OMAGH
BOMBING INQUIRY

INQUIRY LEGAL TEAM CHAPTER 3 SUMMARY (PART 8)

LEGAL PROCEEDINGS SUBSEQUENT TO THE OMAGH BOMBING

1. The purpose of this summary is to address the legal proceedings (both criminal and civil) that were pursued in Northern Ireland and the Republic of Ireland in the period after the Omagh Bombing, where those proceedings may be relevant to the Inquiry's Terms of Reference and the Updated Provisional List of Issues. It deals only with concluded proceedings and is intended to be a neutral, factual summary of the proceedings set out within it. In due course, the Inquiry may receive specific further evidence about each set of proceedings and may also consider other proceedings not referred to in this summary.

2. The summary addresses proceedings in the following order:

Part I: the prosecution of Sean Hoey in Northern Ireland (§§3 – 41);

Part II: the prosecution of Colm Murphy in Dublin and associated judicial review proceedings (§§42 - 133);

Part III: the prosecution of Michael McKevitt in Dublin (§§134 – 201);

Part IV: the prosecution of Vincent McKevitt in Dublin (§§202 – 206);

Part V: the prosecution of Joseph Fee, Gregory Trainor, Seamus McKenna, Eamon Matthews and Gerald Sweeney in Dublin (§§207 – 226);

Part VI: the prosecution of Liam Campbell in Dublin (§§227 – 236);

Part VII: the prosecution of Seamus Daly in Dublin and Belfast (§§237 – 240);

Part VIII: other proceedings in the Republic of Ireland (§§241 – 250);

Part IX: the prosecution of Patrick "Mooch" Blair in Belfast (§§251 – 256);

Part X: other criminal proceedings in the United Kingdom (§§257 – 264);

Part XI: the civil proceedings brought by Mark Breslin and others against Seamus McKenna and others in Belfast (§§265 – 290); and

Part XII: proceedings in the European Court of Human Rights (§§291 + 292).

Part I: SEAN HOEY

R v Hoey [2007] NICC 49

3. On 26 May 2005, Sean Hoey was charged in Northern Ireland with 58 criminal offences of murder, conspiracy to murder, causing explosions, conspiracy to cause explosions and possession of explosive substances with intent to endanger life or cause serious damage to property. The charges related to thirteen separate terrorist incidents. The first incident involved a mortar attack on an Army tower in Crossmaglen on 24 March 1998. The final incident involved the discovery of an abandoned mortar bomb in Altmore Forest on 12 April 2001. The twelfth incident in the series of thirteen was the Omagh Bombing. Excluding the Omagh Bombing, eleven out of the twelve incidents are included in the list of Previous Incidents under investigation by the Inquiry. The thirteenth incident does not appear on the list: see paragraph 2(j) of the Updated Provisional List of Issues. The reason that incident does not feature is because it post-dates the Omagh Bombing by two years and eight months. So, it is not a Previous Incident. The Inquiry will, nonetheless, later in its work, explore whether the circumstances of the events of 12 April 2001 are relevant to establishing who carried out the Omagh Bombing.

4. The Judge who tried Sean Hoey was Mr Justice Weir. He was later appointed a Lord Justice of Appeal in Northern Ireland. Mr Justice Weir sat without a jury in what was known as a "Diplock Trial" to try Sean Hoey. This trial was one of the last of its type in Northern Ireland before the system for non-jury trials was reformed by the Justice and Security (Northern Ireland) Act 2007. This Act established a rebuttable presumption of trial by jury.

5. Mr Justice Weir said the following in relation to the Omagh Bombing at the beginning of his judgment, which was delivered on 20 December 2007:

> *"(The offences with which the accused is charged) arise from thirteen bomb and mortar attacks, attempts at such attacks and the finding of unexploded devices ... (They include) the infamous car bomb explosion that destroyed much of the shopping centre of Omagh on the afternoon of Saturday, 15 August 1998 with the*

appalling consequence that twenty-nine members of the public, including a lady pregnant with twins which did not survive, were killed and hundreds of others were injured, many gravely, leaving permanent and widespread physical and psychological scars. The town centre was destroyed. This huge explosion was among the very worst of the numerous terrible events of that recent thirty–year violent period of Northern Ireland history sometimes euphemistically referred to as "the Troubles". The prosecution contended, and there seems little doubt, that those responsible for all these incidents were so-called republicans who did not accept the implications of the Good Friday Agreement for the continuation of their terrorist campaign."

6. The Judge then set out a summary of the thirteen incidents with which the prosecution was concerned and how the Defendant was alleged to have been criminally involved in each of them. In summary, the Judge addressed:

(1) The mortar attack on a G30 Army Tower at Crossmaglen on 24 March 1998

(i) A search following an explosion close to an Army tower led to the discovery of twin mortar tubes mounted on a base plate. The mortars had been fired but had fallen short of the tower. The Timer Power Unit (TPU) was found to be a 'Coupatan' brand two-hour timer with two toggle isolating switches mounted on a plastic lunch box with the power provided by batteries housed within the box and wires leading from holes in the box for connection to the detonator. The characteristics of the TPU distinguished it from its predecessors, so it became known as a "Mark 19" TPU. Such TPUs were used in eleven of the thirteen incidents that featured in the Hoey trial.

(ii) Enquiries revealed that an order had been placed in January 1997 for 480 Coupatan timers, manufactured in France. These timers were marked with their week of manufacture – 99710, signifying the tenth week of 1997. The person ordering the timers had provided fictitious details. Timers from the same batch were also recovered in devices in London and the Republic of Ireland between 3 March 1998 and 10 July 1998.

(2) The mortar attack on Forkhill Army/RUC base on 24 March 1998

(i) One mortar exploded within the Army/RUC compound in this location but did not strike a person or building. A follow up search found two mortar base plates with tubes. Each had its own TPU, one of which was a Mark 19 timer.

(3) The hoax device found on a railway line at Red Bridge, Newry on 3 April 1998

(i) A suspicious item found by a railway worker proved to be a hoax device consisting of a paint bucket filled with car fillers and containing a Mark 19 TPU.

(4) The car bomb in Market Square, Lisburn, on 30 April 1998

(i) Between 10:38 and 11:09 on this date, ten bomb warnings were received. The warning calls initially maintained that there was a 600lb car bomb outside the Bank of Ireland in Market Steet in a blue Toyota Corolla. The code words "*Martha Pope*", associated with dissident republican terrorists, were given. Those code words (or similar words) were later used in connection with the attempted attack at Armagh on 16 May 1998, the attack at Banbridge on 1 August 1998 and the Omagh Bombing. The car bomb was, in fact, 125 feet from the bank and, as a later warning call stated, outside a butcher's shop, where it was found by police. The device was disabled by controlled explosions. It was found to have a Mark 19 TPU in the driver's footwell along with a large quantity of improvised explosive material, "*the characteristic construction of various car bombs in this case*".

(5) The mortar attack on Belleek RUC station on 9 May 1998

(i) Police received reports of suspicious tubes in the grounds of a hotel near the police station. A mortar base plate with two tubes facing the RUC station was found. While the area was being cleared, there was an explosion, but a mortar fell short of the station, causing no injuries. On examination, the TPU was found to be a Mark 19.

(6) The car bomb placed near Armagh RUC station on 16 May 1998

(i) A Toyota car was seen by police parked on the Newry Road in Armagh close to the police station. A check revealed it was displaying false number plates. A TPU was seen in the driver's footwell. A bomb warning call was received by the Samaritans. The warning call again contained the words "*Martha Pope*". Three minutes later

the Fire Brigade received a warning. A controlled explosion was carried out, and subsequent examination showed the device to be a bomb of a similar type to that discovered at Lisburn on 30 April 1998 with a Mark 19 TPU and a large amount of improvised explosive material.

(7) The placing of a bomb on the railway line at Finaghy on 24 May 1998

(i) Two people were seen acting suspiciously on the line under a railway bridge. A suspect device was found where they had been. While the area was being cleared, the device partially exploded without injury being caused. The device contained a Mark 19 TPU.

(8) The leaving of a trailer bomb near Blackwatertown Road on or around 9 July 1998

(i) Following a call to a television station to the effect that a device had been left in the Blackwatertown area, a car trailer was found on a side road. It contained a very large amount of improvised explosive material with two booster tubes. A Mark 19 TPU was found five to ten metres from the trailer, where it appeared to have been thrown.

(ii) At the conclusion of the prosecution case, Mr Justice Weir ruled that there was no case for the Defendant to answer on this charge and found him not guilty of it.

(9) The car bomb at Newry Courthouse on 13 July 1998

(i) A car was abandoned at Newry Courthouse. Four warnings of the presence of a bomb outside the Courthouse were made by telephone. The area was cleared and a controlled explosion carried out. Examination revealed a car boot filled with improvised explosives and a Mark 19 TPU in the driver's footwell. The TPU had a modification to those seen previously. That modification was designed to prevent accidental deployment of the toggle switches.

(10) The mortar attack on the Corry Square RUC Station Newry on 21 July 1998

(i) Police received a report that a van had been abandoned on ground to the rear of the station. Five minutes later, a mortar was fired from the van but did not reach

the station and did not explode. The attack was later claimed using recognised code words (which are not identified in the ruling). Examination found an improvised mortar fired by a Mark 19 TPU. This TPU had been modified to prevent the time from clicking back into the 'on' position allowing for a safe, short delay between arming and firing.

(ii) In 2006, a man named Gary Jones[1] was tried and convicted of involvement in this attack. His conviction was quashed on appeal and, at a retrial in 2010, he was acquitted. The circumstances of his alleged involvement in that offence are considered in further detail below.

(11) The car bomb at Newry Street, Banbridge on 1 August 1998

(i) Three warnings were received that there was a bomb in a red Vauxhall Cavalier parked outside premises described as "*the Ranch*" or "*Ranchhouse*" in Newry Street, Banbridge. The code words "*Marjorie Pope*" were given in two of the warnings, the third time similar code words had been used in this sequence of attacks. The bomb exploded while an evacuation was carried out. Many injuries were sustained but no-one was killed. There was "*great destruction of property*". Due to the damage, it was impossible to recover any part of the explosives or explosive device.

(ii) At the conclusion of the prosecution case, Mr Justice Weir ruled that there was no case for the Defendant to answer on this charge and found him not guilty of it.

(12) The car bomb on Market Street, Omagh on 15 August 1998

(i) At 14:29 the first warning call was made from a phone box in Forkhill, County Armagh. It was received by UTV, who noted: "*Bomb Courthouse Omagh Main Street, 500 lbs explosion 30 minutes*" and the code words "Martha Pope", another use of those or similar words. A second warning call was made at 14:31 from a telephone box in Newtownhamilton in County Armagh stating, "*Martha Pope 15 minutes bomb Omagh Town*". At the same time, a third call was made from a telephone box in Forkhill to the Samaritans stating: "*Am I through to Omagh? This*

[1] Gary Jones is the man referred to as "Man B" in the PONI Report of 12 December 2001.

is a bomb warning. It is going to go off in the centre of Omagh in 30 minutes time. Martha Pope. Main street about 200 yards from the Courthouse."

(ii) Mr Justice Weir noted that Omagh is the County Town of Tyrone and was thronged with visitors and shoppers at the time of the attack. Police on duty in the town faced, he said, the "*huge task*" of evacuating and sealing off the town due to the centre being a long linear street, with many shops and thoroughfares running off, and because the warnings gave no description of the car in which the bomb was contained and there were many vehicles parked by the roadside. It was, he concluded, impossible to focus on a known vehicle and work by reference to it to move people to safety.

(iii) The bomb exploded at 15:04 with appalling consequences. Several people remembered seeing the Cavalier either being driven towards or parking on Market Street in Omagh. One saw two men in the front of the vehicle and another saw a man leaving it once it was parked. There was agreement in the evidence that the car was in place at around 14:20 and in a position later measured at around 365 yards from the Courthouse.

(13) The discovery of an abandoned mortar bomb at Altmore Forest on 12 April 2001

(i) Police discovered a Toyota Hiace van abandoned on a remote country road beside a forest. It contained a base plate with a mortar tube and mortar packed with explosives. It had a TPU of different design from the Mark 19 type. It was capable of being fired but there was no identifiable target, although the prosecution case was that it was intended as a lethal attack against a security installation because that was the only form of target such devices had been used against over the years.

7. Mr Justice Weir summarised the prosecution case against Sean Hoey overall at paragraph 30 of his judgment:

"The Nature of the Prosecution Case against the accused

The charges are based upon what the prosecution say are a number of strands that taken together lead to the conclusion that the accused was involved in each of the 12 remaining incidents to the extent necessary to support each charge. Put shortly, they say that those strands are as follows:

1. *An examination of the manufacture of the Mark 19 TPUs that are known to have been used in eleven of the first twelve incidents and others found in other incidents tends to show that those used in the twelve had been made by the same person because of consistent features of their design and manufacture.*
2. *Fibres were recovered from melted glue used to secure components within the housing of several of the TPUs. These were consistent with having come from knitted gloves suggesting that similar gloves were worn by whoever assembled the TPUs. At the accused's house there was a mobile home. When it was searched in 2003 some fibre samples were recovered. Four fibres found on the Lisburn device are said to be indistinguishable from five fibres recovered from the mobile home. No knitted gloves were recovered. It is said that these fibres provide weak support for the proposition that the Lisburn TPU and items from that mobile home have been in contact with the same garment or fabric although it is conceded that this finding is not of itself strong.*
3. *DNA examination of a type known as "Low Copy Number" was undertaken subsequent to the events of 1998/9 upon quite a number of the items recovered although at the time that they were being recovered the possibility of their being examined for DNA was not considered by those effecting their recovery, storage and transmission. It is said that the result of DNA examination is to show that the accused was in contact with parts of the devices from Lisburn, Armagh, Blackwatertown Road and Altmore Forest.*

The Prosecution submit that the combination of those strands produces the result that the accused can be shown to be involved in the construction of the twelve devices and thereby an essential part of the conspiracy to cause each of the remaining incidents charged. I shall examine each of the strands in turn."

8. Mr Justice Weir addressed 'Strand 1', namely the alleged common authorship of the Mark 19 TPUs from paragraph 31 of his ruling. The principal oral evidence on this issue had been given by Dennis McAuley, a Senior Scientific Officer within the Forensic

Science Northern Ireland (FSNI). Mr McAuley (who has provided a witness statement to the Inquiry) was said by Mr Justice Weir to have examined *"eleven Mark 19 TPUs from the present incidents, another found in London and another in the Republic of Ireland. He also examined the photographs and case notes of the Garda Siochana relating to two others found in the Republic."*[2] At paragraph 31, the Judge said this of Mr McAuley's work:

> *"His examinations were acknowledged by all to be lengthy, painstaking and comprehensive and were directed to assessing the similarity or otherwise of the construction of the TPU's in order to seek to say whether all or any may have been constructed by the same person. To that end he examined:*
>
> 1. *The identification of the components used.*
> 2. *How and where the major components were mounted and their proximity to each other.*
> 3. *The sequence of components in the electrical circuit.*
> 4. *The physical characteristics and configuration of the lengths of wiring used in the circuit.*
> 5. *Whether any of the soldered connections displayed "characteristic workmanship".*
> 6. *Whether any physical matches existed between materials in or attached to one unit and those in or attached to another such as tape ends, sections of plastic conduit or terminal blocks."*

9. Mr Justice Weir summarised the similarities and dissimilarities of the Mark 19 TPUs discovered through Mr McAuley's examinations:
    a. The devices were all contained within "*Addis*" or similar plastic lunch boxes;
    b. Those which could be examined had similarly placed holes melted in them to accommodate the major components and allow for wiring to leave the box to connect to the detonator;

[2] See Mr McAuley's statement of 2nd September 2003. Annex A identifies the 11 TPUs from the list of 13 incidents set out at the start of the judgment (the incidents at Banbridge on 1 August 1998 and Altmore Forest on 12 April 2001 are excluded) and the TPU which he examined from London (that related to a device found on 10 July 1998). Annex B identifies the TPU which he examined from the Republic of Ireland as that relating to a car bomb in Dundalk on 21 March 1998 – along with the photographs and case notes which he examined relating to two further incidents in the Republic of Ireland, namely car bombs discovered at Hackballscross on 3 March 1998 and at Dun Laoghaire on 2 April 1998.

c. They all employed a Coupatan timer bearing the manufacturing date of the batch of 480 timers supplied in 1997;

d. All employed two toggle switches with on/off plates, although in six devices the switches were of different size to those used in the others;

e. The major components and internal wiring were glued with hot melt glue;

f. LEDs of similar size were a common feature in all of the Northern Ireland devices;

g. Electrical resistors of the same resistance were also found in each Northern Ireland device, with the London device having a comparatively lower resistor;

h. The battery packs involved a snap connector and most used four smaller volt batteries, but several used a single larger volt battery. The London device did not have a battery pack.

10. The Northern Ireland units had major components which were fitted in the lunch box and were similarly configured. In three cases, the four holes were so co-incident that the use of a template was suggested. The sequence of components and wiring was similar. Similar colour of wiring was used, although Mr McAuley accepted that this was likely explained by the conventional use of appropriately coloured wiring for the various wiring tasks. Soldered connections were made to timer terminals, toggle switch terminals, resistors and LEDs.

11. Mr McAuley's evidence on the question of common authorship sought to draw conclusions from the soldering in the units and the way in which the soldered connections were made. Mr Justice Weir noted that with regard to Mr McAuley's search for physical matches between components, which might have indicated assembly of units at the same time and place, there were no matches between insulating tape ends, cut plastic trunking or terminal blocks.

12. Mr McAuley concluded that variances between components and some wiring types suggested that some of the units were made at different times when, possibly, different materials were available. None of the units could be described as identical, although two, from Newry Courthouse and Corry Square RUC Station, were closely similar and another, from Blackwatertown Road, had a plastic box with holes whose

location was virtually co-incident with the holes in the previous two. Mr McAuley said that these findings led him to conclude it was: *"likely that the same person was involved in the construction of these units"*. Mr Justice Weir noted that these three incidents were consecutive in the Northern Ireland series and all three occurred within twelve days in July 1998.[3] These attacks were referred to by the Judge as "*Group 1*".

13. Mr Justice Weir described Mr McAuley's conclusions in respect of the coincidence of authorship of the other TPUs as "*less positive*".[4] What he described as the "*Group 2*" incidents included the events at Belleek RUC Station, Newry Road Armagh, Finaghy Halt (which occurred over fifteen days between 9 and 24 May 1998) and Omagh. In relation to these, Mr McAuley was able to say only that the similarities were such that the same person *"may"* have been involved in the construction of all seven TPUs in Groups 1 and 2.

14. The Judge noted, in relation to the Omagh device:[5]

> *"...Furthermore, the TPU from Omagh was fragmented by the explosion so that only the remains of components were recovered. While some of the connections survived quite well as they were embedded in the glue and although most of the unit could be reconstructed from the components retrieved it was not possible to fully assess the overall construction of the device."*

15. In relation to the remaining four devices with Mark 19 TPUs in the Northern Ireland series, Mr McAuley said, *"it is possible that the same person was involved in the construction of all the NI units"*. It was his view that the person who made the London and Republic of Ireland devices did not make the Northern Ireland devices, although there was shared knowledge and access to similar components, such as the timer.

[3] The three incidents, on 9, 13 and 21 July 1998, are Incidents numbered 27, 29 and 30 on the Inquiry's list of Previous Incidents which it intends to consider.
[4] §36 of the judgment.
[5] *Ibid*.

16. Mr Justice Weir noted that the Defence challenged Mr McAuley in respect of the validity of the conclusions he sought to draw from his examinations and findings. Mr Justice Weir noted that Mr McAuley:[6]

> *"made many very proper concessions in the course of his cross-examination. For example, he admitted that he was not an electrical engineer and had little prior knowledge of soldering. He agreed that, in assessing what were, or which he believed to be, similarities between the TPUs, he could not say what degree of shared knowledge might have existed, whether the lunch boxes might have been supplied pre-drilled, whether there was an assembly line with more than one participant and whether drawings might have provided to the assemblers. He agreed that he could not say how many people might solder in the same way and he agreed that there was nothing unique about it."*

17. The Judge's conclusion was that he could not be satisfied beyond a reasonable doubt, *"or indeed to any acceptable standard"*[7] that there was common authorship between any of the TPUs. It was possible there was common authorship between some or all of the TPUs, but nothing more had been proved. Mr Justice Weir said:[8]

> *"It has not been proved who received or distributed them, where or when any were used in making TPUs or by whom? There is no information as to whether all or some were manufactured by following a set of instructions or more than one set of instructions which could account for commonality of construction and design just as much as would common authorship. His conclusions as to the similarity of solder joints, based as he readily conceded upon an absence of any prior science, expertise in soldering or soldered joints, are, when examined, in reality no more than speculation. In the particular case of the Omagh TPU, which as I have earlier noted is out of chronological sequence with the other three in Group 2, the unavoidable absence of a complete TPU meant that Mr McAuley was unable to make a proper comparison with the other units recovered intact. It is therefore*

[6] §38 of the judgment.
[7] §39 of the judgment.
[8] *Ibid*.

impossible to exclude the possibility that features of difference just as much as of similarity may have been destroyed by the explosion."

18. In relation to evidential 'Strand 2', which involved the finding of fibres on TPUs and at a mobile home occupied by the Defendant, Mr Justice Weir noted, as with the TPU examinations, the *"very considerable and detailed work"*[9] undertaken by two FSNI scientists. He noted that there was no significant challenge to their findings or conclusions but pointed out that the dispute was whether they supported the contention of the prosecution that the Northern Ireland TPUs were made by one person, Sean Hoey. Mr Justice Weir noted the glue in the TPUs, to hold components together with insulating tape, had provided "*highly retentive surfaces*". Mr Justice Weir stated:[10]

"That also meant that fibres were recovered from multiple parts of the devices which indicated areas of contact with a source of the fibres, supporting the proposition that the fibres were transferred during construction of the devices by contact with, it was assumed, knitted gloves composed of fibres in the particular recovered population."

