. This car was driven by a third person. It was later found burnt out at the Somme Centre, just off the carriageway between Bangor and Newtownards.

[36] At the same time a Volkswagen Golf similar to the one owned by the applicant's co-accused Greer, was seen parked at the Somme Centre. It was the prosecution case that the men in the Honda Civic had transferred to the Golf. Also, the case was made that a combination of CCTV and ANPR demonstrated that the Golf belonging to Greer had travelled from the Somme Centre to the Belvoir Estate before being stopped at Ormeau Avenue.

[37] The applicant, was arrested in the Golf 50 minutes after the shooting on Ormeau Avenue in Belfast. The car key of the Honda Civic which had been burnt out was found inside the Golf as were a number of items of clothing including a pair of gloves in the passenger footwell containing the applicant's DNA. A purple baseball hat was also found in the car from which on DNA analysis the applicant could not be excluded as a significant contributor to a mixed profile. The applicant later admitted wearing the purple baseball hat whilst messing around in Greer's car.

[38] A single particle of cartridge discharge residue was also found on one of the gloves which were in the car. The applicant initially maintained that the owner of the car was "my mate Pete" and that he had only just borrowed the car. Subsequently, he

accepted at interview that it was Greer's car and that he got into the car a short time before he was apprehended.

[39] The prosecution produced evidence which it said was indicative of a "dry run" having been made covering the same route the previous day on 12 May 2011. The evidence demonstrated that Greer left his home at Mountcollyer Avenue at 10:54 in his Golf and returned at 11:05 having picked up a passenger. The Golf was then driven to the murder scene arriving at 11:41. It was driven back to Mountcollyer Avenue at 12:26 at which stage Greer and his passenger went into Greer's house. The passenger wore a hooded top and light-coloured tracksuit bottoms. Later that evening a Golf was seen at Academy Street near to the applicant's flat at St Anne's Square. Greer arrived home with a passenger who wore light coloured tracksuit bottoms and, on this occasion, a purple baseball hat. The passenger emerged from Greer's house with a holdall which he put into the boot of a Honda Civic parked up the street. Further sightings were then made via CCTV and ANPR of a Golf and Civic.

[40] On the day of the murder and attempted murder Greer left his home in his Golf at 10:46. Five minutes later a silver Golf was seen at Academy Street, then Milltown Road then Belvoir Road. The Honda Civic was seen on ANPR north of the Somme Centre heading towards Bangor and Hazelbrook Avenue at 12:06.

[41] The prosecution case against the applicant (and his co-accused) was based on circumstantial evidence. It was said that this was a joint enterprise. It was also understood without any objection being made that the prosecution could not ascribe particular roles to either the applicant or his co-accused.

[42] The applicant was represented at trial by Mr Arthur Harvey KC and Mr Michael Duffy. He did not give evidence.

[43] We summarised the evidence relied upon at trial at para [13] of our first judgment as follows:

(a) Photographic evidence relating to 12 May (several sightings of a VW Golf, some accepted by the defence to be Mr Greer's car and some not; CCTV of individuals which was substantially challenged by the defence).

(b) The sighting of a VW Golf in Academy Street alleged to be the applicant being collected by Mr Greer.

(c) The timing of the journey from the Somme Heritage Centre to Ormeau Avenue where the applicant was stopped which left only five minutes for the handover to the applicant.

(d) A change of top in the vehicle the applicant was driving.

(e) The key for the Honda Civic used in the attack being found in the VW Golf.

(f) One particle of CDR found on the glove from the passenger footwell of the Golf. The major DNA profile obtained from the glove matched that of the applicant.

(g) Selective answers in the police interviews and lies about where he was living; the claim that his account of innocently collecting the VW Golf was inherently improbable.

(h) Adverse inferences from a failure to give evidence at trial.

[44] At trial, the prosecution invited the jury to compare the clothing worn by the applicant on his arrest, with that worn by the man in the footage at Mountcollyer Avenue, in particular at 12:26 on 12 May 2011, after the dry run and, later, at 17:35, as he walked towards the Honda Civic which he would later drive to the Newtownards Area to deposit. The jury were also invited to compare the t-shirt worn by the applicant on his arrest to the ANPR image showing the passenger in the Golf at 12:49 on 13 May.

[45] Four items of clothing worn by the applicant on his arrest, or otherwise connected with him, were of interest. He wore a light blue Florida State t-shirt, light coloured adidas tracksuit bottoms with dark stripes down the sides and dark trainers with a white edge to the sole. A purple baseball cap was also found in the Golf

[46] It is not disputed that the applicant's tracksuit bottoms and trainers bore similarity to that worn by the man seen with Peter Greer at Mountcollyer Avenue on 12 May. When Greer returned home from the dry run, arriving back at Mountcollyer Avenue at 12:26, and Greer and his passenger went into Greer's house, his passenger wore a hooded top and light-coloured tracksuit bottoms, with dark shoes showing a flash of something white as he walked.

