Neutral Citation No: [2023] NICA 67	*Ref:* **KEE12277**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:* **22/041598/A01**
	Delivered: **25/10/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE CROWN COURT SITTING IN BELFAST

THE KING

v

JOSEPH JOYCE

_____

Mr Desmond Fahy KC with Mr Stephen Toal (instructed by Sheridan & Leonard Solicitors) for the Appellant
Mr Barra McGrory KC with Ms Natalie Pinkerton (instructed by the Public Prosecution Service) for the Respondent

_____

Before: Keegan LCJ, McCloskey LJ and Fowler J

_____

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

Introduction

[1] This is a judgment to which all members of the court have contributed.

[2] We are concerned with an appeal against conviction which is brought by the above appellant with leave of the single judge following a trial before Mr Justice Rooney ("the trial judge"). The conviction followed a jury trial and a guilty verdict delivered on 20 June 2022 in relation to the following offences:

(i) Murder.

(ii) Section 18 grievous bodily harm with intent.

(iii) Possession of an offensive weapon.

(iv) Affray.

(v) A second offence of possession of a weapon in a public place.

[3] The appellant was sentenced to life imprisonment in relation to the headline offence of murder, with a period of 10 years set before he is eligible for release by the Parole Commissioners. All other sentences on the other offences were ordered to run concurrently. There is no appeal against sentence.

[4] Three grounds of appeal are advanced against conviction may be summarised as follows:

(i) That the trial judge erred in not leaving the alternative verdict of manslaughter to the jury.

(ii) That the trial judge was materially misled when he made his ruling to treat a witness, Jonathan Thompson ("JT"), as hostile and hence he erred in that determination.

(iii) That the trial judge erred in allowing bad character evidence that the appellant was "the King of the Travellers" to go before the jury.

[5] The appellate test is as set out in *R v Pollock* [2004] NICA 34. In that decision which has been consistently applied by our courts, Kerr LCJ set out the principles to be applied by the Court of Appeal when considering appeals against conviction as follows:

> "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."

[6] We proceed to apply these appellate principles in undertaking our adjudication of the three grounds of appeal referred to above. In doing so, we record at the outset that no criticism is made of the legal directions given by the trial judge or the judge's charge.

Background facts

[7] It is common case and was known to all, including the jury, that both the appellant and the deceased are/were members of the travelling community as are their families.

[8] This case involves an incident which occurred in Enniskillen, Co Fermanagh on 11 April 2020. The appellant lived at an end house of the cul-de-sac called Coolcullen Meadows which bordered Drumawill Gardens in Enniskillen where the deceased's family lived. There was evidence to the effect that a party was going on towards the back of the appellant's home which came from an adjoining property. That party was at the home of the McDonagh family who lived there. What ensued on the street outside the appellant's property, was a verbal and physical confrontation between the appellant on the one hand and John Paul McDonagh, Gerard McDonagh and Jimmy McDonagh on the other hand. John Paul McDonagh ultimately died as a result of the altercation.

[9] Prior to the parties' interaction at the front of the appellant's property there had been a verbal altercation at the rear of the property. This resulted in the interface between the two families. It was not possible to determine with certainty who had instigated the altercation. CCTV footage was available of the events that took place and formed a pivotal aspect of the trial. We have also viewed the CCTV footage in the course of this appeal.

Summary of the CCTV evidence

[10] The single judge has helpfully summarised the CCTV in a way that we consider encapsulates the substance of it and which we adopt as follows:

> "(i) The appellant is seen standing on the road outside his property with an item in his hands variously described as a slash hook, bill hook or scythe.
>
> (ii) The appellant's children can be seen running into Charlie Rose Noble's (a neighbour) house.
>
> (iii) John Paul McDonagh, Gerry McDonagh and Jimmy McDonagh are observed running towards the appellant. John Paul McDonagh is holding a garden hoe above his head; Jimmy McDonagh has a long

knife; and Gerry McDonagh has concealed a large cider bottle under his coat.

(iv) The appellant retreats and squirts what was subsequently discovered to be an ammonia solution from a plastic bottle at John Paul and Gerard McDonagh.

(v) The appellant advances slightly and Gerard McDonagh throws a bottle at him, which misses and smashes on the road surface.

(vi) The appellant swings his weapon. At this stage, the McDonaghs are out of the picture captured by the CCTV.

(vii) John Paul McDonagh hands a hoe to Gerard McDonagh who swings at the appellant.

(viii) Rose McDonagh, the mother of John Paul McDonagh, Gerry McDonagh and Jimmy McDonagh, steps in between them and the appellant.

(ix) John Paul McDonagh swipes at the appellant with the long pole of his hoe on two occasions, prompting the appellant to squirt ammonia from the plastic bottle.

(x) Rose McDonagh attempts to separate the two McDonagh brothers and the appellant.

(xi) Jimmy McDonagh runs out of the screen view.

(xii) The appellant slaps or punches Gerard McDonagh to the side of his head which prompts John Paul McDonagh to push Rose McDonagh aside and to advance towards the appellant with the pole raised above his head.

(xiii) The appellant swings his weapon at John Paul McDonagh's legs, catching him behind the knee of his left leg, thereby causing the injury to the popliteal artery which subsequently proved to be a fatal injury.

(xiv) At almost the same time, Jimmy McDonagh hands Gerard McDonagh a shovel which he then raises and, according to Charlie Rose Noble, swings the shovel at the appellant, striking him between his left shoulder and head. No injury was sustained by the appellant.

(xv) For almost a minute, Gerard and Jimmy McDonagh and the appellant move beyond the area covered by the CCTV camera.

(xvi) When the appellant and Gerard McDonagh are seen again on the CCTV footage, Gerard McDonagh raises the shovel above his head and Jimmy McDonagh raises the knife.

(xvii) The appellant swings his weapon at Gerard McDonagh's legs, thereby causing a laceration. Gerard McDonagh does not swing the shovel at the appellant."

The respective prosecution and defence case made at trial

[11] The prosecution case was a simple one encapsulated in the prosecution opening. It was that the jury could be sure that the appellant voluntarily armed himself with a lethal weapon, namely a scythe or bill hook and, in addition to that, had a bottle of ammonia with him and thereafter willingly engaged in a street battle with the intent to cause really serious harm.

[12] Against that the defence case was equally simple that the appellant was acting in lawful self-defence and that he believed it was necessary to use force to defend himself and his family from the McDonagh's who were wielding weapons. The defence maintained that the amount of force used was reasonable in the circumstances.

[13] The defence position was presented at interview in a prepared statement which was read by the appellant's solicitor at police interview on 14 April 2020. We set this account out in its entirety as follows:

> "Just to help you when I read this into the record. This is a statement of Joe Joyce. On Saturday 11 April 2020, I was at my home at 14 Coolcullen Meadow in Enniskillen, with my wife Ellen and my three children aged seven, six and three. If I can just stop there during our consultations in the police station today there has been a mistake on my part in that his eldest daughter, who is Alice aged 7, wasn't actually at

the home, she was with her grandparents, so there is a slight mistake in the first sentence of that statement. So his eldest daughter, Ellen, sorry Alice, who is 7 wasn't at the home. The McDonagh family live in the next street over, I think it's called Drumawill Gardens. My back garden is in close proximity to theirs about two or three gardens away. Rosie McDonagh lives there with her children including her sons Gerard who is about 22, John who is about 18, and Jimmy who is about 17 years of age.

Throughout the afternoon we could hear them all drinking and having a party, music was playing, voices were raised, and they were arguing with each other. Several other females were there as well but I do not know their names. At around 8pm I had to go to the shops to buy some electric for the meter. The garage near our house was closed so I had to go to the garage on the Donegall Road which is about three miles away. Whilst at the garage I met a female police officer who asked me why I was out. I told her where I lived and explained why I was out, and she followed me back to the house to make sure I was going home. When I got back home Ellen came outside and told us that the McDonagh's party was getting out of hand, and they were arguing with each other. The police officer said that she would go over to speak to them, but I do not know if she did. A short time later I was outside in my back garden tidying up and I could hear the McDonagh's shouting over at me shouting something like you Joyce bastard we are coming over to kill you and burn your house with your wife and you in it. I jumped up onto the square box at the side of the house that houses the chimney pipe of the boiler so I could look at them and see what their problem was. I told them to wise up and that I wanted no trouble. I was worried about them coming round to our house and attacking me and my wife and children. I appealed with them to leave us alone. They were all drunk and this just made them worse. Gerard shouted, 'we're coming over to kill you.' I again pleaded with them to leave us alone. By this stage I was genuinely worried for my own safety and especially for my wife and children. Ellen was upstairs looking out of the window at what was happening and was terrified. Suddenly she screamed down to me that they were coming over. By this stage I was terrified, and Ellen and the children were hysterical. I feared the worst and grabbed a weed slasher that was inside my shed, and I went out to the front of the house.

As I got out on to the street, I could see the three McDonagh men running down my street towards me followed a few seconds later by several females. Gerard had something under his jacket and he said, 'I am going to shoot you, I am going to shoot you.' I genuinely feared he had a gun and I thought he was going to shoot me. Jimmy had a large knife which was about 12 inches long and had a metal handle. John was armed with a spade or shovel of some sort, and they all approached me. I shouted at Rosie to take her sons home but she just shouted 'kill the Joyce bastard.'

They all surrounded me and started to attack me, I was terrified. I thought I was going to die, and I had to fight for my life. Jimmy was stabbing and swinging at me with a knife maybe about 10 or 15 times. Gerard took out his hand from under his jacket and I then realised it was only a bottle, but he threw it at me narrowly missing my head as I dodged it. John was swinging the shovel at my head and at one stage nearly connected with it, but I managed to block it with my left hand, and it cut it open causing it to bleed quite badly. As they were all attacking me, I struck John on the leg, and he moved backwards. Around this time one of the girls handed another weapon to Gerard. I don't know if it was a knife or some sort of steel bar, but he came at me again and he was swinging at me again. I acted in self-defence and struck on the leg as well and he backed off. Once I seen that they had backed off a bit I saw my chance and ran back into my garden, but I was terrified that they were coming after me, so I jumped over the fence and ran away.

I was full of adrenaline and wanted to get away from the house so that they would not attack me inside it in front of Ellen and the kids. I flagged down a neighbour who was driving by and told him I had been attacked and needed help. I asked him to drop me off a friend's house. I was in a state of shock and feared that I would be arrested. I did not know what to do. I went to the hospital the next day because I thought my hand was broken but it was just tissue damage, and the cut was too old to stitch properly. I deeply regret that John McDonagh has died as a result of this incident, but I did not intend to kill him or cause him any serious harm. I was genuinely terrified for my life and the lives of my wife and children. I was being attacked by three men and was acting in self-defence.

> Similarly, I did not intend to kill or seriously injure either Gerard or Jimmy McDonagh and was also acting in self-defence. I am sincerely sorry for Mr McDonagh's death and for the loss his family have suffered.
>
> That is the prepared statement of Joe Joyce."

[14] The defence statement which followed is dated 17 September 2021. This statement replicates the prepared statement which we have set out above. Specifically, and without any equivocation or qualification, the appellant makes the case that he acted in self-defence. The relevant portion of the defence statement reads as follows:

> "The defendant adopted a defensive stance on the street with a weapon. In other words, he took up a position only metres from his house and he was not moving towards the threat but waiting for an attack. Any citizen is perfectly entitled to use the threat of force in these circumstances. During the incident the defendant only ever sought to defend himself against the three men and to repel them from an attack on his family and his home. The defendant used proportionate force in order to defend himself and his family."

[15] Within this factual matrix there is much that is uncontroversial. The appellant's skeleton argument filed for this appeal refers to various aspects of the case history which he accepts as follows:

(i) That the three McDonagh's and Joseph Joyce engaged in a heated verbal exchange at the back of 14 Coolcullen Meadows.