19. Acrylic fibres on each device were examined for significant populations, fibres common between different parts of the device, and fibres common between different devices. On the TPUs for Crossmaglen, Forkhill, Newry and Banbridge no significant populations were found. Populations on the remainder varied from device to device but particular fibres noted as 'A', 'B' and 'C' were found "*with possible commonality with more than one device*".[11] On this issue, the Judge said:[12]

"However, it could not be demonstrated that each device in which a fibre population was found had the same fibres and therefore that the same gloves, or gloves of the same manufactured batch, had been used in the making of each TPU. Rather some contained fibres that were not found in others, suggestive if anything

[9] §40 of the judgment.
[10] *Ibid*.
[11] §41 of the judgment.
[12] *Ibid*.

that different gloves (if gloves were indeed the source of the fibres) had been used in the making of some of the TPUs. For example, the single fibre type found on the Omagh device was not found replicated in fibres taken from other devices. Of course, if different woollen gloves were worn to construct the devices that neither proves nor disproves the existence of one or more makers as gloves are easily changed by or between one or more wearers and more likely perhaps to be so if the devices are made at more than one time. Nor was it asserted that any of the fibres found was of an uncommon type, rather they were consistent with having come from a mass-produced garment such as a woollen glove or perhaps a hat, a scarf or a pullover."

20. It was noted by the Judge that, in 2003, five fibres were recovered from items in a mobile home adjacent to Sean Hoey's home which, according to tests performed on them, not including a test called "*thin layer chromatography*" due to the length of the fibres, matched four acrylic fibres found on the Lisburn TPU (incident 4). Three of the mobile home fibres were found on tape lifts from a sofa, one from the collar of a cardigan and one from a pocket of another cardigan. None of the fibres were attributable to Sean Hoey other than by being within the mobile home adjacent to his home. The Judge said:[13]

"There was no evidence as to who, if anyone, had lived in or had access to the home over the previous five years nor was any source garment for the fibres identified."

21. FSNI's evidence was that the fibres could have originated from the same source of fibres as those on the Lisburn device. The four fibres on the Lisburn TPU could have been transferred by a limited contact with the source of the fibres and the five found in the mobile home could have been transferred by limited contact with the source of the fibres or an indirect contact through an intermediate item. Dr Ruth Griffin (an FSNI forensic scientist):

[13] §42 of the judgment.

"considered that the findings weakly support the proposition that the Lisburn TPU and the items from the mobile home have been in contact with the same fabric or garment."[14]

22. The Judge noted that no fibres matched types A, B and C nor any individual fibres from any other devices. Mr Justice Weir stated:

"Importantly, Dr Griffin's opinion was therefore that these findings support the proposition that the Lisburn TPU device was not made up nor had it been in the mobile home environment."[15]

23. Mr Justice Weir's conclusion on this issue was that, again, he could not be satisfied beyond a reasonable doubt or to any acceptable standard that the FSNI findings established common authorship of the Mark 19 TPUs in the Northern Ireland series. The Judge concluded:[16]

"The most that they can be said to do is to provide support, in varying degrees, for the proposition that certain of the devices not including Omagh or Lisburn have been in contact with fibres from what are thought (but not shown) to have been acrylic gloves supposed to have been used by whoever assembled the devices. The findings at the Molly's Road mobile home made five years after the construction of the 1998 devices do not by themselves connect, even weakly, the accused to the Lisburn TPU in preference to any of the other unidentified occupants of or visitors to that home during the lengthy intervening period."

24. Finally, Mr Justice Weir addressed 'Strand 3', the DNA evidence. The Judge summarised the prosecution submission as follows:[17]

"This strand requires the examination of a number of distinct but at the same time closely interrelated aspects. The DNA results upon which the prosecution rely

[14] §43 of the judgment.
[15] *Ibid*.
[16] §44 of the judgment.
[17] §45 of the judgment.

relate to exhibits collected from the scenes of the various incidents, taken into the possession of the police, transmitted to the Forensic laboratory for various examinations not initially including DNA, returned in many cases to the Police and ultimately transmitted to the Birmingham laboratories of the English FSS for testing for DNA by the Low Copy Number ("LCN") method. The prosecution case is that the examination of exhibits from Lisburn, Armagh and Blackwatertown Road in the 1998 series of events and from the single 1999 incident at Altmore, four incidents in all, disclosed the existence of the accused's DNA on parts of the devices, thereby connecting him with the making and/or assembly of those devices."[18]

25. Mr Justice Weir said that examination of the police and forensic laboratory records carried out by the Defence had *"uncovered very many unsatisfactory matters"*.[19] The context for this comment was that, *"It is highly important in this connection to bear in mind that, given the tiny amount of material needed to give a result using the LCN DNA technique, everyone agreed that especially stringent measures must be taken to avoid the contamination of samples"*.[20] Evidence from Dr Griffin of FSNI was that protective measures had been taken in the laboratory since the advent of the LCN DNA technique and there was an awareness of the need for the wearing of masks and hair covering to prevent the transfer of DNA from the examiner onto the item.

26. Mr Justice Weir agreed with the Defence submission that it was for the Prosecution to establish the integrity and freedom from possible contamination of every item from the point of seizure to any examination relied upon. He also accepted the contention that the Court had to be satisfied that all dealings with relevant exhibits had been satisfactorily accounted for from the moment of seizure to the point at which any evidential sample was taken and that this had been done by a method and in conditions shown to be reliable. The Judge said that:[21]

[18] Whilst Mr Justice Weir referred to a "*single 1999 incident at Altmore*", it appears he intended to refer to the incident at Altmore in 2001 as there is no 1999 incident referred to elsewhere throughout the Court's judgment.
[19] §46 of the judgment.
[20] *Ibid*.
[21] *Ibid*.

"This means that each person who has dealt with the item in the intervening period must be ascertainable and be able to demonstrate by reference to some proper system of bagging, labelling, and recording that the item has been preserved at every stage free from the suspicion of interference or contamination. For this purpose, they must be able to demonstrate how and when and under what conditions and with what object and by what means and in whose presence he or she examined the item. Only if all these requirements have been satisfactorily vouched can a tribunal have confidence in the reliability of any forensic findings said to have been derived from any examination of the item."

27. Mr Justice Weir then went on to give examples of problems in the case in the recovery, packing, storing and transmission of items by the Army, RUC and Scenes of Crime Officers. These occurred in relation to the incidents at Lisburn, Armagh, Blackwatertown Road and Altmore Forest. In summary, the issues were:

(i) At §47 of the judgment, in relation to the events at Lisburn, Mr Justice Weir detailed what he called "*the mystery*" of adhesive tape being added to a TPU after its removal from a vehicle, which could not be explained by an Army Technical Officer (ATO) or by a Scenes of Crime Officer (SOCO). The SOCO said he had brought the TPU to Lisburn Police Station, a fact which was not confirmed in records. The ATO had also taken parts of the device to his base, which were collected by another SOCO. They were found not to be bagged, with the ATO stating that this was not "*our job*". These items had been submitted for fingerprint analysis but not DNA examination, which he did not think the items were suitable for. A SOCO said that in the two or three years prior to the trial in 2006 to 2007, there was an awareness of DNA contamination, with the need to wear a full suit with headgear, mask, two pairs of gloves and overshoes understood, but that in 1998 there was no such awareness.

(ii) At §48 of the judgment, in relation to the events at Armagh (Incident 6), Mr Justice Weir stated that an Army Weapons Intelligence Section[22] member entered a scene after a SOCO made it safe, without special clothing and without gloves. The

[22] Evidence was given at the trial as to the purpose for an officer of the Army Weapons Intelligence Section attending the scene, namely, to collate information (including taking photographs) and report.

soldier said he did not touch exhibits but leant over them to take photographs. By 2000, when the soldier left service, no change in approach (i.e. to provide him with special clothing) had been implemented. A SOCO could not explain writing and alterations on a bag containing a detonator and, when asked to open the bag, items were found that he could not say were part of the exhibit when he bagged it. In relation to DNA, he said this issue did not occur to him as he could not see blood and "*no one knew how DNA was going*."

(iii) At §49 of the judgment, in relation to Blackwatertown Road (Incident 8), Mr Justice Weir said *"there were no proper records relating to the custody of the items seized and bagged by the SOCO, who was the same as at Armagh... It was often impossible to say by reference to any station record what item was where nor were records kept of who entered the property stores, when or for what purpose)"*.

(iv) At §50 of the judgment, in relation to Altmore Forest (Incident 13), Mr Justice Weir explained that evidence had been given by a SOCO and a Detective Chief Inspector that they wore protective clothing at the scene, but photographic evidence contradicted this. The SOCO at Altmore Forest was the same officer that attended the Forkhill scene. The witnesses were responsible for transporting items, including the TPU, to a laboratory in Belfast and to Birmingham for DNA analysis. The Judge accepted the Defence contention that one witness was responsible for "*beefing up*" her statement. The Judge sent transcripts of this evidence to the Police Ombudsman for investigation and said that what he found was a "*deliberate and calculated deception*" made it impossible for him to accept any of the evidence of either witness.

28. The Ombudsman investigated the matters to which Mr Justice Weir had drawn attention. The Ombudsman found that the officers had added additional details to statements but concluded that the details in the officers' second statements *"did not contain any inaccuracies or embellishments of the facts"* and that there was *"no evidence to support a deliberate and calculated deception by any of the police officers involved"* [23]. The Ombudsman further found that the photographs presented as purportedly contradicting the account of witnesses that they had worn protective

[23] The Police Ombudsman has provided a statement to the Inquiry addressing the outcome of the investigation into this issue.

clothing (§27(iv) above) had not been taken on the occasion the Court had been given to understand. For a full understanding of the Ombudsman's finding, regard should be had to the report itself. These events were also the subject of correspondence between the Lord Chief Justice and the Chairman of the Northern Ireland Policing Board.

29. Mr Justice Weir then went on to give examples of problems with police storage arrangements and at FSNI. He said that *"[t]he evidence establishes that the arrangements within the police in 1998 and 1999 for the recording and storage of items were thoroughly disorganised."*[24]

30. Examples included labels missing from items, labels incorrectly attached to the wrong item, bags without labels and the absence of a universal system for logging items received. There was no proper inventory of items stored in police stations; with some keeping Station Property Registers and some not. Mr Justice Weir said that a major incident should have a specific exhibit book, but these were not always opened or maintained. Exhibits officers could be appointed but not commence duties promptly, meaning items might be left unrecorded or be logged together regardless of the date of receipt. Of one example, Mr Justice Weir said:[25]

> *"...a SOCO who dealt with the Corry Square, Newry incident describing conditions at Newry police station at this period said he handed items over to an exhibits officer for the investigation but he could not say who that was as they did not at that time make records as to when and to whom items had been handed over. He said that at the time the Newry special property store was "a complete mess", that often an item he was looking for within it had not been recorded in the book and that bags within it could "spring a leak". He concluded on this topic by saying "fortunately I wasn't in the special property store very often, it was a mess."*

[24] §51 of the judgment.
[25] §52 of the judgment.

31. Arrangements for the collection by police of items being returned to them by FSNI were "*equally informal*".[26] A witness described the procedure as *"items would be brought out in something like a supermarket trolley, maybe up to four or five trolley loads. He would then go back to reception and sign. He trusted them that they had given him the forms to which the items related to sign. There was therefore no system for verifying what had been collected or what was then placed in the police store."*[27]

32. In evidence, Detective Chief Superintendent Norman Baxter, the Senior Investigating Officer, accepted that some exhibits had been difficult to locate and that some TPUs had never been found. There was disagreement between PSNI and FSNI as to where responsibility for this lay. Mr Justice Weir noted an HMIC inspection report *"published in 2001 or 2002"* which found there was a need for improvement of the storage of exhibits, and that *"generically the RUC had a difficulty in the management of exhibits"*. The issue related to storage but also the condition of exhibits, including bags being sealed and vehicles being disposed of or left outside such that further useful examination was impossible.[28] FSNI also had problems related to the handling, storage and tracking of exhibits, which had led to a temporary suspension of the laboratory's accreditation by the United Kingdom Accreditation Service.[29] Dr Griffin was questioned about the laboratory practice in allowing persons not involved in the examination of items to look at them. One document was described by the Judge as "*disturbing*":[30]

> *"…contemplating as it does at least the real possibility that an item that was subject to LCN DNA examination had previously been handled by Dr Adams and, even more seriously, by other persons whose identity was not known. The candid response of Dr Griffin was that she assumed that in 1998 the examinations (of items) were complete at that time and added: 'the handling, prior to the review, the reassessment (in 2001) was not to the same LCN standards' and later 'at that time they would have assumed that the examination of that item was complete.' Dr*

[26] §54 of the judgment.
[27] *Ibid*.
[28] §55 of the judgment.
[29] §56 of the judgment.
[30] §57 of the judgment.

Griffin later checked the laboratory records at the request of Mr Vaughan but could find no record of Dr Adams having looked at the item."

33. Mr Justice Weir also stated that:[31]

"It was volunteered by Dr Griffin that while people in the laboratory would have worn lab coats when exhibits were being examined in 1998/1999 she could not say whether they would have worn gloves and they certainly would not at that time have worn masks or hats. She accepted that the FSNI procedures for LCN DNA only began to develop around 2000 when knowledge of the Low Copy technique was obtained…She agreed that when the exhibits in this case were initially examined in the laboratory in 1998/99 there were no programmes in place within the laboratory to cater for the special examination and cleaning regimes necessary for the examination of items that might yield LCN DNA profiles."

34. Mr Justice Weir said that the examples provided demonstrated *"how far short of surmounting that high hurdle* (i.e. the submission of the Defence as to what needed to be established, which the Judge had accepted – see above) *the prosecution has fallen in this case"* and that *"it is difficult to avoid some expression of surprise that in an era in which the potential for fibre, if not DNA, contamination was well known to the police such items were so widely and routinely handled with cavalier disregard for their integrity. The position so far as NIFS is concerned is even more difficult to comprehend as everyone there must have been very well aware of the risks of improper labelling, storage and examination. In partial mitigation of the established FSNI shortcomings it may I suppose be recalled that before the re-examination of the case was initiated in 2000 or 2001 everyone at FSNI probably did think that the examinations of the items in this case were complete."*[32]

35. The Judge regarded it as "*extraordinary*" that, knowing that exhibits had not been collected and preserved using methods maintaining a high degree of integrity not only for DNA examination but also for the more exacting requirements of LCN DNA,

[31] §58 of the judgment.
[32] §59 of the judgment.

examinations were then performed in a laboratory in Birmingham with a view to using the results for evidential rather than solely intelligence-gathering purposes. Reliance on those examinations continued despite several witnesses stating that possible examination for DNA was not in their minds in 1998.

36. Mr Justice Weir concluded that he was,

> *"not in the least satisfied in relation to any one of the items upon which reliance is sought to be placed for the results of their LCN DNA examinations that the integrity of any of those items prior to its examination for that purpose has been established by the evidence. Accordingly, I find that that DNA evidence, the third and final strand remaining in the prosecution case, cannot satisfy me either beyond a reasonable doubt or to any other acceptable standard."*[33]

37. The Judge went on to express views about the reliability of the LCN technique for evidential as opposed to intelligence-gathering purposes. He said:[34]

> *"I was concerned at the wide variance in expert opinions, not only as between the Prosecution and Defence but also between the two experts called for the Prosecution. The central plank in the attack made on the evidential value and reliability of this system by the Defence witnesses, Dr Krane and Professor Jamison, was that the LCN system which had been invented by Dr Gill of Birmingham FSS and whose use for evidential purposes is being promoted by him and a colleague at that laboratory, Dr Whitaker, has not been "validated" by the international scientific community. The Defence experts claimed, inter alia:*
>
> 1. *That LCN has only been adopted for evidential purposes in two other countries in the world, the Netherlands and New Zealand.*
> 2. *In the United States a different and much more stringent operating system for LCN is in place despite which the system is only used for intelligence purposes except in a single known case where the American LCN system was used evidentially.*

[33] §61 of the judgment.
[34] §62 of the judgment.

3. *There has been no international agreement on validation and a conference held in the Azores in September 2005 had ended with agreement only that more work in that area was needed.*

4. *This lack of agreement on LCN was in marked contrast to the normal SGM+ test for DNA for which there were internationally-agreed validation guidelines and definitions approved by the Scientific Working Group on DNA Analysis Methods (SWGDAM).*

5. *"Validation" is defined in those guidelines as "the process whereby the scientific community acquires the necessary information to:*
   - *Assess the ability of a procedure to obtain reliable results.*
   - *Determine the conditions under which such results can be obtained.*
   - *Define the limitations of the procedure.*
   - *The validation process identifies aspects of a procedure that are critical and must be carefully controlled and monitored.*

6. *Most analytical procedures have a degree of uncertainty associated with them. When a scientist (or a lawyer) receives a result he wishes to know what degree of reliability can be placed on the result so that he can judge its degree of probative value.*

7. *However, in the case of LCN there is no validation other than the assertion by Drs Gill and Whitaker that two published journal papers they had written amounted in effect to peer review and thereby the necessary validation, a proposition which was strongly disputed by the Defence experts.*

8. *"Reproduceability" i.e. the ability to produce the same result more than once, is a very important determinant of reliability. If, for example a test were performed twice with a matching result, could it be reliably predicted that the same result would occur if the test were repeated a third or fourth time? If not, what would that say about the reliability of the testing and the reliance that could be confidently placed in its results?*

9. *The standard practice at Birmingham was to perform the test on two aliquots of the same sample whereas in the United States they insisted upon three.*

10. *In the present case an experiment had been done at Birmingham in which three tests had in fact been run with the result that the consensus produced*

by the first two tests was removed by the differing results then thrown up by the third. Thus, the normal approach used in the United Kingdom had unintentionally been demonstrated by its own proponents to be potentially (and in that particular instance actually) misleading."

38. Mr Justice Weir said he had:

"concern about the present state of the validation of the science and methodology associated with LCN DNA and, in consequence, its reliability as an evidential tool. The House of Commons Science and Technology Committee published on 25 July 2005 the Government's response to the Committee's Report "Forensic Science on Trial" which had been published on 29 March 2005. At paragraph 55 the Committee's comments on validation are repeated together with the Government's response. Both merit reproduction here:

"55. The absence of an agreed protocol for the validation of scientific techniques prior to their being admitted in court is entirely unsatisfactory. Judges are not well placed to determine scientific validity without input from scientists. We recommend that one of the first tasks of the Forensic Science Advisory Council be to develop a "gate-keeping" test for expert evidence. This should be done in partnership with judges, scientists and other key players in the criminal justice system, and should build on the US Daubert test."

The Government responded:

"....the Home Office, ACPO and APA are planning to consult with stakeholders on the issue of quality regulation in forensic science. The establishment of a regulator is one of the options to be considered, as is how the courts can be supported in appropriately weighing scientific evidence."

When Dr Gill was asked about this in the course of his evidence, he said that he did not know whether anything had yet been done by government to further the plan. If it has not then I consider that the evidence given in this case by the FSS witnesses reinforces in the clearest way possible the need for urgent attention to this task for I am not satisfied that the publishing of two journal articles describing a process

invented by the authors can be regarded without more as having "validated" that process for the purpose of its being confidently used for evidential purposes."[35]

39. It should be noted that, subsequently, in R. v Reed and others [2009] EWCA Crim 2698, the Court of Appeal of England and Wales concluded, having referred to the prosecution of Sean Hoey, that (at paragraph 74(i)):

> *"Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer from stochastic effects (such as allelic drop out mentioned at paragraph 48) which prevent proper interpretation of the alleles."*

40. It is also worth noting that, as the Inquiry understands it, the prosecution did not rely at trial upon the available evidence of cell site analysis by Lisa Purnell or evidence of call pattern analysis at the trial of Sean Hoey.

41. As is noted above, the verdict in the prosecution of Sean Hoey was delivered by the Judge on 20 December 2007. Mr Justice Weir's final conclusion was:[36]

> *"I am acutely aware that the stricken people of Omagh and every other right-thinking member of the Northern Ireland community would very much wish to see whoever was responsible for the outrageous events of August 1998 and the other serious crimes in this series of terrorist incidents convicted and punished for their crimes according to law. But I also bear firmly in mind the cardinal principle of the criminal law which, in delivering the judgment of the Court of Appeal in R. v Steenson and others [1986] NIJB17 at page 36, Lord Lowry LCJ re-emphasised in his concluding observations:*
>
> > *"Justice 'according to law' demands proper evidence. By that we mean not merely evidence which might be true and to a considerable extent probably is true, but, as the learned trial judge put it, "evidence which is so convincing*

[35] §64 of the judgment.
[36] §65 of the judgment.

in truth and manifestly reliable that it reaches the standard of proof beyond reasonable doubt."

The evidence against the accused in this case did not reach that immutable standard. Accordingly I find Mr Hoey not guilty on each of the remaining counts on the indictment."

Part II: COLM MURPHY

DPP v Colm Murphy (2002)

42. Colm Murphy was accused of unlawfully and maliciously conspiring with another between 13 and 16 August 1998 at Dundalk, County Louth, to cause an explosion of a nature likely to endanger life or cause serious injury to property in the State or elsewhere, contrary to Section 3 of the Explosive Substances Act 1883, as substituted by Section 4 of the Criminal Law Jurisdiction Act 1976.[37] The explosion with which the charge was concerned was the Omagh Bombing.

