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(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

BRIAN PATRICK SHIVERS

_____

DEENY J

[1] Brian Patrick Shivers appears before the court on an indictment of ten counts. He is charged with the murder of Patrick Azimkar and Mark Quinsey on 7 March 2009. He is further charged on Counts 3-5 of the indictment with the attempted murder on the same date of Mark Daniel Fitzpatrick, Christopher Fairclough and Richard Marshall. All five of these men were serving soldiers in the 38th Royal Engineers Regiment stationed at Masserene Barracks, Antrim. Mr Shivers is further charged with the attempted murder on the same date of Anthony Watson and Marcin Wietrzynski, who were pizza delivery drivers. He is charged with possession of firearms on this occasion on the eighth count and attempted murder of Ryan Dodwell, a Special Constable on duty at the barracks, on a ninth count. A tenth count was added at the trial on the application of the prosecution. It is of assisting offenders, contrary to s. 4(1) of the Criminal Law Act (N.I.) 1967.

[2] Mr Terence Mooney QC led Mrs Kate Mc Kay and Mr Philip Henry for the prosecution. Mr Orlando Pownall Q.C. led Mr Sean Devine for the defence. I am grateful to senior counsel for their able oral and written submissions and to counsel generally and those instructing them for the expeditious conduct of the matter. A number of matters, both significant and peripheral, were put forward on an agreed basis. I have taken all submissions into account even if not expressly referred to in this judgment.

[3] I propose to set out the circumstances that give rise to these counts on the indictment. In doing so in the following paragraphs I will set matters out which are very largely agreed, but if not agreed, which I find to this effect having been satisfied of them beyond reasonable doubt by the prosecution evidence.

[4] The 7 March 2009 was a Saturday. Most of the soldiers stationed at the Massereene Barracks were expecting to commence a move to Afghanistan on that day but their departure was deferred. In the evening at least two orders for pizzas were made to a local restaurant. This had become a frequent practice at the barracks over the preceding months. In describing what happened on that evening the court has had the benefit not only of those eye witnesses who survived what transpired but of CCTV images from security cameras operating at the entrance to the camp and an analysis of the evidence from Mr Jonathan Greer, a senior forensic scientist with the Forensic Science Laboratory of Northern Ireland.

[5] There are a set of CCTV images. The timing of these correlates with one another but was in fact incorrect by about one hour and four minutes. At about 9.37 pm a Mazda 626 motor car, registration number GEZ 9790 pulled up at a layby in front of some concrete dragon's teeth immediately beside the entrance to the barracks. The five soldiers named at paragraph 1 came out, correctly identifying the vehicle as carrying a pizza delivery. However, it was not the delivery as they expected it and some conversation ensued with Mr Marcin Wietrzynski the deliveryman.

[6] Shortly afterwards a dark blue Volkswagen Bora, registration X904 UOK pulled up with a second deliveryman, Mr Anthony Watson. The soldiers then moved towards that car in search of the pizzas which had been ordered by telephone.

[7] I find that a Vauxhall Cavalier registration number TDZ7309 had approached from the Randalstown direction and done a U-turn just on the town centre side of the barracks entrance at this time. It then pulled up slightly on the town side of the two pizza delivery vehicles. Two gunmen got out of the four-door Vauxhall and opened fire with automatic weapons on the soldiers and the deliverymen.

[8] The Crown here expressly concedes that it is not their case that Mr Shivers was in the car. In these circumstances I need not go into undue detail about this attack. Most evidence points to there being a driver and the two gunmen in the car although one witness before me believed there was a fourth person. An accidentally recorded phone message may indicate a fourth person also.

[9] The two gunmen fired on the seven men and the two civilian motor cars. Two of the soldiers nearest to the adjoining sangar naturally ran towards it. The sangar was fired on also. No doubt this was with the intention of deterring any response and it had that effect. The special constable on duty was armed only with a sidearm. There was no armed soldier on duty.

[10] It is not necessary for me to reach any conclusion on the unhappy state of affairs where unarmed soldiers, as these were, were making their way in a semi-regular and predictable basis to the exterior of the camp with only a special constable with a sidearm as protection, particularly in the light of the level of threat

existing in the province at that time. No doubt those responsible have drawn the appropriate lessons from those circumstances and met their responsibilities towards the victims.

[11] After some seconds of firing, and perhaps concluding that return fire would not be forthcoming, the two gunmen closed in. One of them took the time to reload his weapon having emptied the magazine. At point blank range they fired on the victims of their attack. In particular they fired from above at the recumbent figures, wounded or perhaps already dying, of Sappers Patrick Azimkar and Mark Quinsey. They also inflicted multiple wounds on Sapper Fitzpatrick who attempted to shield Mr Watson as they both sought a measure of refuge in the Bora car. They fired on both the soldiers and the civilians, one of whom, Mr Wietrzynski, was seriously injured.

[12] As is apparent from the CCTV the Vauxhall during the attack moved forward to the actual entrance to the base which was only closed by a bar. This was presumably to allow them sight of the guardhouse and to warn if soldiers were coming. This did not transpire during the attack, which lasted less than 40 seconds and the Vauxhall then reversed back and the two gunmen got into the car, the left handed gunman in the front passenger seat and the right handed gunman, firing almost to the last moment, into the rear seat. The Vauxhall then made off in the direction of Randalstown.

[13] This attack was both ruthless and ferocious. Despite the efforts of those concerned both Sappers Quinsey and Azimkar died that evening. Mr Watson and Sapper Fairclough were injured although not as seriously as others. Some sixty three rounds were fired at the unarmed men.

The Law

[14] Before moving on to the evidence that has particular relevance to the defendant I propose to review the relevant law which I must apply. I am sitting in this matter alone without a jury, pursuant to statute. In those circumstances I thought it right to refresh my memory of the directions which would be given to a jury by a judge as to the relevant legal principles. It is not necessary to set those out in full. Clearly the onus to prove the case is on the prosecution and that onus can only be discharged by satisfying the tribunal of fact that the accused is guilty beyond reasonable doubt of each count on the indictment before a conviction can be safely entered.

[15] The case here is based on circumstantial evidence. Circumstantial evidence is dealt with in Blackstone's Criminal Practice, 2013, at F1.18 to F1.27. The learned authors quote Lord Simon in DPP v Kilbourne [1973] 1 All ER 440 at 462; [1973] AC 729 at 758. The relevant passage reads:

> "The Lord Justice-General (Lord Clyde) started his judgment:

> 'The question in the present case belongs to the department of circumstantial evidence. This consideration is vital to the whole matter …'

> Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities.

See also Exall (1866) 4 F&F 922 at 929 per Pollock CB. The defence relied on Teper v The Queen [1952] AC 480 at 489 per Lord Normand:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."

I pause there to say that this is not alleged in the case of Mr Shivers, in my view quite rightly.

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

See also Archbold, Criminal Pleading Evidence and Practice, 2013; 10-3.

[16] An area of particular relevance here is the participation by the accused in what the prosecution contends was a joint enterprise involving him. Mr Mooney QC opened the case on the basis that the defendant either assisted in the attack with the knowledge of and sharing the objective of the principals of the criminal enterprise or, he agreed to join that enterprise knowing that an attack with lethal weapons was planned and with the foresight that the principals might use those weapons with intent to kill or cause serious injury or, he agreed to provide assistance knowing that a criminal enterprise was planned even if he did not know the exact nature of that criminal enterprise but nevertheless, in the circumstances of this case he must have contemplated or foreseen that within the range of criminal activity that might occur was an attack that might result in the death or grievous bodily harm to other persons.

[17] In the judgment of the Court of Appeal in Northern Ireland ordering the quashing of the convictions of Mr Shivers, [2013] NICA 4, one finds this at paragraph [19]. "In our view this was not a secondary party case in which contemplation of an offence arose and the conviction on that basis was not safe. The case was properly presented as a joint enterprise case where the issue for the court was whether it could be inferred that the appellant participated in a joint venture realising that the principal might commit a crime of the type committed (see R v Powell; R v English [1999] 1 AC 1)." Of course one must recognise, per Lord Steyn in Powell and Lord Bingham in R v Rahman, that one is seeking a coherent theory of accessory liability to be applied, I observe, by judges dealing with different factual situations.

