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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **25/11/2022**

IN THE CROWN COURT IN NORTHERN IRELAND

SITTING IN BELFAST

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THE KING

v

DAVID JONATHAN HOLDEN

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Mr C Murphy KC with Mr S Magee KC (instructed by the Public Prosecution Service) for the Crown
Mr F O'Donoghue KC with Mr I Turkington (instructed by MTB Solicitors) for the Defendant

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O'HARA J

Introduction

[1] The defendant is a former soldier who is charged with a single count of manslaughter. The charge is that on 21 February 1988, contrary to common law, he unlawfully killed Aiden McAnespie. It is not disputed that a bullet fired from a multi-purpose machine gun ("MPMG") controlled by the defendant killed Mr McAnespie. What is disputed is how that came about and whether the prosecution has proved the defendant's guilt beyond a reasonable doubt.

[2] At an earlier stage in the Crown Court proceedings the defendant applied for a No Bill ie a ruling that on the available evidence, even taken at its height, the charge against him could not be proved. I rejected that application in a ruling given on 20 August 2021.

[3] The defendant also applied for a ruling that the case against him should be dismissed as an abuse of process. By agreement, and in accordance with legal authorities, that application was stayed until the prosecution had presented its evidence. At that point I heard the abuse of process application along with an application that there was no case for the defendant to answer because no reasonable jury (or judge) properly directed on the law could find the defendant guilty. (By this

point in the case the prosecution had confirmed that it was proceeding on the basis of gross negligence manslaughter.)

[4] I gave a ruling on 30 May 2022 rejecting both defence applications. Accordingly, the trial continued with the defendant himself giving evidence. I have now to decide, in light of all the evidence, whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of the unlawful killing of Mr McAnespie on the basis of gross negligence manslaughter.

Legal Principles

[5] I remind myself that the onus is, and remains on, the prosecution to prove its case. It can only do so by satisfying me beyond a reasonable doubt that the defendant is guilty. If I find that he is probably guilty, I must acquit Mr Holden. Similarly, if I feel that he has been dishonest in any of his evidence I must still acquit him unless I am satisfied beyond a reasonable doubt of his guilt. Being wrong or dishonest in his evidence is not in itself a basis for convicting the defendant.

[6] While many of the facts in this case are not in dispute, what happened in the sangar in which the defendant had the MPMG on 21 February 1988 is disputed. The defendant is the only person who was there at the time. He has given his account of what he did and did not do. It is not for him to disprove the prosecution case. As Mr O'Donoghue put it during his closing submission, the prosecution has to disprove the defendant's account and do so beyond reasonable doubt. If that is to be done, it has to be by my consideration of the evidence and by me drawing inferences on the basis of which I find the defendant guilty. However, in drawing any such inferences I also have to be satisfied beyond a reasonable doubt that I should reject any alternative interpretations or inferences which are consistent with the defendant not being guilty.

[7] In the context of this case I am also obliged to consider, in the defendant's favour, the impact which the passage of time has had on his ability to recall relevant details from 1988, to challenge any prosecution evidence or to call any evidence in his own defence. This is an issue which I addressed, in particular, at paras [58]-[59] of my ruling on 30 May 2022. I now remind myself that the passage of time remains an issue both generally and especially perhaps to the extent that it affected the defendant when he himself gave evidence.

Background

[8] In February 1988 the defendant was an 18 year old soldier, a Guardsman in the Grenadier Guards. He was born on 20 October 1969 and joined the army on 14 October 1986. He then underwent basic training until July 1987 and further training beyond that, including training on a range of firearms. (The extent and nature of that training is to some degree a matter of dispute, especially in relation to his familiarity with a GPMG.)

[9] The defendant arrived in Northern Ireland in July 1987 but was confined to duties in barracks until October 1987 when he reached the age of 18. After that he spent time doing such duties as foot patrols, mobile patrols and sangar duties although it appears that Sunday 21 February 1988 was the first time he was ever on duty in a sangar armed with a GPMG.

[10] At Aughnacloy, Co Tyrone, near the border with the Republic of Ireland, there was a permanent vehicle checkpoint ("PVCP"). There were two sangars at the checkpoint, each with an upper and lower level and with openings or observation slits through which soldiers could observe and record people and traffic coming and going.

[11] At approximately 2.45pm Mr McAnespie parked his car on the northern side of the checkpoint. He then walked through the checkpoint on his own, in the direction of the border. He was not armed and posed no risk to anyone. The fact of his presence was drawn to the attention of the defendant who was on the upper level of the sangar by Guardsman Norris because Mr McAnespie was said by military witnesses to be a "person of interest" to the security forces.

[12] According to Norris, the defendant told him that Mr McAnespie was walking along the road which would mean he was walking towards the border with his back to the checkpoint. A few minutes later the defendant discharged three bullets from the GPMG which he was armed with in the sangar. One of these three bullets hit the ground near Mr McAnespie and ricocheted into him, entering his back and going through his body. It caused considerable laceration of his right lung, resulting in severe internal bleeding and death.

[13] The defendant was questioned by Detective Chief Inspector C Stewart of the Royal Ulster Constabulary with Detective Inspector M Farr on 22 February 1998. He answered questions and provided a written statement with the assistance of legal representation. On the evening of 22 February he was charged with manslaughter ie the unlawful killing of Mr McAnespie. It appears from the sequence of events that at some point soon after that the defendant was granted bail into military custody.

[14] On 6 September 1988 at approximately 10pm a conference took place at the Northern Ireland Forensic Science Laboratory. A note of what was discussed and who was present was prepared the next day by Mr I Morrison of the office of the Director of Public Prosecutions ("DPP"). With him that night were two other senior representatives from the DPP, DCI Stewart and the firearms expert from the Forensic Science Laboratory, a Mr P Montgomery.