(ii) That shortly thereafter the McDonagh's arrived in Coolcullen Meadows armed with weapons.

(iii) That the McDonaghs moved towards Joseph Joyce's home brandishing weapons.

(iv) That Joseph Joyce was outside his property with a weed cutter and a bottle of ammonia.

(v) That Joseph Joyce's children were assisted by his wife over a fence and sent to the neighbour's house at the moment the incident began.

(vi) That the three McDonaghs were armed.

(vii) That Joseph Joyce swung the weed cutter at the men below knee level at all times.

(viii) That John McDonagh was within two metres of the defendant and had the garden hoe raised above his head.

(ix) That Joseph Joyce killed John McDonagh by inflicting a blow to the back of his leg.

[16] The differences between the above account and the prosecution case are necessarily nuanced. However, it is plain to see that the evidence of witnesses, Ms Charlie Noble in particular, as to how the deceased and his family were presenting prior to the altercation which caused the fatal insult looms large in the defence submissions. That is because the defence case is that the McDonaghs were the initial aggressors and that witnesses to the event saw that three of these men were armed and they were "terrified."

[17] We observe that the trial judge comprehensively summarised the witnesses' evidence in his charge to the jury. No issue is taken with how he conducted that exercise. With that observation firmly in mind, we consider it important to recount some portions of the evidence these witnesses gave utilising the language of the judge's charge.

[18] First of all the judge dealt with the evidence of the witness Charlie Rose Noble. Charlie Rose Noble lived at 11 Coolcullen Meadows, Enniskillen. Within the judge's charge we find the following extracts from her evidence for the jury (this is not a verbatim account, rather edited highlights chosen by us):

> "In the evening at approximately 7 pm she heard lots of shouting and commotion which she stated was not unusual for the estate in which she lived.
>
> Ms Noble's rear garden backed onto the rear garden of 17 Drumawill Gardens, the home of Rose McDonagh. The gardens were separated by a six foot fence.
>
> When she entered her garden, she was aware of shouting from 17 Drumawill Gardens and also from Joe Joyce's house at 14 Coolcullen Meadows. She was unable to make out the nature of the shouting. She says that she saw a male at the fence of 17 Drumawill Gardens who made her feel afraid.
>
> She was aware of shouting, but she could not say how long it had been going on. She stated that she heard two males shouting aggressively and Joe Joyce was responding. She

stated that she could not see him, that is Joe Joyce, and presumed he was at the back bedroom window.

She confirms that she was not aware of Joe Joyce at his car. The prosecution state that this time is significant because it clearly shows Joe Joyce holding a wheel slasher and rummaging in his vehicle for what they say is a bottle. The point forcibly made by the prosecution is that at or about this time the defendant was preparing himself for a fight certainly minutes before the McDonaghs appeared in Coolcullen Meadows.

Ms Noble then stated that she walked towards the alleyway that leads to the rear of her house and saw two men trying to climb onto a fence. She states that she called the police.

Ms Noble stated that when looking down the alleyway at the side of her house she saw one person on the fence and another person climbing on to the fence. At this stage she was not aware of what was happening at 14 Coolcullen Meadows, the home of the defendant.

When Ms Noble made the 999 emergency call to the police the following contemporaneous account is given, I am going to read what was said: "Hi um, I need officers out as soon as possible. There is a big brawl going on at the back of my garden, my daughter is in bed and it's, it's between travellers. It is a lot of travellers that live in Drumawill Gardens." The caller inquires as to how many are involved and Ms Noble replies as follows, "I don't know, I daren't even go out back. I am not even prepared to go out my back garden because they are literally climbing up fences."

When Ms Noble was on the 999 call, she saw three men from Drumawill Gardens enter Coolcullen Meadows. She stated that the three men were walking together. One male had a hoe in his hand and the other had a bottle. The third male did not have a weapon but then ran back and grabbed a shovel but she couldn't say from where he obtained it. Ms Noble stated that she couldn't say when she became initially aware of the defendant coming onto the street.

She also confirmed that Ellen Joyce had asked her to take both her sons into Ms Noble's house. This is graphically

substantiated in Ms Noble's emergency call which I will come back to.

Ms Noble stated that she observed a man with a hoe and another man with a shovel. She stated that the person with the shovel impacted Joe Joyce on two parts of his body. She states that she also observed Joyce swinging a weapon and that at some stage he did catch a person on the leg. She knew the impact was quite severe and in her 999 call stated that the person was bleeding to death. She stated she saw the injured person aided by other people on the other side of the road and they were trying to stop the bleeding. She did not observe where Mr Joyce went after the incident. Ms Noble told Mr McGrory that the incident made her feel petrified.

During cross-examination Ms Noble confirmed that she contacted the police before any violence. She stated that she was sufficiently concerned what was going on in her rear garden. She stated that she could see two persons at her fence from the waist up. One person had a knee on the fence and they were behaving aggressively by their actions and shouting. Ms Noble stated that she felt under threat. She also stated that she had no doubt that the men were trying to get over the fence into her garden. When asked to identify the person she stated that she was unable to do so except to state that one person was a skin head. Ms Noble also confirmed that the men in the fence were the same persons that she had seen on the road in Coolcullen Meadows.

During further questioning of Ms Noble she confirmed that although not seen on the CCTV she was able to see three men on the road to her right, one was carrying a hoe, the seconded a bottle and the third person was not carrying anything. Ms Noble stated that the man with the hoe swung it at Joe Joyce but did not hit him. She then saw a man with a shovel or spade strike Joe Joyce twice initially on Joe Joyce's left shoulder. The other blow struck his left side but she could not recall the exact position. Mr Fahy asked the following question, namely, "Was this the first time when a person on the road struck another person?" Ms Noble replied that the person with the hoe had tried to strike Joe Joyce but didn't make contact however she maintained that this was the first contact, the first contact was made by the second male with a shovel."

[19] The trial judge also said this in directing the jury:

> "You may consider it significant members of the jury that both the prosecution and the defence state that Charlie Rose Noble is an honest and reliable witness. Obviously, it will be for you members of the jury, to consider this but in light of their concession you may consider giving particular weight to her evidence."

[20] Finally, by way of clarification, the trial judge made the following three observations as to this evidence which are not impugned:

> "With regard to the evidence of Ms Noble I would make the following observations; firstly, the CCTV footage does not show the defendant being struck with a shovel. This does not mean that the incident did not take place. It is possible that the defendant was struck by a shovel during an incident outside or beyond the area captured by the CCTV camera.
>
> Secondly, Ms Noble stated that a shovel impacted with the defendant's left shoulder and left side. The agreed medical evidence, which I referred you to earlier, noted the defendant sustained a 6.8 centimetre linear superficial graze to the left forearm.
>
> Thirdly, with reference to the CCTV footage the first time at which any McDonagh male is seen with a shovel is at 20.09.09 when Jimmy McDonagh handed the shovel to Gerard McDonagh immediately prior to the incident when the defendant causes injury to the deceased. So this is a potential inconsistency in Ms Noble's evidence, but you may not feel that it undermines her credibility and overall reliability of her evidence. You may not even feel it is an inconsistency."

[21] The trial judge also summarised the evidence of Elaine Nethercott in some detail. Ms Nethercott confirmed that that she resided at 17 Coolcullen Meadows which was situated directly opposite the home of the Joyces. Again, we set out some portions of the judge's summary as follows:

> "The witness remembers hearing country music played loudly from the Drumawill estate. Closer to 8pm Ms Nethercott could hear shouting and recognised Joe Joyce's voice. She looked out from her window and

saw Ms Noble who lived across the street. She stated that Ms Noble was hopping about like a mad woman shouting that they were trying to get over her fence and to call the police. Elaine Nethercott said she looked up the street and saw three men with weapons. She did not recognise the men. She described their heads as shaved but also commenting that during the Covid or during Covid everyone was getting their head shaved. The witness stated that one male had a knife, and one male had a shovel. She was unable to distinguish between them. She was unable to describe the male with the knife."

Ms Nethercott saw the defendant on the street. She stated that he also had a weapon which she described as a big long stick with a hook on it. The witness then closed the door and looked out. Ms Nethercott stated that the defendant was not doing anything with the weapon. She stated that these men came to attack him. She said that everyone was waving their weapons about. There was also shouting but she couldn't make out what was being said. Ms Nethercott was asked by Mr Fahy whether she recognised the voices, she answered "No." She was asked whether she could hear swearing and she replied, "I think so." The witness stated that her view was obstructed due to the presence of a people carrier vehicle. She said it was incorrect to say that she was always looking out because she was also concentrating on preventing a witness from leaving her house during the incident. Ms Nethercott stated that she was frightened. She referred to women who were shouting at Mrs Joyce trying to antagonise her into a fight. She stated that the younger women were screaming terrible insults at Ellen Joyce who she knew to be pregnant.

Ms Nethercott confirmed in cross-examination that she noticed Ms Noble outside her house on her mobile phone. She described her as looking like "a whiter shade of pale." Ms Noble appeared frightened. Ms Nethercott stated that she overheard Ms Noble say on two occasions that they were trying to get over her fence and she shouted to Ms Nethercott to phone the police. Ms Nethercott did not phone the police. During questioning by Mr Fahy, Ms Nethercott confirmed that when she saw the three men, they were walking together in a line to attack Mr Joyce. Ms Nethercott did not see the incident that led to the injury to John Paul McDonagh."

[22] As to the *bona fides* of Mrs Nethercott the trial judge said this:

> "Elaine Nethercott was a prosecution witness. Neither the prosecution nor the defence suggested that her evidence was unreliable. No one suggested that she was not a credible witness."

[23] Summarising, it is plain to see that all of the witness evidence which the defence say was favourable to them was presented in a comprehensive way to the jury. No complaint is made in relation to how the trial judge approached this part of the judicial task.

[24] The other core element of this case is the CCTV footage. It is good quality evidence which captures much of what happened on the day in question. Perusal of this digital material also assists in our determination of the defence case made on appeal to the effect that as the altercation progressed the appellant may have moved from defending himself to committing an unlawful act which could ground an alternative charge of manslaughter. We have highlighted salient aspects of the CCTV footage above and will now move to discuss it within our consideration of ground 1 of appeal.

Consideration of the three grounds of appeal

(i) Ground 1- Manslaughter as an alternative verdict

[25] The statutory framework governing an alternative verdict of manslaughter in the case of a person tried for murder is found in section 6(2) of the Criminal Law Act (Northern Ireland) 1967 which reads:

> "on an indictment for murder a person found not guilty of murder may be found guilty - (a) of manslaughter …"

[26] As to whether a lesser verdict of manslaughter should be left to a jury some uncontroversial general propositions arise. These are cited in *Blackstone's Criminal Practice 2023 D 19.58*. We paraphrase the section as follows: "In any criminal trial, the trial judge is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law. If, however, the possibility that the accused is guilty of a lesser offence has been obviously raised by the evidence, the judge should in the interests of justice leave the alternative to the jury. This is the case even if neither prosecution nor defence counsel wishes the alternative offence to be left to the jury." It follows that the ultimate obligation rests upon the judge to as a matter of judgement decide whether an alternative verdict should be left to the jury on the basis that it is obviously supported by the evidence adduced during the trial.

[27] In this case neither the prosecution nor the defence pushed for the alternative verdict to be left to the jury. That approach speaks volumes however it is not the end of the matter or determinative of the issue.

[28] The trial judge was alive to the question of whether manslaughter should be left as an alternative verdict. He invited submissions from the parties. The defence adopted a neutral stance in relation to this. The prosecution initially opposed any suggestion that manslaughter should be left as an alternative verdict before simply saying it was in the hands of the judge. Prosecution counsel did not return to the issue in court which is regrettable we think. That led to a situation where there is no formal judicial ruling on record as to the issue through no fault of the judge.