[18] Given the importance of the issue generally I would propose to add a little to what has been said there. The matter is helpfully dealt with in Blackstone's Criminal Practice 2013 A4.10FF. Lord Lowry LCJ is quoted in the R v Maxwell [1978] 1 WLR 1363 at pages 1374-5:

> "His guilt springs from the fact that he contemplates the commission of one (or more) of a number of crimes by the principle and he intentionally lends his assistance in order that such a crime will be committed …
>
> The relevant crime must be within the contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principle a completely blank cheque.
> [He] must … have contemplated the bombing of the Crosskeys Inn as not the only possibility but one of the most obvious possibilities among the jobs which the principles were likely to be undertaking."

The use of the word contemplation has found favour over the years. Foresight is also referred it although the two are not synonymous and more recently the House of Lords used the verb to realise: R v Rahman [2008] 4 AER 351.

[19] The editors of Blackstone at A4.14 cite Lord Hutton in R v English [1997] 3 WLR 959: [1999 1 A.C. 1 as agreeing with the Privy Council in Chen Wing-Siu v The Queen [1985] AC 168 that the realisation by the accessory of a fleeting risk which is then dismissed as altogether negligible is not sufficient. …Contemplation or foresight of a real or serious risk is clearly sufficient … and it is immaterial whether the secondary party is present at the scene of the crime or lends assistance or encouragement in advance (R v Rook [1993] 1 WLR 1005). In R v Rahman [2009] 1 AC 129 Lord Brown said with the approval of a number of his colleagues, at [68]:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture that will amount to a sufficient mental element for B to be guilty of murder if A with the requisite intent, kills in the course of the venture."

It is neither necessary nor appropriate for me to complicate matters by dealing with the cases where a secondary party has sought to withdraw from joint venture. See also Archbold, 2013 18-15FF.

[20] The matter was considered at length by the House of Lords in R v Powell; R v English [1999] 1 A.C. This involved, as the name conveys, two different appeals which had made their way to the highest court. Both dealt with secondary parties. Neither was on all fours with the case before me but the House sought to express principles of general application. As Lord Mustill said at page 12A-B:

> "What the trial judge needs is a clear and comprehensible statement of a workable principle, which he or she will find in the speech of my noble and learned friend Lord Hutton; and the judge's task will not be helped in any way by a long exposition of the theory which might have prevailed, but in the event has not."

The theory which he considered has prevailed as he said in the preceding page is that the culpability of the secondary party "lies in his participation in the venture or with foresight of the crime as a possible incident of the common unlawful enterprise."

[21] In his judgment Lord Steyn at page 12-13A said as follows:

> "The established principle is that a secondary party to a criminal enterprise may be criminally liable for a greater criminal offence committed by the primary offender of a type which the former foresaw but did not necessarily intend. The criminal culpability lies in participating in the criminal enterprise with that foresight. Foresight and intention are not synonymous terms. But foresight is a necessary and sufficient ground of the liability of accessories."

[22] The principal judgment by Lord Hutton deals with the matter with comprehensive citation of authority. I refer particularly to pages 20-21 and 28-29 for these purposes. Inter alia he cites with approval a dictum from the High Court of Australia in McAuliffe v The Queen 69 A.L.J.R. 621,624:

> "The scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose."
>
> "Therefore when two parties embark on a joint criminal enterprise one party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise even if he is not tacitly agreed to that act."

Again at 21F His Lordship stated the following:

> "There is therefore a strong line of authority that participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise."

[23] I have mentioned R v Rahman, op. cit. The relevant section of paragraph 68 is cited from Blackstone. All the judgments of course warrant careful consideration. However I will content myself with this salutary reminder from Lord Bingham's judgment at [11], page 356 h, and j:

> "Thus the House [in Powell] answered the certified question in the appeal of Powell and Daniels and the first certified question in the appeal of English by stating that [subject to the ruling on the second certified question in English] `it is sufficient to find a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do or with intent to cause grievous bodily harm.' Thus in this context the touchstone is one of foresight. … Possession of the gun was not of itself conclusive, but it was evidence from which the jury could infer that the appellants foresaw (or `realised' or `contemplated') that the gun might be used to inflict, at least, really serious injury."

[24] If a secondary party agrees to join in an enterprise and aid a principal, although he foresees or realises or contemplates that there is a real possibility that the principal may mount a deadly attack on someone with gun or bomb then the secondary party shares responsibility for any death that subsequently occurs as a result of such a gun or bomb attack and is guilty of murder, even if he had not given express approval to that being the purpose of the enterprise. Here the prosecution

must prove that the defendant was present at Ranaghan Road and did act to assist the Masserene gunmen. That act may be the attempted destruction of the attack vehicle or the carrying away of the gunmen and their driver in another vehicle. But to prove Mr Shivers is guilty of murder and the other charges on the indictment and not only as an aider and abetter after the fact, the prosecution must, in addition, satisfy the court beyond reasonable doubt that the defendant, before turning up at Ranaghan Road on 7 March 2009 foresaw, realised or contemplated that there was a real possibility that the enterprise he was involved with consisted of a deadly gun or bomb attack on other human beings.

The Evidence

[25] The evidence was that some 65 rounds had been discharged from these weapons; two cases were found unfired. The ammunition was of 7.62 by 39 mm calibre. It had been manufactured in Yugoslavia in 1982 for military use. It would have been fired from AKM assault rifles. The magazine of this rifle contains 30 rounds so, as stated above, one of the gunman had reloaded in the process of the attack. The second gun used in the attack had, in the uncontested opinion of Mr Greer, been previously used before. It had been used for a shooting at Randalstown and Strand Road police stations in 2004. Cartridge cases had been recovered from both those incidents.

[26] Later on the night of 7 March a local resident observed a Vauxhall Cavalier registration number TDZ 7309 at an isolated rural junction, that of Ranaghan Road and Derrycowan Road, between Randalstown and Toome. Constable Colin Carson and two other police officers received a radio transmission about this car. They made their way there shortly after 22.50 on the night of 7th and set up a cordon until they were relieved at about 8.00 a.m the next morning.

[27] The car was not forensically examined that day Sunday 8 March because of fears that it may have been booby-trapped but was preserved, it is accepted, by such a cordon until the necessary arrangements could be made for an examination by an Army Technical Officer. This was done on 9 March by Warrant Officer Alan Ness of 321 EOD Squadron based at Aldergrove. The cordon was still in place when he arrived. He used a remote vehicle to observe the car and used a small explosive device to open the boot of the car. He took photographs not only of the vehicle but of a holdall inside the boot of the car and of a jar containing 7.62 mm short rounds in the glove compartment of the car and, fourthly, a photograph of mobile phones on the console between the two front seats of the Vauxhall Cavalier registration number TDZ 7309. These images were contained in Exhibit 89 of the court exhibits. When he examined the car itself he was garbed in an explosive suit but wearing forensic gloves. However after replacing the holdall in the boot of the car, having satisfied himself that there was not an explosive device in the vehicle he was then given and wore a forensic suit, boots and gloves.

[28] In summary the holdall included oil and balaclavas but also a quantity of small arms ammunition. As mentioned there was ammunition in the glove compartment also. It was evident that attempts had been made to set fire to the vehicle. It was consistent with the appearance of the attacked vehicle at Masserene. What makes this clear beyond peradventure is that the ammunition found in the car when examined proved to be not only of the same calibre as the cartridge cases found at the murder scene and not only of the same manufacture but, the forensic scientist was also able to say, had actually been chambered in one or other of the weapons used in the murders. I am therefore satisfied in the way that I must be that the Vauxhall Cavalier at Ranaghan Road was indeed the vehicle used by the murderers.

[29] I pause to make a further observation. I was struck by the evidence of the attention to detail of those who carried out these crimes. In order to avoid or minimise the risk of a misfire they had tried every cartridge in their guns before the attack to see that they would not jam, one would infer. The existence of the ammunition in the vehicle which might, in certain circumstances, have yielded forensic evidence is also a pointer to the belief of the gunman that it would be destroyed with the car by the fire that was to be ignited therein.

[30] Consistent with these other findings was the discovery nearby as marked on a map and given in evidence of a petrol container and a cap that fitted that container. The petrol container and cap showed some damage consistent with fire or scorching to them. The logical inference from that is that the container was close to the petrol soaked interior of the car when it was ignited, the petrol in the can having being poured over the front seats in particular.