43. The Special Criminal Court in Dublin delivered a written judgment on 22 January 2002 following the conclusion of Colm Murphy's trial on that charge. That trial had commenced on 12 October 2001. The judgment was given by Mr Justice Barr, who was sitting with His Honour Judge Matthews and Her Honour Judge O'Halloran.

44. Mr Justice Barr began by setting out details of the Omagh Bombing and explained that it was uncontroversial that the vehicle containing the bomb had been stolen in Carrickmacross in County Monaghan before being loaded with explosives and driven from the vicinity of Dundalk to Omagh via Castleblayney and Auchnacloy on the day of the explosion. The Court stated:

"Forensic evidence which was found in Omagh subsequently and certain telephone records satisfy the Court that the foregoing sequence of events is in fact correct. It is also contended by the prosecution that on Friday, 14th August 1998, the day before the Omagh bombing, the accused borrowed a mobile phone from

[37] A second count was brought against Colm Murphy, but this was not determined by the Court.

his foreman, Patrick Terrence Morgan, by way of a subterfuge as to the purpose for so doing and he gave the latter telephone and his own mobile phone to one Seamus Daly, a dissident Republican terrorist in Dundalk that day.

On his own admission in the course of Garda interrogation after arrest he did so to assist Daly in moving explosives to Northern Ireland for the purpose of bombing targets there. This evidence is contained in a note of oral information including admissions alleged to have been given and made by the accused in the course of being interviewed…at Monaghan Garda Station on 23rd February 1999".

45. The Court recorded the position of the prosecution to be that the information from Colm Murphy had been obtained voluntarily, lawfully and recorded as the interview progressed; although no audio recordings were made and the only records were the written notes of the officers which were read over to Colm Murphy and with which he agreed. Colm Murphy refused to sign the document, stating *"No, I have told you more than I should have told yee"*. The relevant parts of the note of the interview were set out by the Court, including that:

a. Colm Murphy said he gave Seamus Daly two telephones, one belonging to his foreman Patrick Terence Morgan but maintained that he did not know to what use they would be put.

b. Colm Murphy initially denied giving Seamus Daly his telephone for the purposes of the bombing of Banbridge on 1 August 1998 but then accepted that he gave Seamus Daly a phone to *"move gear",* knowing that it would be used in "*some criminal act*". Colm Murphy stated that he *"didn't think he would use it for other phone calls"*.

c. Colm Murphy said: *"I knew it would be used for moving bombs. I knew these fellows were involved in moving bombs to Northern Ireland to bomb targets"*.

d. Later, Colm Murphy said in relation to the mobile telephone, *"I didn't give it to anyone. It was taken … I am a Republican. It is an open house"*.

e. It was put to Colm Murphy that there was a link between the attacks at Banbridge and Omagh involving his telephone number 087***5585. He was asked whether he gave his telephone to Seamus Daly for Banbridge *"as well"*, to which Colm Murphy replied *"No, I gave it to Joe Fee. I mean, he took it and used it."*

46. Mr Justice Barr went on to say that *"the foregoing note and its acceptance by the Court as a truthful account of what the accused said at that interview is crucial to the prosecution case"*. That case was that Colm Murphy procured Terence Morgan's mobile telephone on 14 August 1998 and gave it, with his own, to Seamus Daly in the knowledge that both were required by Seamus Daly in connection with the movement of a bomb for detonation in Northern Ireland and that Colm Murphy was tied *"into a conspiracy with others in connection with that proposed crime"*.

47. The prosecution alleged that the admissions made by the Colm Murphy were corroborated as follows:

a. The admissions recorded at interview were uncontradicted;
b. There was evidence of Colm Murphy's mobile telephone being at Banbridge prior to the bombing on 1 August 1998. There were close connections between the Banbridge and Omagh Bombings. A red Cavalier car was used as the bomb car in both attacks and the code words "Martha Pope" were used on each occasion;
c. Colm Murphy told Terence Morgan a lie as to why he wished to borrow his mobile telephone i.e. that he needed it because his own was not working. It was established that his telephone was working on 15 August 1998 on a journey to and from Omagh;
d. The telephone traffic between Colm Murphy and Terence Morgan's telephones on 15 August 1998 provided further corroboration;
e. The lies told by Colm Murphy to the AGS in relation to his use of his mobile telephone on 15 August 1998 also did so.

48. The following legal principles were set out in the Court's judgment:

a. AGS interviews must be conducted with probity, fairness and in accordance with law. The conduct of interrogators is governed by the "*Judges Rules*" and the right of an accused to consult his solicitor and be provided with rest and food, as well as a maximum period of permitted detention.
b. In relation to Colm Murphy's alleged confessions, under Section 10(1) of the Criminal Procedure Act 1993, the Court is required to have due regard to

whether there is evidence of corroboration of any such confession. Corroboration is not essential, but a Court should be slow to rely on a confession which is not corroborated.

49. Mr Justice Barr said that the essence of the crime of conspiracy was that Colm Murphy collaborated with one or more persons to provide a significant service (i.e. the provision of mobile telephones) in connection with the intended conveyance of a bomb to Northern Ireland for the purpose of detonation and, in doing so, knew the purpose for providing the telephones required by Seamus Daly, his co-conspirator. Mr Justice Barr said it was not necessary to prove Colm Murphy knew that the proposed site for detonation was Omagh - it was common knowledge that terrorist groups operated on a "*need to know*" basis.

50. The Court defined circumstantial evidence, upon which the prosecution case depended to some extent, by reference to two decisions of the Court of Appeal of England and Wales. In R. v Taylor, Weaver and Donovan (1930) 21 Cr. App. R 20, the Court of Appeal had said...

> *"evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."*

51. And in Tepper v R [1952] AC 480, the Court said:

> *"it is 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."*

52. Colm Murphy did not give evidence in his own defence at trial. As a result, the Court ruled, *"there is no conflict for a resolution by the Court as between what the accused might have said had he given evidence and the actual oral testimony of the Garda interrogators about what is alleged to have been said by him and by them during the interviews in question"*. In other words, the Court was drawing attention to the fact

that Colm Murphy did not go into the witness box in order to challenge the admissions that he was said to have made.

53. Notwithstanding that he had not given evidence, Colm Murphy did challenge the legality and validity of the AGS account of what he was alleged to have admitted, and the admissibility of the evidence against him. He did so on four grounds:

(1) First, the Court had earlier ruled, on 15 November 2001, that the evidence of one of the teams[38] of AGS officers who interrogated Colm Murphy (namely officers Liam Donnelly and John Fahy) was entirely inadmissible, including notes said to have been made during the interview. Forensic evidence had established that false information (namely that Colm Murphy had acknowledged that his wife was the sister of Sheila Grew, a woman associated with Seamus Daly) had been inserted into an interview note. It was argued that this wrong-doing cast doubt over the entire investigation, that all interview notes were tainted and that there was a real possibility that the evidence of other interrogating officers might be unreliable. This argument had been rejected by the Court earlier and, after having heard further testimony, the Court found there was no evidence the false information was ever divulged to the investigation team more generally. Mr Justice Barr therefore again rejected the contention that the investigation as a whole was tainted.

(2) Second, in relation to the alleged use of Colm Murphy's mobile telephone in the Banbridge area on 1 August 1998 shortly before the detonation of a car bomb similar to Omagh, and his admissions in that regard, it was asserted that three AGS officers and Lisa Purnell, working for PSNI, had *"deliberately mislead (sic) the Court in evidence"*. It was contended that AGS officers were *"untruthful and unreliable"* in relation to material facts and that their entire testimony should be rejected. Others, it was suggested, had *"endeavoured to deceive the Court by "dove tailing" their evidence so that it is mutually supportive."* The point made by the Defence, in simple terms, was that the officers who had interviewed Colm Murphy had put to him that his phone could be placed in Banbridge at a stage at which they had not received evidence to substantiate

[38] Three teams of officers were involved in the interviews. Each team was comprised of two officers.

that fact from Lisa Purnell. It was suggested that they had subsequently misled the Court about what they knew at the relevant time. In all of those circumstances, the contention was that the evidence of the admissions by Colm Murphy ought to be excluded. This was said to be so notwithstanding that, in fact, *"the relevant telephone records established beyond a reasonable doubt that the accused's mobile phone was in fact in the Banbridge area and used there shortly before the car bomb explosion on 1st August 1998. That fact is not challenged."* The Judge, having heard from the relevant witnesses had no hesitation in rejecting the Defence argument: *"the Court is nonetheless satisfied beyond reasonable doubt that [the two AGS officers] did in fact have the cell site mast information about the user of the accused's telephone in Banbridge on 1st August 1998 when interrogating him on that matter and that they had the information before the arrival of the formal confirmation, Exhibit 64, on 24th February 1999."* The Court found the witnesses truthful and reliable. The Judge was impressed by the demeanour of Lisa Purnell and the quality of her evidence, which he accepted as *"honest, reliable testimony"* and did not find evidence of "*dove tailing*". The Court said that *"the admissions recorded…have a firm ring of truth about them and there are cogent reasons why the accused would have said what is alleged."*

(3) Third, the argument focussed on a conversation between two AGS officers about what new information, if any, had emerged at an interview of the Defendant on 23 February 1999. There was a dispute between the officers about what had been said between the two of them about it. The Judge heard from the witnesses. The first officer created an impression of *"truthfulness and reasonable intelligence"*. Conversely, the second officer's evidence had already been discredited as he was the officer who had inserted information about Sheila Grew into interview notes. The Judge regarded him as an unimpressive witness: *"no depth of thought was apparent"*. In the circumstances, the Judge was unimpressed with the Defence's argument, which he rejected.

(4) Fourth, the Defence advanced a general criticism of all interview notes. It was suggested that they were in the main far too short having regard to the duration of the interviews and that this cast doubt on their validity. The Court accepted that the approach of recording the entirety of every police interview in Northern Ireland was *"a desirable improvement in criminal investigation"* but observed that this facility was not generally available to the AGS, and it was not an obligation of law. The *"traditional procedure adopted in this case by the interrogating Gardai of making contemporaneous manuscript notes of relevant matters emerging at interview is lawful per se and acceptable to the Court"*. The Court was not satisfied that the length of the notes by comparison to length of interviews cast doubt on their validity, and this submission too was rejected.

54. Mr Justice Barr noted that Colm Murphy was a building contractor and that Terence Morgan was at all material times his foreman. Terence Morgan was working in Dublin in August 1998 and communicated with Colm Murphy via telephone. This was also Terence Morgan's method of communicating with his wife at the time. Terence Morgan gave evidence on 14 November 2001:

> *"He stated that on Friday, 14th August 1998 the accused came to the Dublin City University site as usual and paid his men. He also borrowed Mr Morgan's mobile phone having proffered the excuse that his own was "on the blink". Mr Morgan also stated that the telephone was returned to him on the following Monday."*

55. The Court then said that it emerged that the prosecution had received a letter dated 8 January 2002 from a solicitor acting on behalf of Terence Morgan *"intimating that he wished to retract his evidence and contending that he had been compelled to give a false account of having loaned his mobile phone to the accused on 14th August 1998"*.

56. In light of this, Terence Morgan was recalled to give evidence early in January 2002. He said that he wished to retract his original evidence about the loan of a mobile telephone to Colm Murphy because it was untrue. He maintained that he had given his initial account *"because of pressure and threats by the police in Northern Ireland during his interrogation after arrest there and subsequently by the Gardai indirectly*

through his in-laws" and he *"alleged that his nerves had been upset since his arrest in Northern Ireland and he was having ongoing treatment and medication in that regard"*. However, the Court noted that Terence Morgan had shown no sign of distress or abnormality when he gave his evidence in November 2001. In his further evidence (which the Court ultimately rejected) Terence Morgan said that he kept his mobile telephone in a glove compartment in a van. He discovered it missing on 14 August 1998. He did not raise an alarm about this and found it under a seat when searching for it the following Monday. Terence Morgan could offer no explanation for the telephone's movements on 15 August 1998 and could not identify the user of it at that time.

57. The Court found Colm Murphy's admission that he borrowed Terence Morgan's telephone on 14 August 1998 *"is in the teeth of the latter's retraction but is consistent with his original evidence"* and that Terence Morgan's *"demeanour and the general tenor of his evidence on 11 January [2002]…created a clear impression of discomfort and untruthfulness"*. The Court rejected Terence Morgan's retraction and was satisfied beyond reasonable doubt as to the veracity of his original account.

58. The final area of evidence considered by the Court was telephone evidence. The Court introduced this topic by asking whether this material could *"be interpreted as evidence of surrounding circumstances which is capable of proving beyond a reasonable doubt the accused's admission of being guilty of the criminal conspiracy of which he is charged?"*

59. The accuracy of the telephone records before the Court was not in dispute. There were two aspects of the evidence which were described as being of *"particular interest"*.

a. The first related to calls made by Colm Murphy's telephone which utilised a cell site in Banbridge on 1 August 1998, less than an hour before the bomb exploded there. The pattern was broadly similar to that involving the use of Terence Morgan's mobile phone two weeks later in respect of the Omagh Bombing i.e. *"one flash call and another of very short duration…made in quick succession in that location"*. The Court records that Colm Murphy had eventually admitted in interview that he had handed his mobile phone to a man named Jim Fee on both

1 and 15 August 1998 – although the interview notes themselves indicate that the phone had been handed to a man called Joe Fee. Colm Murphy claimed in interview that he had fallen out with Fee by reason of the Banbridge and Omagh bombings.

b. The second relates to the use of Colm Murphy and Terence Morgan's telephones on 15 August 1998. The pattern of calls and cell site data indicated that each phone travelled from County Monaghan to Omagh shortly before the detonation of the car bomb there and returned to County Monaghan thereafter. The Court regarded it as highly probable that "conveyance" of the car bomb would have involved not only the car carrying the bomb itself but also a scout car travelling ahead of it, with contact between the two vehicles probable. In the Court's view, contact with the person who gave the bomb warnings may also have been made by Colm Murphy or Terence Morgan's telephones.

60. The Court considered whether the telephone evidence corroborated Colm Murphy's confession that he conspired with Seamus Daly to provide him with assistance, namely providing two mobile telephones, in connection with an intention to move a car bomb to Northern Ireland for detonation and said that *"the following facts which have been proved in evidence beyond a reasonable doubt are collectively corroborative of the accused's confessions of guilt regarding his part in the conspiracy to plant and detonate the Omagh car bomb."* Those facts were:

a. Telephone records establishing the movement of the telephones of Colm Murphy and Terence Morgan to and from Omagh at a time consistent with involvement in the bombing.
b. Traffic between the two phones on 15 August 1998.
c. The lies told by Colm Murphy to Terence Morgan by way of explanation for wishing to borrow his mobile telephone on 14 August 1998.
d. The lies told by Colm Murphy to the AGS about not having loaned his mobile to anyone, which he retracted in later interrogations.
e. Colm Murphy's admissions of guilt in recorded AGS interview notes were uncontradicted in evidence.

f. Telephone records relating to the user of Colm Murphy's mobile telephone on 1 August 1998 and the broad similarity between the traffic and pattern on the telephones of Colm Murphy and Terence Morgan on that day in Banbridge and two weeks later in Omagh.

g. Colm Murphy was a Republican terrorist of long-standing, having been convicted of serious offences in the United States[39] and the Republic of Ireland. With this background, and membership of a dissident terrorist group which was not on ceasefire, he was likely to have been involved in terrorist activities of the sort charged against him.

h. Among others contacted by Colm Murphy's mobile telephone shortly before the Banbridge bombing was Seamus Daly, to whom he had stated he supplied his own phone and Terence Morgan's phone on or around 15 August 1998 for use in connection with the Omagh Bombing.

i. Colm Murphy was alleged to have conceded that Seamus Daly was a member of the Real IRA. Seamus Daly had received three telephone calls from Colm Murphy's mobile telephone on 1 August 1998.

61. The Court said that these facts *"lead only to a conclusion that the confessions allegedly made…were in fact made…during the course of lawfully conducted and recorded interrogations and that it is proper for the Court to regard them as truthful and accurate."* Colm Murphy's admission to loaning his mobile telephone to Jim Fee on or around 1 August 1998, who Colm Murphy implied had some involvement in the Banbridge bombing that day, established a connection to that attack and the attack two weeks later in Omagh. The Banbridge evidence, the Court found, *"is another stick in the bundle which collectively established that the accused was guilty of complicity in the Omagh bomb conspiracy"*.

62. The Court found that *"a critical review of the entire evidence has lead the Court to conclude beyond a reasonable doubt that the accused is guilty of the offence charged in the first count in the indictment"* but that *"even if the foregoing evidential factors fell short of corroborating the accused's guilt of conspiracy as charged, it would have been*

[39] Colm Murphy was convicted in New York in 1982 of seeking to acquire weaponry for importation to Northern Ireland. His appeal was dismissed in 1984.

proper to convict him on the basis of his own admissions." The Court's analysis was that the development of the account of Colm Murphy over the course of the AGS interviews was important: *"in order to avoid the conclusion [that he was the person who used his telephone on 15th August 1998] and to distance himself from actual participation in the Omagh bombing per se he had a strong incentive to tell the truth i.e. that he had collaborated in the Omagh conspiracy to the extent that he had provided the two mobile phones for use in carrying out the intended objective but that that was the full extent of his part in the operation."*

63. Following delivery of the Court's verdict, there was then an application on behalf of Colm Murphy for the Court not to record a conviction but instead to discharge itself and set a date for a retrial. Underlying this application was the submission of defence counsel that *"there are matters in the judgment which cause us very, very grave concern"*. The Court rejected that application and indicated that it proposed to proceed with the sentencing of Colm Murphy.

64. On 25 January 2002, the Court sentenced Colm Murphy. The maximum penalty was one of 20 years' imprisonment. The prosecution called evidence from an AGS Officer in relation to the Omagh and Banbridge attacks and in relation to Colm Murphy's character. It was noted that he had a number of previous convictions, including in relation to firearms and membership of the IRA. During a plea in mitigation, defence counsel said:

> *"...he maintains absolutely his innocence of this offence and maintains that what has occurred is a miscarriage of justice ... He is a person who, he has asked us to emphasise, had no hand, act or part in the outrage which occurred at Omagh."*

65. In passing sentence, the Court noted:

> *"The perpetrators of the crime, including the accused, were prepared to expose innocent people to that risk [of death and injury to many] and had no regard for their right to life and bodily integrity. The consequence of that disregard for the basic human rights of others is now only too well known."*

66. The Court sentenced Colm Murphy to 14 years' imprisonment. The hearing concluded with those representing Colm Murphy setting out 39 separate grounds of appeal and seeking a certificate for leave to appeal against his conviction. That application was refused.

DPP v Colm Murphy [2005] IECCA 1

67. Colm Murphy appealed his conviction to the Court of Criminal Appeal in Ireland. The Court (Kearns, MacMenamin and Clarke JJs) delivered its ruling on 21 January 2005.

68. The Court of Criminal Appeal considered the admissions made by Colm Murphy in the course of interview by AGS officers. The Court recited the prosecution's reliance on the content and meaning of Colm Murphy's interviews, telephone records and the initial and retraction evidence from Terence Morgan. The Court said that, while more than 40 grounds of appeal were lodged, the principal grounds of appeal were:

(a) *"the Special Criminal Court ruled incorrectly as to the legality of the accused's arrest and subsequent detention and wrongly admitted evidence of interview notes and of alleged utterances by the accused;*

(b) *the Special Criminal Court failed to either grant a direction or acquit the accused when there was before the court evidence that police witnesses had altered notes of written interviews and had lied under oath;*

(c) *the Special Criminal Court breached the accused's entitlement to a presumption of innocence by having regard to inadmissible evidence of previous convictions;*

(d) *the Special Criminal Court wrongly admitted telephone records as evidence;*

(e) *the Special Criminal Court wrongly relied on the evidence of Terence Morgan, which said evidence was of an unreliable character;*

(f) *the Special Criminal Court misdirected itself as to corroboration and made findings as to corroboration which were not supported by the evidence;*

(g) *the Special Criminal Court failed to adequately address the defence case or rule in detail on various points argued on behalf of the accused by counsel;*

(h) the trial was rendered unsatisfactory by reason of an almost two month break in proceedings."

69. The Court set out its function in dealing with appeals from the Special Criminal Court, referring to the judgment of O'Higgins CJ in The People v Madden [1977] IR 336 as follows:

> *"In the appeals now before this court, we have transcripts of the rulings of the Special Criminal Court made in the course, and at the end, of the trial on questions of law and findings of facts in relation to the admissibility of evidence, the sufficiency or cogency of the evidence, and the reasons for the rulings and verdicts given. Therefore, subject to the grounds of appeal, it would seem to be the function of this court to consider the conduct of the trial as disclosed in the stenographer's report to determine whether or not the trial was satisfactory in the sense of being conducted in a constitutional manner with fairness, to review so far as may be required any rulings on matters of law, to review so far as may be necessary the application of the rules of evidence as applied in the trial, and to consider whether any inferences of fact drawn by the court of trial can properly be supported by the evidence; but otherwise to adopt all findings of fact, subject to the admonitions in the passages cited above."*

70. The Court of Appeal[40] concluded that the conviction should be set aside on the grounds at (b) and (c) above. Its ruling focussed primarily on its reasons for this, along with providing a ruling specifically on the question of the admissibility of telephone records in criminal prosecutions such as those against Colm Murphy. A retrial was directed. It is helpful, however, to set out what the Court said about each of grounds (a) to (h).

71. In respect of ground (a), the Court said it was *"quite satisfied as to the correctness of all rulings made by the Special Criminal Court …"*.