[29] We are bound to say that more could have been done by counsel to assist the judge. To our mind counsel should, in fulfilment of their duties to the court, be able to address the issue of alternative verdicts in a criminal case in the hypothetical sense without compromising their obligations to either client. We also think that as a matter of practice issues such as this should be raised in court by counsel in the absence of the jury rather than via email exchanges as such exchanges are prone to confuse or obscure the issue. It is unproductive to say more as to how the issue was addressed in this case given the outcome we have reached.

[30] This was also a case where the judge helpfully circulated his charge. The question of alternative verdict was clearly in play for discussion and ultimately a decision was taken by the judge not to leave this alternative verdict to the jury. It is this judicial exercise of judgement which we must analyse.

[31] In support of his case, counsel for the appellant Mr Fahy KC in essence contends that there was enough evidence to require the judge to leave manslaughter as an alternative verdict to the jury, together with the partial defence of loss of control introduced by sections 54 and 55 of the Coroners and Justice Act 2009.

[32] The leading authority on alternative verdicts is *R v Coutts* [2006] 1 WLR 2154. This case was adopted as sound authority by our Court of Appeal in the case of *R v Croome* [2011] NICA 3. The Court of Appeal in *Croome* noted that *Coutts* was a case in which the appellant was charged with murder and his defence was, as in the appellant's case, that the death was a tragic accident. The trial judge did not leave the alternative of manslaughter to the jury and the appellant was convicted. The House of Lords allowed the appeal.

[33] Lord Bingham, with whom the other Law Lords agreed, set out the relevant principles at paras [23]–[24]:

> "23. The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial

> counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases, it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.
>
> 24. It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged."

[34] In his concurring opinion in *Coutts* Lord Hutton referred with approval to the passage in Lord Clyde's speech in *Von Stark v Queen* [2000] 1 WLR 1270, which set out the nature of the obligation on the court:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in

> the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them."

[35] The Court of Appeal then concluded in *Croome* by noting the following at para [22]:

> "The House of Lords preferred an alternative line of cases the reasoning of which is encapsulated in the following passage from the judgment of Callinan J in *Gilbert v The Queen* (201) CLR 414:
>
> > '101. The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.'"

[36] This line of authority was further embraced by the Northern Ireland Court of Appeal in *R v Maybin* [2021] NICA 12. In that case trial counsel were opposed to adding a section 20 count on an indictment alleging section 18, GBH with intent. The facts involved an attack at a hurling match, whereby the accused struck another man with a hurling stick. The Court of Appeal noted the following at paras [11]–[13]:

> "[11] In respect of alternative verdicts, judges are not always obliged to leave all alternative verdicts. When, however, there is an allegation of an offence involving specific intent Blackstone's Criminal Practice (2021) at D19.58 observes:
>
> > 'It is important for the court to leave an alternative which does not require proof of specific intent where such intent was required for the charge on the indictment.' (*Hobson* [2009] EWCA Crim 1590; *Foster* [2019] EWCA Crim 2214; *Johnson* [2013] EWCA Crim 2001).'
>
> [12] The appeals were allowed on the issue of intent in all three of the cases cited in the above passage from Blackstone. In *Hobson*, D smashed a glass into the face of another lady in a bar but later claimed that she acted instinctively and in self-defence during the scuffle. The Crown case was that an independent witness had testified

to say that the complainant had done nothing wrong, whereas the defence case was that she had grabbed D by the throat. At the trial, the alternative verdict of section 20 was not left to the jury, and they convicted of the section 18 offence. Allowing the appeal, the Court of Appeal said the following at paras 11-12:

> 'It is, in our view, particularly important that this is done [leaving the alternative verdict] where the offence charged requires proof of a specific intent and the alternative offence does not. Even then there may be circumstances where the issue of specific intent does not truly arise. For example, if a man is shot at point-blank range in the head and the defence is simply that the defendant was not present, there is no requirement on the judge then to leave the alternative of manslaughter by way of killing without the necessary intent for murder. However, there will be cases, as Coutts recognised, where it is necessary to leave the lesser offence as an alternative to avoid the dangerous situation where the jury is faced with the stark choice of convicting for the serious offence or acquitting altogether. That may give rise to a miscarriage of justice.
>
> In the present case it seems to this court that it was properly open to the jury to have found on the evidence that the appellant had not acted in self-defence and had intended to hit the victim with the glass, unbroken as it was, but had not intended to cause her serious bodily harm (or at least may not have had that specific intent). As we have pointed out, the prosecution on this appeal accept that that would have been a proper interpretation available to the jury on the evidence they heard.'

[13] The Court of Appeal concluded the appeal by stating at paras 14-16:

> "In the present case the Recorder's course of action seems to us to have presented the jury with that stark choice of either convicting the appellant of section 18 wounding — a very

> serious offence — or of acquitting her completely. We can well understand why they decided against the latter, once they had decided that self-defence and accident were not feasible. But there must be a concern that they may have convicted of section 18 wounding rather than permitting the appellant to go scot-free when, had they had a section 20 verdict available to them, they would not have decided to convict on the more serious charge.
>
> That being so, we can only regard the conviction in this case as being unsafe. The appeal is therefore allowed and the conviction is quashed …"

[37] The Court of Appeal then concluded as follows at para [14]:

> "We are satisfied that it was open to the jury to conclude on the evidence that the blows with the hurley stick struck by the appellant were deliberate (and not in self-defence) but that the appellant did not (or may not) have the necessary specific intent for section 18 (intention to cause grievous bodily harm). This was a realistically and clearly available verdict on the evidence. It is unfortunate that the indictment was not amended before or during trial to include the section 20 count. It is also unfortunate that when the trial judge raised the issue of section 20 as an alternative count at the close of the evidence that her attention was not drawn to the authorities referred to above. Even if both counsel are agreed on the issue of whether an alternative count should be left to the jury, they are still required to remind the judge of her/his "greater and more onerous" independent function and responsibility in relation to alternative verdicts. This is especially so because, as Lord Hutton reminds us in Coutts, save in exceptional circumstances an appellate court should quash a conviction where *the judge* has erred in failing to leave a lesser alternative obviously raised by the evidence. Accordingly, we conclude in this case that the conviction is unsafe by reason of the failure of the trial judge to leave the section 20 offence as a lesser alternative obviously raised by the evidence …"

[38] We provided some other more recent jurisprudence to the parties. These cases restate the principles to be applied in straightforward and instructive terms. In

particular, in *R v M* [2019] EWCA Crim 1094, Males LJ summarises the law in the following paragraphs drawing from other cases which have been decided post *Coutts*:

> "23. This court summarised the effect of *Coutts* and other authorities in *Barre* [2016] EWCA Crim 216. Gross LJ, giving the judgment of the court, said at [22]:
>
> > 'The law in this area has been considered in a number of authorities, most recently *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 … and *R v Foster* [2007] EWCA Crim 2869, [2008] 1 WLR 1615, a decision in four conjoined appeals heard by a five-member Court of Appeal. For present purposes the following summary may be distilled based on these decisions and others there referred to together with the discussion in *Archbold* at paragraphs 4-532 and following:
> >
> > 1. The public interest in the administration of justice will be best served by a judge leaving to the jury any obvious alternative offence to the offence charged. The actual wishes of trial counsel on either side are immaterial. As observed by Lord Bingham in *Coutts*:
> >
> > > 'A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.'
>
> 2. Not every alternative verdict must be left to the jury. Plainly there is no such requirement if it would be unfair to the defendant to do so. Likewise, there is a 'proportionality consideration': *Foster* at [61]. The alternative need not be left where it would be trivial, insubstantial or where any possible compromise verdict could not reflect the real issues in the case (*ibid*). The requirements to leave an alternative verdict arises where it is 'obviously' raised by the evidence. It is one to which 'a jury could reasonably come' or, put another way, 'where it arises as a viable issue on a reasonable view of the evidence': *Foster* at [54]; *Coutts* at [85].
>
> 3. Subject to the above framework, whether in any individual case an alternative verdict must be left to the

jury is necessarily fact specific. In this context, the trial judge will have 'the feel of the case' which this court lacks: *Foster* at [61].

4. Where an alternative verdict is erroneously not left to the jury, on an appeal to the court the question remains as to whether the safety of the conviction is undermined: *Foster* (*loc cit*)."

24. *Barre* was a case of injuries, in that case fatal injuries, caused by a knife wound during a fight although, inevitably, there were a number of differences between the facts of that case and the facts of the present case. The issue was whether the judge ought to have left manslaughter to the jury as an alternative to murder. The court held that he was not obliged to do so. The principal reason for so holding was that the use of a knife with "moderate force" (that being a technical expression in this context) in the chest area penetrating the deceased's body to the hilt of the weapon was itself indicative of an intention to cause at least really serious harm. In those circumstances the court concluded at [32]:

> 'The upshot, in our judgment, is that an alternative verdict of manslaughter was not obviously raised on the evidence. It did not arise as a viable issue on a reasonable view of the evidence. In the circumstances, the judge did not err in declining to leave the alternative verdict to the jury. The most that can be said is that some judges might have left it but that falls short of establishing error on the part of this judge in this case.'

25. The recent case of *R v Braithwaite* [2019] EWCA Crim 597 was also a case of a fatal stabbing where the question arose whether manslaughter should have been left to the jury. In fact, the judge did direct the jury that if the defendant deliberately stabbed the victim, without intending to kill or to cause really serious harm, but intending to cause some harm falling short of this, they should find him not guilty of murder but guilty of manslaughter. The defence contended, however, that the possibility of a conviction for manslaughter should also have been left to the jury on a different basis. This was unlawful act manslaughter which was said to arise

> because, even though the jury may not have been sure that the defendant had deliberately stabbed the victim who may therefore have been impaled on the knife in the course of a fight, the defendant was unlawfully in possession of and was brandishing a knife in circumstances where all sober and reasonable people would inevitably realise that there was a risk of some harm.
>
> 26. The court rejected this argument. After citing what he had said in *Barre*, Gross LJ observed that this alternative version of manslaughter was remote from the real issues at the trial, which were primarily whether the stabbing was deliberate and, if so, whether it had been done in self-defence. It was an artificial and unreal scenario which "emphatically does not arise obviously from the evidence."
>
> Thus, we see that the authorities have consistently followed the approach suggested by Lord Bingham in *Coutts* and that the critical question is often whether the alternative offence is one which arises obviously from the evidence."

[39] At para [36] of this decision the Court of Appeal also described the judicial exercise in the following way.

> "[36] It is and remains the case that it is for the trial judge to make a judgment. He (or she) will have a better feel for the case than this court will have. That judgement is whether, in any particular case, it is appropriate to include the possibility of a lesser alternative verdict. "

[40] We adopt the above articulation of the law and the judicial exercise in play which we agree is correctly described as a matter of judgement. Therefore, applying the well-established law that we have discussed in some detail above we must ask ourselves the simple question - was there obvious evidence upon which the judge should have left the alternative verdict of manslaughter to the jury? The answer to this question necessarily requires a fact specific analysis of an individual case.

[41] Having analysed all of the evidence in this case including the CCTV evidence which we have viewed, we consider that there was no obvious evidence upon which the trial judge could have left the alternative charge to the jury. That is because on any reading the appellant could not be said to have had anything other than intent to cause really serious harm by virtue of being equipped to confront the McDonaghs with a bill hook and a bottle of ammonia. We are not convinced by Mr Fahy's hypothesis of "excessive self-defence" arising at a single point in time just before the fatal blow. In our judgement there was in the circumstances of this case no realistic

scope for the possibility that the appellant had wounded the deceased deliberately with the bill hook but in doing so had not intended to cause him really serious bodily harm. It matters not that the bill hook was directed at the lower body of the deceased. The deliberate blow with the bill hook spoke for itself. It matters not as Mr Fahy suggested that this was a bill hook rather than a knife. This was a lethal weapon which from the CCTV imagery the appellant equipped himself with along with a bottle of ammonia prior to the altercation. We are entirely convinced that there was compelling evidence of an intention to cause really serious harm.