[31] Mr Ness accepted in cross-examination by Mr Pownall that the vehicle as shown in the photographs had been moved back about a car's length on the Ranaghan Road towards the junction.

[32] Mr Ness had said that he never touched the vehicles or its contents without being gloved. He accepted there was damage to the number plate and boot at the rear of the car and that the movement of the car had not been a gentle manoeuvre. He said it was difficult to determine what affect that would have had on any matchsticks or other contents of the car. He had seen the matches on the backseat and mentioned that to the Crime Scene Manager. He denied climbing into the vehicle but had leant in. He did not see a latex glove tip later found. The latex tip carried the DNA of Colin Duffy, earlier acquitted, and not that of this accused Shivers. The petrol container mentioned above had been found some distance away from the vehicle over a hedge. The principal person responsible for the searching of the car on 9 March after it was cleared by the ATO was Rachel Deane who was the Crime Scene Manager. Her evidence was that she was wearing a complete forensic suit with shoes and two pairs of gloves. She had the assistance of a crime scene management log which was largely made at the time with some notes added in shortly afterwards. She described the finding of the coffee jar with rounds of ammunition, a balaclava label, the two mobiles in the central consul and in the boot

the further balaclavas and further rounds. She also saw the three matches – two on the back seat, one on the road near to the original position of the car.

[33] I am satisfied generally by the continuity evidence that the proper steps were taken with regard to the collection of evidence, and indeed the defence accepted that was so, on 12 March 2013. This is particularly important in a case reliant on DNA evidence. The samples are infinitesimally small. However, there are certain significant qualifications to the general satisfactory nature of the continuity evidence. Mr Pownall was critical of some of Mrs Deane's note-taking.

There were four separate points of significance:

(i) the fact that the back seat of the Vauxhall Cavalier was pushed down on to the two matches which were later to form a crucial part of the Crown case;

(ii) that Mr Robinson put both matches into the same bag allowing free contact between them, if that had not already occurred;

(iii) the finding of Mr Robinson's DNA on a car key.

(iv) the finding of DNA in the car from the driver who took the vehicle to Maydown.

[34] Rachel Deane agreed with counsel that extreme care with scientific evidence was required. Slightly surprisingly when asked if she was a very careful person she said, after a pause, that she tried to be diligent rather than careful. She agreed the day of the inspection was wet and windy. With regard to the absence of some photographs of items earlier on she agreed that with hindsight it would have been useful to have those. She removed certain items but did not remove the two matches from the seat. She acknowledged that there was fire damage in the interior of the vehicle. It was also clear that an attempt had been made to clean the vehicle to remove forensic evidence, inferentially before they set it on fire.

[35] I turn to (i) at paragraph [33] above. The court heard oral evidence from Rosemary Johnston, another crime scene investigator who was active in this matter on 10, 12 and 24 March. She had dealings with the tip of the latex glove on which the DNA of Colin Duffy was found, as it was on a seatbelt buckle of the car also. Colin Duffy was acquitted of these offences.

[36] She was cross-examined by Mr Pownall and agreed that she had never been at a crime scene before involving matches or wood. Matches are industrially made and are only likely to have been touched by persons after that process was completed. She agreed it was possible that an individual could touch other matches in the box each time it was opened. She did not uplift the matches on 10 March because she did not believe they were receptive for DNA. She agreed that she had

let the back seat of the Vauxhall go down on top of the matches with a possibility of DNA transfer from the seat to the matches. In re-examination counsel for the prosecution sought to show with the assistance of photograph 5 of album Exhibit 91 that only part of the rear seat was folded down flat and that was not the part of the seat where the matches were. But Mr Pownall was able to point to other photographs not in the exhibit but discovered to the defence. These were actually Ms Johnston's photographs and they showed both sides of the seat had been lowered down i.e. including the side on which the matches lay. What is the significance of that? The evidence of the vendor of the Vauxhall is clear that there is no reason why Mr Shivers would ever have been in it before its sale to another person a week before the attack on the barracks, but if Mr Shivers had been sitting in the back of this car in the course of that week his hands, or other parts of his body, could have left DNA there which transferred to the matches. Several persons have been identified as associated with the Vauxhall who have not, to the best of my knowledge, been prosecuted let alone convicted, with the inference that mere presence in the vehicle has not been regarded as sufficient to demonstrate participation in the conspiracy.

[37] When another crime scene investigator William Mark Robinson, mentioned above, came to give evidence he accepted that it was not good practice to put a seat down as there may be fibre or other transfers. I accept his description of the matches, which I saw, as struck but not burnt through i.e. as if they had blown out immediately after being struck.

[38] With regard to (ii) at paragraph [33] above one turns to the evidence of William Mark Robinson, a crime scene investigator employed by PSNI. He went to the car at Maydown Police Station on Wednesday 11 March. It was he who packaged sealed and labelled the two struck matches sitting on the rear off-side seat as WMR13. The first thing to observe is that they had been sitting there for some four days which seems somewhat surprising in the circumstances. While the car had, presumably, been secure on the 8th it had been the subject of a controlled explosion on the 9th and inspection by a number of persons as well as movement to the Maydown police garage. It is surprising that the matches were not recovered earlier.

[39] That aside it seems clear that they should have been put into different packages. DNA was later found on these matches but it is accepted that it could have been on one of them and in the course of the days they were together have been transferred to the other, particularly as they were then put in the same sealed package. Mr Robinson figures again in relation to point (iii) at paragraph [33] because, at a very late stage it was disclosed at the trial, after tests requested by the defence, that Mr Robinson's DNA was found on one of the car keys. See his statement read into the evidence, of 8 April 2009. Either what he says there is not the case or again it demonstrates the ease with which DNA can be transferred even by an experienced crime scene investigator like this, wearing, according to his own statement, two pairs of nitrile gloves.

[40] I deal with point (iv) at [33] above. A full profile DNA of Mr Robin Greer was found on the handbrake and gear lever of the Vauxhall car. Mrs Deane said she was horrified at this. He should have been in a full forensic suit with gloves at all times. Either he disregarded the procedures laid down, which is worrying, or he wiped his gloved hand on his face at some stage and thus transferred DNA to the motor car. If the latter it shows how easily DNA can be transferred. In a way it is not surprising that this happened. He put the car in a low loader at the scene and took it to Maydown. The entrance to the forensic garage at Maydown looks a tricky enough one to tow a vehicle into or unload it from a low loader. Unfortunately he did not admit that it was in the course of such a latter operation that he may have applied this DNA. He produced a wholly incredible story about enquiries being made to him by telephone about the label on the car. I reject his account. Again it does not inspire confidence in the Crown case that this mistake was made and that it was then explained in a way which I find to be wholly specious. Mr Greer was apparently interviewed under caution about this matter by the police. One of the statements in his earlier witness statement of 22 July 2009 was:

> "At no time did I enter the inside of the vehicle."

That is clearly untrue.

DNA Evidence

[41] The prosecution in this case had at one stage proposed to call not only a forensic scientist from England but one from the United States. There was an application from the defence, first of all to obtain further information about the workings of the US witness and, subject to the receipt of that information, to object to the admissibility of his methodology as not yet scientifically established. In the event there were discussions between the parties. They resulted in certain concessions being made by the defence which obviated the need to call either the Crown's US DNA witness or the defence's US DNA witness. Out of caution I propose to attach to this judgment four documents received as agreed evidence in the course of the trial. The first is headed "Agreed Facts". The second is headed "Second Set of Agreed Facts". The third is entitled "Agreed Facts Regarding Computer Examination" and the fourth is headed "Interviews with Brian Shivers – Summary".

[42] The principal oral evidence heard by the court was therefore that of Mr Andrew John McDonald M.Sc. from Orchid Cellmark Forensic Science Laboratory in England. He is an employee of that firm but is in addition a member of a specialist DNA working group set up by the Forensic Science Regulator. Cellmark provides DNA analysis for forensic purposes in the United Kingdom. Mr McDonald did not give evidence at the previous trial of Mr Shivers. That evidence was given by a colleague of his who is not available on this occasion, for medical reasons.