[47] On the evening of 12 May, before the Honda Civic was deposited for use the next day, at a location near Newtownards, Greer arrived back home at 17:35 with what appeared to be the same passenger as before. Again, he wore light-coloured tracksuit bottoms with something white on his footwear and, on this occasion, a purple baseball cap.

[48] The cap was similar to that recovered from the Golf when the applicant was stopped. He could not be excluded as a significant contributor to a complex mixed profile obtained from the inside of the cap. Subsequently, he accepted in interview that he had worn it, although claimed that he had done so only while messing about in Greer's car.

[49] The passenger took a yellow bag into Greer's house, coming back out carrying a holdall which he put into the boot of a Honda Civic, parked further up the street. As he walked towards the Civic, his tracksuit bottoms could be seen to have a stripe down the side of the leg. At 17:38, he drove off in the Civic while Greer left in his Golf.

[50] As to the ANPR image, captured at 12:50 after the murder, the passenger in Greer's Golf can be seen to be wearing a t-shirt which appeared light blue in colour. Dark areas, irregular in shape, can be seen either side of the seat belt. These corresponded with the dark pattern of the applicant's Florida State t-shirt worn by him when he was stopped in the Golf 17 minutes later, at 13:07.

[51] It was never suggested that this imagery was crystal clear. However, the significance of the ANPR image is that the camera was situated at a point before the Golf could have turned into the Belvoir Estate, where the applicant claimed in interview he first got into the car.

[52] On appeal the prosecution reiterates the case made at trial that the ANPR image could not be considered in isolation to connect the applicant to the offending. Specifically, the prosecution refers as follows:

> "The contention that Smith was the man in each instance was supported by the following evidence:
>
> (a) the fact that Smith was in the Golf when it was stopped by police after the murder;
>
> (b) the evidence of the Golf travelling to Academy Street, near to where Smith was living, on three occasions over the two days when Greer either gained or lost a passenger;
>
> (c) Smith's lying attempts to distance himself from his flat in St Anne's Square;
>
> (d) his implausible story about how he came to be driving the Golf;
>
> (e) all the other evidence detailed in the respondent's first skeleton argument at paras. 33 to 64 and summarised by the court in the first judgment, at [3] to [13] (see also in the conclusion below); and
>
> (f) of most obvious relevance to the ANPR image was that Smith was stopped in the same car 17 minutes later wearing a light blue t-shirt with a pattern on the front;"

[53] Therefore, the prosecution maintained the case that the combination of that other evidence, when taken together with the similarities between their clothing, justified a conclusion that the applicant was indeed Greer's passenger seen in the CCTV on Mountcollyer Avenue and on the ANPR at Belvoir Road after the murder.

[54] In light of the foregoing it is plain to us that the prosecution was not making a case based on direct identification of the applicant. Rather they were asking the jury to piece together various strands in order to decide on the basis of everything they heard whether or not he was involved in this criminal enterprise as secondary party.

[55] On 25 November 2014 the Court of Appeal dismissed the appeals that were brought against conviction including that of this applicant. The judgment was delivered by Girvan LJ and is reported at [2014] NICA 84.

[56] In that appeal the applicant was represented by different counsel, Mr Brendan Kelly KC. He relied upon four grounds of appeal which are set out at para [40] of the judgment of the court as follows:

> "[40] Mr Kelly in his submissions sought to rely on four grounds of appeal. The first ground of appeal was that the trial judge failed to properly direct the jury in the light of what Crown counsel said in his closing speech in relation to the identification of the appellants as being the potential gunmen involved directly in the shooting. The second ground of appeal related to the question of the finding of a single CDR particle on a glove connected to Smith. Thirdly, counsel further relied on what was alleged to have been an error by the judge in giving the Lucas direction in the case. Fourthly, it was alleged that the trial judge erred in his directions in relation to adverse inferences."

[57] The Court of Appeal concluded that the circumstantial evidence against each appellant was "very strong" and was in no doubt as to the safety of the convictions. Para [49] also sets out the court's consideration of fresh evidence which was available to the defence at the time as follows:

> "[49] We rejected the application to adduce additional evidence. Mr Kelly accepted that there was a high threshold for the introduction of fresh evidence. The appellant could not in fact proffer any reasonable explanation for the failure to adduce the evidence at trial. The appellant was represented by very experienced counsel and solicitors at the trial. They effectively cross-examined Anne Irwin who accepted that the CDR was very weak support for the Crown case. The appellants' representatives may well have considered that nothing was to be gained by adducing any further expert evidence on the topic such as that proffered by Mr Boyce. His categorisation of the evidence as "insignificant" is in any event a value judgement on the extent of the relevance

> of the evidence which was a matter for the jury. The evidence would not in itself have offered a ground for allowing the appeal nor even if accepted, would it call into question the safety of the conviction in the light of the rest of the strong circumstantial case. The judge in his charge reminded the jury of Ms Irwin's evidence that the particle provided very weak support for contact with a cartridge source such as found at [the property in] Hazelbrook Avenue, and he reminded the jury that she also referred to the means of secondary transfer. Both the Crown and the judge in his charge made clear the limitations of the evidence."