[42] Put simply, this is a case where to our mind the jury was confronted with a stark choice. Either the appellant had attacked the deceased with the requisite intent when armed with a bill hook and a bottle of ammonia or he had been acting in reasonable self-defence. From the time he was first interviewed to the end of the trial these were the only two scenarios in play. Objectively, on any fair and reasonable assessment, manslaughter was not an obvious alternative offence which there was evidence to support thus warranting consideration by the jury. Our assessment also mirrors the firm stance of both prosecution and defence at the trial.

[43] Furthermore, the inclusion of an alternative verdict in this case would we think have potentially led to the danger highlighted in *Coutts* and other cases, and which Gross LJ referenced in *Braithwaite* at [39] in the following terms:

> "The real tension in such cases … arises from the possibility that the jury will decide that the defendant is not guilty of the offence on the indictment, but is guilty of 'something.' This in turn raises the risk that either the jury will convict him of the more serious offence to ensure he does not escape punishment altogether (which would clearly be unfair on the defendant), or else acquit him even though they … are sure that he is guilty of some criminality (thus leaving criminality unpunished)."

[44] Accordingly, we see no error on the part of the trial judge in failing to leave manslaughter as an alternative verdict on the facts of this case. Such a course was not obvious from the evidence. Hence, it follows that the judge exercised his judgement correctly to proceed on the basis that this was a case where the choice was between murder which requires intent or accident which does not.

[45] The remaining aspect of this appeal ground is that a loss of control defence was available and should have been left to the jury. The partial defence of loss of control was introduced by sections 54 and 55 of the Coroners and Justice Act 2009. It can only be availed of if the statutory requirements are met. These are contained in the statute which reads as follows:

> "54. **Partial defence to murder: loss of control**

(1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55.—Meaning of "qualifying trigger":

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to 'D' and 'V' are to be construed in accordance with section 54."

[46] The appellant has manifestly failed to satisfy us that the necessary statutory requirements are met. We entirely agree with the prosecution submission that there

is no analysis of the evidence in this case which would have warranted a direction to the jury on loss of self-control. As the prosecution do, we can surmise that the appellant seeks to argue that the requisite "qualifying trigger" was the alleged threat from the McDonaghs to come round and burn his house down and that the appellant's reaction was within the boundaries of behaviour expected from a man with a normal degree of tolerance and self-restraint thus engaging the terms of section 55(3) and/or (4). However, crucially, no evidence was given by or called by the appellant regarding the alleged threat and therefore no evidence was heard by the jury whether this threat was in fact made, how it impacted upon him, whether it led to a loss of control or could in fact lead to a loss of self-control or if it was said whether it angered him and he sought retaliation. Without such an evidential basis this partial defence simply did not arise. The contrary argument is entirely divorced from the reality of the case.

[47] Accordingly, for the reasons we have given we find no merit in the first ground of appeal. This court has no reservations about the safety of the appellant's conviction arising out of the decisions by the trial judge (a) not to leave manslaughter to the jury as an alternative verdict and (b) not to direct the jury on the partial defence of loss of self-control.

(ii) ***Ground 2 - the hostile witness ruling***

[48] The trial judge's hostile witness ruling came about in the following way. One discrete aspect of the police investigation entailed the interview of an adult male person whom we shall describe as "JT." This person and his family were the occupants of a residential property situated opposite that of the appellant. The CCTV evidence emanated from this property. Ultimately, the prosecution case was that JT witnessed most of the material events in their entirety.

[49] JT's interaction with the police followed subsequently, beginning on 15 April 2019, four days after the material events. It is not disputed that at the outset JT and his wife were in fear that if either became a witness there might be reprisals against them. Furthermore, they requested the protection of anonymity. It would appear that these were the stimuli for interviewing JT by the Achieving Best Evidence ("ABE") mechanism. The transcript of his ensuing interview was assigned to the unused materials bundle. Within this transcript are the following material passages:

> "I seen Joe Joyce to the right of me with a bill hook and then 3 boys came into my line of view from the left hand side ran down the street, one had a hoe and had a knife, one had a bit of a spade. I said fuck that this is going to be a traveller war kick off, locked the fucking door. Went into the living room seen, starting to kick, starting to stir up with them out in the street. …
>
> They were swinging at Joe chasing him down the street and he was sort of coming back at them, he was trying to

> squeeze stuff out of the thing I thought it was petrol to start with, thinking know well at least if they run away they'll not, cause it's hard to shift the smell of petrol off yourself even with a wash ... later found out it was ammonia … there's 3 men running down the fucking street, he's one man and he's on the dead end … To me knowing farmers I'd class it as a bill hook … Bill hook's about 3½, 4 foot … He had it up know as to say know if you come near me I will swing it sort of a thing you know … It's resting up on his shoulder like this … Joe's backed in, he's backed into a corner like you know … they ran, they run down the street and then you know they slow down when they get to Joe like … John pushes past his ma and joins in again swinging the hoe and changing off the ground or whatever like cause you see, you see the orange sparks when it hits the floor like … It's how you would swing a 16 pound sledge you know …"

[50] Around one year later, JT and his family having gone to live elsewhere, police approached him about the possibility of making a witness statement. JT was agreeable to this course and a witness statement duly materialised. This was not, however, generated by the orthodox mechanism of recorded questions and answers in an interview setting. Rather, drawing from the ABE transcript, a police officer prepared a draft statement. This was followed by JT's attendance at the relevant police station. There, having apparently read the draft and signified his agreement with its contents, having made some alterations, he signed the document. This statement also formed part of the committal bundle.

[51] JT's witness statement had the following significant content:

> "I then noticed Joe Joyce to the right of me with a bill hook (this is something you cut briers with, it's a wooden stick with a slight curve on it, its about 3 and a half - 4 foot long) and a squirty bottle, like a River Rock bottle with a squirt like a sports cap. Then I saw 3 boys come into my line of view from my left hand side, one of these boys had a bit of a spade … I knew that a traveller war was about to kick off … I can describe Joe wearing a red t-shirt and shorts and he's sort of waiting for these boys to come and attack him, cause he's standing and he's holding this bottle of what looked like water in his left hand. Initially I thought that it was petrol he was spraying, so that if they run off and hide they would stink of petrol but later on I found out that it was ammonia that Joe was using. He had the bill hook resting on his shoulder, as if to say if you come near me, I will swing it sort of thing … Joe was then backed into

a corner and he had nowhere to run to … These 3 boys were running down towards Joe and didn't stop until they reached him … John was swinging a big black hoe which was between 4-6 feet long. He lost his head and was swinging the hoe. I recall that one of the other fella's was wearing a purple/burgundy coloured top and dark coloured trousers. This boy was running down with a kitchen knife. This second male was about the same sort of height as John McDonagh, medium/average build, smaller/lighter build than John and he had the same skinhead as John. He was carrying a machete style kitchen knife, it was the length of a machete, but it was shiny like a kitchen knife and pointy, I would say it had a good 10 - 12 inch blade on it… What I can tell you is that it was the three boys who swung first at Joe … John then pushed past his ma and joined in again swinging the hoe at Joe and charging off the ground, which causes orange sparks when it hits the floor. There was some force behind the swing, like swinging to knock down a wall. John swings at Joe, he swings full extension. I see Joe stepping back and then he steps forward and clips John with the bill hook. Joe swipes the bill hook from his waist area, but there appeared to be no force behind this swipe, his elbow was close to his body, Joe used a third of the power. It was John that got hit on the left thigh … "

[52] At the trial, JT gave evidence as a witness for the prosecution. He testified inter alia:

"(i) The appellant was carrying a "weed cutting implement."

(ii) Was he carrying anything else? "I believe, a bottle of water."

(iii) The three McDonagh males were "... coming down the street … from the left …"

(iv) "I seen one of them holding the end of a spade, one holding a hoe and, I believe, one holding a large kitchen knife."

(v) With reference to the appellant, "… he seemed that he was backed into a corner by three men … there's nowhere else he could have went other than …"

(vi) The appellant "... was squirting the bottle … I think he threw the bottle at one point, when it was empty … It looked like water … without physically tasting it or smelling it, I couldn't tell you what it was in the bottle."

[53] At this juncture, in the absence of the jury, the trial judge received a submission from prosecuting counsel that JT should be considered a hostile witness. The judge took the sensible course of requiring the prosecution to make its application in writing and an adjournment followed. In exchanges with counsel he established that JT had not been shown his witness statement prior to giving evidence. JT was then re-called briefly and confirmed this. He further declined an invitation to read his statement. (In passing, this was the correct procedure to adopt: see Archbold, para 8-240).

[54] Following the aforementioned adjournment, both parties presented written submissions on this issue. The prosecution submission rehearsed all but the fifth of the six features of JT's examination in chief noted in para [52] above. The essence of defence counsel's replying submission was that JT was simply a witness who had not "come up to proof", nothing more. The judge then made his ruling acceding to the prosecution application. It is apparent from the transcript that the judge's ruling was made on the following grounds: JT's conflicting descriptions of the instrument held by the appellant, which the judge considered to amount to "two completely different things"; the conflict between JT's description in his statement of the appellant being out on the street and his evidence in chief that he first saw the three McDonaghs approaching from the left; his conflicting descriptions of the contents of the bottle held by the appellant; and, finally, JT's rejection of the invitation to read the contents of his witness statement. It is important to identify what the judge described as the "second" basis of his ruling:

> "The second is in his evidence he said that when he saw the three McDonaghs coming down towards the cul-de-sac he saw them carrying, one had a spade, one had a hoe, one had a large kitchen knife. In his statement now **I appreciate he says something different later on in his statement, but in the initial part of his statement** he says that he saw three boys coming to his view or his line of view from his left and one of the boys had a spade."
> [Emphasis added.]

From the highlighted words the judge evidently considered that one element of JT's "hostility" was that he gave evidence in accordance with a later passage, rather than an earlier passage, in his statement.

[55] The narrative continues as follows. Further exchanges between the parties' counsel and the judge followed immediately thereafter. During these the judge made

the pre-eminently sensible suggestion that further questioning of JT should initially be in orthodox examination-in-chief terms. The judge further suggested that the continued questioning of JT should (in our shorthand) rewind to the beginning. Following further exchanges the judge effectively ruled that prosecuting counsel should:

> "… just simply say to the jury that I have allowed you the opportunity to take him back through his evidence and to highlight if there are any inconsistencies with what he said yesterday and what he said in his evidence and what he might say in his evidence."

The judge further agreed with defence counsel's submission that the use of the adjective "hostile" should be avoided. Notably, in the course of these exchanges the judge stated that the papers at his disposal did not include the transcript of JT's ABE interview.

[56] In the next succeeding phase of the trial JT was re-called. His written statement was placed before him and he responded, "I'll just have a quick read through." From this part of the transcript it emerges that the written statement is dated 21 May 2021 (the interview of this witness having occurred on 15 April 2020 – supra). In the questions and answers which followed JT placed some emphasis on the elapse of time. He further testified that at the stage when his written statement materialised, he was "… advised to say certain things …" He reluctantly accepted his witness statement as an accurate account of his evidence. He testified that the statement was "... written for me …" He further testified "… I put down what I recall." He next testified that the first person seen by him was a named lady, to whom he shouted "… go inside the house …", and he "then" noticed the appellant to his right. When questioned about the implement held by the appellant, he replied:

> "There's a number of names for them, they're used to cut briers. They're called a hook knife, they're called a slash hook, they're called a bill hook. There's a number of names for them."

[57] He next testified that his description of "bill hook" in his statement was "what I was advised to call it", adding "... I would call it a hook knife, personally … it has a shaft of three or four feet and a hook blade." Elaborating, he described the hook as being 10 to 12 inches in length and curved; it was a "hook knife"; the term "bill hook" emanated from the police officers concerned. JT reiterated, in substance, that (disregarding non-protagonists) he had first seen the appellant (to his right) and then the McDonaghs (to his left).