[43] In the course of his submissions Mr Pownall QC expressed concern, courteously, that the court might be clouded in making its independent judgment by the fact that another judge had previously convicted the accused. Indeed he expressly invited the court to read the judgment of Mr Justice Hart with a view to seeing that there were important distinctions between the evidence that was presented to him and the evidence before me. Obviously I must decide the case on the evidence before me, which in this regard is the evidence of Mr McDonald with any other matters agreed between the parties or otherwise before the court. In at least two respects Mr McDonald differed from his colleague in a way that was of assistance to the defence. The evidence of the defendant's DNA on the third match was now stronger but as it must be inferred that it was from the same box as those inside the car that is of little moment.

[44] DNA is the abbreviation of deoxyribonucleic acid, a self-replicating material present in nearly all living organisms. It was discovered more than half a century ago. If found in sufficient, albeit tiny, quantities it can be identified with particular individuals. The methodology of doing that need not be exhaustively described here. A standard methodology is a short tandem repeat methodology of which the current sub-set is SGM+ (Second Generation Multiplex+) which the witness said had been accredited in the United Kingdom since 1999. For forensic purposes the first step is to examine an item and recover any DNA that might be present on that item. Having recovered it it is extracted from the material, such as a swab taken from the defendant, as was done here. It is then quantified. The quantities used may be of the extent of 50 micro litres i.e. millionths of a litre. Within that DNA will be looked for in nanograms or even picograms. A nanogram is one thousand millionth of a gram. A picogram is one million millionth of a gram. Therefore, said the witness, they would regard finding ten millionths of a gram of DNA in a microlitre as "a huge quantity".

[45] For a variety of reasons I need not go into this matter in great detail. Suffice it to say that various methods of enhancement of these quantities have been attempted to increase the precision and effectiveness of DNA techniques. The witness said that low template DNA was an enhancement process that followed on from low copy DNA, which had been the subject of judicial criticism here, and that it had been accredited for more than ten years in the United Kingdom. There was no challenge to the principle of this. The net effect of the DNA evidence is as follows.

[46] Exhibit WMR13 consists of the two matches found in the back seat of the Cavalier. The quantity of DNA found was less than 1% of 1000th of a millionth of a gram. However, with the enhanced technique used a profile matching Mr Shivers' alleles is found to a certainty of one in a billion. It could be that other persons DNA is found in these matches as well, a mixed profile but not that of Dominic McGlinchey junior. The alleles are sought at 11 loci, one of which discloses gender and the other 10 of which contribute cumulatively to identify an individual's DNA profile.

[47] The possibility of other DNA arises from the presence of alleles not matching Mr Shivers which might be those of another individual or might be side products, "artefacts", of the analysis process. I pause there to remind myself of the absence of DNA from some at least of the occupants of the car from which the attack was carried out. The reason for that is agreed to be the wearing of gloves as well as the deliberate attempt to clean the car of forensic evidence before it was set fire to. The defence therefore stress that the person setting fire to the car was obviously at least an aider and abettor of these terrorists and might reasonably be expected to be wearing gloves like them therefore. Why would the gunmen take the care they did, "very professional" in Mr Greer's view and then introduce an ungloved assistant whose DNA or even fingerprints might be traced?

[48] Mr McDonald gave a helpful explanation of the risks involved in secondary transfer of DNA from either another surface or a person. See transcript of 13 March pages 34ff and 55ff. He thought it more likely that the DNA was as a result of primary transfer from Mr Shivers rather than secondary transfer. At page 62 of that transcript Mr McDonald excludes Dominic McGlinchey junior from the DNA on the two matches in the car. These two men, Dominic McGlinchey junior and Gerard McGaghey were named by the defendant in his second defence statement at the first trial as persons he associated with. Their names have been raised, as they were at the earlier trial and it was part of the agreed facts, which I propose to exhibit to this judgment, that Dominic McGlinchey junior had been arrested by PSNI on the reasonable suspicion of involvement in these offences. Gerard McGaghey is also linked with them partly for the reason I am about to describe and partly because of his purchase of top up cards for the mobile phones which appear to have been purchased for the purposes of the conspiracy to murder the soldiers. McGaghey's DNA may be on the two matches as two alleles are shared by him, but also by some one in five of the population. This court makes no finding adverse against either of these men but their putative involvement is a part of the defence case.

[49] In cross-examination Mr McDonald accepted that the presence of DNA on a smooth or rough surface does not mean that the person with the DNA profile on it has necessarily touched it. It could be transferred by a sneeze or a cough or by the mere act of talking. Therefore DNA can be "left on stuff without you knowing". He also accepted that the DNA detected here was at sub-optimal levels. Equipment was operated at very very low levels. Instead of 0.2 nanograms, which are, remarkably, regarded as an optimal level, what was found in regard to the sample WMR13 was less than 0.01 nanograms per microlitre, one twentieth of the preferred amount. The witness was taken to a document relating to the interpretation and reporting guidelines for STR high sensitivity analysis. He did not dissent from the matters recorded there including the important caveat that high sensitivity DNA results "cannot determine how long the DNA that gave the STR profile was present on the item or related to a particular event or action". Mr Pownall was making the point as part of a large and important point that the defendant's DNA is not actually on the car purchased a week before the shootings. It is on the matches and on the phones

bought November 2008. Whether his DNA got there by primary transfer, him touching the items or sneezing on them etc or by secondary transfer, it could have happened at any time prior to the discovery of these items by the police.

[50] With regard to the matches the witness accepted that it could be a mixed profile i.e. the DNA of more than one person on the matches (or at least one of them as there may have been transfer from one match to the other match by them being bagged together). The expert accepted that if you put your hand into somebody else's box of matches to light a cigarette, cigar or a candle there was an opportunity to leave and deposit some of your DNA on the remaining matches in the box. That was not fanciful but possible. Once it is in the box it can be distributed between the matches. There may be the DNA of several persons in a box of matches that has been in use and is not fresh from the factory. The box constitutes "a fairly protected environment".

[51] DNA was found on one of surfaces of the petrol container found nearby but it did not match that of Mr Shivers. No DNA was found on the handle of the container or in the cap of the container which was also recovered in the search operation. The witness accepted that that possibly bore the inference that the person opening the cap of the container was in fact wearing gloves. But if the defendant was setting fire to the vehicle ungloved why was his DNA on the matches but not the container?

[52] One of the respects in which Mr McDonald differed from the evidence of Dr Watson at the first trial was in saying that he could not exclude Gerard McGahey as a potential DNA contributor to the two matches WMR13.

[53] In answer to questions from the court Mr McDonald said with regard to WMR13 that there was a potential risk of transfer from the back seat of the Vauxhall onto the two matches but that if it was not a "wet" source of DNA it is much less likely. The car had of course been sitting for some time with the doors closed before this seat back was put down.

[54] JC5 was a single matchstick found on the road near the position of the Vauxhall before it was moved by the ATO. The location was therefore consistent with it being dropped by the person who was seeking to set the vehicle on fire. Counsel were sensibly able to avoid the prolongation of the trial and considerable costs by agreeing for the purposes of these proceedings that the DNA of Mr Shivers was found on this match. Again this was low level DNA which Mr McDonald accepted was "at the very limit in other words .01" i.e. one hundred thousand millionths of a gram per microlitre. The obvious inference is that this match would have come from the same box as the other two matches found in the car.

[55] The evidence is clear that DNA here shows a mixed profile i.e. the DNA of more than one individual on the match (13th March, p.70). A number of the points made about the two matches clearly apply to this match. But what is interesting

about this match is that the prosecution witness testified to the low level DNA analysis indicating DNA from at least two individuals and possibly four. Dominic McGlinchey Junior and Gerard McGaghey are excluded from providing "any significant amount of DNA" with "no clear indication" that they had done so.

[56] The defence complain that if Mr Robinson had not put the two matches WMR13 in the same bag they might have been able to show that one of these matches did not have his DNA at all thus excluding him from handling the match with bare hands at the scene, which in effect must be the case being made by the prosecution here.