[58] Two reports were obtained from Mr Boyce mentioned above. He is a forensic scientist. These reports are dated 26 May 2014 and 4 March 2019. The first report discusses guidance in relation to CDR coding. The second report provides an opinion that there is no support for firearms contact and that the presence of a single particle of cartridge discharge residue CDR is insignificant. In any event these reports are not relied upon as fresh evidence in this application.

[59] As regards the first appeal we also note that the applicant in what is entitled " "proof of evidence" to the CCRC states at para [27] that:

> "EMD were instructed by my trial solicitors to analyse the CCTV footage. Eddie from EMD was present at trial but he did not give evidence. Arthur Harvey QC reintroduced the Hindsight presentation in his closing argument and highlighted inconsistencies that EMD had uncovered."

[60] In the same document at para [37] the applicant states that he contacted a Mr Boyce independently after the case and sent him a copy of the Crown forensic report. At para [45] he states:

> "Following the grant of permission by the single judge (based on Mr Harvey's grounds) Mr Harvey arranged for Eddie from EMD Media to attend the Court of Appeal in Northern Ireland to assist with challenging the Hindsight evidence. Eddie McDowell from EMD Media attended the Court of Appeal however Brendan Kelly QC decided not to rely upon him."

[61] At this point we turn to consider the conduct of the original trial which was led by a highly experienced counsel Mr Harvey. We have been provided with transcripts and notes of consultations with the applicant which are proof of the defence strategy that was employed. From the material we have seen we can see that a decision was taken by Mr Harvey to challenge the photographic evidence before the jury. The

assistance of an expert (Mr McDowell) was available to the defence. However, a clear and informed choice was made not to call upon him or cross examine the prosecution expert Mr Matthew Cass.

[62] That is not the end of the matter because another prosecution witness DC Beattie was called to deal with the photographic evidence. He gave evidence over a number of days by way of commentary on the CCTV evidence, but he did not provide any opinion upon it. Mr Harvey asked questions in cross examination.

[63] We have also reviewed the transcript of evidence of Mr Cass on 6 March 2013. He described himself as a principal consultant specialising in CCTV analysis and specifically vehicle identification. His evidence simply dealt with vehicle identification of the Golf as a Mark 4 Golf at various locations of relevance and the Honda Civic. With some of the imagery he could not be definitive. It does not deal with the applicant's clothing. He was taken through some CCTV evidence which was put together in the Hindsight analysis and he was then cross examined briefly by defence counsel. A feature of Mr Harvey's questioning was an examination of the issue of unconscious confirmation bias, the danger of looking for corroboration of a preconceived view or theory that an expert may already have in mind and subconsciously try to fit the available evidence into that theory. It was accepted by Mr Cass that this was something to be guarded against by expert witnesses and indeed anyone making important decisions.

[64] The notes of consultation between the lawyers and the applicant which have been volunteered are also insightful. Counsel for the applicant did not suggest from these notes that any particular support could be gleaned. Accordingly, we do not need to specifically quote from them as an overview is sufficient to establish a number of points which do not assist the applicant. First, it is clear that the applicant was fully sighted on the strategy being deployed by his counsel, specifically that a combination of the circumstantial evidence was difficult for the applicant particularly the Honda key being found in the Golf. At one point the applicant also says himself that he is worried about the T-shirt. In addition, and of particular significance, is that Arthur Harvey's tactic of simply critiquing the Hindsight presentation before the jury was discussed and agreed with the benefit of advice from EMD Media. This was clearly seen as the best chance of placing a reasonable doubt in the mind of the jurors rather than opening up issues through cross examination. The notes also clearly point to the fact that the co-accused Greer was running a cut throat defence.

[65] Three other parts of the trial transcript have influenced us in our evaluation. First, the evidence of Lesley-Ann Beck which is instructive as to the DNA evidence. Second the closing speech of Mr Harvey which is relevant in relation to photographic evidence. Third, the judge's charge particularly where he summarises the parts of the evidence now at issue.

[66] First we reference some portions of the evidence of Lesley-Ann Beck on the DNA issue which we set out as follows:

Q. Were you able to carry out any analysis of the minor profile relating to the right glove?

A. Yes. I looked at the profile of Jamie Smith and concluded that he could not be excluded as being a minor contributor from the glove, sorry, from the right gloves – I was able to assess the minor profile from the right glove, but I was unable to do any –

Q. In relation to the left glove you couldn't –

A. I wasn't able to do any meaningful interpretation from the left glove.

Q. But your conclusion the right glove was that Mr Smith could not be excluded, is that right?

A. Yes, that's correct.

[67] Under cross-examination by Mr Duffy (who then appeared for the applicant) the witness continued as follows:

Q. Mr McCollum gave you the example of if he put his hand on the glass that there could be a DNA profile obtained from that. Do you remember that question?