[40] DPP v Colm Murphy [2005] IECCA 1.

72. Ground (b) related to the alteration of interview notes and evidence given by AGS officers in respect of those notes. The Court of Appeal noted that following Colm Murphy's arrest, three teams of two AGS officers were allocated to question him. Colm Murphy declined to sign or initial any interview notes compiled in relation to him. The Defence case was that Colm Murphy did discuss his history of Republicanism but *"made no further admissions and certainly none of an incriminating nature"*.

73. Colm Murphy's legal team had instructed an expert to determine whether the notes of interviews conducted with him had been altered in any way, or pages re-written or substituted. They also looked for evidence the notes were not contemporaneous or were not what they purported to be. The main product of this expert work was that notes of an interview on 22 February 1999 (Exhibit 23) had been re-written in an amended form to remove an alleged concession by Colm Murphy that his wife was related to Shiela Grew, a woman believed to have strong republican connections and to be the girlfriend of Seamus Daly. The Court of Appeal regarded this as important. There was a basis for believing that the officers had initially inserted a manufactured concession as to the connection between Colm Murphy and Shiela Grew, then removed it once they realised it was not correct as a matter of fact. Counsel for Colm Murphy submitted that there must be an *inescapable inference that Murphy never said any such thing, that the question and answer were concocted and that the two officers, on discovering the error, set about altering the third page of the interview notes*."

74. The Court of Appeal recognised the Special Criminal Court's criticism of the AGS officers involved. The important question was the significance of the alteration and of the evidence of the officers, both for the integrity of the interviews as a whole and in terms of the consequences for the trial itself. The Court at first instance had declined a request for a direction of "*no case to answer*" but had struck out the evidence and interview notes of the officers concerned. It did not find that the evidence of other AGS officers was tainted.

75. The Court of Appeal noted that the fact of a significant alteration to the interview notes gave rise to a range of possibilities as to how that might have happened:

"it must be said that there was no evidence in the case to support the finding which the court made, albeit as a matter of inference and likelihood, that Garda Donnelly somehow himself discovered the error and, in collusion with Garda Fahy, re-wrote the page, deleting the erroneous section about Mrs. Murphy's relationship with Ms. Grew. Equally, there is absolutely no evidence to support the conclusion arrived at by the Special Criminal Court that "the revised note was then restored to Garda Whelan's custody apparently without his knowledge".

76. The Court said that, while the court was obliged to review the entire case in the light of the principles laid down in D.P.P. v Madden [1977] I.R. 336, its *"more immediate concern is to answer the question whether or not the court correctly declined to direct an acquittal at the end of the prosecution case when the problems concerning Gardaí Donnelly and Fahy, their altered notes and dishonest testimony (as so found by court) had been identified."* The Court of Appeal said:

"We are satisfied that the alteration to the notes of one of the interviews in this case was of a nature as to raise an issue or question as to the extent to which other officers might or might not have been involved to some degree in collusion, at least to the extent of correcting the initial error and facilitating the filing of an amended third page in the material section of notes we have identified. This is not to say that any conspiracy or significant wrongdoing which involved other members of the investigation team did in fact take place or that any one particular scenario of what may have happened is more probable than another. The test at this point of the case for the court was to determine whether, having excised the evidence which had been shown to be tainted, the case was still one in which a notional reasonable jury properly charged could convict. A direction should be granted in a case where the court determines that no reasonable jury properly charged could convict."

77. The Court then said:

"It does appear to this court that evidence was available, by inference at least, to enable the court to consider and evaluate the issue whether or not the contamination of the garda evidence went beyond officers Donnelly and Daly (sic).

The court could have had regard not to just the absence of any positive evidence to that effect, but also to the very discontinuity between successive interviews of the accused, a fact and feature of this case which was emphasised time after time in a different context by the defence during the trial. Quite a number of the interviews with the accused commenced as though the preceding interview had never taken place. This may be seen as being inconsistent with the notion of conspiracies or deceitful efforts to dovetail fabricated confessions. Rather it is capable of being seen as pointing strongly towards an opposite inference. This court is not of course expressing any view as to the weight to be attached to such factors beyond noting that they were present.

The court could thus have properly determined at the direction stage that there was evidence from which it might later decide that no collusive or improper effort to falsify interviews had occurred having regard to all of the interview notes and the form in which they exist in this case. It was open to the court in our view to rule as it did that there should be no direction, but at the very least the circumstances of this case demanded that the court remind and warn itself at all times thereafter that, having excised the tainted evidence, the surviving garda evidence would have to be evaluated in the most critical and careful manner because of the matters which had come to light. In any trial with a jury a very strong warning to this affect would have had to be given. Whether the weight ultimately attached by the court to the 'discontinuities' between the admissions would, when taken in conjunction with the absence of any positive evidence of a more widespread complicity on the part of the investigation team in any wrongdoing, have been such as to enable the court be satisfied beyond reasonable doubt about the integrity of the police interviews is another matter. Our concern is more with the approach adopted by the court of trial to the evidence and the self-directions which appear from the reasoning in the judgment.

We do not consider that the court of trial brought to the issue of the possible contamination of evidence or to the evaluation of the surviving garda evidence that degree of extra critical analysis which was surely warranted having regard to the development which had occurred in relation to Gardaí Donnelly and Fahy.

Alternatively, if the court was taking on board such concerns, the requirement to expressly adopt a critical approach on this account and to state that it was so doing does not appear on the face of the judgment. In particular, the court failed to assess, though requested to do so by the defence, the impact on the credibility of Detective Garda Hanley's evidence of criticisms made of him in the course of the judgment of the Special Criminal Court in the then recent case of D.P.P. v. Gilligan, Special Criminal Court, Unreported, 5th March, 2001, and to place that in the balance when assessing the police evidence as a whole. Instead the court simply made findings as matters of probability about the police evidence which were based on speculation and not on evidence. For example, the suggestion that Garda Donnelly retrieved his notes from Custody Officer Whelan, re-wrote the final page, deleting the false allegation about Mrs. Murphy's relationship with Ms. Grew, and then restored the revised note to Garda Whelan's custody, all without the latter's knowledge, is speculation only. We believe the court of trial misdirected itself by having regard to possible explanations for which there was no evidence in support and for failing to give due consideration to other evidence and circumstances which might have provided a proper foundation for the conclusion arrived at by the court. By favouring one scenario for which there was no evidence, the court's approach was the very opposite of the more critical approach which the particular circumstances of this case demanded. The court feels compelled for this reason to set aside the conviction as unsafe."

78. On ground (c), which related to the admission at trial of Colm Murphy's previous convictions and the reliance placed upon them, the Court of Appeal stated that:

"It is undeniable that the court of trial had regard to the accused's previous convictions, although the accused had not himself given evidence or put his own 'good character' in issue. The case clearly did not come within any of the exceptions detailed in s.1(f) of the Criminal Justice (Evidence) Act, 1924, and Mr. Charleton, Senior Counsel for the State, has not pointed to any common law jurisprudence which would justify the leading of evidence of previous convictions to establish that such convictions are either corroborative of an alleged admission or probative of the guilt of the accused on facts such as those proved in the instant

case. In fact, the prosecution was at pains throughout the trial not to lead evidence from the interviews with the accused which might be construed as either prejudicial to or in any way compromising of the accused's presumption of innocence."

79. The Court stated that a prior conviction at some point in time could not be corroborative of a confession of guilt to a later unrelated crime and that, the 'fact' of any prior convictions of Colm Murphy had not been proved in the trial either beyond reasonable doubt or at all. In fact, no such evidence had been led by the State during the trial proper. The Court said:

"One might begin this portion of the court's review therefore by attempting, to identify from what source or sources the court of trial derived the particular information."

80. Aside from a voir dire (a trial within the trial as to an issue of admissibility) in relation to the legality of Colm Murphy's arrest and detention, which itself did not involve any formal evidence of convictions but which did involve hearsay evidence of convictions and suspicions of the arresting officer, the only other occasion on which the issue was raised was in a question asked by Counsel for Colm Murphy – which could not be regarded as evidence – and the answers given were not helpful.

81. The Court said:

"At no stage did the prosecution attempt to lead formal evidence of previous convictions, nor did the court of trial indicate it intended relying on same or afford to the defence any opportunity of making submissions as to the admissibility or otherwise of such material prior to delivering judgment. To have regard to previous convictions in respect of which no admissible evidence was tendered and where no grounds for doing so were established can only be seen as a significant erosion of the presumption of innocence, whether couched in terms which go to corroboration or in terms which suggest that previous convictions are probative in some way of the guilt of an accused person in relation to a specific offence. While this was not a jury trial where the risk of prejudice would be glaringly obvious, it is

impossible to avoid the conclusion that the previous convictions and bad character of the accused (as so found by the court) formed a significant element in the court's decision to convict. We remain of this view even though the court at a later point in its judgment indicated it was satisfied to convict on the basis of the admissions of the accused alone. There is a consistent line of authority of long-standing to the effect that a conviction is unsafe where evidence of previous convictions has been improperly introduced."

And:

"This court is driven to the inescapable conclusion that the court of trial fell into error in relying upon either the material contained in the voir dire or in counsel's questions to admit as probative evidence which was manifestly inadmissible."

82. In respect of ground (d), in relation to telephone records, the Court said by reference to the case of The Statue of Liberty; The Sapporo Maru M/S (owners) v. Steam Tanker Statue of Liberty (Owners) [1968] 1 W.L.R. 739, that *"The fact that a recording is produced mechanically without human intervention makes no difference to its general admissibility in evidence."*

83. The Court considered that evidence of this type came precisely within the category envisaged by Section 5(1) of the Criminal Evidence Act 1992. This provided that information contained in a document will be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information:

"(a) Was compiled in the ordinary course of a business,

(b) Was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had personal knowledge of the matters dealt with, and

(c) In the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned."

This is subject to the proviso contained in Subsection (2) of Section 5 which provides:

> *"Subsection 1 shall apply whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he is identifiable) through whom it was supplied received it in the ordinary course of a business."*

84. The Court considered several authorities and submissions on the proper interpretation of the Interception of Postal Package and Telecommunications Messages (Regulation) Act 1993. Colm Murphy's submission was that that Act did not expressly make telephone records which had been obtained under the Act admissible in criminal or any proceedings. The Court considered amendments made to a particular section, namely Section 98, and said it was *"entirely apposite for the purposes which arose in the trial in the Special Criminal Court."*

85. In relation to the Postal and Telecommunication Services Act 1983, the Court said that: *"Provided therefore it is established to the satisfaction of the trial court that the interception is being carried out under lawful authority such evidence is in the view of this Court admissible."* The Court concluded that the provisions of the Criminal Evidence Act 1992 also envisaged the admissibility of such evidence in criminal proceedings. The Court said that "*the objections made to the admissibility of telephone records in this case are ill-founded*".

86. The Court continued:

> *"The appellant further contends that such records as were adduced and admitted were an invasion of the appellant's right of privacy. However, as has been held in a number of cases, the right to privacy is not absolute. It may be superseded by the public interest (see Desmond v. Glackin (No. 2) [1993] 3 I.R. 67), and also may be curtailed by the exigencies of the common good; (see Kennedy v. Ireland [1987] I.R. 587 at 592)".*

87. Colm Murphy also argued that interception of telephone records was *prima facie* a breach of the right to privacy guaranteed by Article 8 of the European Convention on Human Rights, which right required certain safeguards. These safeguards were principally found in "*legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authority*" in ordering the release of such information. The Court found that the 1993 Act provided precisely such safeguards as to the scope and manner of exercise of a discretion.

88. Ground (e) related to Terence Morgan's evidence. The question of his credibility was, the Court found:

> *"entirely within the competence of the trial court which had the opportunity of hearing and observing Mr. Morgan while he was giving evidence. While the obvious contradiction between the two accounts given by Mr. Morgan is a matter which was, quite properly, canvassed by the defence at the trial, it does not seem to this court that it would be appropriate for it to seek to 'second-guess' the assessment of the credibility of Mr. Morgan."*

89. On ground (f), the issue of corroboration of alleged admissions, the Court of Appeal said that *"as a matter of law, the distinction which can properly be drawn between evidence which is in the legal sense corroborative on the one hand or merely supportive on the other hand arises only in a limited number of cases. In the vast majority of circumstances the distinction between corroborative and supportive evidence is of little substance."*

90. The Court said that "*it seems clear that the only obligation upon the trial court in this case was to have regard to the fact that there was potentially a danger in convicting the accused on the basis of his admissions in circumstances where there was no corroboration of same*."

91. In the circumstances, the Court rejected this ground of appeal.

92. The penultimate ground, ground (g) was the asserted failure of the Court to consider properly the defence case. The Court of Appeal said that:

> *"The fact that there may have been many points canvassed in the course of both the evidence and the argument designed to persuade the court to accept or reject evidence tendered by either side does not, of itself, mean that the court is required to rule in detail on each and every point so raised. Unless the judgment of the Special Criminal Court discloses a failure on the part of that court to consider the substance of the key areas argued on behalf of the accused at the trial then it is no part of the function of this court to review whether each and every element of the case made before the Special Criminal Court was commented on in detail in its determination. While there are, doubtless, a number of matters which were addressed in the course of argument before the Special Criminal Court which are not commented on in the judgment this court is not satisfied that any of same, either taken individually or collectively amount to a failure to address the substance of the defence case. In those circumstances this ground also fails."*

93. On the final appeal ground (h), Colm Murphy complained "*about the fact that a gap in the conduct of the trial occurred arising on Monday 19 November, 2001 (being day 22 of the trial) which lasted until the court reconvened on Friday 11 January, 2002. The reason for the initial adjournment of the proceedings on 19 November, 2001, was the illness of one of the members of the court which resulted in the President of the Court stating that it would be unrealistic, in his opinion, to set a date earlier than the first day of the following term for a recommencement*."

94. The Court said that:

> "*While there may be circumstances (particularly in cases being tried before a jury) where, in all the circumstances of the case, a trial may become so unsatisfactory as to render a verdict unsafe by virtue of a prolonged gap, this court is not satisfied that it has been established that such is the case in the present proceedings*.

It must be noted that a trial before professional judges who are experienced in hearing evidence over periods of time, including in many cases trials which are for one reason or another interrupted, is necessarily less open to difficulties resulting from any interruption than jury trials."

95. It follows that a retrial was directed only on certain grounds, namely grounds (b) and (c).

Colm Murphy v DPP and the Attorney General [2007] IEHC 349

96. Colm Murphy issued a claim for judicial review. The judgment on that claim was delivered by Justice O'Neill on 23 October 2007.

97. By that time, the two officers who had been accused of altering the interview notes (Liam Donnelly and John Fahy) had been tried and acquitted. Their acquittal occurred on 23 October 2006.

98. The Court's judgment explains the background to the Omagh Bombing and Colm Murphy's arrests and prosecution and the Court of Appeal decision. It then sets out that:

"A very unusual complication occurred at this point. Two members of An Garda Síochána who had given evidence in the applicant's first trial, were charged immediately after the Court of Criminal Appeal had given its judgment, with perjury alleged to have been committed during the first trial of the applicant. The first respondent decided to proceed with the prosecution of both of these garda witnesses before the applicant's re-trial. The applicant agreed with this manner of proceeding because he would be gravely inhibited in his cross examination of these two gardaí in a re-trial if that took place before the prosecution of these two gardaí."

99. Judicial review proceedings commenced as Colm Murphy's re-trial, following the Court of Appeal decision, was set by the Special Criminal Court for 11 January 2007. The judicial review claim sought relief which essentially prevented the re-trial. It was

suggested that a trial would contravene Colm Murphy's rights under Article 6 ECHR. Leave was granted on 17 July 2006 on the grounds that the lapse of time between the institution of proceedings against him and the proposed trial arguably presented a real risk of an unfair trial and/or would contravene Article 6 ECHR. Leave was later granted on a third ground, which was that Colm Murphy's capacity to defend criminal proceedings against him was compromised by reason of memory impairment such that it was unfair to try him and to do so would be unfair and/or in breach of Article 6 ECHR given the lapse of time. Medical evidence was relied upon to support the proposition that Colm Murphy had a memory impairment.

100. Mr Justice O'Neill said that:

> *"The applicant submits that from the time of his arrest and charging in 1999 until the date fixed for his trial in January 2007 approximately eight years elapsed and that within this period there was culpable prosecutorial delay on the part of the first named respondent and "systems" delay otherwise which cumulatively have had the effect of prejudicing the applicant's defence to such extent that he can no longer get a trial in due course of law as required by Article 38(1) of Bunreacht na hÉireann [the Irish Constitution] and he has been denied an expeditious trial as required by Article 6(1) of the European Convention on Human Rights. In addition, the applicant submits that the impairment of his memory as outlined in the medical reports of Professor Kennedy and Dr. Ferguson is of such extent as to prejudice him in the conduct of his defence in any future trial."*

101. The Court said that the first essential requirement for an Order for prohibition on the grounds of prosecutorial delay was that there had been blameworthy prosecutorial delay. The first period relied upon was a period of around two and a half years for the case to be brought to trial at the Special Criminal Court in October 2001. Colm Murphy criticised the prosecution's conduct and claimed either *"culpable delay or "systems" delay"*.

102. Mr Justice O'Neill said that:

"The prosecution in this case was a difficult one and a considerable volume of material had to be prepared and furnished to the applicant. In my view in the process of this, there is no evidence of any blameworthy delay whatever. Delay did occur as a result of the original trial date having to be abandoned. This resulted in a delay from 16th January to the 12th October, 2001. In the first place, the first named respondent had no responsibility at all for this period of delay. Secondly, the failure to get a case on as anticipated on one occasion could not in my view lead to a conclusion that the second named respondent was culpably in default of its obligation to provide the necessary resources to the Special Criminal Court to carry out its function.

In my view the period of time between the charging of the applicant and the commencement of his trial on the 12th October 2001 could not be said to be in the circumstances of this prosecution, inordinate or constitute blameworthy delay."

103. Mr Justice O'Neill found that the period between November 2001 and January 2002 (when a member of the Court was indisposed) did not amount to culpable delay.

104. The next period between the verdict of the Special Criminal Court in January 2002, the Court of Criminal Appeal hearing in December 2004 and judgment in January 2005 involved delay but,

"in my view, on the evidence before me the applicant was responsible in very large measure for that delay…I am of opinion that there was inordinate and unexplained delay on the part of the applicant in advancing his application for legal aid and that this delay in turn inevitably affected the onward progress of the application for leave to appeal, in the Court of Criminal Appeal list. Had the applicant pursued his application for legal aid in a timely fashion, it is probable that his appeal would have been prepared far sooner and been given a date for hearing far sooner than occurred. I am satisfied that all of this delay was occasioned by inaction on the part of the applicant."

105. The period from January 2005 until January 2007 (between the date of the decision of the Court of Criminal Appeals and the start of the retrial) was, according to O'Neill J:

> "*entirely explained by the prosecution of the two Garda witnesses in the first trial of the applicant for perjury. The applicant acquiesced in this manner of proceeding and consented to various adjournments along the way. In my view he cannot now complain about this delay.*
>
> *I am satisfied that notwithstanding the lengthy period that has elapsed since the applicant was charged with the offences concerned, there has not been any blameworthy delay on the part of either the first or second named respondents."*

106. Of the submissions made on behalf of Colm Murphy, O'Neill J said the following:

(1) First, *"In my view it simply cannot be said that because the applicant suffers a type and level of anxiety and stress as described by Dr. Kennedy that there could on that basis be a prohibition of the prosecution. If it were the case that blameworthy prosecutorial delay could lead to an order of prohibition, where the stress and anxiety suffered is no more than is to be expected in the circumstances, the inevitable consequence would be that prosecutorial delay, per se, would in effect be sufficient to obtain a prohibition of the trial. In my opinion where stress and anxiety is relied upon as the prejudice justifying prohibition it must be of a wholly different order and degree than the stress and anxiety which one would expect to find in someone facing prosecution for serious criminal offences."*

(2) Second, in respect of the argument that the delay impaired Colm Murphy's ability to have a fair trial, as required by the Irish Constitution and ECHR, O'Neill J said that *"There is no suggestion that any of the evidence which was available for the first trial has been lost as a result of delay. No witnesses have died or become unavailable. The applicant's principal concern is that the case has now become a "stale" case with the consequence that memories will have dimmed and that even though ample written material is available to enable witnesses to refresh their memory, the spontaneity in the evidence in the first trial will have been lost. Furthermore, the applicant is concerned that in respect of many of*

the points of defence which were advanced through cross examination in the first trial the applicant will now be disadvantaged because the element of surprise will have been lost." The Court rejected this, saying *"All of the elements of defence that were available to the applicant in the first trial remain available to him."*

107. O'Neill J considered the final ground on which leave was granted*, "namely that as a result of a brain injury suffered in an accident in 1989 [Colm Murphy] now suffers from memory impairment such that he cannot now be fairly tried for these offences."* It was noted that there were no issues around Colm Murphy's fitness to plead, which would be a matter for a trial judge in any event. On the basis of the medical evidence, O'Neill J said:

"I would infer that the applicant's memory difficulty is limited to a short-term difficulty in absorbing information verbally presented to him in a fast-paced interrogative style interview. He has no difficulty in recalling events or information from his past including his post-accident past and has no difficulty in recalling what he himself has said in the past" and that the memory impairment has *"not at all affected his ability to recall relevant events and in particular his participation in interviews with members of An Garda Síochána and to instruct his legal team accordingly. Thus insofar as an important part of the State case against the applicant is an admission allegedly made by him in the course of one interview, it would seem to me that his memory impairment would not affect his ability to remember something as important at this, allegedly said by him. It is noteworthy that in this regard no memory difficulties apparently impinged upon his defence in the first trial."*

108. Any difficulty would arise in in cross-examination, but should it arise *"an appropriate strategy will be devised to give the applicant a fair opportunity to hear, absorb, fully understand and respond to the questions"* and nothing in the medical evidence *"gives rise to a concern that the applicant's memory impairment is such that he cannot now have a fair trial."*

109. The final complaint was in relation to Colm Murphy's rights under Article 6 ECHR. This was not part of domestic law until the European Convention on Human Rights Act, 2003 and did not have retrospective effect and, in any event, O'Neill J said that *"there was no culpable delay on the part of either the first or second respondent in the period since the coming into effect of this Act*".