[15] Mr Montgomery had already provided a written report to the DPP which was discussed, explained and expanded. Mr Morrison's note of the meeting concludes with a summary of the views reached by all or some of those in attendance in light of the exchanges:

"1. It is probable that the weapon was mistakenly left in a cocked condition by L/Sgt Peters;

2. Holden would have had no reason to suspect that the gun was cocked and ready to fire;

3. The explanation given by Holden that his wet finger slipped off the tripper guard onto the trigger thus discharging the weapon cannot be ruled out but;

4. The more likely explanation for the discharge is that in grasping the weapon in order to move it Holden's finger pulled the trigger without slipping but without Holden intending to discharge any rounds.

5. The pattern of strike marks does not lead to any certain conclusion as to whether the weapon was firmly aimed at the time it began to discharge or whether it was being moved in the manner Holden claims. In either case it cannot be predicted exactly how the direction of the weapon would have been moved by Holden's reaction to a discharge which he did not expect."

[16] On 26 September 1988 the charge of manslaughter against the defendant was withdrawn in Belfast Magistrates' Court and the criminal case came to an end. It then appears that the defendant may have remained in military custody until on or about 22 December 1988. On that date he admitted an offence of conduct to the prejudice of good order and military discipline, contrary to section 9 of the Army Act 1955. The details of the offence were that "at Aughnacloy on 21 February 1988 when on duty at a vehicle checkpoint there [he] so negligently handled a general purpose machine gun as to cause it to be discharged." For this offence his commanding officer imposed a fine of £370.86.

[17] That is how matters remained until 2008 when the Historical Enquiries Team ("HET") of the Police Service of Northern Ireland provided a report to the family of Mr McAnespie on the killing. In September 2015 the then Attorney General invited the then DPP to review the 1988 decision not to prosecute. (At least in part this appears to have been prompted by what DCI Stewart says is a misinterpretation or misunderstanding by the HET of his conclusion at the end of his investigation in August 1988.)

The Evidence

[18] The prosecution case is not advanced on the basis that there is new evidence which was not known or available in 1988. Rather, the prosecution contends that the decision not to prosecute in 1988 was simply wrong and that the facts which have been proved should lead to a conviction.

[19] Much of the evidence was not disputed. In broad terms there is agreement about what happened on 21 February 1988 with the dispute focusing on why and exactly how it happened.

[20] The original GPMG fired by the defendant was available at court for examination and inspection but in the intervening years it had been modified. Accordingly, the prosecution also brought a second GPMG, very similar to the original.

[21] The scene of the shooting has changed completely since 1988 but the prosecution was able to provide the original maps from the scene with markings depicting all relevant information. In addition, the photographs taken at the time were available. They showed the sangar, the spot where Mr McAnespie lay dead and other essential details.

[22] Those maps showed that of the three bullets fired by the defendant one left a strike mark (KD1) on the road 122 metres from the sangar, another (KD2) left a strike mark on the road 283 metres from the sangar and the third (KD3) left a strike mark on the road 299 metres from the sangar. Mr McAnespie's body was between KD2 and KD3, 296 metres from the sangar. It is most likely that he was killed by the bullet which left strike mark KD2 and then ricocheted off the ground into his body. Which of the three rounds that was in order of fire is less certain.

[23] The GPMG was capable of firing 750 rounds per minute. Accordingly, the firing of three rounds would take less than .25 of one second.

[24] The prosecution case was opened on the basis that "the issue of safety was emphasised by standing orders placed on a notice board of the Aughnacloy sangars including the handover/take over drill for the GPMG which set out the procedure to be adopted when assuming control of the gun." This two page drill (Exhibit 4) sets out in detail what is to happen when sentries are posted and relieved, a role which is to be assumed "personally by the Guard Commander or his deputy whenever possible." The precise and elaborate nature of the drill reflects the level of danger which the GPMG represents. It also specifies the training which is to be given to soldiers who are "likely to handle GPMGs in a sangar or elsewhere."

[25] On 21 February 1988 from approximately 8:30am the defendant and Norris were assigned to the north sangar. They took over responsibility at that sangar under the direction of Lance Sergeant Peters. The defendant and Peters went upstairs in the sangar. The soldier coming off duty unloaded the GPMG and Peters counted 150 rounds. In his evidence Peters then said that he told the defendant to take the gun

and place a belt with 50 rounds in it. At this point Peters knew that the gun had been cleared by being unloaded by those who were leaving duty. Peters then confirmed with the defendant that he was happy with the gun and with his orders. As Peters agreed in cross-examination, this procedure did not exactly match the drill referred to in the prosecution opening which had been on the notice board in the sangar. He testified that the end result of what he did with the defendant should be the same but accepted that it was different because the defendant did not personally go through every element of the drill himself.

[26] The evidence given by Norris was that after approximately two hours downstairs in the sangar he swopped places with the defendant who had been upstairs. It was undisputed that when this change over took place there was no involvement from Peters or any other officer and there was no compliance with the drill which requires sentries to be posted and relieved personally by the Guard Commander or his deputy whenever possible.

[27] The circumstances were complicated that day by the arrival for an unannounced inspection of the PVCP of Sergeant Major Beresford and Colour Sergeant Hague. They arrived at approximately 11am and stayed for about 45 minutes. During the inspection Hague went to the north sangar where Norris was in the upper part with the GPMG and Holden was in the lower part. There is some confusion and uncertainty about precisely who else was there at different points.

[28] As part of the inspection Hague appears to have instructed Norris to take the GPMG off the bracket which was supporting it at the north facing observation slit and to unload it. According to Norris, Peters was also there. Hague required the barrel to be removed. When some rust was found on it (possibly because the barrel protrudes from the observation slit and is exposed to the elements) Hague required the barrel to be cleaned.

[29] This was done by the defendant being handed down the barrel, taking it to be cleaned and then returning to the sangar and handing it to someone for the GPMG to be reassembled upstairs.

[30] The details of this process which culminated in the GPMG being reassembled would almost certainly not have appeared to anyone involved as having any significance at the time. However, when Mr McAnespie was killed a few hours later they assumed significance because this was potentially the last important interaction with and movement of the gun before the shooting took place.