A. Yes, I do.

Q. Similarly, if one then wrapped a cloth around that glass, is it possible that one could have transferred onto that cloth the DNA profile which was on the glass or the cup?

A. Yes, that would be correct, yes.

Q. And that would be a transfer of DNA from one item to another, so even though Mr McCollum may not have touched the item which has been in contact with the glass, his DNA would be on that other item?

A. Yes, that would be known as secondary transfer.

[68] Under cross-examination by Mr McDonald KC who appeared for the co-accused, Greer, she also said:

> Q. Miss Beck, if I might just deal with a number of basic matters about DNA. It is of course now known that DNA is a remarkably sophisticated science and can detect almost material which would be invisible to the naked eye, in other words traces, isn't that right?
>
> A. Yes, that's correct. Advances in science have moved on, yes.
>
> Q. So when you say to this jury that the percentages are in the orders of billions, you may take it that as far as I'm concerned that science is that sophisticated …
>
> A. Not on the – yes, on the, yes, on the right glove.
>
> Q. That's the one I am talking about, yes?
>
> A. Yes.
>
> Q. I'll come back to that in a moment now. I just want to be clear about how narrow a ground we are on or how wide. And then the left glove, what about it?
>
> A. The left gloves also produced a mixed DNA profile and it was possible to determine the major profile from this glove and this profile matched the profile attributed to Peter Greer.
>
> Q. Yes. So coming back now to the right one because I understood that you mentioned a mixed profile and you made, if you like, you framed your finding as to the mixed profile in a particular way and if you could just repeat it, if you can, to me from the note or the report that you have helpfully prepared.
>
> A. Jamie Smith could not be excluded as being a minor contributor from the right glove, which was item 33, LML3.
>
> Q. Jamie Smith could not be excluded. Now we know, if I understood your evidence correctly, that both of these gloves which were found, both sets of these gloves which were found in Mountcollyer, are

unmistakably identified as being the DNA of Mr Peter Greer, but as far as I understand it as one glove is concerned, you say that the profile, is that accurate?

A. Yes, to the right glove, that's correct.

Q. Now I want to try, if I might, we have heard a scale of what might be described as a scale of probability which scientists like yourself use to determine whether a person is or is not a contributor to the profile. Now, do you use that scale in determining whether or not, when you say that someone cannot be excluded which is a negative."

[69] We note that the judge intervenes at one stage to bring some focus to the exchange as follows:

"Judge Smyth: But the question really comes down to this, doesn't it, is the scale you've mentioned, is it used in relation to DNA retrieval at all?

Witness: In relation to?

Judge Smyth: Assessment of your conclusions in relation to DNA matching, is that scale used?

Witness: Yes, we do use it on a basis, yes.

Mr McDonald: Yes. Could I ask you to put that finding in respect of this gentleman Smith, could I ask you to put that on the scale – weak, very weak, strong, I think those were the sorts of things that you mentioned.

A. The weak/strong was in relation to the fibre evidence. What in DNA profiling terms, I could not exclude Jamie Smith as being a minor contributor from the right glove. I'm not able to put a statistical evaluation on that because it is not kind of clear.

Q. That's the point that I am on. In other words, the reason that you chose that designation with such care, may I suggest, is because you cannot rule out the other proposition which is that Mr Smith's DNA is not on that particular glove, isn't that right?

A. Well yes, what I have said is –

Q. Well is the answer to that yes?

Mr McCollum: Let her finish the answer.

Mr McDonald: Just hold on a minute.

Witness: Although Jamie Smith could not be excluded, I feel that is – kind of looking at that as a minor contributor from the right glove, I have looked at Jamie Smith's profile and looked at the contributor that was left and I felt that he couldn't be ruled out although I couldn't put a statistical analysis on it.

Q. Now, may the jury take it that at that level of quantity and ability to analyse, that it would be quite frankly impossible for you to speculate about the circumstances in which it might have got there?

Mr McCollum: It is not the job of this witness to speculate about the circumstances in which it got there in any circumstances.

Judge Smyth: That is more a comment, Mr McDonald.

Mr McDonald: Yes, fair enough. It is an expert witness, your Honour, I am simply trying to see where we are, but I think that's more or less everything, your Honour, thank you very much."