110. In all of those circumstances, the application for judicial review was refused.

Colm Murphy v DPP [2009] IESC 53

111. Colm Murphy appealed the High Court's decision in his judicial review proceedings to the Supreme Court of Ireland. The Supreme Court (Murray CJ and Hardiman, Geoghegan, Fennelly and Finnegan JJs) delivered its judgment on 14 July 2009.

112. Geoghegan J said that *"The ground put forward for such judicial review was essentially delay in different forms in processing the proceedings against the applicant."*

113. The Supreme Court noted that, as originally charged, Colm Murphy faced a second charge of membership of an unlawful organisation. The trial of this charge had been postponed pending the resolution of the trial on the conspiracy charge. Colm Murphy complained that this second charge had not been dealt with in the judgment in the judicial review and sought to include the delay involved in the resolution of this charge in his complaints about delay in the proceedings before the Supreme Court.

114. The Court set out a chronology of relevant events and referred to the Notice of Appeal, dated 26 November 2007, which listed 28 grounds. The Court considered that those 28 grounds could be distilled into seven issues:

(1) An alleged failure to deal with the membership charge in the judgment.
(2) The finding that there was no blameworthy prosecutorial delay.
(3) An allegation of systemic delay due to alleged inadequate resourcing of the Special Criminal Court.

(4) The finding by the Judge that there had been inordinate and unexplained delay on the part of the appellant in advancing an application for legal aid in relation to his appeal.
(5) The alleged memory impairment on the part of the appellant.
(6) The finding that the appellant had failed to demonstrate any prejudice arising from alleged delay or that he had suffered a significant level of anxiety.
(7) The finding that there had been no breaches of Article 6 of the European Convention on Human Rights.

115. On the issue of delay and the blameworthiness of that delay, Geoghegan J said he was "*in broad agreement with the views of the learned trial judge…"* With regard to the first period of complaint between 23 February 1999, when Colm Murphy was charged, and 5 October 1999, when the book of evidence was served, Geoghegan J stated that *"While this period could not be described exactly as short, I agree with the learned High Court judge that given the nature of the case and the events in connection with it, the period could not be described as inordinate*."

116. Geoghegan J said that Colm Murphy,

> *"is complaining of the lack of resources given by the State to the Special Criminal Court to enable speedier trials and he is characterising this as so-called "systemic delay"… I believe it can mean so many different things that it is dangerously imprecise. If carried to its logical conclusion, the courts could abort a trial because there were not enough judges or not enough court rooms etc. I do not know of any judgment of the European Court of Human Rights in Strasbourg still less any court in this jurisdiction which has ever given credence to that view and there is nothing whatever in Article 6 of the Convention which says that there can be no trial in such situation even if there was a breach. There is an established constitutional jurisprudence in this jurisdiction relating to delay and its effect or non-effect on an impending criminal proceeding. I have no reason to believe that the application of that jurisprudence does not adequately fulfil the requirements of the European Convention on Human Rights."*

117. This finding also resolved Colm Murphy's complaint relating to compliance with Article 6 ECHR.

118. The Court reached a similar conclusion in relation to the adjournment of the Special Criminal Court trial and in relation to the obtaining of transcripts, saying:

> "*I am not satisfied that any justiciable complaint could be made about delay in obtaining the transcript in this case. At any rate, it appears that the appellant delayed considerably in delivering his written submissions for the purposes of the appeal.*"

119. In relation to the period between January 2005 and January 2007 (which was designed to enable the trial of AGS officers to take place) Geoghegan J said:

> *"It seems so obvious that the appellant would not want his re-trial to commence until after the trial of the two gardaí charged with perjury that any suggestion that the acquiescence was in some way reluctant (which seems now to be suggested) is simply incredible and irrespective of whether in this regard the High Court judge can be said to have made a finding of fact or to have drawn an inference from the facts, it would be wholly inappropriate for this court to interfere with that finding."*

120. On the decisions made by the court at first instance in respect of the arguments based on alleged stress to and memory loss on the part of Colm Murphy, and their impact on Colm Murphy's ability to have a fair trial, Geoghegan J said that he could *"see no basis on which this court can set aside those findings by the High Court judge."*

121. That disposed of the challenge relating to the conspiracy charge.

122. In relation to the membership charge, Geoghegan J said that:

> *"As far as the conspiracy count is concerned, I would dismiss the appeal. The membership count however is in a different position. There has never been a trial on it and it has lain dormant for many years. It would have been perfectly proper*

originally not to have proceeded with this trial in tandem with the conspiracy count having regard in particular to special evidential rules which can apply to a membership charge. Even apart from that aspect it would have been reasonable for the [Director of Public Prosecutions] to delay that trial pending the outcome of the conspiracy trial. But the extraordinary events which occurred could not have been anticipated: the sickness of a judge, the overlap of a previous trial but above all the delay caused by the perjury trial. In the events that have happened, I am of opinion it would be unfair to allow that trial to proceed now and, therefore, I would allow the appeal to that extent only. Accordingly, there should be an injunction against the [Director of Public Prosecutions] from proceeding with that particular count."

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123. The retrial of Colm Murphy on the charge of conspiracy to cause an explosion eventually took place before the Special Criminal Court in January and February 2010. The Court ruled on 24 February 2010, acquitting Colm Murphy.

124. The ruling on the retrial set out the charge and a summary of the prosecution case as follows:

"The prosecution alleges a conspiracy to cause an explosion and the kernel of the case against the accused is that he lent his own and another mobile telephone to persons in the knowledge that those phones would be used for an unlawful purpose and, in particular, for the carrying out of a bombing mission to and in Northern Ireland. It is not alleged that the accused was one of the bombers, or even that he knew of the particular bombing mission mentioned."

125. The Court explained that it had received evidence relating to "*telephone traffic involving the accused's mobile phone and another mobile phone*". Colm Murphy's phone was used a number of times on 15 August 1998 through various cell sites from County Monaghan up to Omagh, in Omagh and back over the border. Colm Murphy's phone was also shown to have been in Banbridge on 1 August 1998, but the Court

concluded that the evidence did not establish that he lent his phone for any purpose on that occasion or that the presence of the phone had anything to do with the bombing there.

126. The Court went on to explain that the principal evidence relied upon by the prosecution arose from the interviews which the Garda had conducted with Colm Murphy at the time of his arrest. Notwithstanding the acquittal of the officers, the ruling went on to note that the Prosecution, quite properly, did not rely on the impugned interview or the other interviews conducted by those officer and stated the following:

> *"As we observed in a previous ruling, a grave feature of this case is that, as a result of scientific evidence adduced on behalf of both the accused and the Director of Public Prosecutions at a previous trial, it has been established and agreed on behalf of the DPP that notes of an interview that took place on 22nd February, 1999, between 3.45 pm and 5.45 pm and conducted by Detective Garda Fahy and the late Detective Garda Donnelly were falsified ... We do not know the full extent of the falsification, nor do we know when the notes were altered or who else, if anyone, was aware of the alteration."*

127. A total of fifteen interviews with Colm Murphy took place between 21 February 1999 and 23 February 1999, with three teams, each comprising of two AGS interviewers. The Court set out details of some of the interviews. That included details of the interview on 22 February 1999 when Colm Murphy was asked: *"You know Daly was working with the Real IRA who were involved in planting bombs in the North. Did you know your phone was going to be used for that, isn't that what you mean by gear?"*. Colm Murphy replied *"Yes, I knew it would be used for moving bombs. I knew these fellas were involved in moving bombs to Northern Ireland to bomb targets"*.

128. The Court regarded that admission as critical, describing it as,

> *"essential to the prosecution case as it is the only direct evidence that he knew that the phones were to be used for a bombing mission or missions and thereby would*

constitute the only evidence of the accused's involvement in the conspiracy alleged".

129. In other words, the Court regarded that admission as the central prosecution evidence in the case.

130. On behalf of Colm Murphy, it was argued that the prosecution had not established a sufficient case for the trial to be allowed to proceed. It was argued that the remaining interviews and the alleged admissions within them, which the Court regarded as forming the foundation for the case, should be excluded. That application was made on a number of grounds:

(1) The failure to properly record Colm Murphy's interviews;
(2) The fact that there was said to be time during the interviews that was unaccounted for;
(3) The improbability of admissions being made relating to bombs, having regard to a number of factors;
(4) The fact that some investigating AGS officers put matters to Colm Murphy in respect of which they did not have the requisite information that the time.

131. The Court accepted the arguments of the defence, ruling:

"The fact that the notes of the interview conducted by Detective Garda Donnelly and Detective Garda Fahy were falsified, combined with the facts that there is no explanation in relation thereto, and the fact that this was part of a series of interviews being conducted by three teams of two Gardai each, does, we find, taint all of the interviews, and by reason of the fact that the onus of proof is on the prosecution and the accused is entitled to the benefit of any doubt that arises, he must be given the benefit of the doubt in this regard.

By reason of the foregoing, we are satisfied that all evidence in relation to the interviews is inadmissible. In making this finding, we would like to make it very clear

that we are making no finding in relation to the credibility of the other interviewing Gardai."

132. That led to only one conclusion:

"The result of the foregoing finding is that there is no evidence before the court upon which a jury, properly charged, could convict the accused and we grant the direction sought."

133. Colm Murphy died on 18 April 2023.

Part III: MICHAEL McKEVITT

DPP v Michael McKevitt (2003)

134. Michael McKevitt was charged and tried before the Special Criminal Court in Dublin. The Court consisted of Justices Johnson, O'Hagan and Reilly. Michael McKevitt faced two charges:

(1) Membership of an unlawful organisation contrary to Section 21 of the Offences Against the State Act 1939, as amended, on the basis that between 29 August 1999 and 28 March 2001 he was a member of the IRA; and

(2) Directing the activities of an organisation in respect of which a suppression order had been made under Section 19 of the Offences Against the State Act 1939, contrary to Section 6 of the Offences Against the State (Amendment) Act 1998, on the basis that between 29 August 1999 and 23 October 2000, he directed the activities of the IRA.

135. Judgment was given by the Court on 6 August 2003. The Court observed that,

"this is the first time in the history of the State that a prosecution has been taken of directing contrary to Section 6 of the Offences Against the State (Amendment) Act 1998" and *"there has been no judicial interpretation of the word "directs" and therefore the Court has adopted the ordinary meaning of the word as being*

"controlling, supervising, showing the way or giving an order or authoritative instruction"."

136. The Court structured its judgment as follows. First, it assessed the evidence in relation to Count 2, which was:

a. The evidence of David Rupert;

b. Corroboration and other evidence of the following nature:

i. AGS evidence and evidence of civilian witnesses;

ii. Results of a search of Michael McKevitt's house; and

iii. Exhibits.

137. Second, the Court considered the evidence in relation to Count 1 and, thirdly, issues of credibility, before arriving at its findings.

138. In relation to Count 2, the Court said that David Rupert was an American who *"clearly had a very checquered (sic) business career and operated close to the edge in many matters"*. He visited Ireland on several occasions commencing in the early 1990s when, in 1994, he was approached with a view to *"working with the FBI and supplying information"* to the United States on various individuals including Joe O'Neill and their relationship. In the latter part of 1994, Rupert agreed to that request.

139. The Court heard evidence of David Rupert's activities as an *"intelligence asset"*. The Court set out that *"he reported to him [his FBI handler Agent Buckley] after every trip and Buckley would check in with him from time to time"*. Some of this involved meeting an individual related to Michael McKevitt's wife and attending Republican Sinn Fein headquarters and functions. David Rupert obtained the lease of a pub in Ireland in 1996 and in the course of this business he passed information *"on occasions"* to an AGS Chief Superintendent.

140. David Rupert gave evidence that he met the "*British Secret Service*" (the phrase used in the Court's judgment – along with *"BSS"*) in 1997 and David Rupert *"then decided to use encryption emails both to the FBI and the BSS"*. David Rupert said that, around the time of the Belfast Good Friday Agreement, he was asked by Joe O'Neill to *"head*

up a cell for the army and be in charge of their computer cyber-terrorism squad". He *"placed himself in the middle of things so he could play along with his role"*.

141. David Rupert was in Ireland on 15 August 1998 but was *"very nervous for his safety and he wanted to get out and left"*. In November 1998 he met individuals at the Republican Sinn Fein Ard Fheis (conference). Those individuals included the OC (Officer Commanding) of the Continuity IRA in Derry, and another who was said to be the *"second in command to Des Long in the Continuity IRA"*. There was talk of a new group being formed and the names of Michael McKevitt and his wife, Bernadette Sands McKevitt, were mentioned to him.

142. David Rupert said that he first met Michael McKevitt in August or September 1999. The Court said:

> *"In many cases the witness has been unable to recollect the precise time and location or indeed all of the content of the meetings but he has deposed to the fact that (a) the meetings took place and (b) that the subjects upon which he has given evidence were discussed"*. His recollection of *"the contents of the [meetings] has been clear and the persons alleged to have attended these meetings has also been clear"*.

143. The first meeting of significance was in August/September 1999. Michael McKevitt and Seamus McGrane were present. Michael McKevitt was not introduced to David Rupert, but he seemed to know who David Rupert was and spoke to him. The Court said: *"The demeanour of the accused and the conversation at that meeting indicated to the witness that he McKevitt was the leader. Having regard to a number of requirements and requests made to Rupert this indicated leadership control and direction..."*. Those requirements and requests included encouraging Republican Sinn Fein to become the political wing of a new organisation, that he seek funds in the United States for that new organisation and that David Rupert would meet a *"sleeper"* that Michael McKevitt had in place in the United States.

144. David Rupert said that, during this particular trip to Ireland, he was given a command structure to report to, that being Michael McKevitt first, Liam Campbell second and Bernadette Sands McKevitt third. Michael McKevitt *"stated he was looking to bring the campaign against the Brits to mainland England and that this campaign was to be against military and financial targets"*. David Rupert also reported that Michael McKevitt said he was in an arms deal with Libya and that he was desirous of support from the United States. The Court also said:

> *"... The accused discussed with Rupert the proportionality of the involvement of various organisations in the Republican family with the Omagh bombing."*

145. David Rupert met Michael McKevitt on several occasions in Ireland in November 1999. That included a meeting at Michael McKevitt's home when Liam Campbell was present. At that meeting, Michael McKevitt *"told the witness Rupert that he would like him (Rupert) to be the Army Liaison person in the U.S., that he would meet the army council in Ireland and carry reports to the U.S so that they would know what their money was being used for."* Michael McKevitt also recited his history within the Provisional IRA and his experience of storing and managing arms. He identified two agents in the United States.

146. David Rupert testified that he attended a meeting of engineers in Dundalk in November 1999, along with Michael McKevitt and an electronics engineer and a bomb technician, and another such meeting during a visit to Ireland in February 2000. Also, Rupert testified that in February 2000, *"he attended a meeting of the Army Council in the Greenore area with Kieran McLaughlin, Liam Campbell and a gentleman named Morris was present. He was not in a position to say whether or not the accused was present at that meeting. Subsequently the witness pointed out this house to the Gardai"*.

147. David Rupert's final visit to Ireland was in October 2000 when he had a number of meetings with Michael McKevitt. In one meeting, Michael McKevitt told David Rupert, *"he had had to take over the directional duties of the army until he was able to replace Campbell"* in reference to the arrest of Liam Campbell. On another occasion during this visits, McKevitt told Rupert that *"nobody is in the army unless I say so"*.

148. David Rupert entered into a further contract with the FBI in 2001 to become a co-operating witness. He was asked about and recognised items which had been seized from Michael McKevitt's home on his arrest.

149. The Court said that *"The witness David Rupert on day 6 of the trial identified the accused in Court as the Michael McKevitt that he referred to in his evidence and who he alleged he met as detailed in his evidence"*.

150. The Court then assessed the evidence of Garda officers, including those from a National Surveillance Unit and those who had attended Republican Sinn Fein Ard Fheis and 32 County Sovereignty Committee meetings, and civilian witnesses. It also considered the items found and seized from Michael McKevitt's home during his arrest, including those which David Rupert had been asked about. The Court noted that exhibits setting out the terms of contracts between David Rupert and the FBI had not been challenged by Michael McKevitt in the course of the trial.

151. In relation to the evidence underpinning Count 1, the Court heard from a Chief Superintendent in the AGS (Chief Superintendent Michael Finnegan). He said he had known Michael McKevitt since 1985 and held the view that he was a member of the IRA as alleged in the charge. He said that his opinion had nothing to do with the evidence of David Rupert.

152. On the issue of credibility, the Court noted: *"The defence has put the credibility of Mr. Rupert as their primary issue so it is to that the Court addresses its mind at this time. The areas are as follows:*

(1) His knowledge of the facts to which he testifies;

(2) His disinterestedness.

(3) His integrity.

(4) His veracity.

(5) *Being bound to speak the truth by such an Oath as he deems obligatory...*

(6) The Court's overall opinion of the witness.

(7) Any evidence of corroboration.

(8) General."

153. The Court then addressed each of those areas. Of the first, the Court found *"Overall he had very considerable knowledge of the facts to which he testified."*

154. The Court said the second related to whether David Rupert's evidence was *"directly related and inextricably linked to the amount of money he gets"* and considered the contracts between David Rupert, the FBI and the British Secret Service; the alleged settling of David Rupert's tax affairs in the United States and a book. The Court noted: *"He did state that it was not the money that triggered his decision to testify but rather the viewing of a TV Programme on the Omagh bomb and his own moral thinking."*

155. On the third issue, the Court noted that the eleven days of David Rupert's cross-examination concentrated on his activities and history in the United States with a view to *"...show him up to be an unreliable and untruthful witness and a person not worthy of being believed. To this end many topics were investigated..."*. The Court said *"The balance of the cross examination in so far as it related to events in Ireland, his movements in the US, and his dealings with the Republican Family are tantamount to suggestions he is lying and these matters are figments of his imagination. The perception that he would be allowed to get so close to the hub of a Republican movement without being sworn in is alleged to be unbelievable."*

156. The Court noted the *"the defence suggested on behalf of the accused that he had never met David Rupert and asserts on behalf of the accused that Mr Rupert's evidence was an entire invention, a concoction, a tissue of lies, a serial deceit and just not true."*

157. On the issue of veracity, the Court said there is no proof that David Rupert offered any deliberate false words. On the issue of the Oath, David Rupert took the Oath to tell the truth and *"He would appear to have had a Christian upbringing and consequently understands the nature of the same"*.

158. The Court's overall opinion of David Rupert was *"assisted by his demeanour, deportment, ability to cope with cross-examination which in this case, at times,*

lurched back and forth to disconnected events and in many instances did not follow any chronological sequence" which was *"clearly"* designed to test David Rupert.

159. On the issue of corroboration, the Court referred to its earlier comments on other evidence on this issue and, on the final issue, addressed complaints in relation to disclosure made during Michael McKevitt's trial.

160. In its findings, the Court restated the charges faced by Michael McKevitt. It noted that the Omagh Bombing had been mentioned in the evidence but made clear that this Attack *"is not within the period for which the accused is charged on either count."*

161. On Count 2, the Court was satisfied beyond all reasonable doubt that David Rupert was *"a truthful witness and that his credibility has in no way been impugned"*. The Court was further satisfied of the evidence of AGS officers and civilians. It noted that David Rupert's evidence of recognising items from Michael McKevitt's home was *"uncontested"* and found his identification of Michael McKevitt's home and other properties to be *"corroborative of his evidence that he attended these locations and knew them."*

162. The Court concluded that the IRA was an organisation suppressed pursuant to the Unlawful Organisation (Suppression) Order 1939 and that:

> *"7. The Court is satisfied beyond all reasonable doubt that Rupert's evidence relating to the instructions given to him by the accused constitutes directing with the meaning of the section and is open to no other interpretation.*
>
> *8. In view of the above findings the Court rejects the suggestion that Rupert and the accused Michael McKevitt never met.*
>
> ...
>
> *11. Consequently, the Court finds the accused Michael McKevitt guilty on Count 2."*

163. On Count 1, the Court accepted the AGS Chief Superintendent's *"uncontested evidence"* and opinion alone as sufficient to convict Michael McKevitt and said:

"However in view of the credibility of David Rupert's evidence the Court finds such evidence to be corroborative of the Chief Superintendent's evidence". The Court therefore found Michael McKevitt guilty on Count 1 as well as Count 2.

164. On 7 August 2003, Michael McKevitt was sentenced to 20 years' imprisonment. The Judge is reported to have said, "*The accused played a leading role in the organisation which he directed and induced others to join*."

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165. Michael McKevitt appealed.

166. The Court of Criminal Appeal, consisting of Justices Kearns, O'Donovan and O'Sullivan, issued a judgment on the appeal on 9 December 2005.