[31] The evidence gave no clear picture as between Beresford, Hague, Norris and Peters as to who did exactly what with the gun during this exchange. Furthermore, there was undoubtedly some role played by Peters' second in command, Guardsman Docherty, but by reason of illness he was unable to give oral evidence. His witness statement was submitted and read as evidence but it is silent on the question of cleaning and reassembling the gun because he was not asked about that issue at the

time by the police. (Mr O'Donoghue conceded that this was the only omission in an otherwise flawless investigation of events by the RUC under Detective Chief Inspector Stewart.)

[32] What is not in dispute is that the defendant was not involved in reassembling the GPMG after it had been cleaned or in checking that it had been made safe. The defendant and Norris (and others) had lunch between approximately 12 noon and 12:30 at their stations. At this point Norris was still upstairs with the GPMG mounted at the south facing observation slit with the defendant downstairs. After lunch more cleaning up was done in and around the sangar by them and other soldiers. There is at least a possibility, if not more, that one or more soldiers went upstairs to help with the clean up during this period.

[33] At some point, probably around 2pm, the defendant and Norris swopped places once again. On the evidence these changes took place to minimise the risk of boredom from soldiers being on duty in the same place during their entire shift. In any event this left the defendant upstairs and Norris downstairs.

[34] As with their change of positions at around 10am there was no handover drill as required by the formal procedure. The defendant would have been entitled to believe that the GPMG had been made safe but in the absence of a drill or anything said or done to confirm that he could not have been certain that it was.

[35] The fatal shooting occurred at approximately 2:45pm. On the defendant's case, which was largely accepted by Norris and other witnesses, he had been alerted by Norris to the fact that Mr McAnespie had parked his car on the northern side of the PVCP and had walked through the checkpoint. There appears to have been nothing unusual about that. The defendant saw him through the north facing observation slit and then moved to the south facing slit on foot of an enquiry from downstairs about where Mr McAnespie had gone. The defendant had a clear view and was able to report that Mr McAnespie was walking on his own on the road and had passed by a garage. These exchanges were easily made and audible because the soldiers were only a few feet away from each other.

[36] On the defendant's case, as put to Norris and others, the GPMG was on a pintle ie a pivot on which the gun could turn. Since the weight of the gun is in the butt and the barrel is lighter, the barrel was pointing skywards. According to the defendant the barrel was pointing to his right across the PVCP. He decided to centre the gun. To do so he took it in his right hand with his right index finger along the outside of the trigger guard.

[37] On his case, as put in cross-examination of witnesses, his finger slipped off the guard as he did so and accidentally pulled the trigger. As a result of this the three rounds were discharged. According to this version the defendant's hands were "slightly wet" from washing walls with a wet cloth a little while earlier. Given that

only three rounds were discharged the contact between his finger and the trigger must have been extremely short.

[38] After the shots had been fired, Norris looked up and saw the defendant who appeared shocked. The defendant did not reply when he was asked what had happened. Peters then ran upstairs to the defendant and found him standing with his back to the wall of the sangar. He appeared to Peters to have a pale pallor and to be upset. When asked what had happened he told Peters "I squeezed the trigger." Peters saw three empty cases on the floor. He immediately believed that this was "just" a negligent discharge. Remarkably he said that he did not look through the observation slit to see if anyone had been injured by one of the bullets.

[39] As indicated at para [10] above, the defendant was interviewed by Detective Chief Inspector Stewart and Detective Inspector Farr on the day after the shooting. He gave an oral account of what had happened and a written statement. In the written statement he said:

> "… I lifted the gun with my right hand with a loose grip and moved it to the centre of the window. That's when my finger slipped onto the trigger. That's when the rounds went off. As soon as the first round went I released the trigger and fired another two rounds straight after. That's what it felt like. My hand slipped because they were still wet from doing the cleaning. The gun was heavy because I moved it with one hand.
>
> I told Sergeant Peters that I had been moving the gun from right to centre of the window when my hand slipped onto the trigger."

[40] This statement was similar, but not identical, to what was said during his interview. DCI Stewart formed the impression during five hours of interviews that the defendant was a scared young man who made a consistent case that he did not cock and aim the gun to fire it and that what had happened was an accident.

[41] Colonel Aubrey-Fletcher was a Major in the Grenadier Guards in 1988, the Officer in Command of the company to which the defendant was assigned. He had some personal knowledge of the defendant for approximately six months up to February 1988. The Colonel testified about the training which all soldiers were provided with in his experience, training in safe handling and weapon skills generally. From this training soldiers learn how to load a weapon, make it safe, cock it and prepare to fire, dismantle and unload it. Before "passing out", as the defendant had done, a soldier must be proficient on a range of weapons.

[42] The Colonel was able to confirm from the defendant's training records that he had received further training in Northern Ireland and that this included training on a

GPMG. The GPMG, he said, was routinely used in sangars but not in built up areas. This was because it was a weapon which would cover an area or a zone – it was not a highly accurate weapon to the point that he would only expect the first round to land where it was aimed.

[43] He accepted that the defendant would probably have had no specific training in handling a GPMG on a pintle in a sangar but said that he would not expect such training and it was the same weapon whether used in the open or from a sangar.

[44] Training records were put to the Colonel showing that the defendant had some, but limited, training on a GPMG including the firing of live rounds on a limited number of occasions. The Colonel accepted that the training was limited but said it was no more so than in the case of other soldiers of the same age as the defendant. He further accepted that all of the training which was given to him had most probably been in the context of lying prone on a range, not standing.

[45] In terms of the written drill with which the former soldiers who gave evidence appeared to be unfamiliar, the Colonel could not say why that was so because it had clearly been designed for a purpose. He confirmed that he would expect the drill to be followed at each change-over of soldiers, not just at the start and end of a shift.

[46] In terms of the defendant personally, the Colonel said that he did not stand out for good or for bad and that he had no concerns about his character or conduct.