[70] Next, we turn to the closing speech of Mr Harvey which important in our evaluation of whether there is a valid issue now raised by the applicant as regards the

photographic evidence. We refer to the following extract from the closing speech to illustrate the point:

> "Let's just see what Mr Cass told you about himself. Mr Cass told you, "I'm a senior consultant in the video investigations team, part of an incident investigation and reconstruction group at the Transport Research Laboratory in Berkshire …."
>
> Now, it is difficult to imagine an individual better qualified when it comes to examining video evidence of both vehicles and people. He has an Honours degree in photography. He has a degree in video imaging - illustration - medical illustration, that's of people. You as a jury are being asked to do something that he wasn't asked to do. Who do you think would have been better qualified in dealing with this issue? Any one of you or Mr Cass or what the law says? It's your function to look at the video because it's a piece of real evidence, to determine what you see on it, but secondly, you do that in accordance with the evidence. And here is an expert in evidence - an expert who gave evidence in this case and he wasn't asked one single question about this and yet, we know that the Crown or the prosecution must have had this in contemplation, certainly from at least the 5th of March, if not earlier. Now, why is that? Why are you not being given the assistance that you might be entitled to?
>
> Well, firstly, could I ask you to look at the image? Now, do any of you - any of you - know where that came from? Know what it relates to? Well, let's see with the Crown - the prosecution have said what that constitutes. The figure that you can see just to the right of the two white doors has been taken from the video clip. It's been taken from a video clip which is known as clip 18, and clip 18 was taken at 17.35 on the 12th of May 2011. And what my learned friend said, you can see the mark on the outside right leg and that shadow, which is seen running down the leg, are three stripes from a pair of Adidas grey tracksuit bottoms. Now - and that really what has happened is that the three stripes have merged as one. Three stripes merged as one.
>
> Now, with respect to my learned friend, that's what he says, but where's the evidence? You look at it. Do you see three stripes? Have you been given any reason why three stripes should merge as one? Do you have the expertise to

> arrive at that conclusion? This again is one of those matters which comes back to the confirmation error. If that's what you want to see, I can't stop you seeing it. But what I can do is ask you to consider why do you see that as three stripes submerged as one. Why? Have you been given any scientific explanation as to why that should happen? Have you been given any explanation which would account for it not being seen elsewhere? The answer to that is quite plainly no, because the one expert who may have assisted you in relation to this isn't Constable Beattie, because for all of the expertise that he has and demonstrably has, he is not qualified in relation to the evaluation of photograph and electronic imaging in the same way as Mr Cass.
>
> Now, one has to ask why, if this was such an important piece of evidence, that it hadn't been addressed in terms of producing this image or showing it on the video before my learned friend stands up to address you. Undoubtedly the one thing about it is, it's a piece of real evidence. It's a photograph and it's what you see is important, not what an expert sees, but surely you must say to yourself, why is it produced this late? Why has an expert not been called to give evidence in relation to it? And why is it being asserted that it shows three stripes that have merged into one?

[71] Mr Harvey continued by playing clips to the jury during his closing and commenting upon them. This can be found at pages 507–519 of the transcript. Clips 12 and 18 were shown to the jury which were from CCTV in Mountcollyer on 12 May 2011. Mr Harvey over the course of his detailed closing highlighted to the jury deficiencies in the image quality, colour, light and shadow distortion of the images, which he suggests points away from the applicant's involvement. He drew attention to the weather, ubiquitous nature of grey tracksuits and the inability to see three or indeed any actual stripes on the tracksuit in the images. He similarly drew the jury's attention to how very common trainers are and the lack of distinctive features on the trainers as seen in the images. He emphasised to the jury that the one thing that this evidence could not do was identify the applicant.

[72] Finally, we turn to the judge's charge. Obviously, it is instructive to look at how he dealt with the defence case and so we set the relevant portion out in some detail as follows:

> "Now I said I would deal with points made by the Defence. I will do that very briefly, and again I will not repeat everything (it will take far too long) you heard on yesterday and the day before. Mr Harvey took you through some clips taken by the CCTV from Mountcollyer. He

pointed out the quality of the images, and I think here at the conclusion of this I might just simply show a simple contrast. He pointed out the quality of the images. It's accepted that Detective Sergeant Beattie accepted that there was a purple tinge to the footage taken from the CCTV in Mountcollyer, and Mr Harvey again emphasized that. So there can be colour distortion, there can be light distortion, there can be the quality of the individual CCTV. And also Mr Harvey, at some length, pointed out that Mr Cass (who gave evidence on the recognition of cars) there was no expert called to assist you in relation to what appears on the screen. Now there is, just simply to give you ... I'm not sure if it takes it time to get it up, the one to the right is the footage that was actually played to you. I'm not going to go through this in any great detail, members of the jury. The one to the left is what Mr Harvey was using …