[57] The third and final source of the defendant's DNA was EFC1 the mobile phone the number of which concluded with 585. It will be recalled that this was found with another mobile phone in the console between the front seats of the Vauxhall. The prosecution have proven that his DNA was on this phone. It was on the inside of the phone which they rely on. However the laboratory technician who carried out the testing accepted that because her colleagues who were testing for other materials as the phone was dismantled did not change their gloves at every step that there was a possibility of the DNA found on the inside having been transferred from the outside. She did not think this was likely. But it is right to say that Mr McDonald in his evidence accepted the views expressed by A Pooy and R A H Van Oorschot in an article of 2005 put to him that tertiary and even quaternary transfers are possible. This phone recorded a short conversation between persons in the motor car which was clearly between the attack and the car being abandoned shortly afterwards at Ranaghan Road. It is clearly therefore a "guilty item" after the event.

[58] I pause there however to remind myself what these items are. The mobile phones appear to have been acquired by some member of the conspiracy in November 2008 as a batch of payphones that would not be traceable to an individual and could be used in the conspiracy. That assists the Crown. But I remind myself that mobile phones nowadays are extremely common. Matches are extremely common, still. Neither are sinister objects. It is very different from finding a fingerprint on a gun or an explosive device or DNA on a gun or explosive device. The presence of the DNA here does not mean that Mr Shivers touched this mobile phone between November 2008 and the evening of March 2009. He may have done so. But even if he did so it does not necessarily mean that he was assisting the person who carried out this murder. It could have been a quite innocent touching. And of course the transfer may have been secondary and not direct; shaking hands with someone who then handled the phone. In the same regard the DNA on the matches does indicate contact with the box of matches used by the person who did set fire to the vehicle on 7 March. But that contact with that object might have been an entirely innocent one. The DNA of a person suspected of involvement in this matter may be on all the matches form one box but there are indications of the DNA of 1-3 other people, who are not identified, who may well have just have borrowed a

match out of this box at some stage in the weeks or even months before these crimes. That could include Mr Shivers.

[59] A further difficulty for the Crown is that this is again a mixed profile on the phone. There is DNA from at least three and perhaps as many as five individuals on the phone (transcript, 14th March, p.21). But the thrust of the Crown's case is that the presence of his DNA on all three of these exhibits, the three matches and the phone somehow points conclusively to the presence of Mr Shivers on the evening of 7 March to set fire to the vehicle after the attack and/or convey the culprits away.

[60] At one point Mr McDonald said that the DNA on the two matches was more likely to be by a primary transfer. However this is on the basis of the quantity of material he found. Given that he elsewhere acknowledged the suboptimal and infinitesimally small quantity involved I find this opinion difficult to accept. He did satisfy me generally of the utility of the DNA analysis even at an enhanced level. But witnesses have to be careful not to give sweeping opinions, particularly when being asked questions by the counsel who called them. He said at one point: "My experience is that matchsticks is (sic) not a good, a very good substrate to recover from". (14th March, p. 42). But he later admitted in answer to a question from the court that he had never in fact previously examined any matches for DNA during his career as an analyst (p.44).

[61] The prosecution seek to rely on two further matters to bolster their case. The first is that they invite the court pursuant to Article 3 of the Criminal Evidence Order (Northern Ireland) 1988 to draw an inference from the failure of the accused to mention facts relied on in his defence when questioned by the police. It was not in dispute that he was properly cautioned. I have appended a summary of his interviews which was handed in to the court. At this first interview Mr Shivers said as follows. "Well I have, I have never been or never have been a member of the IRA and I had nothing to do with Masserene murders and that night I was in the house, I was in the Chinese and came home, went to the house all night". He then answered no comment to the subsequent questions put to him. He has not given evidence and not therefore sought to blame this on advice from his solicitor. I observe that his solicitor was remarkably intrusive in the course of the interviews. He was giving the impression that his client was a guilty man whom he was trying to protect. But I cannot blame the accused for the infelicitous approach of his solicitor. One exception to the no comment is found at page 718 of the papers when he declined to give the identity of his girlfriend: "Because my girlfriend is a Protestant I don't want people landing on her door and then causing bother with the relationship".

[62] One of the reasons that I said above that I thought an allegation of fabrication of evidence, in any event, a phenomenon very rarely encountered in this jurisdiction in criminal prosecutions in my experience, is that it is clear that Shivers was not a "usual suspect" to the police. Not only was he not interviewed for two months after the events of 7 March but he was then released by them. However he was rearrested and interviewed on 22 July 2009. The prosecution point out legitimately that

although it was being put to him expressly that his DNA was found on matches inside the car, outside the car, and on the inside of the mobile phone found in the car he initially replied no comment. He was expressly asked about Dominic McGlinchey junior and Gerard McGaghey but again answered no comment. However at page 951 of the papers on 22 July 2009 after he had consulted with his solicitor he added the following:

> "I would like to say that I had nothing to do with the murders of the two soldiers or any of the other offences. I am not and have never been a member of the real IRA. I am engaged to get married to my fiancée Lisa Leacock and we plan to have children. I spend most of my time looking after my health and I am not going to spend whatever years I have left doing anything other than enjoying my life with my fiancée. I can't understand how it is my DNA, if it is my DNA. If it proven to be my DNA it can only be there for innocent purposes as I have nothing to do with this."

[63] Subsequently in a second defence statement at the time of his previous trial on these charges he claimed to know both these men and the court is invited to infer that his DNA may have gone on these items through an innocent association with one or other of these men who may have been involved in these offences.

[64] That second defence statement also describes a series of alleged movements by Mr Shivers accounting for where he was on the evening of 7 March before he came home to his fiancée. These were not mentioned to the police in either May or July of 2009. No evidence has been advanced to support that account.

[65] I have concluded, not without some hesitation, that I should draw an adverse inference from the defendant's failure to say to the police, by July anyway, that he did know the two men whom they asked him about. But I think the inference I draw can only be of modest weight. He did not remain stubbornly silent but answered some police questions. It is all too understandable for an accused person to be reluctant to admit to knowing two people whom, by July, being questioned by the police, he might think could have some involvement in this matter. Reluctance to incriminate himself and reluctance to being thought an informer make it understandable that even an innocent person would not give these names to the police at that time or agree that he knew these men. The failure to describe his movements is more notable although he has not actually given evidence about that in his trial.

[66] The prosecution also asked the court to draw an adverse inference pursuant to Article 4 of the Criminal Evidence (NI) Order 1988 because of his failure to give evidence. Having considered, as I have with the Article 3 point, the relevant case

law they are entitled to say that some explanation should, in the state of the law as it has been laid down by Parliament, be forthcoming as a qualification of the right to remain silent and the duty on the prosecution to prove the case against the accused. I am therefore minded to draw an adverse inference from his failure to give evidence. Again however, in all the circumstances I conclude that is of slight enough weight in all the circumstances including that he did give evidence before. He is entitled to say that the prosecution must prove his case.

[67] Although the defendant did not give evidence I had extensive opportunity to consider his demeanour as he sat opposite me for the three weeks of the trial. I can only say that his bemused and sometimes distracted demeanour did not accord with my memory of any other persons convicted of murder that I have observed in the course of 39 years at the Bar and on the Bench.

Ms Leacock

[68] It is also my duty to take into account the evidence of prosecution witness Ms Leacock to the effect that when they learnt of the Masserene Barracks shootings on the following morning the defendant joined with her in absolutely condemning them. He had not expressed to her any sympathy for such activities in the course of their relationship.

[69] I turn to the evidence of Ms Lisa Leacock. She is a witness upon whom both the prosecution and the defence rely for different aspects of her evidence. The defence criticised the prosecution in that having called her, apparently as a witness of truth, for they seek to rely on part of her evidence, they then sought to attack part of her evidence. They did so without ever applying to the court to have her declared a hostile witness. I think there was force in these criticisms.

[70] Ms Leacock is the fiancée of the defendant having been in a relationship with him from about 2004 which continues to this day (subject obviously to his incarceration for some time). In such circumstances she will be well disposed to help the accused and I take that into account. On the other hand she has been brought up in the Protestant religion and from a Protestant district. The inference, for anyone unfamiliar with Northern Ireland, is that it is very unlikely that she would be an adherent of Irish Republicanism, particularly that of the Real IRA who appeared to claim responsibility or whatever group of dissident IRA which carried out these offences. That is a proper inference in my view to draw (despite the historical roots of Irish Republicanism in Ulster Presbyterianism in the 18th century). I had the benefit of listening to and observing Ms Leacock in the witness box and of considering her statement to the police and other evidence, from computer analysts as well and have reached an overall conclusion. I considered her generally to be a witness of truth. The events of 7 March were, as she told me, and I accept, to some degree fixed in her mind both by the unusual transaction of Brian Shivers being initially unwilling to spend that Saturday evening with her, at one stage and by learning the following morning of the double murder at Masserene Barracks. This

was an unusual event, unique in this century. Furthermore her fiancé was arrested, although only some two months after these events and that no doubt was a topic of conversation between them. When therefore she was interviewed by the Police Service of Northern Ireland on 22 July 2009 it is reasonable to accept that she would have been able to give an account of 7 March albeit it was four months before.