[47] The forensic firearms expert who reported in 1988 was a Mr Peter Montgomery – see paras [14]-[15] above. By the time of this trial Mr Montgomery was retired and too ill to give evidence. Accordingly, the prosecution applied to have his report admitted in evidence. I allowed that application in respect of which I gave a written ruling in 2021. In addition, the prosecution engaged a Mr Mastaglio and a Ms Shaw to report. Mr Mastaglio also gave oral evidence.

[48] Before summarising their evidence it is important to note that with the possible exception of an issue about the safety catch, there is no significant difference between the experts. And while the defence was obviously aware of all of the reports well in advance of the trial no other expert's opinion was put to Mr Mastaglio in cross-examination.

[49] The issues on which there is no expert dispute included the following:

- Nobody can tell whether a GPMG is cocked and ready to fire just by looking at it.

- A GPMG should not be in a cocked position except when it is being fired or just about to be fired.

- For the GPMG to be fired, it must have been cocked and the trigger pressed.

- The pressure required on the trigger to discharge a round in 1988 was nine pounds.

- The shape of the entry wound in Mr McAnespie's body showed that he was killed by a ricochet.

- If the discharge was inadvertent, as the defendant contends, three rounds is probably the least number that would be discharged by accidental trigger pressure.

- The difference in distance between KD1, on the one hand, and KD2 and 3 on the other hand, suggests either that the gun was not held securely or that it was moving.

- Forensic expert witnesses cannot comment on the issue of intent.

- Mr Mastaglio added that the golden rules with guns are to always ensure that the gun is safe, never aim unless you intend to fire and never increase the risk of negligent or inadvertent discharge. He suggested that plain common sense tells you not to handle a deadly weapon such as a GPMG with wet hands because that increases the chance of the weapon or finger slipping.

- Mr Mastaglio testified that one way to check if a weapon is cocked and therefore ready to be fired is to press the safety catch because it can only be applied after the weapon has been cocked. This echoes Mr Montgomery's report at page 4 when he wrote:

> "The design of the weapon is such that the safety catch can only be applied after the weapon has been cocked."

[50] The defendant's own evidence confirmed that he joined the Grenadier Guards when he was 16½ years old and that he was posted to Northern Ireland before he was 18. He was confined to duties within barracks until his 18th birthday. Only after that time was he allowed out of the barracks, armed, on any duties.

[51] His training included basic training on a GPMG. That covered among other things loading and unloading the weapon and live firing on ranges. He had not been trained on using or manoeuvring or handling a GPMG on a pintle or in a sangar. Nor had he been trained in the use of the safety catch on a GPMG.

[52] The defendant said that in 2022 his memory of the events of 1988 is very poor and that he cannot recall all of the details which are in his interview notes. (In this context the point stands in his favour that he did not decline to answer questions at interview at the time and that he made a written statement. As a result there is a contemporaneous record of the explanations he gave when events were fresh in his

mind.) He did not challenge, in any way, the accuracy of the witness statement of DCI Stewart or that witness's oral evidence of his interviews of the defendant.

[53] The defendant recalled the start of his shift at 8:30am, taking over control of the PVCP, going upstairs in the north sangar and the drill with Sergeant Peters. He did not recall specifically a change over (from upstairs to downstairs) at about 10 or 10:30 but did recall that there was one at some point.

[54] The defendant recalled the arrival of senior officers for a check and clean up of the PVCP. He confirmed that the GPMG was dismantled and that he was sent to clean the barrel or have it cleaned. He was sure that on his return he gave the barrel to Docherty who took it upstairs in the sangar.

[55] The defendant was understandably hazy about some details such as having lunch at around 12noon and whether cleaning tasks continued. He also could not recall whether anyone other than Norris had been upstairs after the earlier episode which had led to the work being done on the GPMG.

[56] He did, however, state that he recalled going upstairs in the sangar at or after 2pm. By that time the GPMG had already been placed in the south facing opening ie towards the border. He remembered Norris saying that Mr McAnespie had parked his car (on the northern side of the sangar) and asking the defendant what house he had gone into. The defendant's reply was that Mr McAnespie had not gone into a house but was walking towards the checkpoint – this was visible through the north facing opening.

[57] The defendant said that he carried on doing some cleaning and then heard Norris ask again where Mr McAnespie had gone. The reply from the defendant was that he had gone past the garage and towards the bend in the road. He was able to see this by looking through the south facing opening.

[58] The defendant then said that he continued cleaning the area and then noticed that the GPMG was not in the correct position. By this he meant that the barrel was pointing towards the village of Aughnacloy rather than straight ahead towards fields. (Of course, the barrel was pointing vertically because of the weight of the butt.)

[59] In order to centralise the weapon, he picked it up by the pistol grip. As he did so his "finger ended up on the trigger" but he "didn't have a tight grip." As he picked it up, he said, he could not recall what happened but the "weapon somehow dropped and [his] finger ended up on the trigger." This was entirely accidental, he said. He could not explain how it happened but was insistent that the "gun was not aimed at Mr McAnespie." The three rounds went off as the weapon dropped but not because he had cocked the weapon – he had not done that, he insisted.

[60] When asked about what he had said to the police about his hands being wet, the defendant said that was a theory which he had advanced to the police to assist

their investigation. He further said that he could not recall saying to Peters "I squeezed the trigger" though he was emphatic that he had not deliberately squeezed it.

[61] The defendant said he could not recall the aftermath but that he did not see where the rounds went and he did not look to see where they went. He added that in order to see that he would have had to crouch down a bit. In relation to Mr McAnespie he said he was sure that Mr McAnespie was out of sight when the rounds were fired and that he had never pointed the weapon at him. In fact, it was not until later that night that he learned for the first time that the dead man was Mr McAnespie.