Oh, I beg your pardon. I think that's very important, members of the jury, that I should get this right. The one to the left is what you were played in the time-line, and I make no comment about that because it is so obviously a matter for your assessment. You just look at that, and assess the points made by both Mr McDowell, and the points made by Mr Harvey. Again, the one on the right is what was provided to Mr Harvey. It may well be that whatever difference (and this is that matter that is for you to decide) it may be because it's a copy, or something else there seem to be some differences. But that is what Mr Harvey was working from and, again, it's no criticism that was the copy that was provided to him. So look at those; I make absolutely no comment about them. You can see both the left and the right. I think that's that. Now Mr Harvey referred to shadow, light distortion, quality and he made his points. What he's saying is that rather than pointing towards Mr Smith's involvement, what he showed you points away from Mr Smith's involvement, but these are matters for your assessment. You make your own assessment. Mr Harvey referred to the weather, the frequency of grey tracksuits, and challenged that anyone could usefully concede that what was seen in the moving images or the still was, in fact, three stripes. He put to you that what could be seen, in fact, did the opposite of what Mr McDowell was contending - namely that there was an absence of apparent stripes, and the presence of other markings (he said) ruled out Mr Smith as the person seen in the images. He made some similar points about the

> Automatic Number Plate Recognition shot taken at Belvoir on the dual carriageway, and he challenged the assessment that Mr McDowell asked you to draw. Again, you look at this and you examine it. Also look at the times. Look at the manner in which these matters came to be disclosed to the police. Mr McDowell says that really Belvoir was only mentioned at the very end, when Mr Smith realized that he was in trouble, and that the fact remained the car showed a definite passenger at a time before it went into the Estate. Mr Harvey said if there was time to drop off a passenger in the Estate, there could have been time for a hand-over of a car. Mr McDowell said there was about four minutes in the Estate for that person to get out, and the driver to hand-over, and you have had no evidence as to, to whom, and as to who was present, and to where, from Mr Smith. He makes the point that if that had been something that occurred, would you not expect a person accused of a murder to tell but(sic) it? The ANPR would be available quickly to the police after all, as it is their system. So the ANPR would be available quickly. The Russell's footage would only become available to the police after they had commenced their investigations, and until then the going into the Belvoir Estate, and the going out of the Belvoir Estate would not have been obvious, unless time made it obvious. Mr Harvey also made points about the inferences or assessments you've been asked to draw about Academy Street. I have already touched upon Mr Cass's evidence, and these are clearly matters for you. You no doubt will look at this and examine it."

[73] All of the above extracts from the trial reinforce the fact that the defence clearly made the case that the photographic evidence was weak. The defence also made much of the fact that the prosecution had no additional expert evidence to assist the case they wanted to make. The judge also reiterated the limitations of the evidence and correctly directed the jury that they had to decide what was true as a matter of fact. That is as it should be.

[74] It is within the overall context of the case that the reports from Mr Evans must be viewed. In particular, it is important to bear in mind that the applicant was stopped on Ormeau Avenue, in the same car as that in the ANPR image, at 13:07, 17 minutes after the ANPR image was captured, at 12:50, before it entered the Belvoir Estate. The car was sighted regularly on its route into the city centre, beginning at 12:55 when the Golf, admittedly driven by the applicant, came out of the Estate. His account for his driving the vehicle was wholly implausible.

[75] In summary, the first report of Mr Evans identified similarities between the clothing and no inconsistencies which could not be explained by other factors. Of the comparison between the ANPR image and the applicant's t-shirt, he noted in his first report that the ANPR image was of poor resolution and, at para [30], was a scanned copy where the overall colour was unreliable but that the t-shirt was light-toned and tended towards the blue end of the spectrum (before positing other potential colours).

[76] At para [32], he stated:

> "There are a number of small, dark-toned patches apparent at the front and right side of the garment (left as we look at the image). We can see in an overlay image, while they appear to be of 'roughly' similar size and general location to some items of the graphic design on Item 2 DMcC6, it is very uncertain as we cannot see the whole design. It is probable that there are creases and shadows which the camera will struggle to resolve adequately through the windscreen and therefore it is not possible to draw a conclusion that these patches are consistent with Item 2 DMcC6 (see Fig. 07 ANPR overlay Image 4)."

[77] At para [60], he summarised his findings as:

> "While there are a small number of broad similarities between the two items of clothing, the apparent differences in the placement of the dark patches, unless satisfactorily explained, means we cannot categorically state that the garment in the ANPR camera is the same as that worn by the Defendant." [emphasis added]

[78] In his conclusion, at para [67], he said:

> "While there is a lack of a unique characteristic to conclusively link the two, the material lends at best, limited support to the assertion that the items are one and the same." [emphasis added]

[79] In the second report, dated 17 April 2023, Mr Evans again appears to have used a scanned copy of the ANPR image (albeit one subsequently provided by the PPS). He offers further analysis thereof which is repetitive and, again, emphasises the "lack of any unique characteristics to conclusively link the two garments", concluding, at paras [55] and [56]:

> "55. … Although there are broad similarities between the two garments, these are not identical. There are apparent differences in the placement of the design on the

> front of these garments, these apparent differences may be due to poor resolution and difference or indeed, be actual differences. If actual differences, it would tend to exclude them from being the same and so lend no support.
>
> 56. As I could see no additional detail in the ANPR image of the car from Belvoir Road, this material lends at best, limited support to the assertion that the Exhibit DMcC6 and the T-shirt seen in the car are the same. "

[80] Of course, categoric or conclusive support is not necessary for evidence to bear importance in a circumstantial case, when viewed in the context of other evidence. In any event, Mr Evans, over his two reports, confirms the existence of dark patches on the front of the light-toned t-shirt worn by the passenger, analysis of which appears pale blue in colour. He notes that any apparent differences between it and the applicant's t-shirt may be due to poor resolution.