[71] I take the view that that was an honest account. As counsel pointed out, if she was a dishonest person trying to help her fiancée she could have claimed that he was with her all evening. Where she seeks to depart from that account I have significant concerns. Observing her when she tried in the witness box to say that Mr Shivers' return to the house they shared in Magherafelt was not "about 9.55 pm-10.20 pm" as she had said in her police statement but earlier than that, I thought her demeanour and her body language changed markedly and I was not persuaded. She gave evidence in the earlier trial of this matter. Before that she had consulted with Mr Shiver's solicitor. Without reaching any conclusion of any impropriety it seems to me as a matter of common sense that having her attention drawn to matters that were of interest or concern to the defence would inevitably muddy the waters of her memory. I found much less convincing therefore the belated additional detail that was proffered.

[72] One issue of importance debated at the trial was whether there was indeed time for Mr Shivers to have been at Ranaghan Road to set fire to the vehicle and take the gunman away and yet be back at his home in Magherafelt by the time Ms Leacock said he was. I heard the evidence of a Constable David Saunderson of PSNI in regard to that. He managed to complete the journey from Antrim to Magherafelt via Ranaghan Road in some 19 minutes at an average speed of about 60 mph. But as Mr Pownall pointed out not only was he an experienced and advanced driver but he was driving a contemporary and powerful motor car well beyond the speed limits. Furthermore the terrorists would have had to stop for at least some little time at Ranaghan Road to transfer out of one vehicle into another vehicle with their weapons. However, even allowing for significantly slower driving on the part of the 13 year old Vauxhall Cavalier and indeed of the Mercedes if it made the second part of the journey and a pause of, say, 5 minutes at Ranaghan Road, I am satisfied that the defendant could have been back at Ranaghan Road by 10.15 pm. This indeed I think is not disputed by the defence. Whether he could have dropped off three or four other persons at some house safe for them becomes more problematical for the Crown. In light of those views I have concluded that Ms Leacock does not provide an alibi to Brian Shivers. He could have been at Ranaghan Road to set fire to the Vauxhall Cavalier and made it back to her at their house by 10.15 or 10.20 pm on the evening in question.

[73] However there are a number of other aspects of the matter which have to be taken carefully into account. In her police statement and her evidence she describes going out to her mother's house after Mr Shivers came home to turn off the lights as her mother's house was nearby but unoccupied that night. She then gets into Mr Shivers car to put it in its normal parking place which had been previously

occupied by somebody else. She notices a McDonald's wrapper in the car. She is suspicious of him in her capacity as a fiancée. He had associated with some other woman the previous year which had caused a disruption in their relationship and she was suspicious that he might have been intending to see a woman that night and not as described below. She said to me, in a wholly credible way, that there was nothing else unusual about the car and in particular no smell of petrol. If the prosecution are right this car had been used to transport 3 or 4 men from Ranaghan Road, two of whom were carrying automatic weapons from which they had discharged 65 rounds of ammunition. It would be surprising if that fact and the fact that at least one of the people in the car is alleged to have then set fire to the Vauxhall Cavalier had left no trace or scent at all in the motor car.

[74] He had told her, early on the Saturday, that he was going into Belfast that night to a party for some men he knew, who had been working with a member of his family and who were returning to Eastern Europe. The nationality seemed to vary slightly. The Crown rely on this as an unusual event in the relationship, which it was, and which they suggest was a cover for him to take part in the attack or assist those doing so. However her evidence, which was part of her evidence on behalf of the prosecution, was that after she, to put it frankly, nagged him about this, he agreed not to go to the party in Belfast but to spend the evening with her. It is very hard to correlate that concession by him with his involvement in a murderous conspiracy with these carefully prepared gunmen. In the events later in the afternoon she said that she said to him that he could go to Belfast.

[75] Her sworn evidence was that the defendant was a smoker who used matches or lighters. Among the callers to their home was Dominic McGlinchy junior, who had done some work for the defendant, who owned two buy to let properties. But she said she had only met Gerard McGaghey since 2009.

[76] The prosecution rely on the fact that though there had been much use of the phone earlier in the day Mr Shivers' mobile phone was switched off from the late afternoon, 5 p.m. until he returned to his home at about 10.20 pm. We know he had returned by 10.27 pm because analysis of the phone records confirms the evidence of Ms Leacock that he rang the Chinese restaurant to order a dish for her, which he walked over to collect. Ms Leacock says that when she got to the house after 8.00 o'clock his phone was simply charging there upstairs in the bedroom. There is therefore a sinister explanation for him not having his phone with him but also an innocent one. He, of course, has chosen not to give evidence. Even if Shivers did not drive the gunman away from the scene at Ranaghan Road, he did set fire to the vehicle, say the prosecution. We know that there is scorching around the petrol can and I have to infer that there was some kind of flow back of flames therefore in the course of attempting to set fire to the vehicle. Even if Shivers walked straight into the house and to the bathroom to wash his hands and face it seems to me I should infer that there would probably be some smell of petrol or burning on his clothes if he really had done that only half an hour before. But Ms Leacock says that was not the case.

[77] I must consider another point. Clearly the attackers would want another vehicle at Ranaghan Road to convey them away in case the Vauxhall had been clearly identified in the course of the attack. The defence point out that aerial footage of the area by a security forces helicopter showed evidence of a vehicle having been parked close by in an open gateway. Tyre casts were taken but did not identify a vehicle - certainly not that of Mr Shivers. Therefore the getaway vehicle might well have been left at Ranaghan Road. There was no need for Mr Shivers to be there. On the other hand a local resident, Mr Richardson, now deceased, noted the unusual phenomenon of two vehicles coming down the Ranaghan Road towards his farmhouse at the relevant times. The prosecution say that this would have been in all likelihood Mr Shivers leading or following the Vauxhall. As I said to Mr Mooney QC at the time this does seem to me a very unusual vehicle to choose for taking the gunmen away. There were at least three people in the Vauxhall, and, according to two pieces of evidence, four persons, implicitly men. Five men were therefore going to get into Mr Shivers car. But it was a two door car, a coupé. No doubt they could have fitted in but it seems an unlikely choice of vehicle.

[78] Of further significance is the fact that the car bore a personalised number plate which one might have thought was the last thing for any terrorist to want. On the number plate in question was "B2 SHV". This is an English registration and in itself therefore a little unusual in Northern Ireland. But it is a clear pointer to this defendant. Taking these factors and the general thrust of the evidence outlined above I could not be satisfied beyond reasonable doubt that he did remove the gunmen from the scene. But the prosecution also opened that he was the person who set fire to the vehicle. The difficulty there is the obvious one of why the terrorists needed him to do that. These men were so thorough as to have chambered every round, including ones they did not use but held in reserve in the car, in the guns they were using. Surely it would have been much safer for them not to involve some further person to set fire to the vehicle when they could have done it themselves by simply bringing a box of matches and petrol? Why widen the conspiracy? If they were going to involve somebody else, the defence say why choose Mr Shivers?

[79] It is common case that he suffers from cystic fibrosis. He has a range of medications. His condition means that his bowel movements are not entirely regular or predictable causing him to require a toilet at short notice on occasions. He was in a relationship with a young Protestant woman, who could not be relied on to keep silent if she learnt of the plot.

[80] Furthermore, as the defence were entitled to point out without calling him, he was of previous good character. Taking these factors together he seems an unlikely associate for this determined gang to rely on. Independent evidence shows him going on line after the Chinese take away on the night of March 7th checking local property prices.