167. The Court of Appeal stated that:

> *"After a trial lasting 27 days, the appellant was convicted by the Special Criminal Court on both counts on the indictment on 6 August, 2003. On 7 August, 2003, the appellant was sentenced to 6 years imprisonment on Count No.1 and to 20 years' imprisonment on Count No.2, each sentence to run concurrently and to date from the date of the appellant's arrest, namely, 29 March, 2001."*

168. In its introduction, the Court of Criminal Appeal said:

> *"this was a criminal trial without precedent. The charge of directing the activities of an unlawful organisation was the first such charge to be brought within this jurisdiction by virtue of an amendment to the Offences Against the State Act, 1939, which had been introduced in the aftermath of the Omagh bombing."*

169. It also said that:

"the present appeal did not seek to impugn the propriety of the conviction of the appellant in respect of the offence of membership of an unlawful organisation. Other than a suggestion that the two counts should have been severed and a separate trial directed in respect of each, the entirety of the appeal was addressed to the conviction recorded against the appellant in respect of directing the activities of the Real IRA."

170. Those representing Michael McKevitt said that the 42 grounds in his notice of appeal could be considered under three headings:

a. Alleged failure by the prosecution to ensure adequate disclosure (**the first heading**).
b. The Special Criminal Court should not have found that David Rupert was a credible witness whose evidence could be safely relied upon (**the second heading**).
c. There was prejudice and unfairness to the appellant in the course of the trial arising from late disclosure of a Garda surveillance report relating to events on 17 February, 2000 (**the third heading**).

171. The Court set out David Rupert's business background and his travel to Ireland and relationship with the FBI and the British Security Services. It was noted that David Rupert had testified about meeting with Michael McKevitt and others. The Court said:

"David Rupert described how the Omagh bombing had been discussed at this particular meeting, that the appellant had stated it was a joint operation between the Real IRA and the Continuity IRA."

172. The Court noted that David Rupert had described a meeting at Michael McKevitt's home. Michael McKevitt had said to David Rupert that certain individuals wanted to kill police officers, but that he (Michael McKevitt) thought that this "*would not be "a big enough event"* and that the *"first hit of the new organisation should be a spectacular that would overshadow Omagh"*.

173. On the issue of disclosure (**the first heading**), the Court referred to the Ward principles, namely the principles deriving from DPP v Special Criminal Court and Paul Ward [1999] 1 IR 60:

> *"The prosecution must disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things".*

174. The Court observed that the case was unusual in that documentation relating to the principal prosecution witness, David Rupert was largely if not entirely to be found outside the jurisdiction, in particular material arising out of his relationships with the FBI and BSS.

175. The Court drew attention to the fact that the British Ambassador to Ireland had:

> *"deposed in his affidavit that all material within the possession of the BSS which was of relevance to the accused having regard to the Ward principles had been made available to the prosecutor so as to be disclosed to the accused."* Further, a representative of the FBI *"deposed to his belief that all of the documents within the possession of the FBI relevant to the case had been reviewed and that all material of relevance had been made available to the prosecution for its determination as to disclosure to the defendant."*

176. Against that background, the Court of Criminal Appeal had to consider the extent of the prosecution's obligation as to disclosure in circumstances in which the prosecution was dependent upon the co-operation of an overseas agency not otherwise amenable to court order. Having determined the nature and extent of that obligation, the Court had to consider whether it was discharged in the circumstances of Michael McKevitt's case.

177. The Prosecution submitted that *"the prosecution had shown absolute good faith and met that or any other appropriate test, because:-*

a. *a great level of co-operation had been sought by the prosecution at the highest level from the overseas agencies, and the extent of the co-operation was evident from the volume of documentation disclosed;*
b. *Responsible and credible officials from overseas agencies had given sworn testimony that they had complied with the Ward principles when determining what documentation should or should not be disclosed;*
c. *In addition, the appellant and defence had in this respect received every possible assistance which could be seen in the fact that the State had underwritten the cost of retaining lawyers of the appellant's choosing in the US and in the UK, not only to advise the appellant but also to independently pursue inquiries into the background and history of David Rupert, which said efforts and inquiries had yielded tangible fruits of benefit and assistance to the appellant;*
d. *Various security handlers in the BSS who had prepared documents or memos of interest to the defence were offered for interview to the defence and were duly interviewed in London and were available to be called by the defence as witnesses;*
e. *Material in respect of which redactions had been made or in respect of which privilege had been asserted were available at a secure location and could be viewed by the court if it so directed."*

178. Conversely, the Defence argued that,

"decisions which were effectively judicial in nature had been taken either by unnamed overseas intelligence agents, counsel in the UK or prosecution counsel in this jurisdiction, none of which complied with the obligations set out in DPP v Special Criminal Court. He complained further that no adequate schedule of documents in respect of which privilege was asserted had been furnished to the defendants, thus making it difficult, if not impossible, for the defence to challenge multiple aspects of disclosure. He also outlined a number of concerns about specific items which had been disclosed and these concerns are dealt with later."

179. The Court rejected the Defence arguments on disclosure, stating:

"More critical, however, is the question whether or not the Special Criminal Court was correct in adopting the approach which it did to disclosure generally. Leaving to one side for the moment complaints of a specific nature about certain documents which emerged on disclosure, this court is satisfied – or as satisfied as it can be in this relatively uncharted area - that it ruled correctly on the appropriate test to apply to the prosecution where documentation is in the possession of an overseas agency which is not amenable to an order of an Irish court. The court is also satisfied that the overriding requirement to ensure that no real risk of an unfair trial would occur was also met" and *"As a further part of the test therefore the court in our view also had to consider whether the response from the overseas agencies was such as to counter any contention that, notwithstanding the response made, there nonetheless remained a real risk of an unavoidably unfair trial."*

180. The Court said:

"On the "good faith effort" limb of the test, it seems to us that the court was entitled from the evidence it heard and received at the disclosure hearing to find that great care and attention was attached by the prosecution to the requirement to convey the requirements of the Ward principles to the overseas agencies" and *"On the second part of the test, representatives of those agencies, and also the British Ambassador to Ireland on behalf of his government, gave sworn testimony that those principles had guided the agencies in their approach to disclosure and that those agencies had complied with those requirements. The various witnesses, who were seen and heard by the court, were found to be truthful and credible. These witnesses gave evidence that everything of relevance had been furnished. A massive amount of material, amounting to 2300 e-mails and four binder folders of documentation, was furnished by way of response. It covered myriad aspects of David Rupert's past life, his relations with the FBI and BSS, the relationship between those agencies inter se and with the gardai. The court was entitled in our view to take all of these matters into account to rule, as it did in October, 2002, that the trial should proceed and that adequate disclosure had been made. In so ruling the*

Special Criminal Court was effectively concluding at that point that it saw no real risk arising of an unavoidably unfair trial."

181. The Court added that:

"In ensuring, insofar as it was possible, that the parties enjoyed 'equality of arms' in this respect, this court further takes cognisance of the measures put in place ahead of this trial to ensure the appellant had the benefit of legal services of his own choosing in the US and in Britain. The defence was further offered and availed of opportunities furnished to interview David Rupert's security handlers in London. These persons were also to be made available as witnesses if the defence so required" concluding *"We are satisfied therefore as to the correctness of all rulings made on disclosure where overseas agencies were concerned."*

182. In relation to disclosure in Ireland, the Court of Appeal said:

"the court quite clearly was acting within its jurisdiction and within its discretion in making an order upholding privilege on the grounds asserted, namely, that people's lives, security and safety would be placed at risk by disclosure."

183. On the issue of David Rupert's credibility (**the second heading**), the Court of Criminal Appeal reminded itself of the approach to be taken by an appellate court to findings of fact made by a court at first instance. That included the test set out by Holmes L.J. in the S.S. Gairloch [1899] 2 I.R. 1 at p.18 in the following terms:

"When a judge after trying a case upon viva voce evidence comes to a conclusion regarding a specific and definite matter of fact, his finding ought not to be reversed by a court that has not had the same opportunity of seeing and hearing the witness, unless it is so clearly against the weight of the testimony as to amount to a manifest defeat of justice..."

184. Of David Rupert's evidence, the Court of Appeal said:

"It may be therefore safely said that the greatest opportunity was availed of by the trial court because of the length of cross-examination in this case to assess the veracity and credibility of the main prosecution witness.

In structuring its judgment in relation to the evidence of David Rupert, the Special Criminal Court firstly considered the entire history of David Rupert to date of trial, including (a) his history prior to his involvement with the FBI in 1994 (b) his history from 1994 to the time when he met the appellant in 1999 and (c) his history from 1999 to date."

185. The Court of Appeal was satisfied that the court at first instance *"conducted a careful and balanced assessment of the evidence which had been presented and which, of necessity, had to be summarised in condensed form in the judgment of the trial court"* before proceeding to consider evidence which confirmed or corroborated David Rupert's evidence and his credibility. The Court of Appeal rejected all criticisms of the judgment of the court at first instance in relation to the credibility of David Rupert. The main complaint of the appellant was that David Rupert should have been treated as a special witness and with particular caution, given he was an *"informer, agent provocateur and agent"* of the FBI and BSS and stood to gain from his activities. On this issue, the Court said:

"Indeed, the very background which emerged in the course of such a lengthy cross-examination showed David Rupert to be a person whom the court would be entitled to regard as uniquely qualified for the dangerous and demanding role of double agent in which he was engaged. Further the fact that the overseas agencies increased his remuneration with each passing year could be seen by the court as indicating that the FBI and BSS felt they were getting intelligence information of value and reliability."

186. The Court also dismissed the complaints based on the alleged late disclosure of the surveillance document (**the third heading**) and on the refusal of the Court at first instance to order severance.

187. In all of those circumstances, the Court of Criminal Appeal dismissed Michael McKevitt's appeal.

DPP v Michael McKevitt [2008] IESC 51

188. The Court of Criminal Appeal issued a certificate under Section 29 of the Courts of Justice Act 1924. That section provides that a decision of the Court of Criminal Appeal is final unless the Court of Criminal Appeal or the Attorney-General certify that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. The certificate in Michael McKevitt's case was in these terms:

> *"Where the pivotal issue is the credibility of a witness and there is documentary evidence relevant to his credibility in the possession of parties out of the jurisdiction, are the obligations of disclosure by the prosecution in a criminal trial fulfilled when in respect of such disclosure the court is satisfied that all reasonable good faith efforts have been made to secure such documentation and that a high level of co-operation has been given by such parties in response to such efforts?"*

189. The Supreme Court was comprised of Murray CJ and Justices Denham, Hardiman, Geoghegan and Fennelly. Geoghegan J (with whom all other members of the Court agreed) gave judgment on 30 July 2008.

190. The Court deprecated the approach of the appellant in advancing extensive grounds of appeal that were unrelated to the certified point and declined to address any ground save for those which fell under the three headings identified by Kearns J. in the Court of Appeal, namely:

f. The alleged failure by the prosecution to ensure adequate disclosure.
g. The Special Criminal Court should not have found that David Rupert was a credible witness whose evidence could be safely relied upon.
h. There was prejudice and unfairness to the appellant in the course of the trial arising from late disclosure of a Garda surveillance report relating to events on 17 February 2000.

191. As for the issue of disclosure (**the first heading**) Court said:

> *"To succeed in this appeal on the grounds of inadequate disclosure, the appellants would have to show that particular rulings by the Special Criminal Court were clearly wrong in law and that the Court of Criminal Appeal should have so held."*

192. Mr Justice Geoghegan said:

> *"Not only does there not appear to be a legal infirmity in the disclosure decisions by the trial court but the court also seems to have gone out of its way to adopt fair procedures. There was a four day pre-trial hearing at which all issues were argued and there was substantial cross-examination. Disclosed material in its unredacted form was made available for inspection by the trial court and this was documentation in the custody of officers of the British Security Services. At this stage, the issue of privilege did not arise because the prosecution's primary position was that these redacted portions of the material were not relevant to the defence. Therefore, if the trial court chose to inspect the documentation it would be for the purposes of deciding whether any of the redacted parts were relevant to the appellant's defence or not. But if the trial court was to determine that any of the redacted portions were relevant it had been proposed to claim privilege over those portions. The basis of the privilege was that lives would be placed at risk and that therefore there should be a public interest immunity. If this stage had been reached, the court would have been furnished with full information as to the basis of the privilege claimed. But it would not have been disclosed to the defence. In the event, the appellant objected to the trial court inspecting any of the documents and objected also to the trial court having sight of any of the reasons for claiming privilege. At a later stage and during the trial, the court was requested by the appellant to view a few documents as to their relevance and the court held that the redacted portions were irrelevant."*

193. Later, the Court went on to say:

"I am satisfied that the approach of the trial court … was impeccable" and *"I am in complete agreement with the view taken by the Court of Criminal Appeal in relation to the approach adopted by the trial court and it would seem to be a suitable point at which to give an affirmative answer to the question of law certified by the Court of Criminal Appeal."*

194. On the issue of David Rupert's credibility (**the second heading**), Geoghegan J said:

"In my view, this ground of appeal must fail on the simple basis that the Special Criminal Court believed Mr. Rupert. That finding cannot be interfered with by an appellate court unless it was not open rationally to have had that belief or at least not to have had a reasonable doubt. If it had been a traditional jury verdict the question would have been was it a perverse verdict? I think it is impossible to conclude that the verdict was, in any sense, perverse or that it was not open to the Special Criminal Court to accept the evidence of Mr. Rupert. The fact that Mr. Rupert may or may not have had a shady background, depending on your point of view, and the fact that as a paid agent he might be suspect as a witness at any rate are neither here nor there, as far as an appellate court is concerned. Numerous criminal trials over the years have been conducted in circumstances where a key witness such as an accomplice, for example, has a background which might make his evidence suspect. If it was a jury trial, a jury would always be warned of the danger in relation to such evidence but it was never the law that in the last analysis the jury was not entitled to accept the evidence. In this instance, there is abundant evidence that the Special Criminal Court was fully mindful of the potential unreliability of Mr. Rupert's evidence but nevertheless believed him. I do not see how that finding of belief can be overturned."

195. The Supreme Court also went on to reject Michael McKevitt's complaint about the adequacy of the reasons given by the trial court.

196. On the ground of appeal alleging prejudice and unfairness to the appellant in the course of the trial arising from the late disclosure of a Garda surveillance report relating to events on 17 February 2000 (**the third heading**), the Court said that:

"What was involved was late disclosure in circumstances where the court was entitled to regard the lateness as bona fide. On the other hand, disclosure was made when it was realized that the documents gave some ammunition for cross-examination as to timing. If Mr. Rupert had been recalled, that cross-examination could have been pursued but, at any rate, it was for the purposes of credibility only.[41] *To quote the judgment of the Court of Criminal Appeal:*

> *"The direct evidence of David Rupert commenced on the third day of the trial and concluded towards the end of the sixth day. David Rupert was then subjected to a cross-examination of virtually unprecedented length, which focused almost entirely on the witnesses' credibility and which concluded on day twenty of the trial. That portion of the cross-examination which addressed David Rupert's contacts with the appellant commenced only on day 19 of the trial, the cross-examination up to that point having focused entirely on David Rupert's past history and associations, including those with the FBI and the British Security Service."*

That passage puts into perspective where this alleged late bit of evidence fits in. To suggest that because of that element of late disclosure, the trial was so unfair that the conviction should be quashed, seems to me to be far-fetched in the extreme and I can find no criticism of the trial court for proceeding with the trial accordingly."

197. Mr Justice Geohegan concluded that:

"Fundamentally, there is no material difference between the view I take and the view taken by the Court of Criminal Appeal in the judgment delivered by Kearns J. For all the various reasons which I have indicated, I believe the conviction to be safe and I would dismiss the appeal. I have already answered the certified question in the affirmative."

[41] In fact, the defence declined the opportunity for David Rupert to be recalled for further cross-examination.

DPP v Michael McKevitt [2009] IESC 29

198. Later in 2008, Michael McKevitt made an application to the Supreme Court to set aside the decision of the Supreme Court on the Section 29 appeal and direct a re-hearing.

199. The application was founded on the fact that the original judgment of the Supreme Court had erroneously stated that the prosecution had photographic evidence of David Rupert and the appellant entering a house separately and then leaving it together and the sighting of them together in the company of their wives.

200. The Supreme Court regarded it as "*absurd to suggest that the incorrect statement made the slightest difference to the outcome of the appeal.*" The Court declined to hear submissions from either party and refused the application on the grounds that it was manifestly unfounded.

N.B.

201. The Inquiry is aware of other legal proceedings involving Michael McKevitt[42] but does not, at this stage, consider it necessary to set out details of those in this note.

Part IV: VINCENT McKEVITT

DPP v Vincent McKevitt (2004)

202. Vincent McKevitt is the younger brother of Michael McKevitt. He appeared before the Special Criminal Court in Dublin for sentence in March 2004, having admitted the unlawful possession of firearms (a sawn-off shotgun and semi-automatic pistol). He had a previous conviction, dating back to 1982, for the unlawful possession of firearms and the hijacking of a vehicle.

[42] Including DPP v Murphy [2014] IECCA 19, McKevitt v The Governor of Portlaoise Prison [2014] IEHC 442, McKevitt v The Minister for Justice and Equality & Ors. [2014] IEHC 551, McKevitt v The Minister for Justice and Equality [2015] IEHC 152 and McKevitt v The Minister for Justice and Equality & Ors. [2015] IECA 122.

203. A Chief Superintendent from the AGS gave evidence at the hearing to say he was the officer in charge of an investigation into the activities of an unlawful organisation in County Louth on 5 January 2002. Vincent McKevitt was found in a house in Dundalk with five others and searches discovered a sawn-off shotgun with four cartridges and a 9mm pistol loaded with twelve rounds of ammunition. A nail bar, hammer and balaclavas were found as well as mobile telephones, walkie-talkies, a scanner for radio messages and gloves.

204. Medical evidence was given at the hearing about Vincent McKevitt's medical condition. He had suffered a heart attack in prison and undergone surgery.

205. Vincent McKevitt himself gave evidence at the sentencing hearing, undertaking that he would not associate with people known or believed to be members of an unlawful association or any people known to him to be under an indictment before the Special Criminal Court.

206. Vincent McKevitt was sentenced to five years' imprisonment. This was suspended for two years on condition of compliance with his undertakings, although these did not apply to family members.

Part V: JOSEPH FEE, GREGORY TRAINOR, SEAMUS McKENNA, EAMON MATTHEWS and GERALD SWEENEY

DPP v Joseph Fee, Gregory Trainor, Seamus McKenna, Eamon Matthews and Gerald Sweeney (2004)

207. These five defendants appeared before the Special Criminal Court in Dublin (Mr Justice O'Donovan and Judges Matthews and Malone) for sentence on 8 December 2004 following an investigation by the AGS.

208. The prosecution opening made clear that:

a. Gerald Sweeney had pleaded guilty as his trial was due to commence to the offence of withholding information that he knew might be of material

assistance in preventing the commission by any other person of a serious offence or securing the apprehension, prosecution or conviction of any other person for a serious offence contrary to Section 9 of the Offences Against the State (Amendment) Act 1998.

b. Gregory Trainor had pleaded guilty on the second morning of trial to the offence of unlawfully and maliciously having in his possession an explosive substance with intent by means thereof to endanger life or cause serious injury to property or to enable another to do so, contrary to Section 3 of the Explosive Substances Act 1883 as substituted/amended.

c. Seamus McKenna had pleaded guilty to the same offence as Gregory Trainor, but a day later.

d. Joseph Fee had faced two counts of which he was convicted at trial:

    i. on 13 June 2003, he knowingly had in his possession an explosive substance in such circumstances as to give rise to a reasonable suspicion that he had not got it in his possession for a lawful object, contrary to Section 4 of the Explosive Substances Act 1883 as substituted/amended;

    ii. on 13 June 2003, he had in his possession an explosive substance contrary to Section 3 of the Explosive Substances Act 1883 as substituted/amended.

e. Eamon Matthews had been convicted, following a contested trial, of the offence of membership of the IRA contrary to Section 21 of the Offences Against the State Act 1939, as amended.

209. An AGS Detective Superintendent gave evidence at the sentencing hearing to explain that the Gardai mounted an operation targeted at the Continuity IRA in June 2003. This involved monitoring a number of persons of interest. The officer confirmed that Eamon Matthews and Seamus McKenna were seen driving a cement mixer and rotavator on a stolen vehicle, with changed number plates, in June 2003 in Dundalk. The officer confirmed that the plates which were put on the stolen vehicle were corresponding plates of another vehicle. In other words, the plates had been "cloned". The vehicle was driven to the home of Joseph Fee, where the cement mixer was deposited. The same stolen vehicle went to a farmyard owned by Gerald Sweeney, from which Joseph

Fee and Seamus McKenna were seen leaving, Seamus McKenna in another vehicle recently stolen in Northern Ireland and which had had its number plates changed, again replacing them with plates that corresponded to a similar type of vehicle. The AGS saw Joseph Fee, Seamus McKenna and Gregory Trainor engaged in work around a shed. The AGS arrived and found a cement mixer and material suspected, and later proved, to be an explosive substance, comprising, in appropriate quantities, ammonium nitrate which had been crushed (crushed fertilizer) mixed with sugar. At the scene were a number of full and empty bags of sugar as well as further bags of fertiliser. The AGS said the amount of explosives found was *"bigger than some of the ones that caused terrible devastation previously in Northern Ireland. It was in its final stages of completeness … all that was needed at that stage was … for it to be primed with booster tube and TPU …"*. Explosives found in Joseph Fee's van were believed to be intended for use. The Officer said: *"It was then ready for moving to its destination"*.

210. When spoken to by the AGS, Gerald Sweeney said Joseph Fee had approached him in relation to moving a grain grinder into his farm about six months earlier, which happened about six weeks later, that grinder being found to contain residues of explosives consisting of ground down fertilizer and sugar.

211. Following arrest, Joseph Fee, Seamus McKenna, Gregory Trainor and Eamonn Matthews were questioned in relation to the possession of explosives and their alleged membership of the IRA.