[81] As to clothing, the language used by Mr Evans is again that of (an absence of) conclusive support. This is not one of the levels of support on the FIAG scale cited by Mr Evans and, again, suggests a lack of certainty, rather than a true weakness:

> "Only the most general characteristics can be observed in Clips A-Z, and due to the lack of medium or fine detail we cannot categorically state that the garment is the same as that worn by the Defendant."

[82] At paras [68] and [69], he acknowledged the broad similarities in the tone and shape of the garments, concluding that:

> "Given the poor quality of the footage and the lack of characteristic or unique detail to **conclusively** link the clothing viewed in CCTV Clips A-Z with the disputed t-shirt Item 2 DMcC6, and there being an apparent difference in the detail of the trouser leg stripes seen on CCTV and the disputed trousers Item 1 DMcC5, the material lends **no conclusive support** to the assertion that the items are one and the same."

[83] In his second report, with the benefit of the original footage, Mr Evans appears to come to a slightly different conclusion. That is so because he states, at paras [37]-[38]:

> "37. The supplied footage is less blurred and of a somewhat better quality (though not resolution) as that received initially. This enables one to better see the area of the trouser leg. The footage does not further support my

> initial observation of there being a stripe along the leg of the trousers. The better footage rather indicates that the previously observed apparent stripe or stripes, is more likely to have been the blurring of the shadow and natural crumpling rather than a single thick stripe or a number of closely spaced but poorly resolved stripes. An enlarged section suggests that the dark area is shadow. No additional stripe detail is seen (see Fig 03A).
>
> 38. A composite illustration showing a series of frames from the sequence demonstrates that the 'stripe' on the right leg is not seen in all the frames and in form, rather inconclusive with being a thick stripe or several thinner stripes in close proximity to each other (see Fig 03B)."

[84] Mr Evans also noted the broad similarity of the footwear (with the pale-toned strip running around the outsole) worn by the person in the footage and that seized from the applicant.

[85] In his summary, he continued:

> "49. Based on the improved closer footage of Person X dressed in grey trousers seen walking along Mountcollyer Avenue, compared with the detail on Exhibit DMcC5, they are not wholly consistent with each other. There is an apparent difference in that the feature I had previously defined as a 'stripe' appears to be more of a shadow which is not seen in all of the frames indicating that it may not be a permanent feature like a fixed stripe, but more a shadow, moving as the trouser leg moves with each stride." [emphasis added]

[86] In his conclusion, he also stated, at para [53]:

> "53. Based on the improved close-up CCTV footage of Person X walking along Mountcollyer Avenue on the 12th of May 2011, the difference in stripe feature on the trousers tends to exclude them from being the same as Exhibit DMcC5, but the exact details are somewhat inconclusive." [emphasis added]

[87] Having considered all of the above we agree with the prosecution submission that the fact that the stripe previously identified by Mr Evans may not be present or that the details are somewhat inconclusive falls very far short of "effectively demolishing" this aspect of the prosecution case as the applicant contends.

Ultimately, we have to view his evidence in light of the overall factual matrix of this case.

[88] Turning back to the position at trial, it is plain to see as we would expect that Mr Harvey methodically raised a number of questions for the jury to consider regarding the reliability of the CCTV footage in Mountcollyer Cresent. The applicant's counsel belatedly argues that Mr Harvey did not specifically address the jury on one ANPR photograph relied upon by the Crown (13 May 2013, 12.50). To our mind this is not fatal on an overall view as all of the photographic evidence was before the jury having been examined during the trial. We also accept the Crown's submission that the closing speech effectively dealt with the matters now raised and that the applicant was fully sighted upon the case that was made. We also accept the prosecution submission that the evidence had to be viewed as a whole.

[89] Next, we turn to the second ground of appeal upon which leave is sought. At the outset we must say that we are unconvinced that anything turns upon the point that it was only during his oral submissions in the last hearing before us that, Mr McCollum KC specifically stated that the disputed DNA evidence was adduced at the request of Greer's counsel, and that he could not therefore oppose this. It is submitted that, having conceded that this evidence was not of any significance against the applicant the Crown were under a duty not to adduce this evidence or at the very least to set out their concession in front of the jury. This it is said would have allowed defence counsel to comment and the judge to direct the jury accordingly. To our mind, this submission is divorced from the reality of the case that the DNA evidence at issue was not of real significance during trial and that there was other DNA evidence against the applicant. This is not a case where this piece of DNA evidence was crucial or attracted huge prominence.