[62] In cross-examination the defendant said he did not know that when the gun was fired it was pointing horizontally (with the result that it was roughly on a level with the incline up which Mr McAnespie was walking as shown by photograph 12). He panicked and was speechless at the gun going off but for some reason (which he could not explain) he had not checked to see if matters had been made even worse by someone being hit. He agreed that he had told DCI Stewart in 1988 that apart from Mr McAnespie there was nobody else on the road.

[63] So far as his training was concerned he was adamant that if he was moving the GPMG he was to lift it by the pistol grip and under the barrel. He was never taught how to handle it on the pintle. In the sangar, with the weight of the butt pulling the weapon down, he had to lift or raise it by the pistol grip so that the barrel would not scrape against the top of the opening and suffer damage as a result.

[64] It was suggested to him, and he accepted, that he was taught not to put his finger near the trigger although he suggested that his finger was on the trigger guard "from force of habit."

[65] It was further put to him that he knew the gun was loaded. He accepted this but he understood or assumed that it was not cocked and ready to fire. He denied aiming it at Mr McAnespie or following him along the road with the gun aimed at him. Mr Murphy reminded the defendant that in examination in chief he had been able to describe, all these years later, how to set up the GPMG to the extent that he could virtually do it in his sleep. He also knew how the safety catch worked and that if it was on, any risk was greatly reduced.

[66] The defendant agreed that the trigger should not have been pulled and that his duty was to take steps not to pull it. This is fundamental to controlling a lethal weapon, he acknowledged, a weapon which he was familiar with and had fired. He accepted that his duty was to everyone in the weapon's path, but he did not believe that he had failed in that duty.

[67] In relation to Mr McAnespie, the defendant said that he knew that he was a person of interest to the security forces. In fact, he had passed through that same morning, a point which Norris had drawn his attention to earlier.

[68] While the defendant asserted that Mr McAnespie had been out of sight when the shots were fired, he conceded that according to photographs taken in 1988 and exhibited to Mr Montgomery's report this was not correct. The defendant then agreed that Mr McAnespie was always in sight. He further accepted that it was after Mr McAnespie had passed the garage, walking along the road on his own, that the defendant had decided to move the weapon. When pressed about why he needed to move the weapon, the defendant said that he wanted it placed in the centre of the opening in case he needed to use it.

[69] When quizzed about saying that he had squeezed the trigger, he could not explain his words beyond being in shock. But he accepted it was not a hair trigger, that it required pressure to be applied and the whole reason for the trigger guard was to restrict access to the trigger.

[70] He was reminded that DCI Stewart had queried whether a finger slipping could have led to the requisite pressure being applied to which he had replied "with my hands wet – that's all I can put it down to."

[71] Mr Murphy's suggestion that the obvious way to move the weapon the few degrees necessary was to pull it from left to right with his left hand, rather than reach his right hand over the weapon to the pistol grip, was not accepted by the defendant.

[72] It was further put to the defendant that while it was not clear if he was standing over his 1988 assertion that his hands were wet, he should not have been handling a lethal weapon with slippery hands anyway. That point was accepted by him.

Submissions

[73] I am indebted to counsel for their high quality written and oral submissions which have been of great assistance. They have been fully considered along with the authorities referred to and are summarised briefly below.

[74] For the prosecution it was submitted that the test for gross negligence manslaughter is found in *R v Adomako* [1995] 1 AC 171 at page 178(b) where Lord Mackay said:

> "… in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the

> defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.
>
> It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that it is fatal to its being correct as the test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is, I think, likely to achieve only a spurious precision. The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgement to a criminal act or omission."

[75] In relation to foreseeability, the prosecution referred to *R v Honey Rose* [2018] QB 328 at para [77] where it is stated that:

> "(1) The offence of gross negligence manslaughter requires breach of an existing duty of care which it is reasonably foreseeable gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to go beyond the requirement of compensation but to amount to a criminal act or omission.
>
> (2) There are, therefore, five elements which the prosecution must prove in order for a person to be guilty of an offence of manslaughter by gross negligence:
>
> (a) the defendant owed an existing duty of care to the victim;
>
> (b) the defendant negligently breached that duty of care;
>
> (c) it was reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death;

(d) the breach of that duty caused the death of the victim;

(e) the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction."

[76] Mr Murphy then submitted that on the evidence there are two possible factual scenarios, on both of which the defendant is guilty.

[77] The first scenario is that while the defendant did not know that the weapon was cocked, he trained it in the direction of Mr McAnespie and pulled the trigger, not intending that it should fire but it did fire.

[78] The second scenario is that, again, he did not know that the weapon was cocked but he handled it with wet hands and a loose grip in a way which caused his fingers somehow to land on the trigger, somehow with sufficient pressure, to cause the weapon to discharge while pointing it in the direction of Mr McAnespie.

[79] It is the prosecution case that on the evidence the first scenario is far more likely to be the true explanation of what happened. The second scenario is, in effect, the defendant's case, says the prosecution. While that case is challenged as being inconsistent and illogical, the prosecution says it is still in effect an admission of guilt because it amounts to an admission of gross negligence in the handling of a lethal weapon.

[80] Focusing on the first scenario, the prosecution contend that the facts and proper inferences support it in that:

- The defendant's shocked reaction is consistent with an immediate understanding of the gravity of what he had done ie hit Mr McAnespie rather than merely discharged the weapon unintentionally.

- The extent of his reaction is much more consistent with him knowing that he had shot Mr McAnespie than with him being concerned only about the weapon having been fired.

- Mr McAnespie, said to be a person of interest, was the only person on the road.

- What are the chances of Mr McAnespie being struck, even if by ricochet, given the spread of terrain which the bullet could have hit?

- The defendant claimed falsely that Mr McAnespie had disappeared from view, into a blind spot.

- The defendant's admission that he "squeezed the trigger."

- The total implausibility of his finger slipping with pressure on to the trigger and then him reacting so quickly as to be able to stop the firing.

- The total implausibility of him having reverted to cleaning duties after he watched Mr McAnespie go past the garage thereby raising the prospect of a wet hands defence.

- The total implausibility of the defendant somehow choosing that very moment in time to change the position of the weapon.