212. Investigations showed that Joseph Fee had purchased, or had others do so at his behest, sugar, a necessary component in the bomb, in June 2003. It was confirmed that when the AGS attended the scene, Seamus McKenna and Gregory Trainor were actually in the act of mixing the bomb.

213. The AGS officer described the Continuity IRA as opposed to the Belfast Good Friday Agreement and actively involved in the disruption of its implementation through the use of car bombs: "*In the last two years alone … they have been involved in up to 40 incidents both in this country, Northern Ireland and in England"*. Joseph Fee and Seamus McKenna were described as the *"primary motivators in this organisation"*.

214. The Court sentenced Gerald Sweeney to three years' imprisonment, suspended for three years on condition that he keep the peace and be of good behaviour and that he undertook not to knowingly associate with people convicted of subversive crime. Eamon Matthews was sentenced to a period of imprisonment of three years and nine months, considering time already served.

215. The Court sentenced Joseph Fee and Seamus McKenna together, saying:

> *"The Court is satisfied that they were part of a joint enterprise to manufacture explosives with a view, that the court can only conclude, a view to making a bomb or bombs with for the purpose of terrorising the public and/or to further the commission of crime ... the quantity of explosives involved in the activity was such that it had the capacity to cause devastation to life and property to an enormous extent"*.

216. Seamus McKenna was sentenced to a period of six years' imprisonment. Joseph Fee was sentenced on Count One to a sentence of imprisonment of seven years and, on Count Two, to ten years - those sentences were to be served concurrently.

217. The Inquiry understands, from a newspaper article, that Gregory Trainor was sentenced at a later date, on 21 December 2004, to a period of imprisonment of three years.

218. Eamon Matthews and Joseph Fee applied for leave to appeal their convictions.

DPP v Eamonn Matthews [2006] IECCA 103

219. Eamon Matthews applied for leave to appeal his conviction for the offence of membership of the IRA contrary to Section 21 of the Offences Against the State Act 1939, as amended. The Court of Criminal Appeal in Ireland (Justices Macken, Herbert and Haugh), delivered judgment on 14 July 2006.

220. The Court set out the background to the offence alleged against Matthews and the findings of the Special Criminal Court. The Court of Criminal Appeal summarised the evidence against Matthews was as follows:

a. A Chief Superintendent's belief that Matthews was a member of the IRA on the date in question, based primarily on confidential information in respect of which privilege was claimed.
b. The Applicant's presence at parades and republican/paramilitary commemorative events of which direct evidence was given to the Court by Garda witnesses who had conducted surveillance.
c. The Applicant's movements and associations on 12 and 13 June 2003 (the hiring of the cement mixer, driving to Joseph Fee's house, driving to the Tallanstown farm, meeting with his co-accused and so forth).
d. The inferences drawn from the Applicant's failure to reply to material questions in the course of interviews, together with the trial court's findings in respect of a lie told by him in one interview concerning his presence at the Tallanstown farm.

221. Eamon Matthews did not *"seriously challenge"* the prosecution case on the facts but claimed "*the conclusions drawn by the trial court from the evidence were erroneous, unsafe, unreliable, and further – at least in so far as the events of the 12th and 13th June are concerned – that the evidence was capable of innocent explanation, which he was entitled to have found in his favour*." Eamon Matthews also claimed his trial was unfair and his conviction unsafe contrary to Article 38 of the Irish Constitution and Article 6 ECHR.

222. The Court of Criminal Appeal rejected all of Eamon Matthews' grounds of appeal.

DPP v Joseph Fee [2006] IECCA 102

223. The Court of Criminal Appeal (Justices Macken, Budd and White) gave judgment on Joseph Fee's application to appeal his conviction on 13 July 2006.

224. The Court set out the relevant background facts and findings of the Special Criminal Court.

225. Joseph Fee had appealed on a number of grounds, all of which the Court of Criminal Appeal dismissed.

226. He subsequently asked the Court of Criminal Appeal to issue a certificate to enable him to appeal to the Supreme Court. The Court of Appeal declined to do so: DPP v Joseph Fee [2007] IECCA 24.

Part VI: LIAM CAMPBELL

227. Liam Campbell appeared for sentence before the Special Criminal Court in Dublin (Mr Justice Barr, and His Honour Judge Deery and His Honour Judge Hamill) having been convicted of membership of the Real IRA contrary to Section 21 of the Offences Against the State Act 1939 (as amended), the date of membership being 3 October 2000: DPP v Liam Campbell (2001).

228. In convicting Liam Campbell, the Court ruled:

> *"The Court is satisfied that on 3 October 2000 the accused was a member of the IRA splinter group which has become known as the 'Real IRA'. The Court accepts that that splinter group has been engaged in much criminal activity in support of its purported aims since 1997. That conduct amounts to a grievous crime against the people of Ireland, north and south. It follows that membership of it constitutes a serious criminal offence."*

229. Liam Campbell was sentenced to a term of five years' imprisonment, the last three months of which were suspended to take into account the period of time he was in custody prior to being granted bail.

230. Liam Campbell's counsel applied to the trial court for leave to appeal conviction and sentence. Both applications were refused.

231. In due course, however, the Court of Criminal Appeal quashed Liam Campbell's conviction of membership of an unlawful organisation. The Court ordered a retrial.

232. Subsequently, the Court of Criminal Appeal granted a certificate pursuant to Section 29 of the Courts of Justice Act 1924 to Liam Campbell that its decision of 19 December 2003 involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court from that decision. The DPP raised a preliminary issue that as the Applicant's conviction had been quashed, he was not entitled to seek a certificate pursuant to Section 29 of the Courts of Justice Act 1924.

233. The Supreme Court ruled in favour of the DPP: DPP v Liam Campell [2004] IESC 26. That brought an end to the proceedings before the Supreme Court.

234. Liam Campbell's retrial then took place. He did not contest the evidence, and the Special Criminal Court treated his approach as equivalent to a plea of guilty. For two offences of membership of an unlawful organisation the first on 3 Oct 2000; the second committed on bail on 29 July 2001) the Court convicted Liam Campbell on 24 May 2004 and sentenced him to a total of eight years' imprisonment (with the final 18 months' suspended) – four years on each charge, to be served consecutively: DPP v Liam Campbell (2004).

235. Liam Campbell subsequently sought leave to appeal to the Court of Criminal Appeal on the basis that the Special Criminal Court had been wrong to hold that the Real IRA was a proscribed organisation: DPP v Liam Campbell [2005] IECCA 27. The Court of Criminal Appeal dismissed his application.

N.B.

236. As with Michael McKevitt, Liam Campbell was also involved in other proceedings, including the widely publicised extradition proceedings relating to alleged weapons

smuggling offences in Lithuania,[43] which it is not considered necessary to set out in this summary.

Part VII: SEAMUS DALY

DPP v Seamus Daly

237. On 12 February 2003, a warrant for the arrest of Seamus Daly was issued in the Republic of Ireland in respect of an allegation that between 29 April 1998 and 20 November 2000, he had been a member of an unlawful organisation, namely the IRA. Seamus Daly was arrested pursuant to that warrant on 18 February 2003. The date range for the offence was, in accordance with what was then apparently the usual practice, reduced to a single date, namely membership on 20 November 2000. At the sentencing hearing on 2 March 2004, Detective Superintendent Foley made clear that the faction with which Seamus Daly was affiliated was the Real IRA and counsel for Seamus Daly did not demur. The Court sentenced Seamus Daly to three and a half years' imprisonment.

R v Seamus Daly

238. Seamus Daly was prosecuted for 33 offences in Northern Ireland in relation to three bombings; those being at Lisburn on 30 April 1998, at Banbridge on 1 August 1998 and at Omagh on 15 August 1998. The key evidence against Seamus Daly was that of mobile telephone usage at the time and in the area of the three bombings. The prosecution sought to prove that certain mobile telephones were used in connection with the bombings, that the attacks were connected and that Seamus Daly was connected to the telephones. This evidence indicating his possession of the 585 phone during the bomb run was put to him in extensive police interviews. To each question, Seamus Daly replied "no comment".

[43]Lithuania and Liam Campbell [2009] NICty 5 (INQ042154), Campbell, Re Judicial Review [2009] NIQB 82, Campbell & Anor.v. MJELR [2010] IEHC 197, Lithuania v Campbell [2013] NIQB 19, MJE v Campbell (Approved) [2021] IECA 219 and MJE v Campbell (Approved) (Rev 1) [2022] IESC 21.

239. The prosecution sought to have Seamus Daly committed to the Crown Court at a preliminary inquiry hearing in the Magistrates' Court, the procedure of which is governed by The Magistrates' Courts (Northern Ireland) Order 1980. At that point, Seamus Daly challenged that there was sufficient evidence on which to commit him.

240. The Public Prosecution Service withdrew the proceedings against Seamus Daly on 1 March 2016 following evidence given at the committal hearing.

Part VIII: Other proceedings in the Republic of Ireland

DPP v Anne Murphy (1972)

241. Anne Murphy pleaded guilty on 22 November 1972 to two counts of unlawfully and maliciously causing by an explosive substance an explosion of a nature likely to endanger life or cause serious injury to property, contrary to Section 2 of the Explosive Substances Act 1883. The offences were committed on 17 March 1972 (Count 1) and 7 November 1972 (Count 2). Anne Murphy was sentenced on 22 November 1974 to five years' penal servitude, concurrent on each count.

DPP v Patrick "Mooch" Blair (1975)

242. In 1975, Patrick "Mooch" Blair was convicted of a series of offences committed in 1974. Limited information is currently available, but they included: attempted murder, wounding with intent, possessing firearms and ammunition with intent, intimidation, causing an explosion likely to endanger life and robbery. He was sentenced to a total of 15 years' imprisonment.

DPP v Anthony Cunnane (1976)

243. Anthony Cunnane was convicted on 28 January 1976 of an offence contrary to Section 21 of the Offences Against the State Act 1939. He was sentenced to 12 months' imprisonment.

DPP v Seamus McGrane (1976)

244. Seamus McGrane was convicted of IRA membership in 1976. He was sentenced to 12 months' imprisonment.

DPP v Damien Lawless (1999)

245. Damien Lawless was arrested at Herbertstown, County Meath in an underground Real IRA training camp on 20 October 1999 with nine others (including Seamus McGrane – see below). Firearms and ammunition were discovered. He pleaded guilty to offences relating to that find and received a sentence of three years' imprisonment.

DPP v Seamus McGrane (1999)

246. Seamus McGrane pleaded guilty on 26 March 2001 to an offence of training other persons in the use of firearms, contrary to Section 12 of the Offences Against the State (Amendment) Act 1998. Seamus McGrane was sentenced on 26 March 2001 to four years' imprisonment.

DPP v Paddy McDonagh (1999)

247. Paddy McDonagh pleaded guilty on 21 April 1999 to an offence of unlawfully and maliciously having in his possession, or under his control, explosive substances of an improvised explosive substance, namely one booster tube with detonating cord, with intent by means thereof to endanger life or cause serious injury to property or with intent to enable another person by means thereof to endanger life or cause serious injury to property, contrary to Section 3 of the Explosive Substances Act 1883 as amended by Section 4 of the Criminal Law (Jurisdiction) Act 1976. Paddy McDonagh was sentenced on 21 April 1999 to six years' imprisonment.

DPP v Thomas Larkin (1999)

248. On 7 December 1998 RIRA firearms and explosives were seized in Dundalk, County Louth. On 23 November 1999, Real IRA member Thomas Larkin was convicted of unlawful possession of firearms and explosives and sentenced to 5 years imprisonment.

DPP v Derek "Shanty" Brady (2004)

249. Derek "Shanty" Brady was prosecuted before the Special Criminal Court. The offence alleged was that on 21 March 1998 in Dundalk, County Louth, he unlawfully and maliciously had in his possession an explosive substance, that being 1240lbs of an improvised explosive nature, a quantity of improvised detonating fuse, a timer power unit, an electrical detonator, two adapted beer kegs and two improvised booster tubes, with the intent to endanger life or cause serious injury to property[44]. Derek Brady pleaded guilty. On 20 February 2004, he was sentenced to a period of imprisonment of ten years. Contemporaneous reporting records that Derek Brady was arrested standing with a length of booster tube in his hands with 15 bags of homemade explosives on the ground at the back of a stolen jeep.[45]

250. Kevin Murray was with Derek Brady on 21 March 1998. He was convicted of the same offences as Derek Brady, although earlier and sentenced to 12 years' imprisonment. Contemporaneous reporting of the sentencing of Derek Brady indicates that Kevin Murray died in prison.[46]

Part IX: PATRICK BLAIR

R v Blair & Ors [2020] NICC 14

251. Patrick "Mooch" Blair was charged in Northern Ireland with fifteen offences. They included belonging or professing to belong to a proscribed organisation contrary to Section 11(1) of the Terrorism Act 2000 between August and November 2014; providing weapons, training and instruction contrary to the 2000 Act; conspiracy to possess explosives with intent to endanger life or cause serious injury to property, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section 3(1)(b) of the Explosive Substances Act 1883; conspiracy to possess firearms and ammunition with intent, contrary to Article 9(1) of the 1983 Order and Article 58(1) of the Firearms (Northern Ireland) Order 2004; preparation of terrorist acts contrary to

[44] This is incident 13 in the list of previous incidents at §2(j) of the Updated Provisional List of Issues.
[45] http://news.bbc.co.uk/1/hi/northern_ireland/3507159.stm
[46] http://news.bbc.co.uk/1/hi/northern_ireland/3507159.stm

section 5(1) of the Terrorism Act 2006 and collecting information likely to be of use to terrorists contrary to Section 58(1)(b) of the Terrorism Act 2000.

252. He was sentenced, along with other defendants, by Mr Justice Colton, as he then was, at Belfast Crown Court on 13 November 2020. The prosecution followed an investigation involving surveillance. In the course of that investigation, recordings were made which revealed that Patrick Blair and others belonged to the IRA and discussed terrorist activities. The Court said:

> *[8] At their most serious the conversations relate to potential strategies for their organisation including how to deal with other "dissident" Republican organisations, the size and structure of their organisation, the identification of possible targets, training and sourcing of weapons and materials for pipe bombs and sources of funding for criminal activities including robbery.*

253. The Court gave a summary of recordings relating to Patrick Blair:

> *[47] ...it is trite to say that these are very serious offences. The contents of the discussions make grim and depressing reading. It is the overwhelming wish and the expectation of all right-thinking law abiding citizens in this jurisdiction that the days of shootings, killings and explosions should be confined to the past. It is clear from the contents of the discussions of those who were present at the meetings described (to varying degrees) that they were willing to return us to the days which so disfigured our society.*
>
> *[48] Those who seek to do so represent a grave danger to the community and those who commit crimes in furtherance of that objective must expect deterrent sentences.*

254. Mr Justice Colton said Patrick Blair played a leading role at meetings and that an aggravating feature was that he had previous and highly relevant criminal convictions, including from 1974 until 2003, the latter being a conviction in the Republic of Ireland

for possessing firearms and ammunition in suspicious circumstances and for which he was sentenced to three years' imprisonment.[47]

255. The Court was also required to make an assessment of whether Patrick Blair was dangerous within the meaning of the Criminal Justice (Northern Ireland) Order 2008. The test was whether there was a significant risk to members of the public of serious harm occasioned by the commission by Patrick Blair of further specified offences. The Judge found that test satisfied but concluded that an extended custodial sentence would not be adequate for the purposes of protecting the public from serious harm. He said that:

> *"The difficulty I have with the imposition of an extended custodial sentence from the point of view of public protection is that at some point after his release from prison he will no longer be subject to any licence requirements or supervision."*

256. In the result, Patrick Blair was sentenced to (i) five years' imprisonment for the three offences relating to belonging to or professing to belong to a proscribed organisation and collecting information likely to be of use to terrorists, and (ii) an indeterminate custodial sentence with a minimum term of imprisonment of five years in respect of the other twelve offences which were specified under the 2008 Order. He was also made subject to counter-terrorism notification requirements for thirty years.

Part X: Other proceedings in the United Kingdon

Colm Murphy (1972)

257. On 29 June 1976 Colm Murphy was found guilty of offences of membership of an unlawful organisation (namely the IRA), possession of a firearm and ammunition with intent to endanger life, possession of a firearm and ammunition without a certificate, and assault occasioning actual bodily harm. He received custodial sentences 12 months, 3 years, 12 months and 2 years respectively, with the sentences running concurrently.

[47] Sentence on 7 October 2003 following conviction after trial.

258. While not a conviction in Northern Ireland, on 15 July 1983 in the Eastern District of New York, Colm Murphy was convicted of firearms offences and sentenced to 5 years' imprisonment and a fine of $10,000. He was released in 1985.

Peter Campbell (1980)

259. Peter Campbell was prosecuted at Belfast Crown Court on 9 December 1983 for two offences of causing an explosion likely to endanger life or property, one offence of possessing explosives with intent to endanger life and property and one offence of arson (with the offences committed on 1 March 1980). He was sentenced to 14 years' imprisonment. Elsewhere, this conviction appears to be given different dates.

Michael Campbell (1982)

260. Michael Campbell was convicted of two offences relating to the unlawful collection of information useful to terrorists, committed on 11 March 1982. He was sentenced to two years' imprisonment suspended for three years, concurrent on both counts.

Anthony Hyland, Darren Mulholland and Liam Grogan (1998)

261. In July 1998, dissident republican terrorists Anthony Hyland, Darren Mulholland and Liam Grogan conspired to cause explosions in London. Following conviction, they were sentenced as follows: Anthony Mulholland to 25 years' imprisonment and Darren Mulholland and Liam Grogan to 22 years' imprisonment.

Gary Jones (1998)

262. On 21 July 1998 a white transit van was driven into a yard and disused car park off Monaghan Street Newry, which is adjacent to Corry Square police station. A mortar device, which comprised a large gas cylinder, was launched from the rear of the van. It passed through the roof of the vehicle and landed a short distance in front of the van, but did not explode. This was Incident 10 of the 13 incidents in respect of which Sean Hoey was separately prosecuted and acquitted.

263. Prior to that occurring, the driver of the van became involved in an altercation with another man, whose vehicle he had struck with the van. In the course of that

altercation, the man's jacket and jumper were pulled off and later recovered by the police. Forensic examination of the jumper established that there was one small spot of blood on the inside left collar. DNA extracted from the blood stain matched that of Gary Jones (known as Man B in the PONI report of 12 December 2001). An expert concluded that the combination of DNA characteristics observed in the blood spot would be expected to arise in fewer than one in a billion males unrelated to Gary Jones. Gary Jones was interviewed by the police. He was informed that blood found on the jumper recovered at the scene matched his DNA profile. The jumper was produced to him, and he was asked if it was his. He was asked to give an account of how the jumper was at the scene. He was asked if he was wearing it when he planted the mortar. He made no reply to all questions.

264. At trial before Morgan J. sitting at Belfast Crown Court without a jury, Gary Jones was convicted of causing an explosion contrary to section 2 of the Explosive Substances Act 1883. He appealed: [2007] NICA 28. His conviction was quashed. At a retrial before McCloskey J. in November 2010, Gary Jones was acquitted.

Part XI: BRESLIN & Others

Breslin & Ors. v. Seamus McKenna, the Real IRA, Michael McKevitt, Liam Campbell, Colm Murphy and Seamus Daly [2009] NIQB 50

265. Twelve Plaintiffs issued proceedings in the High Court in Northern Ireland on 10 August 2001 claiming damages arising from the death and injury caused by the detonation of the Omagh Bombing and conspiracy to injure. The central allegation was that the Omagh bomb was

> *"planned, prepared, transported and detonated by persons acting on behalf of a terrorist organisation styling itself the Real IRA. It is contended that the first, third, fourth, fifth and sixth defendants were involved at various stages of the operation."*

266. Seamus McKenna was the first defendant. The Real IRA was the second defendant. Michael McKevitt was the third defendant. Liam Campbell was the fourth defendant. Colm Murphy was the fifth defendant. Seamus Daly was the sixth defendant.

267. The High Court proceedings were dealt with by Morgan J, as he then was. He issued a number of preliminary rulings[48] and there were other related proceedings in Northern Ireland and the Republic of Ireland before the claim was substantively determined.[49]

268. Mr Justice Morgan delivered judgment on 8 June 2009. He commenced by stating:[50]

> *"1. The 12 plaintiffs in this action claim damages including aggravated and exemplary damages for personal injuries sustained by them as a result of the explosion of a bomb in Omagh town centre on 15 August 1998. In addition, there are three further claims for damages under the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 as a result of the death of members of their families in the explosion. The plaintiffs also include a claim for an injunction to restrain the defendants in respect of their future conduct.*
>
> *2. The defendants are five named individuals and an unincorporated association identified as The Real Irish Republican Army. Two of the defendants are sued on their own behalf and/or as representing that*

[48] Breslin & Ors v McKenna & Ors [2005] NIQB 18(on discovery from the Defendants and an appeal before the Court of Appeal under Breslin & Ors v McKenna & Ors [2007] NICA 14), Breslin & Ors v McKenna & Ors [2005] NIQB 20 (on legal representation for discovery), Breslin & Ors v McKenna & Ors [2005] NIQB 53 (an application to set aside the writ and stay of proceedings), Breslin & Ors v McKenna & Ors [2005] NICA 50; Breslin & Ors v McKenna & Ors [2008] NIQB 5 (an application to strike out proceedings on the grounds that they did not disclose a reasonable cause of action or comply with court rules and were embarring, prolix, scandalous and obviously ill-founded), Breslin & Ors v McKenna & Ors [2008] NIQB 9 (an application to strike out proceedings as an abuse of process), Breslin & Ors v McKenna & Ors [2008] NIQB 19 (an application seeking the ability to examine AGS officers in the Republic of Ireland) (INQ012009), Breslin & Ors v McKenna & Ors [2008] NIQB 49 (on the admission of hearsay evidence), Breslin & Ors v McKenna & Ors [2008] NIQB 51 (on disclosure from the Security Service), Breslin & Ors v McKenna & Ors [2008] NIQB 98 (an application to exclude PSNI discovery from hearing), Breslin & Ors v McKenna & Ors [2008] NIQB 115 (on the admissibility of evidence relating to telephones), Breslin & Ors v McKenna & Ors [2008] NIQB 120 (on the admissibility of evidence relating to telephones), Breslin & Ors v McKenna & Ors [2008] NIQB 139 (on the admissibility of evidence relating to a book/newspaper article), Breslin & Ors v McKenna & Ors [2009] NIQB 19 (an application for discovery from the Security Service, GCHQ, PSNI and PONI).