[58] It is appropriate at this stage to interpose the analysis that during this phase of his sworn evidence JT was evincing a clear inclination to distance himself from certain aspects of his witness statement. Furthermore, he asserted, and repeated, that

his statement was made "under duress" from the police officers and with an associated anxiety to leave the police station as quickly as possible. Next JT testified unequivocally that the McDonaghs were "… carrying a garden spade, a garden hoe and a large kitchen knife." JT was also questioned by prosecuting counsel about the sequence of appearances/movements of the protagonists at the scene. He testified that these occurred "within seconds of each other." He acknowledged that he may have given inconsistent evidence about this at an earlier stage.

[59] It was at this stage that the issue of the differing accounts of JT in the ABE interview and his later witness statement resurfaced. The trial judge observed that he had not been alerted to any such discrepancy during the hostile witness application (evidently because the ABE interview transcript was not included in his papers). This failure on the part of prosecuting counsel is both incontestable and regrettable.

[60] During the next series of questions and answers JT testified that (a) he had initially believed/assumed that the bottle carried by the appellant contained petrol and had said this during his police interview, (b) (in terms) on further reflection he could not be confident about the contents, water being one possibility and (c) he had then been told by the police that the contents were "acid or ammonia."

[61] In the set of questions and answers which followed next, JT testified that "... there was three men coming down the street to attack one man … they clearly came down armed with weapons to do damage … with a bit of a spade, a hoe and a large kitchen knife … travellers tend to fight … it's usually categorised as a war … even if they are fighting within their own families it's categorised as a war." In substance, he confirmed his description of "traveller war" in his witness statement.

[62] JT next accepted that one particular aspect of his sworn evidence differed from his witness statement, namely that he was <u>now</u> maintaining that he saw the appellant first and then the McDonaghs, rather than vice-versa. He confirmed that he used the term "bill hook" in his statement. The appellant was "… prepared to swing it if anybody came to swing at something with him …" That was "the impression … that was my opinion … he sort of seemed like he was ready, waiting for them."

[63] At this point prosecuting counsel announced that he had no further questions for JT. Next, in the absence of the jury, the main issue ventilated on behalf of the appellant was that of how the witness statement was generated and, in particular, how and why its contents differed from the ABE interview transcript. It was submitted that explanations were required, and disclosure issues had arisen. The question of whether the CCTV recording had been seen by JT before his ABE interview commenced was also raised. So too the issue of what had been said to him by police offices driving him from his home to the station for interview. The final issue raised was that of an <u>aborted</u> ABE interview.

[64] Exchanges between the parties' senior counsel and the judge ensued. As the narrative thus far demonstrates, and as these exchanges confirm, there were serious lapses on the part of the prosecution in the matter of the hostile witness application. Obviously relevant parts of JT's ABE interview had been overlooked in making and maintaining the application and this material was not drawn to the attention of the trial judge. These exchanges further confirm that senior defence counsel was fully alert to the issue. When asked by the judge why he had not brought it to the judge's attention, the response was that the judge had not asked senior counsel about it – ie the judge had not raised with senior defence counsel something unknown to him (the judge). All of the foregoing was highly unsatisfactory on both sides. Furthermore, one of the consequences was a series of interruptions in the flow of the evidence, followed by a lengthy fracture during which the completion of JT's evidence was suspended. The court was adjourned at lunchtime on this date 8 June 2022.

[65] JT was not recalled to complete his evidence until 14 June 2022, ie fully seven days after his evidence had begun. The jury was "out" during much of the period 7-14 June. When JT eventually completed his evidence his witness statement was available to him, and he was asked certain questions about it. His evidence confirmed that at the police station he had read the statement, made various alterations to the content and signed it. He testified that the statement, prepared by the police, was "… nit-picked from what they wanted from the ABE."

[66] Before the defence cross examination of JT began, senior defence counsel furnished the trial judge with a copy of JT's ABE interview transcript. It is evident that this marked the judge's first receipt of this important document. It was described by senior counsel as "the second ABE transcript." During the questioning which ensued JT was cross examined out of this transcript.

[67] In this way, JT testified (inter alia) that the appellant was "… backed into a corner … nowhere he can go"; the three McDonaghs were coming down the street at pace; the deceased was swinging a large garden hoe, so vigorously that the head became detached; having run down the street the three McDonaghs slowed as they approached the appellant; the deceased was "… coming down to do damage … pushing forward all the time whereas Joe is on the back foot"; the deceased was "aggressive as fuck"; one of the men accompanying the deceased was carrying a "machete style knife … the length of a machete … like a kitchen knife and pointy"; the blade was 10 or 12 inches long; the third of the McDonaghs was carrying either a full spade or a "spade end"; all three McDonaghs were "swinging [these implements] like full extension, trying to hit [the appellant who] was stepping back swiping at them you know … they came down and they were swinging at him first"; the McDonaghs were "gunning for [the appellant] sort of thing you know"; at the point when the appellant inflicted the fatal wound with the bill hook the deceased "… was going to hit [the appellant] with the spade"; having received the wound the deceased "comes back at" the appellant again; and two or more of the McDonaghs were "coming back to do [the appellant] damage again, so … [the appellant] has then to protect himself again"; in the aftermath of the incident there was a bottle and a hoe

lying outside his house; (returning to the incident) "… I seen [the appellant] to the right of me with a bill hook and then three boys came into my line of view from the left hand side, ran down the street … one had a hoe, and had a knife, one had a bit of a spade."

[68] JT was then re-examined by prosecuting counsel. This questioning took the form of drawing to the attention of the witness various parts of his ABE interview transcript and receiving from him the confirmation that this was what he had indeed said. All of this evidence was elicited through a series of leading questions. It is evident that no one considered the issue of whether, this witness having been declared hostile and having been cross examined by prosecuting counsel, he could be <u>further</u> cross examined under the guise of re-examination. This is an important issue of practice to which legal representatives and trial judges will have to be alert in future cases. Furthermore, the defence did not invite the judge to revisit his declaration of hostility.

[69] To continue the narrative, JT confirmed that he had viewed the CCTV recording prior to being interviewed by police. JT further confirmed that "… what was in the ABE was the best to my knowledge what happened then and there." He further testified that his account in the ABE interview transcript was based on a combination of what he had actually seen and what he saw when reviewing the CCTV recording.

[70] The evidence of JT was completed when the judge asked him whether there should be any difference between what could be seen on the CCTV recording and (a) his witness statement or (b) his evidence to the jury. JT replied "No, I don't believe so."

[71] The final ingredient in the "hostile witness chapter" of this trial is the judge's charge to the jury. The judge's directions to the jury on this issue have the hallmarks of conspicuous care and studied neutrality. Notably, they are not the subject of any complaint or criticism on behalf of the appellant.

[72] At the outset of this discrete section of his charge the judge directed the jury to form their own view about JT's demeanour. In its conclusion the judge stated that it was for the jury to consider "... the truthfulness and reliability" of his evidence. Next, the judge outlined in a little detail the three grounds upon which he had permitted prosecuting counsel to cross examine JT: first, in examination in chief he testified that he saw the McDonagh brothers before seeing the appellant, whereas the account in his witness statement was that he had seen the appellant with a bill hook before noticing the McDonaghs; second, in examination in chief he testified that he had seen the McDonagh brothers carrying the end of a spade, the end of a hoe and a large kitchen knife, whereas in his witness statement he mentioned only "a bit of a spade"; third, in examination in chief he described the appellant as carrying a weed cutting implement, whereas the description in his witness statement was "a bill hook [for] cutting briers, a long wooden stick with a slight curve on it … about 3/3½ feet

long"; fourth, whereas in evidence in chief he stated that the contents of the bottle held by the appellant were either water or something unknown, in his witness statement he indicated that he initially believed the contents to be petrol and later discovered they were ammonia. Next the judge reminded the jury of JT's refusal to refresh his memory from his witness statement. The hostile witness ruling followed.

[73] The next passage in the judge's charge is of evident importance:

> "After I ruled that [JT] was to be treated as a hostile witness it came to light that unbeknown to me that a section of [JT's] ABE interview on the 15th of April had been wrongly transcribed into his statement and that he had actually said in his ABE interview that he saw three boys come into view, one had a hoe and one had a knife and one had a bit of a spade.
>
> In respect of the remaining stated inconsistencies you may or may not take them into account when considering [JT's] reliability as a witness. It is for you to decide the extent and importance of any inconsistency. If you conclude that there is a serious conflict between the account he gave in court and his previous account you may think you should reject his evidence altogether, however, you may take the view that the inconsistencies are of no relevance or of a limited weight. If so, after careful consideration if you are sure you can rely on all or part of what [JT] said on the previous occasion and when giving evidence you may take this into consideration in giving your verdict."

[74] The judge then outlined to the jury the two successive ABE interviews of the appellant, explaining to them the meaning of "*ABE*", the police officer's preparation of a draft witness statement for JT and JT's evidence about the events surrounding the application of his signature thereto. The jury was then reminded of JT's acceptance that he had signed each page of his statement, had signed the "declaration" that he had read the contents and, finally, had made alterations to the text which he initialled. The judge next reminded the jury that JT had viewed the CCTV evidence prior to his police interviews.

[75] The judge's charge continued:

> "Members of the jury, it is for you to assess the reliability and credibility of [JT]. You might take the view that his demeanour in the witness box and the said assertions made against the interviewing officers were an unnecessary distraction to the real issues in this case. The real issues are whether the contents of his ABE interviews and what he

> finally said in his evidence on the 11th of June were true. When questioned by Mr Fahy on the 11th of June he was taken through his ABE interviews. He confirmed that the interviews were true…
>
> At the end of his evidence I asked [JT] that if he watched the CCTV evidence before he took part in the ABE interviews should there be any difference between what he saw on the CCTV and first of all in his statement and B, his evidence? [JT's] evidence was "No." Members of the jury you must carefully consider [JT's] evidence in light of the CCTV footage. Do you consider him to be a truthful and independent witness? … It is for you members of the jury to consider what you consider to be the truthfulness and reliability of the evidence."

[76] Turning to the legal rules, the starting point is Section 3 of the Criminal Procedure Act 1865 which provides:

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Article 23(1) of the Criminal Justice (Evidence) (NI) Order 2004 must also be considered:

> "If in criminal proceedings a person gives oral evidence and (a) he admits making a previous inconsistent statement, or (b) a previous inconsistent statement made by him is proved by virtue of section 3 of the Criminal Procedure Act 1865, the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible."

This is reflective of the law in England and Wales under the equivalent provision section 119(1) of the Criminal Justice Act 2003.

[77] A miscellany of guiding principles is readily discernible from the relevant case law. In *Phipson on Evidence, 20th Ed.,* it is stated at paras 12-61 p420 that the:

> "… [the]… Court of Appeal has said that an application to treat a witness as hostile must be made at the instant it is obvious that he is showing unmistakable signs of hostility" citing the case of *R v Pestano* [1981] Crim LR 397. Blackstone cites the case of *Maw* [1994] Crim LR 841 when advising that, notwithstanding a witness' apparent hostility, the "… judge should first consider inviting the witness to refresh his or her memory from material which it is legitimate to use for that purpose and should not immediately proceed to treat the witness as hostile."

In *Valentine, 12-21 of Criminal Procedure in Northern Ireland, 2nd Ed., 2010,* it is stated at para 12.21 p322:

> "A hostile witness (as opposed to a merely unfavourable witness) is not desirous of telling the truth at the instance of the party calling him, and serious and otherwise inexplicable inconsistency, more than merely to an omission, between a previous statement and the oral evidence may be sufficient to demonstrate it (*R v Jobe [2004] EWCA Crim 3155*). Mere inconsistency is not enough for a witness to be treated as hostile; the judge may have regard to the witness's demeanour, the terms of any inconsistent statement and the circumstances in which it was made: *Marron (minor) v McKiverigan & McKiverigan* [2010] NIQB 37 at [10], [2010] 5 BNIL 66 (Gillen J)."