- The ease with which the defendant could have redirected the weapon without posing any risk at all compared to his incoherent and contradictory explanation of how he in fact did so.

[81] The prosecution submission is that on both scenarios the defendant is guilty but that the first scenario is infinitely more plausible. Furthermore, it is submitted that there is no other scenario which on the evidence can be advanced to lead to an acquittal.

[82] For the defendant it is submitted that at the opening of the case the prosecution straddled two propositions – gross negligence manslaughter and unlawful act manslaughter. In doing so it failed to identify and address the five essential ingredients of gross negligence manslaughter as set out by the Court of Appeal in *R v Honey Rose* above.

[83] Dealing with those elements in turn, so far as the first element is concerned, breach of an existing duty of care, the defence highlighted the lack of training and experience of the defendant in working in a sangar with a pintle mounted GPMG. The defence contends that the defendant's duty must be confined by his training and that in the absence of specific training he did not owe an individual duty of care as distinct from the duty owed by the Ministry of Defence as his employer.

[84] Mr O'Donoghue further contended that if, contrary to his primary submission, a duty of care was owed, the extent of that duty has to be defined. In that context he described the evidence about the general failure to adhere to the handover drill (Exhibit 4) as a "devastating blow" to the prosecution case. He reminded me that it had been relied on in the Crown opening. It was now accepted by the prosecution that there is no evidence that the defendant cocked the weapon. That being the case, he was placed in a potentially dangerous situation by the negligence of others, not by any failing on his own part.

[85] The submission on the extent of the defendant's duty was that the court is not in a position to define the nature and extent of that duty in the absence of clear evidence as to what his training and instructions were in fact as opposed to in theory.

[86] Turning to the second element, the alleged negligent breach of the duty of care, it was submitted that the army may have been in breach of its duty but that the defendant was not. In fact, it would have been contrary to the theoretical handover drill for the defendant on his own to check if the gun was safe by ensuring it was not cocked or by putting the safety mechanism in place. (In this context it is relevant to note again that the agreed evidence is that a solider could not tell just by looking at the weapon whether it was cocked.) On the evidence the defendant could not have been in breach of any duty owed when he was untrained in how to handle a weapon for which he assumed control without any handover drill having been carried out. The prosecution cannot rely on a vague notion of common sense in this context where there should be training and instruction.

[87] The third of the five elements at paragraph [77] of *Honey Rose* is reasonable foreseeability that the breach of duty gives rise to a serious and obvious risk of death. On the defence case reasonable foreseeability is absent in the present case because the defendant did not know that the gun was cocked and assumed, reasonably, that it was safe. This point is strengthened by the fact that no visual check could confirm the position one way or the other.

[88] On the fourth element, the breach of duty causing the death, there was essentially no dispute subject obviously to a contention that the first three elements had not been established.

[89] The fifth element is whether the circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence. This is normally a matter of fact for a jury. As appears from Blackstone's Criminal Practice 2023 at B1.75 what is required is something greater than very serious mistakes or errors of judgement. Instead, the conduct must be something truly exceptionally bad which shows such indifference to an obviously serious risk to life and such a departure from the standard to be expected as to constitute the crime of manslaughter.

[90] It was submitted that in the absence of a finding that the defendant was reckless as to whether the gun was loaded, there is no mistake or error of judgement so exceptionally bad as to satisfy this test.

[91] Finally, I was reminded by the defence in its submission of a number of matters including the burden and standard of proof, the allowances and consideration which I should give for prejudice as a result of delay.

[92] The defendant's good character was highlighted. It goes further than was suggested by his commanding officer (see para 46 above) and adds weight to the evidence which the defendant gave, especially in a case in which the prosecution invites the court to draw inferences. So far as those inferences are concerned it was

emphasised how they can only be drawn where they are reasonable and where no other rational conclusion can be drawn.

Findings of Fact

[93] There is very little, if anything, between the parties as to the law. That being the case, I will set out my conclusions on the facts first.

[94] I agree with the prosecution that the views expressed in 1988 when the decision was taken not to continue the prosecution of the defendant are of no relevance in this trial. The important issues have now been exposed and tested in evidence for the first time. The fact that experienced people of standing and repute reached one conclusion in 1988 should not, and does not, influence me in reaching my conclusion in 2022.

[95] In any event the evidence which I have heard is in some respects quite different from what is reflected in Mr Morrison's note of the meeting in September 1988 and the understanding of those who were present.

[96] In the circumstances of this case I conclude that the prejudice caused by the trial taking place 34 years after the shooting of Mr McAnespie has been very limited indeed. The critical evidence is his own and while he contended that his memory was very poor, that assertion was contradicted by what he was able to recall, or purport to recall, about the critical moments.

[97] I accept that the training records are somewhat sparse but only to the extent that I do not know the precise details of the defendant's training. I do however know the generalities of that training so that for instance I know that he was trained in loading, unloading and firing live rounds from a GPMG. I also note from his 1988 police interviews and statement that he was able to describe confidently how the weapon functioned. He was still able to do so when he gave evidence in 2022.

[98] Much was made by the defence of the fact that the defendant was not trained on the use of a GPMG on a pintle in the sangar, as if that was an admission of consequence. However, his commanding officer, who was not hostile to the defendant, said that he would not have expected any such training to have been given – see para [43] above.

[99] Moreover, and perhaps more importantly, in my judgement the action which the defendant was performing in the sangar, changing the angle of the weapon by a few degrees, was or should have been just about the least dangerous manoeuvre imaginable.

[100] Accordingly, I find that the absence of more detailed training records or of more in-depth training is not a matter of any significance.

[101] The lack of adherence to the take over drill is another matter. I express surprise at the consistent oral evidence from soldiers that this drill which was posted in the sangar was apparently disregarded but that is the evidence before me. The consequences of the failure to follow the drill will be considered below.