[81] Very conscientious work has been carried out on the batch of phones and subsequent top up cards apparently acquired by the terrorists, and two of which are found in the car. As indicated above they link Gerard McCaghey to these matters but they do not link Mr Shivers. The implication in the Crown case must be that he had been given a pay as you go mobile phone to communicate with the terrorists so he would be there at the right place at the right time whether to lead them to the Ranaghan Road or be at the Ranaghan Road. No one could have predicted the precise time in advance. But the prosecution, despite great industry, have not been able to demonstrate the sending of a call which would be consistent with that i.e. him being warned that the attack was about to be carried out and that he should go to a particular spot nor any call attributable to the Defendant.

Conclusion

[82] I must ask myself, in the language used in the House of Lords in DPP v Kilbourne op. cit., have the prosecution eliminated other possibilities than the guilt of the accused? Am I satisfied beyond reasonable doubt of the guilt of the accused? In the light of all the evidence, particularly the matters set out at paragraphs [29], [33] to [40], [43]-[44], [47] to [52], [54] to [59], [66] to [68], [73]-[74] and [76] to [80] above the answer to both questions is clearly no. I find the defendant not guilty on each count of the indictment.

AGREED FACTS

1. It is further admitted that following the attack at the Masserene Barracks police officers made enquiries of hospitals in Northern Ireland and the Republic in an attempt to identify whether anybody had been admitted for treatment of burns on or about the 7th March 2009. No positive results were obtained.

2. Dominic McGlinchey junior was arrested on the 14th March 2009 on the basis of a reasonable suspicion that he had assisted those responsible for the Masserene Barracks attack, after the attack, and had connection with the car used. That suspicion was based upon information that was assessed to be reliable.

3. The prosecution do not suggest that Mr Shivers was in the Cavalier car at the time of the attack in Randalstown Road.

4. Brian Shivers is a man of previous good character.

IN THE LAGANSIDE CROWN COURT

REGINA

-V-

BRIAN SHIVERS

SECOND SET OF AGREED FACTS

[Amendments made after court are underlined]

It is further admitted between the prosecution and defence as follows:

1. Item 467, exhibit RMJ/90, consisted of a set of 2 car keys taken from the ignition of the Cavalier car by Ms. Johnson on Thursday 12th March 2009 (see statement page 184).

2. Key 1 consisted of a key and a ring. Key 2 comprised a single key which had black insulating tape wrapped around the plastic head. This was holding in place an electrical component.

3. Mr. Dowey sold the car with two keys. One fitted the ignition and one fitted the doors. The ignition barrel had been replaced and he had taped the chip from the original barrel onto the new ignition key using black tape (see statement page 299).

4. The following areas were swabbed and submitted for DNA analysis:
   (a) All of key 1 and the ring.
   (b) Tape ends from key 2
   (c) Edges of the plastic part of key 2 and the electrical component.
   (d) Metal shaft of key 2.

5. No profiles were obtained from the swabs of key 1. A partial profile was obtained from the edges of the plastic head of key 2 and the electrical component which matched the profile obtained from Samuel Dowey.

6. A partial profile was obtained from the metal shaft of key 2 which matched the profile of Mr. Robinson who had removed certain exhibits including the 2 matches WMR/13 on the 11th March 2009 and had also swabbed internal surfaces of the Cavalier vehicle. He returned to

the vehicle on Thursday 12th March accompanied by Rose Mary Johnston (page 182). She took swabs he Robinson seized a number of further exhibits and took soil samples (see statement page 185 and evidence 13th March 2013 p105).

7. No fingermarks were identified upon the exhibits.

Phones:

8. The phone JC/7 was one of a batch of 5 LG "pay as you go" phones with consecutive phone numbers ending 9007-9011. The telephone number of JC/7 ended in the number 9010. They were manufactured by LG Electronics in China and were dispatched to the T Mobile factory in Milton Keynes in November 2008. Records show that they were purchased from a branch of Asda stores, but it was not possible to ascertain which branch and when they had been purchased.

9. Non registered pre pay phones are connected to the network prior to leaving the factory where they are manufactured, whereas contract phones are connected when the customer receives the phone.

10. Each of the five "batch" phones was first used to contact the same number shortly after midday on Wednesday the 25th February 2009. That required the sim cards to have been placed in the handsets. The number called was an estate agent in Glengormley. None of the calls connected, i.e. none of the calls was answered.

11. Whereas the handsets were purchased from Asda (branch unidentified), the sim cards for each of the 5 "batch" phones were purchased from a shop in Magherafelt. It is the sim card which gives the sequential nature to the phone numbers rather than the handset i.e. the numbers ending 9007 to 9011.

12. Billing records provided to the defence show the following:

(a) The 9007 phone was used once on the 25th February 2009 to make the call to the estate agent referred to at paragraph 10 above. No records are available of incoming calls. The phone was connected with an aerial at Newtonabbey. Bethany Jackman confirmed no calls or texts were received by the 9007 phone between 21st February 2009 and 14th March 2009. [*Incorrect, see (d) below*]

(b) The 9008 phone was used first on the 25th February 2009 on one occasion to call the estate agent. It was connected with an aerial at Jordanstown. On the 7th March 2009 it made a number of calls between 18.20 and 19.11 hours to the 9009 and 9011 phones. The 9008 phone was situated in Belfast at these times. Further calls were made to these numbers between the 8th and the 13th March 2009 when again the 9008 phone was located in Belfast. Thereafter the phone was not used further.

(c) Incoming calls and SMS messages were also received on the 9008 phone from a number of phones between the 7th March and the 14th March. The phones used included the 9009 and 9011 phones. At all times the 9008 phone was situated in the Belfast area.

(d) The 9009 phone was first used after midday on the 25th February 2009. It was

connected through a mast/aerial at Jordanstown to the estate agent number. Further calls were made to the 9011 phone on the 28th February 2009 when the 9009 phone connected to a mast in the Toome or Lisnagreggan areas. Between the 7th and the 11th March calls were made to the 9007, 9008 and 9011 phones. The incoming call data shows that a call was made to the 9007 phone at 17.15.59 on 7th March 2009. At all times when calls were made by the 9009 phone on or after the 7th March, the connection was to masts/aerials in the Belfast area.

(e) Incoming calls and SMS messages were received by the 9009 phone between the 7th March and the 14th March 2009 from a number of different telephone numbers including the 9008 and 9011 phones. At all times the 9009 phone was connecting to masts/aerials in the Belfast area save for for 4 calls received by the 9009 phone on the 28th February when it connected through masts/aerials in Toome and Ballynocker areas.

(f) The 2010 phone was the second phone found in the Cavalier. It did not have Shivers' DNA thereon and it was not the phone upon which the recording was made shortly after the shooting. It was first used after midday on the 25th February 2009 when it made an outgoing call to the estate agent. It was connected through a mast/aerial at Jordanstown. It made further outgoing calls on the 28th February 2009 to the 9011 phone at which time it connected through a mast/aerial in Toome and Ahoghill.

(g) On the 28th February 2009 the 9010 phone received SMS messages from the service provider, connecting through a mast/aerial located in Toome. On the 7th March 2009 it received one call from the 9011 phone and 3 text messages. The call was at 18.19:11. The first such text message from the 9011 phone was timed at 21.44:28. The other two text messages were from the service provider and are timed at 21.45:14 and 21.45:20. At these three times the 9010 phone was connecting through a mast known as Lisnagreggan (see exhibit 121 plan of route taken by Saunderson).

(h) The 9011 phone was first used on the 25th February 2009 shortly after midday. It was connected through a mast/aerial situated at Jordanstown when it called the estate agent number. Thereafter it was used on the 28th February 2009 when calls connected through masts/aerials in Toome and Lisnagreggan. Further calls were made from the 9011 phone on the 7th, 10th 11th and 14th March 2009. During all the March calls the phone connected through a mast/aerial in the Belfast area. During these dates it phoned the 9008, 9009 and 9010 phones.

Between the 28th February 2009 and the 14th March 2009 the 9011 phone received a number of calls and SMS messages from numbers which included the 9008, 9009 and 9010 phones. During the 28th February calls the 9011 phone connected through masts/aerials in the Toome, Ahoghill and Lisnagreggan areas. Thereafter, all of the calls received by the 9011 phone were received when the phone connected through masts/aerials in the Belfast area.

13. None of the outgoing or incoming calls made on the five phones described was made to a phone associated with Mr. Shivers.