[78] *Phipson (op cit supra),* at p 419, notes that for the purposes of section 3 that "adverse" means "hostile", as per *Greenough v Eccles* (1859) 5 C.B.N.S. 786. A witness would not be considered as hostile when his evidence "merely contradicts his proof or because it is unfavourable to the party calling him." The evidence would have to be given in such a way that, in the opinion of the judge, the witness did not desire to tell the truth and "bears a hostile animus to the party calling him."

[79] One of the most important principles which emerges is that a witness does not qualify for the attribution of hostility merely because their oral evidence is inconsistent with a previous statement and/or is unfavourable to the party at whose instigation the witness is testifying at the trial. Rather the test is whether the witness has evinced an unwillingness to tell the truth and, in the language of *Phipson*, paras 12–61, "… bears a hostile animus to the party calling him." This test, self-evidently, will not be easily satisfied. The hurdle to be overcome is a substantial one.

[80] Where the trial judge accedes to an application to designate a witness hostile, the scenario which will normally (though not invariably) materialise will be that of the jury receiving evidence from the witness concerned which will typically have four sources, or mechanisms: their initial oral evidence; the previous inconsistent statement; evidence elicited by cross examination on behalf of the party calling the witness; and evidence elicited by cross examination on behalf of the other party or parties. While we have included above the observation that there could conceivably be a fifth mechanism, namely re-examination of the witness by the party calling him, it is unnecessary to explore further this discrete issue in this appeal, particularly in the absence of detailed argument from the parties.

[81] In a criminal trial in which a hostile witness has featured how is the jury to be directed? In *Blackstone,* para F6.51, one finds the following suggestion:

> "… if a witness has been treated as hostile, it is necessary for the jury to consider whether the witness should be treated as creditworthy at all, and they should be clearly directed on that point before considering which parts of the evidence are worthy of acceptance and which are to be rejected. It is insufficient to tell the jury to approach the evidence with great caution and reservation. The judge should give a clear warning about the dangers involved in a witness who contradicts him or herself and should direct them to consider whether they can give any credence to such a witness. It is only if they can, that they may then consider which parts of the witness's evidence they can accept (*Maw* [1994] Crim LR 841)."

Archbold, para 8-247, addresses the issue of the weight or value which the jury may properly attribute to the witness's oral testimony and previous statement in this way:

> "This will be a matter for the tribunal of fact, but it would appear to be open to it to act on the statement and to reject the oral evidence, provided it is satisfied to the requisite standard that it is the statement that represents the truthful account."

[82] In this jurisdiction the recommended direction to the jury is the following:

> REVISED 26 MAY 2009
>
> **"4.13 HOSTILE WITNESS**
>
> 1. X was called by the [prosecution/defence] but gave evidence which did not support the [prosecution's/defence's] case. The [prosecution/

> defence] was therefore allowed to treat him as a "hostile" witness – a witness who had, in effect, changed sides" – and to cross-examine him to show that he had given an account on a previous occasion which was inconsistent with the account which he gave in court. [Identify the inconsistency.]
>
> 2. You may take into account any inconsistency [and X's explanation for it] when considering X's reliability as a witness. It is for you to judge the extent and importance of any inconsistency. If you conclude that there is a serious conflict between the account he gave in court and his previous account, you may think that you should reject his evidence altogether and not rely on anything said by him either on the previous occasion or when giving evidence. (1-3)
>
> 3. However if, after careful consideration, you are sure that you can rely on [all or part of] what he said on the previous occasion or when giving evidence, you may take it into consideration in reaching your verdict[s]."

The Crown Court Compendium for England and Wales deals with the admissibility of the previous inconsistent statement of a hostile witness under its Hearsay section, which includes this passage:

> "The jury are entitled, depending on what they make of the witness' change and any reason the witness gave for it, not to rely on any of the witness' evidence at all, but if after careful consideration they are sure that what the witness said, either in the statement or when he/she was in the witness box, was (or in the case of a defence witness, was or may have been) true, they may take account of it in reaching their verdict/s."

[83] This court would not dissent from either of the two preceding formulations, while adding the following. Clearly, it is open to a properly directed jury to accept any aspect of a hostile witness's oral evidence and previous statement which it considers to be true. Thus, the jury might accept elements of the two sources. There is no binary choice to be made. Furthermore, in any given case the trial judge should reflect on the desirability of directing the jury not to be unduly concerned about the question of which party called the hostile witness. A direction of this kind would be faithful to the fundamental rules governing every criminal trial viz the accused is presumed innocent, and the prosecution bears the onus of establishing all of the essential elements of the offence concerned beyond reasonable doubt. How a hostile witness came to be in the witness box should not distract the jury from these

fundamentals. The "whose witness" factor is frequently overplayed, overlooks the "no property in a witness" principle and neglects the fundamental consideration that every witness swears or affirms their commitment to tell the truth. The task and duty of the jury are the same with regard to every witness, irrespective of the party who called them to give evidence. Furthermore, evidence is evidence irrespective of the party at whose instigation it is adduced and whether it is adduced by examination in chief, cross examination, re-examination, re-call to the witness box or judicial questioning.

[84] Among the leading texts there is a common thread that the exercise of the trial judge's discretion in determining whether to declare a witness hostile will be very difficult to impugn on appeal. May on Criminal Evidence 6th Ed. Para 21.12 states:

> "The exercise of the judge's discretion will only be disturbed by the Court of Appeal if it is clearly shown that either there was no real exercise of discretion or that it was improperly exercised: *Booth* (1982) 74 Cr.App.R. 123, 130."

Blackstone goes further:

> "The discretion of the judge, however hostile the witness, is absolute (*Rice v Howard* (1886) 16 QBD 681; *Price v Manning* (1889) 42 Ch D 372), and the decision will rarely be open to a successful challenge on appeal (*Manning* [1968] Crim LR 675)."

"Absolute" in our view suffers from overstatement. But the hurdle is an undeniably high one.

[85] The preamble to an examination of the substance and merits of this ground of appeal has been a necessarily lengthy one. It has entailed tracking the hostile witness issue as it unfolded at the trial from its inception to its conclusion in some detail. The need for this exercise will become apparent.

[86] The argument developed on behalf of the appellant, drawing partly on counsels' own written formulation, may be summarised thus. JT was one of "three independent witnesses in support of the defence case versus two McDonagh witnesses." By reason of the declaration of hostility "… it became two independent witnesses versus the two McDonagh witnesses." If JT had been "… permitted to give his evidence in the normal way" he would have been "a prosecution witness whose evidence was helpful to the appellant." The declaration of hostility enabled prosecuting counsel to cross-examine JT "in an effort to discredit him." Furthermore, it is suggested, "… a succession of PSNI witnesses (who were not on the original depositions or witness list) were called to attack his credibility and standing in the eyes of the jury." Finally, prosecuting counsel's closing speech to the jury challenged JT's evidence (in some unspecified way), while the trial judge's directions drew

attention to JT's "hostile" status. All of the foregoing, it is submitted "introduced fundamental unfairness into this trial."

[87] While the route to this court's determination of this ground of appeal has been an unavoidably protracted one, the answer to the foregoing submissions is of relatively compact dimensions. We consider that the designation of JT as hostile was positively beneficial to the appellant. Fundamentally, it was this declaration which resulted in the ABE transcript of JT's evidence becoming evidence at the trial. This had the consequence that those aspects of JT's first account clearly favourable to the appellant were exposed to the jury. One of the most important elements was JT's ABE description of the McDonaghs carrying a "garden spade, a garden hoe and a large kitchen knife." In his oral evidence, following the declaration of hostility, he repeated this unambiguously. This description was manifestly more favourable to the appellant's case than the description in his witness statement of only one of the McDonaghs carrying only one implement, namely "a bit of a spade." This evidence emerged as a direct result of the hostility designation.

[88] Next it is necessary to highlight other aspects of JT's oral evidence which were also favourable to the appellant's case. Summarising: by virtue of the "advance"(our choice of word) of the McDonaghs the appellant was "backed into a corner"; the deceased was swinging a massive garden hoe; the McDonaghs came running down the road at speed; the kitchen knife carried by one of the McDonaghs was "the length of a machete … and pointy … [with] a good 10 or 12 inch blade …"; the deceased was "… coming down to do damage ... pushing forward all the time whereas [the appellant] is on the back foot"; the deceased was "aggressive as fuck"; the McDonaghs were "swinging [their weapons] like full extension, trying to hit [the deceased, who] was stepping back … they swung first, they came down and were swinging at him first …" Finally, JT confirmed unequivocally that the transcript of his ABE interview contained a true and accurate account of what he had seen.

[89] In short, <u>all</u> of the evidence favourable to the appellant's case which JT was capable of giving was in fact given by him – and repeated. This represents the first, and most important, consequence of the declaration of hostility favourable to the appellant. Second, the declaration of hostility had the further consequence that a quite serious irregularity in the police investigation was fully exposed before the jury. This concerned the manner whereby JT's witness statement had been generated. The exposure of this can only have been favourable to the appellant and simultaneously unfavourable to the prosecution case.

[90] Next, all of the evidence of JT favourable to the appellant's case was highlighted by the trial judge in his charge to the jury. Furthermore, the judge specifically drew to the attention of the jury the issue relating to the emergence of JT's ABE interview transcript <u>after</u> the judge had made his hostility ruling. Simultaneously the judge reminded the jury that a section of this transcript "… had been wrongly transcribed into his statement…" The judge's direction on this issue was, in substance, that the asserted inconsistency between JT's initial oral evidence

and his witness statement had no foundation. Regarding the other suggested inconsistencies, the judge's direction was that the jury "… may or may not take them into account … [and] may take the view that the inconsistencies are of no relevance or of a limited weight." The possibilities of (a) accepting JT's evidence in its entirety, (b) rejecting it in its entirety and (c) accepting part of it were squarely laid before the jury.

[91] Finally we address the submission that in consequence of the hostility designation "… a succession of PSNI witnesses … were called to attack [JT's] credibility and standing in the eyes of the jury" (from counsels' skeleton argument). We consider this submission unsustainable for the following reasons. First, notwithstanding protracted pre-trial exercises initiated by this court regarding the preparation of trial transcripts, none of this evidence has been transcribed and placed before us. Second, we consider it clear from the transcripts which have been provided that the dominant purpose of adducing this additional evidence was to deal with the serious questions raised about the generation of JT's witness statement – a matter which, as already stated, was unfavourable to the prosecution case and favourable to the appellant. It is evident that these witnesses were also required for the purposes of exposing the fact of the two ABE interviews of the appellant and how his pre-trial account progressed from an ABE interview transcript to a written statement. Third, it would appear from the transcript that the evidence of one or more of these witnesses was required to address certain disclosure issues which arose mid-trial (see above). These police witnesses also, it would seem, addressed the issues of whether the CCTV recording was played by any police officer in JT's presence prior to his first interview and what, if anything, was said to him in the police vehicle in which he travelled from his home to the statement for interview. Fourth, this additional evidence tended to favour the defence.

[92] There are four points arising out of the immediately preceding matters. First, the appellant's evidence on these issues had been vague. Second, there was no suggestion that he had concocted anything. Third, these were issues of a relatively peripheral nature, as confirmed by the manner in which the judge directed the jury. Fourth, there is (and can be) no suggestion that any of this evidence was not relevant and admissible.

[93] Ultimately, there is no complaint before this court that in consequence of the designation of JT as a hostile witness any irrelevant or inadmissible evidence was adduced. The designation was undoubtedly the stimulus for evidence which would otherwise probably not have been adduced. However, all of this evidence was relevant and admissible. The appellant can formulate no complaint about this. Furthermore, as the preceding forensic exercise demonstrates, all of the evidence prima facie favourable to the appellant's case which JT was on paper capable of giving was in fact laid before the jury, while elements of the additional police evidence were more favourable to the appellant than the prosecution. Finally, the trial judge's direction to the jury on the hostile witness designation was conspicuously fair and balanced.