[102] For the avoidance of doubt I am satisfied that the defendant himself did not cock the weapon before firing it. If it had been proved that he had done so, he would more likely be facing a charge of murder, not manslaughter.

[103] One of the significant changes in the evidence at trial was the defendant stating that he had advanced the wet hands explanation as a theory to the police, not as a fact. This is difficult to reconcile with his police interviews and statement in which he not only said that they were wet but also explained how they got wet ie from washing the walls with a wet cloth. The prosecution suggested that the defendant was trying to distance himself from the wet hands excuse because it is not credible. It is not suggested by the defence that this new defence is in any way the result of delay in the trial or frailty of memory. That could not be suggested because in his cross examination of prosecution witnesses Mr O'Donoghue had put to them the wet hands explanation. And that must have been because those were his instructions from the defendant when the trial started.

[104] Whatever the reason for the defendant changing his version of events, it is a significant departure from what he said in 1988 and what was considered by those in authority in 1988.

[105] Whether the defendant's hands were wet or not, his explanation in the witness box as to how the weapon came to be fired was entirely unconvincing. All he had to do was lift the butt with either hand by a few inches and swing it slightly to the right, leaving the barrel pointing centrally if rather vertically. Instead, according to his frankly incoherent evidence, he put his right hand on the pistol grip which somehow resulted in his finger slipping onto the trigger and doing so with the significant pressure required to fire the weapon. I do not believe that evidence. I conclude that it is a deliberately false account of what happened.

[106] I also disbelieve the defendant entirely on two further points. I disbelieve his evidence that he somehow decided that the GPMG needed to be centralised in case it was needed for future use at the precise time when Mr McAnespie, and Mr McAnespie alone, was walking along the road. That is just too remarkable a coincidence for me to believe.

[107] Further, I disbelieve his evidence that he did not look to see if the bullets which he had fired had hit Mr McAnespie. There are numerous reasons for disbelieving that proposition:

- It is one thing to discharge a weapon accidentally – that is bad enough but to discharge it and injure or kill someone makes a bad situation infinitely worse.

- He knew Mr McAnespie was on the road, he had seen him only a very short time earlier.

- He had a clear view of the road – there was no blind spot as he falsely claimed later.

- The extent of the shock which was apparent to his colleagues after the shooting is consistent with him knowing that someone had been injured.

[108] It is not central to my findings, but I similarly disbelieve entirely the claim by Sergeant Peters that he did not look out through the opening to see if anyone had been injured. His rush to conclude that this was merely a negligent discharge without enquiring into whether anyone had been killed or injured is simply not credible.

[109] I do accept the evidence of Peters that the defendant said to him "I squeezed the trigger." As a matter of fact, the defendant must have squeezed the trigger, otherwise no shots would have been fired. It is possible to interpret this sentence as meaning "I deliberately squeezed the trigger." That would support the prosecution's first scenario. On its own that interpretation does not necessarily follow but in context it is a relevant and credible part of the picture.

[110] It follows from the conclusions above that I find the defendant's evidence untruthful when he says that he only learned later that night that Mr McAnespie had been killed. It may possibly be the case that he did not immediately know for certain that Mr McAnespie was dead, but I am satisfied that he must have known that he was at the very least gravely injured because his body was lying on the road, visible from the sangar.

[111] The defence contend that on the evidence it is not possible to conclude that the defendant aimed the weapon at Mr McAnespie. Mr O'Donoghue submitted that the distribution of the strike marks prevents any such finding. He also contended that the order in which the bullets were fired is not known. So far as the order in which the bullets were fired is concerned, Mr Mastaglio made what he called a "safe assumption" that the order was tracer-ball-tracer, but he could put it no higher than that. The relevance of this is that Mr McAnespie's death was caused by a tracer bullet. On Mr Mastaglio's evidence that would have been either the first or the third round fired. It is not, however, possible to say which. This is relevant because the distribution of strike marks shows a divergence of 177 metres between the strike marks of the bullet closest to the sangar and the bullet furthest away. This in turn leads into the question of whether it has been proved beyond a reasonable doubt that scenario one, that the defendant was aiming at the deceased, is consistent with what the strike marks suggest to us about the facts. To put it another way, it is possible that KD3 is the strike mark of the first bullet fired. If that is so, and if the defendant was aiming at Mr McAnespie, he missed him (though not by much), then hit a spot 177

metres closer to the sangar with the second round and then swung back 161 metres and fired what was most likely the fatal bullet which hit the ground at KD2.

[112] In the alternative, if the fatal shot was the first, the weapon then swung a considerable distance to the left for round two (KD1) before swinging back an even bigger distance to the right for round three (KD3).

[113] I remind myself of the evidence of Colonel Aubrey Fletcher at para [42] above. That evidence was that the GPMG is not used in built up areas such as towns precisely because it is not a precise or accurate weapon. It is, however, used in comparatively open areas such as the edge of Aughnacloy where there is a greater and more open area of terrain to be covered. The Colonel said that he would expect only the first round fired to land where it was aimed.

[114] In this case two rounds "happened" to hit the ground close to Mr McAnespie, with the middle round being quite a distance away. This compels me to the conclusion that the weapon was in fact aimed at Mr McAnespie. Otherwise, there is another dramatic and simply unbelievable coincidence, that at the point in time when the gun was discharged Mr McAnespie happened to be within a few feet of where two of the three bullets struck the ground.

[115] In reaching this conclusion I am conscious that I am rejecting to some degree one of Mr Montgomery's findings ie his finding that if the GPMG had been deliberately discharged from a firm firing position he would have expected the three bullets to have struck in the same area. Mr Mastaglio hesitated over this point and, referring to the words "deliberately discharged", said that he could not comment on the issue of intent. He did, however, accept that the variation between KD1 on the one hand and KD2 and KD3 on the other suggested either that the weapon was not held securely or was moving.