[90] Professor Syndercombe Courts's report provides commentary and criticism as to the appropriate way in which evidence of this type should be given, some years after Ms Beck made her report and gave her evidence.

[91] We acknowledge that the law permits evidence of the type given by Ms Beck. In *R v Dlugosz; R v Pickering; R v S (MD)* [2013] 1 Cr App R 32 it was confirmed that evaluative opinion could be admissible regarding DNA evidence, even without a statistical basis. Sir John Thomas P, at paras [24] to [28], detailed the circumstances in which that could occur. Notably, in the second of the appeals, *Pickering*, the court said, at paras [78] to [80]:

> "78. Unlike the appeals in the other cases, the expert evidence in this appeal did not extend to any evaluative judgment on the likelihood of the DNA having come from Pickering. It went solely to the question of whether or not Pickering was a possible contributor and therefore could not be excluded, a point not in issue in the other two appeals. Thus, the contention that there was no statistical

> evidence or no evaluative evidence in the form of a hierarchy was not relevant.
>
> 79. The evidence of Mr Paddock on DNA can be summarised as supporting the proposition that Pickering could not be excluded as the person who had contributed to the DNA; if it was his DNA, then the account given by P was consistent with the results; the results also allowed for the possibility that the DNA was deposited when, on Pickering's account, he gave P a "wedgie."
>
> 80. That was relevant evidence, and the judge was right in admitting it. It was not peripheral. It appears that what Mr Paddock said was not really disputed. It is regrettable that the evidence could not have been put in a form which the jury could have received as agreed evidence."

(The criticism of the judge's charge in that case was rejected by the court).

[92] As forensic knowledge has developed in this area, we can see that Ms Beck might use different language now to explain the mixed profile and the judge might have charged in a more specific way. However, this new reality is not at all fatal on the particular facts of this case. That is because we are entirely satisfied that the mixed profile evidence was not of any real significance in this case made against this applicant. It does not have the importance that the applicant seeks to attach to it. At trial, no mention was made of it during the prosecution closing or that on behalf of the applicant, both of which concentrated on the DNA found on the other pair of gloves in the Golf, on which DNA matching that of the applicant was found. When the trial judge charged the jury, his focus was on the effect, on Greer alone, of the evidence of the gloves at Greer's house. There was therefore no danger, in such circumstances, of the jury attaching undue importance to it.

[93] In light of the foregoing we answer the four questions required of section 25 as follows:

(a) The fresh evidence from both experts is on the face of it capable of belief as a subjective opinion. There is one caveat which is that we do not consider a full explanation has been given for the change of emphasis in Mr Evans's second report (other than some better imaging of clothing being received).

(b) We do not consider that the fresh evidence affords a ground for appealing. The attempt to use the report of Dr Syndercombe Court to resurrect a case based on DNA evidence is weak when considered in the context of the case in its entirety. The attempt to reopen the case on the basis of Mr Evans's report also fails for the reasons we have given. Having carefully evaluated all that we have heard, and the detailed arguments made, this court cannot reasonably conclude that

the fresh evidence of Professor Syndercombe Court relating to DNA or Mr Evans regarding the ANPR could have made a difference to the jury's decision to convict.

(c) The report of Dr Syndercombe Court would be admissible as a subjective opinion. Mr McCollum faintly raised a point that Mr Evans's admissibility may have been questioned but as we have not heard any substantive argument on that we cannot make a determination and will take it that it could be admitted.

(d) We acknowledge that the applicant's current legal advisors did send correspondence to the original trial team. However, having examined all material from the trial and the appeal we are not convinced that a reasonable explanation has been given for the failure to produce the fresh evidence at trial. Rather we think that this is a case where a third set of counsel has simply directed other experts on the same point in order to resurrect an appeal where matters had previously been canvassed by two sets of highly experienced counsel. In addition, choices were made by trial counsel as to how to run the case which the applicant was sighted on. Absent some clear error (which we cannot discern) it is impermissible for an appeal to be pursued to have another go with the benefit of hindsight. Such an approach offends legal certainty and can only succeed where an obvious miscarriage of justice may have occurred. That is not the situation in this case for the reasons already given. This was, as an earlier Court of Appeal found in rejecting his appeal, a strong circumstantial case.

[94] We have had regard to the matters specified in section 25(2)(a)-(d) and to our overriding discretion to receive fresh evidence if we think it necessary or expedient in the interests of justice to do so. We do not consider that the evidence, if given at trial, could reasonably have affected the decision of the trial jury to convict.

[95] Therefore, it is not necessary or in the interests of justice to admit the fresh evidence and so we refuse both applications.

Conclusion

[96] Accordingly, having considered all of the evidence and the comprehensive submissions made on behalf of the applicant ,we decline to admit the fresh evidence applying the interests of justice test. We are entirely satisfied as to the safety of the applicant's convictions. We, therefore, refuse leave to appeal and dismiss the appeal.