[94] Two further comments are appropriate. First, it would have been obvious to the jury that JT could not, realistically, have known what the contents of the bottle held by the appellant were. Second, given his position and the topography, who JT saw first was manifestly less important than what he saw, particularly in the context of fast moving, highly charged and frightening events. The importance which the prosecution sought to attribute to JT's inconsistent accounts of both was demonstrably exaggerated.

[95] For all of the reasons elaborated in the foregoing paragraphs, this court has no reservations about the safety of the appellant's conviction arising out of the designation of JT as a hostile witness and the consequences which flowed therefrom.

(iii) Ground 3 - The bad character evidence that the appellant was "The King of the Travellers"

[96] In assessing this final ground of appeal it is necessary to set out the context in which the prosecution served an application to adduce evidence of the appellant's bad character which the defence opposed. The appellant is a man of bad character with convictions in the Republic of Ireland for *inter alia* assault and public order offences. However, in the original trial of this matter and prior to his indictment being severed from that of Gerard and Jamie McDonagh, it appears to have been expressly agreed by the prosecution that it was not their intention to make a bad character application in respect of the appellant. With the obvious caveat, that if the appellant was to attack the character of a prosecution witness or create a false impression, then such an application would be made.

[97] While the prosecution was not bound by this earlier expressed intention in any new trial, this remained the position at the commencement of the appellant's second trial on 31 May 2022. However, on 10 June 2022, the Public Prosecution Service presented a notice of intention to adduce evidence of the appellant's bad character. There were three elements to the bad character evidence sought to be adduced: (i) the appellant's criminal convictions in the Republic of Ireland in relation to assaults causing harm, threatening, abusive and insulting behaviour in public, possession of article with intent to cause harm, breach of the peace and threats to kill or cause serious harm; (ii) YouTube videos and stills showing the appellant engaging in bare knuckle fighting and; (iii) the entire narrative content of a police occurrence enquiry log ("OEL") entry which had been partially opened to the jury in defence cross-examination of a police officer in the trial. This was particularly directed towards the omitted entry which described the appellant as the 'King of the Travellers' and a 'bare knuckle fighter.'

[98] The reason given for this change in stance by the prosecution was that on day 1 of the trial, 1 June 2022, Mr Fahy KC, during cross-examination of Detective Constable Gillen, gave him a copy of an anonymous death threat concerning the appellant contained in a police OEL entry to read. The police constable indicated he

was unaware of this potential death threat or of it being communicated to the appellant. The OEL read as follows:

> "Police occurrence number CC2019120701912 refers. It would appear a male caller with a southern accent, refused all details, reported that he has overheard while on a travelling site that there is a threat against Joe Joyce, he has overheard, that either tonight or tomorrow night that there is a hit on Joe Joyce, that he will be wiped out, that his family will have a miserable Christmas. He described Joe as the king of the travellers and that he is a bare knuckle fighter. Caller stated that he is concerned as Joe's wife Ellen and his two small children will probably be in the house and he said Joe lives on Sligo Rd, Enniskillen…"

[99] Mr Fahy KC in cross examination read out the above entry omitting the sentence 'He described Joe as the king of the travellers and that he is a bare knuckle fighter.' This was considered by Mr Fahy KC to be evidence of bad character and believed he was not obliged to introduce this in evidence against the interests of his client. Mr McGrory KC for the prosecution took exception to this and in the absence of the jury indicated to the trial judge that he would be making an application to re-examine Detective Constable Gillen and adduce evidence of the appellant's bad character. A Notice of intention to adduce evidence of bad character was served in Form 7F under Rule 44N of the Crown Court Rules as amended by the Crown Court (Amendment) Rules (Northern Ireland) 2005. In relation to the issue concerning the OEL entry this Notice stated that:

> "The prosecution also seeks to adduce the full contents of the OEL entry that has already been adduced by Mr Joyce in respect of the purported threat. Contained within is that Mr Joyce is a <u>bare knuckle fighter and king of the travellers</u>."

[100] Of relevance are the terms of Rule 44N which provides that:

> "(4) A prosecutor who wants to adduce evidence of a defendant's bad character or to cross examine a witness with a view to eliciting such evidence, under Article 6 of the 2004 Order, shall give notice in writing which shall be in Form 7F in the Schedule.
>
> (5) Notice under paragraph (4) shall be served on the chief clerk and every other party to the proceedings within 14 days from the date –
>
> (a) of the committal of the defendant…"

The Notice in Form 7F was not served by the prosecution until 10 June 2022 at a time when virtually all the main witnesses in the case had been called and cross-examined.

[101] In summary, Mr McGrory KC's submission to the trial judge was to the effect that under common law if a document is placed before a witness and cross-examined out of, as the OEL entry was, then the totality of the document is put in evidence if the opposing party so requires. The prosecution required the omitted sentence to be adduced in evidence but were conscious that, at a minimum the reference to bare knuckle fighter was bad character and would require an application to the court before it could be adduced.

[102] In reply it was the appellant's basic point that the evidence adduced by the appellant, of the reported death threat, is not hearsay, since it is not to be admitted 'as evidence of any matter stated' in it; that is to say, it is not to be admitted as evidence of the 'truth' of the facts. It was adduced as evidence that the statements were made to police not that there was in fact a death threat. The appellant considered this important evidence in light of the fact the investigating detective was unaware of this report or the communication of it to the appellant. The suggestion was that after the attack by the McDonaghs on the appellant, only three months later, this should have resulted in a line of enquiry being followed by the police to see if there was any connection.

[103] In his ruling of 14 June 2022 the trial judge accepted that the cross examination of Mr Fahy KC concerning the OEL entry was simply to elicit information concerning the communication of a potential death threat to the appellant and what steps the police took in relation to that. In addition, that the grounds for admission of the bad character under articles 6(1)(b), (d) and (f) had not been satisfied. He drew attention to the fact that he had not been supplied with any satisfactory explanation for the delay in bringing the bad character application. The judge, not unreasonably, had difficulty comprehending why Mr McGrory KC had not made the bad character application prior to or at the beginning of the trial, since the prosecution were aware of the appellant's criminal record and YouTube footage of him bare knuckle fighting since an opposed bail application in April 2020. The judge also bore in mind that Mr Fahy KC had cross-examined the majority of prosecution witnesses in the trial from 1 June to 9 June 2022 in a manner designed to prevent triggering a bad character application. In these circumstances the trial judge refused the prosecution's application to admit the evidence of the defendant's bad character, to include his criminal record, evidence of bare knuckle fighting on YouTube videos and reference to being a bare knuckle fighter in the police OEL entry.

[104] At the conclusion of the ruling Mr McGrory KC argued that during submissions on the bad character application Mr Fahy KC had accepted that the phrase 'King of the Travellers' was not bad character and he intended to adduce that evidence on re-examination of Detective Constable Gillen. This was despite the fact the prosecution had previously maintained that any reference to 'King of the

Travellers' was bad character and specifically included it in the narrative of their Notice to adduce evidence of bad character. In support of this apparent change in position Mr McGrory KC stated:

> "… Mr Fahy accepted that if you limit that to a reference being limited to the – being 'King of the Travellers' that's not bad character. That was as I understood it from the debate, accepted, so that then falls out with the ambit of a bad character application…"

[105] This was in fact a mischaracterisation of what Mr Fahy had actually said, from the transcript of the exchange Mr Fahy KC had stated that the prosecution would need a bad character application before it adduced that the appellant was a bare knuckle fighter and went on to say:

> "… I'm not even sure the assertion that someone is the King of the Travellers is bad character … but the bare knuckle issue clearly requires an application…"

Mr Fahy KC on the appeal did not accept that he had made any concession that to describe someone as 'King of the Travellers' was not bad character. It was shortly after this that Mr Fahy KC raised the issue that 'King of the Travellers' is associated and inextricably linked with bare knuckle fighting. The trial judge indicated, and it was accepted by all parties, that he was unaware any such connection.

[106] The following day, 15 June 2022, just before Detective Constable Gillen was to be re-examined by the prosecution, the trial judge expressed his concern that 'King of the Travellers' had a connotation that he did not appreciate and just because he did not know about such a connection did not necessarily mean the jury would be unaware of it. He developed the concern he had in an exchange with Mr McGrory KC as follows:

> "LTJ: … Mr McGrory … You've got the most perfect piece of evidence one could ever have in a prosecution case, namely CCTV evidence as to the altercation and it will be for the jury, when they look at the CCTV, to make their own minds up as to what occurred. So if – I have already refused to admit the evidence – the bad character evidence. I've already refused to admit reference to bare knuckle fighting and if, due to my lack of knowledge, "King of the Travellers" as a connotation that I might not know about, but the Travellers, but that the jury would know about and that it

would potentially be prejudicial to Mr Joyce, why would I admit that into evidence?

Mr McGrory: Because it's relevant and it's relevant because...

LTJ: Why is it relevant? Why is it – why could [it] possibly be relevant?

Mr McGrory: Well, because we have the evidence of Caroline McDonagh, who says he stood as the other side of the fence and described himself as "King." So that's relevant.

LTJ: Well, you still have that then.

Mr McGrory: Yes, I Know, but it's his...

LTJ: You always have that.

Mr McGrory: Yes, but I don't have to reopen the whole argument...

LTJ: Well, you do have to, because I am now being told, and in fairness to Mr Fahy, I did shut him down quite quickly yesterday, and he did say to me that there was a connotation that – in respect of "King of the Travellers" and I said well, I didn't know about it, and I reflected overnight and thought, "do you know what, I just don't know everything," as you would expect, and that if there is a connotation that I don't know about, which could have an adverse effect which could impact upon this trial, which could be prejudicial to the defendant, well then, why would I admit that into evidence?"

[107] Mr Fahy KC with leave of the trial judge then produced online and YouTube material in support of the contention that 'King of the Travellers' is intrinsically linked to bare knuckle fighting within the Traveller community. He developed the following submission- to let such a monicker be placed before the jury would be to allow bad character in through the backdoor. This in a case where the fact the appellant and witnesses were Travellers could induce prejudice and impact on the appellant's

defence of self-defence. In addition that it could prejudicially portray a man accustomed to violence as opposed to an ordinary member of the public exercising his right to self-defence. The trial judge then went on to task Mr Fahy KC by suggesting it would be by no means clear whether prejudice arises from the phrase 'King of the Travellers' and that that would be necessarily associated with bare knuckle fighting by the jury. Mr Fahy KC replied that:

> "… I'm not going to make a submission in as stark a terms as that, but I am saying to you that if there is a concern on the part of the court or a residual concern on the part of the court, and the court has opened its mind to that this morning, then if that concern exists and if the overall duty of the trial judge is to ensure the fairness of the trial then, *ipso facto,* the possibility of unfairness should not be permitted or allowed."

[108] After some sporadic argument and counter argument between counsel, which did little to clarify matters for the trial judge, Mr McGrory KC concluded his argument by reminding the trial judge that he believed that he had a favourable ruling on this point the previous day. Subsequently, the trial judge then made a further ruling that the descriptor 'King of the Travellers' would be permitted to be adduced in evidence on re-examination of Detective Constable Gillen. A single question was asked of Detective Constable Gillen on this issue by Mr McGrory KC, which was answered in the affirmative. It was phrased as follows:

> " … in respect of the phone call to the police which was made back in December 2019, in which there was a potential or alleged threat to Mr Joyce conveyed to the police, was he also described by that caller as 'the King of the Travellers?'"