[116] Of course, as already stated, it is not the prosecution case that the defendant did deliberately discharge the weapon. On the contrary, its case in scenario one is that the defendant aimed the weapon and pulled the trigger deliberately but not intending to cause death acting on the assumption that the weapon was not cocked. In my judgement that scenario is consistent with the findings which I have made above, including the distribution of the strike marks and my primary finding on the facts is that this is what happened.

[117] I must also, however, consider other scenarios. The prosecution's second scenario is that the defendant handled the weapon loosely, with wet hands and no firm grip but in a way which caused the discharge.

[118] I would accept that as a possibility but for the fact that, if it is correct, it gives rise to the same astonishing coincidence that the person who was struck and killed and who was the only person on the road was also the very person whose movements were being tracked because he was said to be involved in the IRA. Such an almighty

coincidence seems to me to be entirely implausible. And of course, the defendant has distanced himself from the wet hands defence which has instead become a theory. On his revised case there is just no explanation for the weapon slipping from his control and the rounds being discharged.

[119] What possible alternative scenarios, consistent with the facts as I have found them, are open to me to identify? In my judgement, having analysed all the evidence and considered all the submissions, there simply are none.

[120] To summarise the conclusions above I find that it is proved beyond a reasonable doubt that:

- The defendant assumed that the gun was not cocked.
- The defendant knew that Mr McAnespie was a person of interest.
- The defendant was tracking Mr McAnespie's movements in the sense that he had been asked questions about where he was.
- The defendant aimed the weapon in Mr McAnespie's direction.
- Mr McAnespie was moving - he was not stationary.
- Mr McAnespie was the only person on the road.
- The defendant had training and some experience in firing a GPMG.
- The defendant deliberately pulled the trigger.
- To his shock, rounds were discharged.
- The defendant knew that he hit Mr McAnespie because he could see him.
- The defendant told Peters "I squeezed the trigger" meaning that he had deliberately squeezed the trigger.
- Peters knew that Mr McAnespie had been shot.
- The defendant lied repeatedly to the police.
- The defendant's hands were not wet in any way which contributed to the shooting.

Application of the findings of fact to the law

[121] I must now apply those facts as I have found them to the law as it is set out in the helpful submissions of counsel. I do so by considering in turn each of the five elements of the test as set out in *R v Honey Rose*. I have also carefully considered the other authorities, including those which analyse the liability in certain circumstances of others such as police officers and mill operators.

[122] The first element is whether the defendant owed a personal duty of care to the defendant. I say "personal" because it is accepted by the defendant that the army owed a duty of care but the existence of such a duty on the part of the defendant is contested. The challenge to this element focused on the suggested limitations of his training and experience. I accept obviously that the defendant was a young soldier at the time, not long past his 18th birthday, with a commensurate lack of experience. But I do not accept that it follows from this or any other factor that he did not personally owe a duty of care. I do not accept that it can be the case that, when they are on duty or patrol, some armed soldiers owe a personal duty of care while others don't, depending on their age, experience and training in circumstances such as the present. Once an individual is entrusted with a lethal weapon, especially one as powerful as the GPMG, that individual owes a duty to every person, the duty being to use it responsibly and carefully.

[123] In my judgement it would be simply extraordinary if no such duty existed. And the extent of that duty is to control and use the weapon in such a way as not to endanger members of the public, or indeed for that matter, his own colleagues. In this case the facts, as I have found them, are that the defendant aimed this particularly lethal weapon towards Mr McAnespie and pulled the trigger. He did that on the assumption that it was not cocked when, in fact, it was. While Mr O'Donoghue was critical of Mr Murphy's proposition that common sense is in play, I am entirely satisfied that it is and that this is supported by the evidence of Mr Mastaglio. That evidence was that there are golden rules which include never aiming the weapon unless one intends to fire and never increasing the risk of negligent discharge. The defendant broke both of those golden rules, each of which should be apparent to even the most inexperienced and youthful soldier.

[124] The next question is whether the defendant negligently breached that duty of care. In my judgement it is clear beyond doubt that he did. On my findings of fact, he aimed the weapon and pulled the trigger. He could not have known from looking at the weapon whether it was cocked. He assumed that it was not. There was no safe basis for that assumption. He did not know what drill, if any, had been carried out since the one in which he himself had participated at 8:30am though he did know that there had been a lot of coming and going that day because of the surprise inspection of the PVCP. Given the risks involved, that assumption should simply not have been made. It was not remotely a safe or proper assumption.

[125] The third element is whether it was reasonably foreseeable that the breach of that duty would give rise to a serious and obvious risk of death. Again, I am entirely satisfied that the risk was serious and obvious. How could it be otherwise, given the

nature of the weapon? Once the trigger was pulled, bullets would literally start to fly. The defendant knew the risk because he had been trained on the weapon. Three bullets were fired in just one quarter of a second.

[126] The fourth element is whether the breach of the duty caused the death. In some cases that might be an issue but not here – the direct and immediate consequence of the negligent discharge of this weapon was the death of Mr McAnespie.

[127] The final element is whether the circumstances of the breach were truly exceptionally bad and so reprehensible as to warrant a finding of gross negligence. That test is applied because not every negligent act can or should attract a criminal sanction. The law says that while we are generally responsible for the consequences of our mistakes, a higher and different level of negligence is demanded for any act or conduct in order for it to amount to the crime of manslaughter.

[128] Accordingly, the question for me is this - just how culpable is the defendant in the circumstances of this case? In my judgement he is beyond any reasonable doubt criminally culpable. I emphasise, again, that the weapon he controlled was lethal in the extreme. It is suggested on his behalf that it was not exceptionally bad or reprehensible for him to assume that the weapon was not cocked. I fundamentally disagree. In my judgement this was the ultimate "take no chances" situation because the risk of disaster was so great. The defendant should have appreciated at the moment he pulled the trigger that if the gun was cocked deadly consequences might follow. That is not something which is only apparent with hindsight. The defendant took an enormous risk for no reason in circumstances where he was under no pressure and in no danger.

[129] In light of the foregoing, I find the defendant guilty of the manslaughter of Aiden McAnespie by gross negligence.