14. Gerard McGaghey was arrested on the 28th October 2009 and interviewed under the Terrorism Act 2000. There was CCTV evidence showing that on the 28th February 2009, he had

purchased 2 mobile phone top up vouchers and petrol from a petrol service station in Magherafelt. The petrol was put into a green petrol can taken from the rear of his vehicle. McGaghey admitted in interview that he had made these purchases.

15. The 2 top up vouchers were subsequently used to top up the 9009 and 9011 phones.

16. In respect of the "585" phone (exhibit JC/8) which was located in the Cavalier centre console and had Shivers' DNA thereon, the two SMS messages received on the 6th March 2009 at 16.43 from the O2 Service Centre showed the phone connecting through a mast/aerial in Dungannon. It received a further 2 text messages at 20.46 on the 7th March 2009. The phone connected through a mast/aerial at Lisnagreggan. A further text message was received at 21.40 when the phone connected through a mast/aerial at Carngranny. (see plan exhibit 121).

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BRIAN SHIVERS

AGREED FACTS REGARDING COMPUTER EXAMINATION

The following facts are agreed as between the prosecution and the defence:

1. On the 15th October 2009 Detective Constable McClurg who, is appropriately qualified, examined SH/2, a Toshiba Computer seized from 3 Sperrin Mews by Police on or about the 15th May 2009. He carried out a further examination of the forensic image on the 1st October 2010.

2. It is admitted that this is the computer used by Brian Shivers and Lisa Leacock at March 2009.

3. The hard disc was removed and imaged using forensic software.

4. The programme used was called "Encase" which allows the user to acquire a complete image of the suspect's hard drive. It permits the examination of that image without changing any data on the original drive.

5. Both date and time settings were found to be accurate.

6. The operating system was installed on the 27th August 2005 and was last shut down on the 5th May 2009 at 20.32 hrs.

7. There were two user accounts which were password protected. The first was in the name "Brian" and the second in the name "Lisa Leacock".

8. Analysis of the files reveals that they were created between 21.49 and 23.28 hrs. Many of the files were created as a result of internet browsing.

9. Creating a file a file can be a function either of user activity or system activity. A computer will of itself perform functions. The presence of files with their created dates is a sign that the computer at the very least is switched on (page 11 of the transcript).

10. If a computer is switched on one would expect to see system activity as part of the normal operating system procedure of a computer would involve files constantly being created. (Trans p 25).

11. Most actions performed on a computer will leave some form of trace of activity with the caveat that it possible for these to be deleted. (trans p 28)

12. It may however be impossible to say if anybody is actually sitting at the computer. If a person walks away from a computer having turned it on one would still expect to find activity by files being modified and created. (Trans p 26)

13. The first files created or "written to" that can be attributed to user activity occur at 21.58 hrs. When Detective Ian McClurg examined the subject lap top computer he found that the files in question had been deleted. This inhibited a more detailed exploration of the precise internet browsing activity during the relevant period on the 7th March 2009.

14. Normally deletion of these kinds of files (those associated with internet browsing) are deleted when a person using the computer deletes their internet history prior to closing the internet browser. (Trans p.18&19)

15. Some files have been overwritten, meaning that only the filenames and date and time attributes remain. This means that at least a portion of the data which formed the content of the file no longer exists on the hard drive. Traces will remain but putting those traces together is difficult as not all the data is available. (Trans p 38)

16. It is possible to state that the Lisa Leacock account was active and that a log on to that account must have taken place prior to 21.58 hrs on the 7th March 2009.

17. It has not been possible to determine a precise log on time for the account however it was noted that only two files were "modified" or "created" on the entire system prior to 21.58. These files were modified at 21.48 and 21.57. The exact nature of these files is undetermined and has not been definitively attributed to user activity. This strongly suggests that the computer was not switched on prior to 21.48 or that it was switched on but was not being used. If a computer is not being used it goes into "sleep function". (Trans p 20) A screen saver is activated after 59 minutes of inactivity.

18. It is impossible to say when a user first opened the web browser. If someone had used the computer prior to 21.48 one would expect to see file activity. (Trans p 20). It is therefore reasonable to say that the "Lisa Leacock"

account "logon" time on 7.3.09 would have occurred some time between 21.48 and 21.58 hour.

19. The nature of the internet activity at 21.58 was MYmsn.com. At 21.59 files within the system indicate that an internet search was performed and that the user was subsequently directed to the web site www.ovarian-cysts.com. At 22.06 the search was directed to Facebook.com.

20. Between 22.08 and 22.23 there were no records present.

21. Between 22.24 and 22.41 various files were searched relating to a "healthyway" magazine and ovarian cysts.

22. A "cookie" file created at 22.26 was examined which revealed that the search term "agnus castus acne teenage boy was used".

23. "Cookies" are small text files created by the user's web browser and are stored on the hard drive following access to a site that makes use of a "Cookie" function.

24. At some time between 22.41 and 22.46 it can be seen that internet activity switches to the "Brian" user account as it underwent a system log in (trans p 14). It is therefore possible to say that the "Brian" account was logged onto between 22.41 and 22.46 hours. Prior to 22.45 all activity had been under "Lisa Leacock" account. After 22.45 all activity was performed under the "Brian" account. (trans p.23).

25. There is no evidence of any activity on the "Brian" user account before that time.

26. Following log in access was made to a number of websites including www.coast-stores.com, www.warehouse.co.uk, www.monsoon.co.uk, msn.com.

27. During the activity on msn.com a number of clothing stores were searched.

28. The browsing under the log in name "Brian" lasted until 23.28 hrs. (Trans p15)

29. The Burns Homes website was accessed at 22.48. (trans p33)

30. There are no other entries between Burns Homes and MSN between 22.50 and 23.19.

31. Although it is impossible to say how long an individual spent surfing a particular website.

32. At 22.50 there is a file that has been downloaded which relates to an address at Coolshinney Heights.

Interviews of Brian Shivers – Summary

The accused Brian Shivers was interviewed on 5 occasions on 15 May 2009. The appropriate caution was administered at the start of each interview.

In the first interview, having been administered the caution, the accused stated (at p.652) as follows:

"Well I have, I have never been or never have been a member of the IRA and I had nothing to do with Massereene murders and that night I was in the house, I was in the Chinese and came home, went to the house all night." He was asked who he had been with and said that he had been with his girlfriend.

From that point onwards the accused made predominantly "no comment" interviews. In the course of the ensuing interviews:

- the accused was asked (at p.699–700) if he smoked, if he had a lighter and if he used matches. He answered "no comment".
- the accused was asked for the identity of his girlfriend. He refused to provide this and gave his reason (at p.718) as follows: "Because my girlfriend is a Protestant, I don't want people landing on her door and then causing bother with the relationship."
- the accused was asked (at p.732) about his movements on the day of 7 March 2009 and made no comment.
- the accused was asked (at p.742–746) questions about Dominic McGlinchey, including whether he had been in a vehicle with Dominic McGlinchey and whether Dominic McGlinchey had ever been at his home. He answered "no comment".

The accused Brian Shivers was interviewed on a further 5 occasions on 22 July 2009. The appropriate caution was administered at the start of each interview.

The accused made predominantly "no comment" interviews. In the course of the interviews:

- among questions about association with various people he was asked (at p.882) about association with Dominic McGlinchey. He answered 'no comment'.

- police officers asked him (at p.855) about smoking in the context of the discovery of matches that were connected to the attempt to burn the attack car and he answered 'no comment'.
- he was asked again (at p.870) about matches found at the scene, in particular about the matches found on the back seat of the attack car and he responded 'no comment'.

- he was asked (at p.906) if he knew Gerard McGaughey and he answered 'no comment'.
- he was told that his DNA was on the matches inside the car, on the match outside the car and on the inside of the mobile phone. When this evidence was put to him he initially made no comment. In a subsequent interview, having consulted with his solicitor, the following statement was read out on his behalf: p. - 951-2

> "I would like to say that I had nothing to do with the murders of the two soldiers or any of the other offences. I am not and have never been a member of the Real IRA. I am engaged to get married to my fiancés Lisa Leacock and we plan to have children. I spend most of my time looking after my health and I'm not going to spend whatever years I have left doing anything other than enjoying my life with my fiancée. I can't understand how it is my DNA, if it is my DNA. If it is proven to be my DNA it can only be there for innocent purposes as I had nothing to do with this."