[109] In respect of the bad character evidence, the arguments on appeal largely mirrored those before the trial judge. It is the appellant's case that the timing of the bad character application, made after most of the witnesses had already given evidence and been cross-examined, was unfair and inappropriate. The evidence adduced in cross-examination concerning the OEL entry is not hearsay and admissible in that it is not relied upon to establish the truth of the threat but simply that a report concerning it had been made. Reference to the appellant being described as King of the Travellers was submitted to be manifestly bad character and was tantamount to the introduction of bad character by the backdoor. Given that King of the Travellers is closely linked to, if not synonymous with, being skilled at bare knuckle fighting, it has negative and potentially reprehensible connotations. That the title 'King of the Travellers' in the context of the present self-defence case was prejudicial and should not have been adduced in evidence before the jury.

[110] Of some significance is the timing of the prosecution application. After amendment of the indictment and a second trial having been listed for hearing, there was no application to adduce evidence of the appellant's bad character in advance of the hearing date of 31 May 2022. This was despite the prosecution being aware of the OEL entry, having considered and disclosed this entry to the defence in a bail application in April 2020 and, further, being aware of the likely evidence of Rose and Caroline McDonagh from their statements of evidence in which they referred to the appellant describing himself as 'a boss' and 'the King.' Then on the first day of evidence in the trial, 1 June 2022, Detective Constable Gillen was cross-examined and the threat report introduced to the jury. Yet no bad character application was immediately brought by the prosecution.

[111] Significantly, witnesses continued to be called by the prosecution and six days later, on 7 June, Rose McDonagh, the mother of the deceased, gave anticipated evidence to the effect that the appellant approached her back fence waving a slash hook shouting aggressively that he was 'a boss.' Later again, on 9 June, Caroline McDonagh, the sister-in-law of the deceased, gave evidence that after the deceased had sustained the wound to his leg and was lying bleeding on the road, she saw the appellant 'jumping up and down, saying I'm the king.' Yet, it was not until 10 June, after the main witnesses in the case had given their evidence, been cross examined and the prosecution case about to close that a bad character application was made. The defence had been careful in the conduct of their cross-examination of the prosecution witnesses not to do anything to put the appellant's character in issue.

[112] In the above circumstances we agree with the observations of the trial judge that it is inexplicable that Mr McGrory KC's application to introduce bad character was left so late in this trial. The issues were crystallised at the very latest on 1 June if not well before that date. The decision of the English Court of Appeal in *R v D* [2006] EWCA Crim 1703 is a case in which the defendant appealed against conviction on the basis, inter alia, that the trial judge ought to have left the determination of a bad character application to the end of the prosecution case rather than determining it at the start of the trial. Dobbs J at para [19] observed in relation to applications to adduce bad character that:

> "We have been invited by counsel for the appellant to give some guidance in relation to the proper timing of such applications. Applications of this kind can be made at different times during the trial. We decline the invitation offered because we cannot set down any rules as to when such applications should be made. They will depend on the circumstances of the case and the views of counsel and the court. … On the facts of this case it would be difficult in our view to wait until the end of the Crown's evidence, because it would have affected the shape of how the case was conducted, not only by the Crown but also by the defence."

reason for a judge to make his ruling on the admissibility of bad character at the start of the case. This approach was also followed in the case of *R v O'Neill* [2022] NICC 3 where Scoffield J at para [31] determined that this approach is most consistent with the statutory scheme and the promotion of fairness to defendants generally, unless there is good reason for doing otherwise.

[113] We are of the view that in the present case the application to adduce bad character evidence should have taken place at the start of the trial to have allowed the appellant to know precisely what he faced at an early stage, prepare and manage his defence and adapt his cross-examination accordingly.

[114] On appeal Mr Fahy KC argued that that the OEL was admissible and not hearsay, since it was not being admitted in evidence as to the truth of the fact that there was an actual death threat made against Mr Joyce on 7 December 2019. Rather, it was being adduced as evidence that a report had been made to police of a potential threat with a view to demonstrating that the police had failed to investigate something of possible relevance to the appellant's alleged offending. As such the OEL entry disclosed by the prosecution and the portion he read out was not hearsay and he had not been obliged to open the entirety of the OEL entry.

[115] A statement is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made: see *Archbold, Criminal Pleading, Evidence and Practice* (2023) at section 11-18 and *Subramaniam v Public Prosecutor* [1956] 1 WLR 969, PC. This issue was considered in detail in *R v Twist and ors* [2011] EWCA Crim 1143 where the court said that the opening words of section 114(1) of the Criminal Justice Act 2003, which is an analogue of Article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004, demonstrates that the Act involves asking what it is a party is seeking to prove:

> "Most (but not all) communications will no doubt contain one or more matters stated, but it does not always follow that any is the matter which the party seeking to adduce the communication is setting out to try to prove, i.e. that the communication is proffered as evidence of that matter. He may sometimes be trying to prove simply that that two people were in communication with each other, and not be concerned with the content at all. On other occasions he may be trying to prove the relationship between the parties to the communication but not be in the least concerned with the veracity of the content of it. And there may, of course, be occasions where what he seeks to prove is that a matter stated in the communications is indeed fact. The

opening words of section 114 show that it is the last of these situations which engages the rule against hearsay."

[116] We accept, as did the trial judge, that that the cross examination of Mr Fahy KC concerning the OEL was simply to elicit information concerning the communication of a potential death threat to the appellant and what steps the police had taken in relation to that. However, in a case where the killing was caught on CCTV we consider that the relevance of this evidence was minimal and more likely designed to engender sympathy for the appellant rather than examine the adequacy or thoroughness of the police investigation. This is perhaps reflected in the absence of any submissions by either party to the judge on how he should deal with this issue in his charge to the jury and the fact it was not mentioned in his charge, nor was its absence the subject of any requisition.

[117] The prosecution argument was that at common law if a party calls for and inspects a document and then cross-examines out of only part of that document, then he is bound to put the entirety of that document in evidence if required by the other party to do so. If correct in practical terms in the present case, this obliged Mr Fahy KC to introduce the appellant's bad character contained in the OEL entry. *May on Criminal Evidence* 6th Ed at paras 21-24 however suggests this is an old rule which is now rarely invoked with no modern authorities dealing with it in criminal trials. The author doubts whether it would now be applied to documents held by the prosecution having regard to the obligations on the prosecution to disclose material in its possession under the Criminal Procedure and Investigation Act 1996. This "rule" further runs the risk of undermining Article 18 of the 2004 Order. For all of these reasons we reject this prosecution argument.

[118] The defence contention that the trial judge was led into error by the prosecution application to introduce the portion of the OEL entry describing the appellant as the 'King of the Travellers' is not without merit: particularly given its potential to be construed as interlinked with bare knuckle fighting which the trial judge had already refused to allow to be adduced in evidence. Having reflected on the issue overnight it is clear from the exchanges between the trial judge and counsel that he had significant unease about whether to allow the phrase 'King of the Travellers' to be adduced. He was provided with online and YouTube materials which he appears to have accepted drew a link between bare knuckle fighting and achieving the title 'King of the Travellers.'

[119] We also find it difficult to see the relevance of the prosecution wishing to lead evidence of the appellant's description of 'King of the Travellers.' It added nothing to the prosecution case, and it is hard to distil from the prosecution argument what its probative value was. It is a challenge to fathom how it in any way assisted the jury in coming to a determination of the counts faced by the appellant. More particularly, before this issue of adducing 'King of the Travellers' was argued before the trial judge the prosecution had already laid before the jury the evidence of Caroline McDonagh that the appellant was in the street after the assault on the deceased describing himself

as 'the King.' In addition, there was Rose McDonagh's evidence of the appellant standing at her fence aggressively saying he was 'a boss.' This was all in a context where it was clear to the jury, by virtue of names and accents and the evidence of JT, that all the protagonists in this incident were members of the travelling community. We agree that the trial judge, who was endeavouring to be fair to all parties, was led into error in admitting in evidence the description 'King of the Travellers' which has connotations and links with bare knuckle fighting and which he had earlier refused to allow to be adduced in evidence. There was evident incongruence in the approach taken to the two descriptors attributed to the appellant in the OEL entry.

[120] In circumstances where the trial judge has been led into error and where there is no criticism of the fairness of the trial judge's charge to the jury, and indeed his conduct of the trial, it is not inevitable that such an error will automatically lead to the conviction being quashed. Judge LJ in *R v Renda* [2005] EWCA Crim 2826 at para [4] said:

> "[4] … even if it is positively established that there has been an incorrect ruling or misdirection by the trial judge, it should be remembered that this court is required to analyse its impact (if any) on the safety of any subsequent conviction. It does not follow from any proved error that the conviction will be quashed."

[121] We have considered the case as a whole and are satisfied that allowing the description 'King of the Travellers' did not unfairly prejudice the appellant or rendered his conviction unsafe. There was high quality CCTV footage which shows the confrontation in which the deceased was wounded. This undoubtably was the central focus of the jury and against which they tested the oral and circumstantial evidence in the case. The evidence of Caroline McDonagh explaining how the appellant had described himself as 'the king' and acted triumphantly after having been involved in a street fight with other travellers, was already before the jury, even before the description of 'King of the Travellers' was adduced and without objection by the defence. Neither the trial judge nor senior counsel for the appellant was aware that there was an association between 'King of the Travellers' and 'bare knuckle fighting' during the evidence of Caroline or Rose McDonagh or in early debate on the bad character application. Counsel indicated to the trial judge that it would be a matter for him how he should address the jury in his charge on the 'King of the Travellers' issue and suggested they would make submission on this just before the closings and the trial judge's charge.

[122] Neither counsel considered that this issue merited revisiting and no submissions were made in the regard. Subsequently, the judge made no mention of 'King of the Travellers' in his charge to the jury and no requisition was raised on this omission. While this might normally have been a failing, in the circumstances of this case we discern no prejudice. Rather, as a matter of common sense, the approach adopted most likely worked to the advantage of the appellant in that the issue did not

gain an exaggerated level of prominence in the judge's charge, it having been introduced in a low key manner in re-examination with a single question and remained a very peripheral issue in the case as a whole.

[123] In terms of prejudice Mr Fahy KC has accepted that it was not immediately obvious to defence counsel whilst on his feet arguing against the introduction of 'bare knuckle fighter' that the description 'King of the Travellers' was bad character. He indicated that it was only when the trial judge ruled that he would only permit that description to be placed before the jury that the realisation struck him that it had the potential to have the same impact as bare knuckle fighter on the jury. Mr Fahy KC reinforced this by suggesting the jury were relatively young and more likely to be aware that 'King of the Travellers' is associated with bare knuckle fighting and is a title earned through violence. We are of the view that it is wrong to speculate about the apparent age of jurors and what they did or did not know. They had been warned by the trial judge not to speculate on the evidence and not to allow prejudice to cloud their assessment of the facts. The entry concerning the death threat and the description of 'King of the Travellers' was tangential to the central focus in the case of the CCTV and oral evidence of the witnesses called before the jury.

[124] Addressing any tangible prejudice the appellant contended that his defence could have been conducted differently had he been aware that this bad character evidence was to be admitted. He indicated that there could have been a full-frontal attack on the credibility of the McDonagh witnesses. Again, this is somewhat self-serving and ignores the fact that there are always tactical considerations in play in the decisions made on how to cross-examine witnesses. There was an appropriate challenge to prosecution witnesses in any event. Had the trial judge ruled at the start of the trial to admit in evidence 'King of the Travellers' only, would the appellant have made a full-frontal attack on all witnesses and risked the introduction of his criminal convictions, bare knuckle fighting and YouTube videos? While we have concluded that the judge erred in permitting this bad character evidence to be adduced, we are not satisfied in the circumstances of this case that the appellant has suffered any tangible unfairness or prejudice giving rise to the assessment that this conviction is unsafe.

[125] It follows that for the reasons set out above this court has no reservations about the safety of the appellant's conviction arising out of the introduction in evidence of the description of the appellant as a 'King of the Travellers.'

Overall conclusion

[126] Accordingly, for the reasons we have given, we are unpersuaded by any of the grounds of appeal. We have no reservations as to the safety of this conviction. Accordingly, the appeal is dismissed.