[49] See the judicial review Murphy & Anor, Re Application for Judicial Review [2007] NIQB 15 and discovery applications in Breslin & Ors v McKenna & Ors [2008] IEHC 122 and appeal to the Supreme Court in Breslin & Ors v McKenna & Ors [2008] IESC 43.

[50] §§1-2, 7 of the judgment.

organisation. It is alleged against the defendants that they were in various ways responsible for the planning, production, planting and detonation of the bomb at Omagh…

7. The plaintiffs have chosen to maintain the case against the defendants on the basis of three causes of action. The first is trespass to the person which in this case amounts to battery, the second is the intentional infliction of harm and the third is conspiracy to injure. I will examine each of these in turn to establish what the plaintiffs are required to prove in each case."

269. Mr Justice Morgan then set out the ingredients of each cause of action and the standard of proof, namely the balance of probabilities. The judgment set out events on the day of the Omagh Bombing and said:[51]

"I consider, however, that it was plain to any of those involved in the planning, production, planting and detonation of this bomb that there was a likelihood that the detonation of the bomb would kill or injure some of those in its vicinity because of blast or thermal damage or fragmentation…I am satisfied, therefore, that those involved in the planning, production, planting and detonation of the bomb recognised the likelihood of serious injury or death from its detonation but decided to take that risk."

270. Mr Justice Morgan addressed the telecommunications evidence relating to the warning calls and more generally. He explained that cell site analysis had been conducted on four telephones, ending 076 and 585 (registered to Colm Murphy), 980 (registered to Michael McDermott, the father-in-law of Terence Morgan who was the general user of the phone), and 430 (registered to Oliver Traynor).[52] Details of the connections between all of the calls, with reference to cell sites, were set out.

[51] §35 of the judgment.
[52] §45 of the judgment.

271. Morgan J addressed the issue of the reliability of telecommunications data contained in an exhibit labelled [O16]1. He concluded that [O16]1 was a hearsay document[53] and the possibility of human error had to be recognised.[54] Morgan J said:[55]

> *"The first issue which I am considering is the reliability of the individual entries asserting that a particular phone called another identified phone each of which was using cell sites for a duration of a particular number of seconds. The second issue is the extent to which I can be confident that the record before me of individual calls is comprehensive so as to exclude any possibility of being misled in particular by the absence of other calls. On the first issue although I cannot exclude the possibility of human error I consider that I can have a high level of confidence that the individual entries have generally been accurately transcribed or downloaded having regard to the high level of competence within Vodafone as a whole. On the second issue I draw a distinction between [O16]1 and the floppy disk material. I am satisfied that there is a clear indication that the terms of interrogation of the phones examined within [O16]1 was to establish all incoming and outgoing calls for the relevant period. I am, therefore, satisfied to a high standard that the material is comprehensive for the period covered. I am unable to take the same view about the floppy disks. It is clear from the format in which this material was subsequently provided that the terms of interrogation were unclear and I cannot exclude the possibility that there are other calls which have not been disclosed as a result of the particular form of interrogation. The level of confidence that the material is comprehensive is, therefore, diminished. I accept, however, that the existence of individual calls to and from certain phones using identified masts is evidence that calls were made to or from those phones using those masts at the time identified and that I can be confident of that fact to a high level. In reaching that conclusion I am not in any way criticising the evidence of Mr Brown but it seems to me that the level of confidence to which he aspired was something akin to certainty."*

272. Mr Justice Morgan also concluded:[56]

[53] §63 of the judgment.
[54] §65 of the judgment.
[55] §66 of the judgment.
[56] §67 of the judgment.

"...I consider that the movements of these phones from the Republic of Ireland and back, the connection between them, the times of travel, the location from which they came having regard to the theft of the bomb car and the connection with the 430 phone in the vicinity of the call boxes from which the warning calls were made lead to an irresistible inference that 585 and 980 were the mobile phones which were used in the bomb run on 15 August 1998..."

273. Mr Justice Morgan's judgment went on to summarise the evidence against each Defendant. In relation to Seamus McKenna, he said:[57]

"The case against the first named defendant depends entirely upon a connection which the plaintiffs seek to establish between the first named defendant and the 980 phone. The plaintiffs contend that the 980 phone was one of those used by the bombers on the bomb run. The telephone evidence, which I have discussed above, suggests that at 1541 that phone phoned the landline of the home of the first named defendant's estranged wife in Silverbridge. The plaintiffs contend that the call was made by the first named defendant and that this establishes his connection to the bomb run. The evidence upon which the plaintiffs rely is the hearsay evidence of Mrs McKenna."

274. Morgan J said Catherine McKenna, who had said in an interview on 4 March 1999 that Seamus McKenna had made the particular telephone call in question,[58] *"was an unsatisfactory witness"*.[59] Morgan J also noted the following in relation to Seamus McKenna. First, an "*off tape*" interview of Terence Morgan in which Terence Morgan claimed Seamus McKenna had not signed in at work on the morning of the Omagh bomb. Second, Seamus McKenna had a previous conviction for unlawfully and maliciously having in his possession an explosive substance with intent by means thereof to endanger life or cause serious injury to property at the Special Criminal Court in 2004.[60]

[57] §69 of the judgment.
[58] §72 of the judgment.
[59] §77 of the judgment.
[60] §79 of the judgment.

275. As for the second defendant, the Real IRA, the Court heard evidence on the emergence of the Real IRA and the attacks with which it was associated from a police officer. Morgan J said that:[61]

> *83. The real issue in connection with this defendant is whether as a matter of law it is possible to maintain an action against it. In legal terms the Real IRA is an unincorporated association. Such an association cannot be made a defendant in its own right to action (see London Association for the Protection of Trade v Greenlands Ltd. [1916] 2 AC 15). Order 15 Rule 12 of the Rules of the Supreme Court (Northern Ireland) 1980 provides that where numerous persons have the same interest in any proceedings the proceedings may be begun and continued against any one or more of them as representing all. At any stage of the proceedings the court may on the application of the plaintiffs appoint one or more of the defendants as representing all of those sued. The issue is whether this Rule provides a mechanism whereby the plaintiffs are entitled to maintain this action against the Real IRA.*
>
> *84. In order to fall within the Rule it is necessary to demonstrate that the persons represented should have the same common interest in defending the proceedings in question...*

276. In relation to Michael McKevitt (the third defendant), Mr Justice Morgan set out the statements and observations of David Rupert (who did not give live evidence in the proceedings, but whose statements and associated materials including email communications were admitted), the evidence of Duncan Campbell (who was an expert on electronics, computers and telecommunications), the evidence of a Security Service representative in relation to Michael McKevitt's connection with a trial at Woolwich Crown Court and Michael McKevitt's conviction by the Special Criminal Court in Dublin for directing terrorism between August 1999 and October 2000.

277. Morgan J said that:

[61] §§83-84 of the judgment.

"I am satisfied that the court has provided a proper opportunity to the third named defendant to investigate Rupert's credibility."[62] He also said: *"I have already indicated that there is in my view substantial evidence proving that the e-mail documentation represents the actual exchange of materials between Rupert and his handlers although I accept firstly that some material [may] be missing and secondly that there is the possibility of human error having regard to the limited interaction necessary to deal with the encryption of these materials"*[63] and that *"I am confident, therefore, that the e-mails represent a reliable record of Rupert's activities and that the evidence demonstrates that Rupert was an active participant in events organised by dissident republicanism as indeed was the third named defendant."*[64]

278. Morgan J concluded:[65]

"In his leadership role he was undoubtedly responsible for encouraging the campaign of bombing in 1998 which culminated in the Omagh bomb and the availability of the materials to prepare that bomb could only have occurred with his support and approval."

279. In relation to Liam Campbell (the fourth defendant), Morgan J said:[66]

"*I have already dealt with the weight to be given to the Rupert material in considering the position of the third named defendant. I am satisfied on the basis of this material that there is cogent evidence that the fourth named defendant was a member of the Army Council of the Real IRA at the time of the Omagh bomb. I am further satisfied that he held an important leadership position in the Real IRA both at that time and subsequently. I am satisfied that there is cogent evidence that the 430 phone was being used by the fourth named defendant at the time of the Omagh*

[62] §163 of the judgment.
[63] §174 of the judgment.
[64] §175 of the judgment.
[65] §179 of the judgment.
[66] §187 of the judgment.

bomb and that the two communications between the 585 phone and the 430 phone on the day of the bomb demonstrate the fourth named defendant's involvement in directing the operation and participating in it."

280. On Colm Murphy (the fifth defendant), Mr Justice Morgan set out an account of his interview notes and records from AGS. Morgan J said:

"There is no issue taken in relation to the interviews up to lunchtime on 22 February 1999. Although Murphy has not given evidence in relation to the interviews there has been a challenge to the accuracy of the record thereafter. There is evidence of a rewriting of the notes on the afternoon of 22 February 1999 and an absence of documentation which is meant to be a safeguard for the person interviewed on that evening. In those circumstances I cannot give any significant weight to the content of the interviews after lunchtime on 22 February 1999."

281. Morgan J went on to consider e-mails relating to Rupert which referred to Colm Murphy, stating that there was *"significant and cogent evidence in relation to Murphy"* and that, according to Rupert, *"Murphy indicated firstly that he had been a member of the Continuity IRA since 1995 and secondly that he had been regularly carrying on terrorist attacks jointly with the third named defendant from that period. This evidence is strongly indicative of the fact that Murphy is a dedicated terrorist who has been an active participant in carrying on terrorist attacks over a long period."*[67]

282. Morgan J said:[68]

"I am satisfied on the basis of the above material that there is clear evidence that the fifth named defendant obtained the Morgan phone, 980, the day before the Omagh bomb. I am entirely satisfied that the Murphy phone, 585, and the Morgan phone were used in connection with the bomb run to plant the bomb. This attack was part of a series of terrorist bombs which included Lisburn, Armagh and Banbridge. It was a joint operation between the Real IRA and Continuity IRA. The

[67] §244 of the judgment.
[68] §246 of the judgment.

fifth named defendant was an active participant in attacks carried out by the Continuity IRA and depended upon material provided by the third named defendant for those attacks. It is common case that when he was interviewed by the Gardai the fifth named defendant lied about the phones when he said that his own phone was in his possession at all times. I consider that the inference is irresistible that the fifth named defendant provided the 585 phone and the 980 phone for the Omagh bomb attack knowing full well the nature of the attack which was going to be conducted. That of course is entirely consistent with the hearsay evidence from the Army Council member that the fifth named defendant was the chief of joint operations with the Real IRA."

283. In relation to Seamus Daly (the sixth defendant), the Court considered the evidence relating to Denis O'Connor and telephone evidence in relation to the Lisburn Bomb on 30 April 1998.

284. The Court's conclusions on liability are set out between §§265-270 of the judgment as follows:

Conclusions on liability

265. In relation to the first named defendant I have indicated in paragraph 69 above that the case against him depends entirely upon a connection which the plaintiffs seek to establish between him and the 980 phone. In order to establish that connection they are dependent upon the hearsay and oral evidence of his estranged wife. I have concluded at paragraph 77 that she is an unsatisfactory witness and at paragraph 78 I conclude that there is no basis upon which I could give weight to the account given by Mrs McKenna in interview on the morning of 4 March 1999. I do not consider that the plaintiffs' position is improved by the fact that this defendant has not given evidence. The proper approach to the silence of a party is set out by Lord Lowry in R v IRC ex p T C Coombs & Co [1991] 2 AC 283.

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

Since no prima facie case has been established against this defendant I do not consider that any adverse inference is justified. Accordingly I dismiss the action against him.

266. *In relation to the third named defendant the case against him depends upon the hearsay evidence of David Rupert. I have found in paragraph 179 that I should give considerable weight to the content of the e-mail traffic. I consider that this material demonstrates that the third named defendant held a significant leadership role in the Real IRA as a result of his defection from the Provisional IRA in the period leading up to the multi-party agreement in April 1998. The evidence demonstrates that he had a particular responsibility in relation to procurement and in those circumstances I consider that the availability of the materials to prepare the bomb could only have occurred with his support and approval. I have already referred to the evidence that there was a policy decision to reduce the amount of time available to locate and defuse bombs beginning in Banbridge on 1 August 1998 and I draw the inference that this was a policy decision instigated or approved by the third named defendant in his leadership position. In light of the fact that there is a proper inference to be drawn that he was responsible for authorising the provision of the material for the bomb I conclude that he is liable in trespass to the plaintiffs on the basis that he intended that the bomb should explode and he foresaw the likely consequence of personal injury particularly having regard to the nature of the time allowed for clearance. In any event I consider that by virtue of this leadership role he is liable as aiding, counselling and directing the commission of the tort. I consider that the failure of the third*

named defendant to give evidence in answer to this case against him is inexplicable and makes the case against him overwhelming.

267. *I have indicated that paragraph 187 that I am satisfied that there is cogent evidence that the fourth named defendant was a member of the Army Council of the Real IRA at the time of the Omagh bomb. I am further satisfied that he held an important leadership position in the Real IRA at that time and subsequently. There is cogent evidence that the 430 phone was being used by him at the time of the Omagh bomb and the two communications between the 585 phone and the 430 phone on the day of the bomb demonstrate his involvement in directing the operation and participating in it. I consider that he also is liable in trespass to the plaintiffs. He initially entered a defence to this claim but subsequently he instructed his solicitors to come off record. In his case also it is inexplicable that he should not have answered this case if he had an answer to it. I consider that the case against him is overwhelming.*

268. *I have indicated in paragraph 246 that I am satisfied that the fifth named defendant obtained the Morgan phone, 980, the day before the Omagh bomb. I am satisfied that the fifth named defendant's registered phone and that phone were used in the bomb run. I am satisfied that the fifth named defendant was at the time an active member of the Continuity IRA and that this was a joint operation between that organisation and the Real IRA. Against that background the only reasonable inference is that the fifth named defendant provided the phones for the Omagh bomb attack knowing full well the nature of the attack which was going to be conducted. He also has not answered the case against him. I indicated to his legal representatives that in light of the fact that he still had to face a criminal prosecution in the Republic of Ireland I would be prepared to consider stringent arrangements to protect his evidence from publicity or disclosure. Such arrangements would have been effective to protect the integrity of the criminal process. The fifth named defendant did not seek to avail of any such arrangements. I consider in any event that the case against him is overwhelming and that he is liable to the plaintiffs in trespass.*

269. *In relation to the sixth named defendant I have indicated at paragraph 262 that the account given in the statements of Denis O'Connor on the afternoon*

of 23 February 1999 and that given in December 2001 should be given weight. I have further find at paragraph 263 that the evidence indicates that the 213 phone which is registered to the sixth named defendant was used by him on 29 to April 1998 and 30 April 1998 in circumstances which at the very least are consistent with a scouting operation on 29 April 1998 and the movement of the bomb on the following day. This evidence is supportive of the evidence linking the sixth named defendant to the phone which was used on the bomb run. The sixth named defendant has chosen to provide no answer to the case against him. The matters with which this evidence is concerned are matters which are within the knowledge of the sixth named defendant and are matters about which he would be expected to give evidence. In my view his failure to give evidence in light of the material against him further supports the case against him and I am satisfied that there is cogent evidence that he is liable in trespass to the plaintiffs.

270. *Finally, I come to the second named defendant. I have already indicated that the arguments in relation to a representation order in respect of the Real IRA are formidable. I accept that someone who has just joined this organisation would have a different interest in relation to this claim from those who were directing the organisation of the time. I have already found the third and fourth named defendants responsible personally but it is clear that there were others who participated in this attack. I cannot identify those persons as a result of the evidence that I have received in these proceedings but I can certainly readily come to the conclusion that those who were members of the Army Council of the Real IRA on 15 August 1998 bear responsibility for directing this attack as part of the campaign that was being waged at that time. I consider, therefore, that it is appropriate to make a representation order in respect of the fourth named defendant as representing the members of the Army Council of the Real IRA on 15 August 1998. I make the order in respect of the fourth named defendant because the evidence demonstrates that he was a member of the Army Council on that date.*

285. Having succeeded on the terms set out, Morgan J assessed damages in relation to each Plaintiff,[69] stating:

> *271. The plaintiffs claim compensatory damages including aggravated damages together with exemplary damages. I have already indicated in Ruling No 9 that I do not consider that is open to me to make an award of exemplary damages in this case. It is clear to me, however, from the reports that I have read and the evidence of those plaintiffs who appeared in court that the senseless and indiscriminate nature of this appalling outrage has deeply affected each of them. It is unsurprising that the plaintiffs should be of the view that it was the specific intention of those who caused the detonation of this bomb that there should be massive death and injury. Although not satisfied that there was any such specific intention I recognise that the likelihood of injury or death occurring was plain in circumstances where a fully loaded car bomb was placed in the centre of a busy market town on a Saturday afternoon. It is of significance that a warning of only 35 minutes was given and that there was no identification of the vehicle as had happened, for instance, in Lisburn. I also accept that the conflicting nature of the warnings has contributed to the sense of distress felt by the victims. In those circumstances I consider that this is an appropriate case in which to make an award of aggravated damages to include damages for injury to feelings as a result of the manner of the commission of this outrage. In assessing the amount of damages to be awarded to each plaintiff I have taken into account the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (third edition) which broadly indicate ranges of damages dependent upon the adverse medical consequence for the victim.*
>
> *272. Many of these cases are claims for psychiatric injury. Such claims occasionally give rise to issues in relation to remoteness. Since I have concluded that the liability of the defendants is based upon trespass, an intentional tort, I do not consider that any issue of remoteness arises (see Wainwright v Home Office [2004] 2 AC 406 and Clerk and Lindsell*

[69] Although substantial damages were awarded against the defendants, not a penny has ever been paid.

19th edition paragraph 2-110). I do not intend to rehearse the detail of the medical reports or the accounts given to me of the enormous difficulties a number of those involved had in coping with the consequences of this bomb. For many the effects are catastrophic and their lives will never be the same.

Breslin & Ors. v. Michael McKevitt, Liam Campbell, Colm Murphy and Seamus Daly [2011] NICA 33

286. Those against whom liability was established at trial appealed:[70]

> *[4] McKevitt, Campbell, Murphy and Daly have appealed against the judge's decision on a number of grounds to which detailed reference will be made below. The plaintiffs for their part have cross-appealed on the ground that the judge was wrong not to order exemplary damages and that the award of aggravated damages was insufficient. In addition the plaintiffs seek to affirm the decision of the trial judge by relying on evidence of convictions outside the United Kingdom of McKevitt, Murphy and Daly which the plaintiffs argue should be admissible as evidence that they committed the acts in respect of which the convictions occurred and that the contrary authority of Hollington v Hewthorn [1943] KB 587 should be treated as no longer good law. While the plaintiffs also appealed on the ground that the judge was wrong in law to confine himself to finding that the RIRA could only be sued under the provisions of Order 15 rule 12 in a representative action and not in its own right the plaintiffs did not pursue that ground of appeal and sought to stand over the judge's representation order against Campbell as representing the Army Council of the RIRA.*

287. The Court of Appeal dismissed the appeal by Michael McKevitt but allowed the appeals of Colm Murphy and Seamus Daly. It also allowed an appeal by Liam Campbell to the extent of setting aside the representation order which had been made. The Plaintiffs' cross-appeal in relation to exemplary and aggravated damages was dismissed.

[70] §4 of that judgment.

Breslin & Ors. v. Colm Murphy & Seamus Daly [2013] NIQB 35

288. In due course, the retrial of Colm Murphy and Seamus Daly took place before Mr Justice Gillen, as he then was.[71]

289. Finding against both Defendants, the Court said:

> ***"Conclusions***
>
> *[230] Throughout my considerations I have reminded myself of the contents of [43]-[45] of this judgment re the standard of proof. I have been conscious of the very serious nature of the allegations and I have given a more critical and anxious assessment of the evidence than in less serious cases. Where, as in the case of much of the telephone evidence, the plaintiffs have relied on circumstantial evidence I have considered all the evidence and the need for the court:*
>
> *• To guard against distorting the facts or the significance of the facts to fit the proposition that Murphy or Daly were involved and to ensure I do not approach this matter with blinkered certainty or instinctive responses without studying closely the evidence.*
>
> *• To be satisfied that no explanation other than guilt is reasonably compatible with the circumstances of these telephone calls.*
>
> *• To remember that any fact proved that is inconsistent with the conclusion that they were not involved in this bombing is more important than all the other facts put together.*
>
> *[231] However given the strength and quality of the evidence I have determined that both defendants were involved in assisting the preparation, planting and detonation of the bomb in circumstances where those involved in assisting in*

[71] Preliminary rulings were Breslin & Ors .v. Colm Murphy & Seamus Daly [2012] NIQB 69 (a request to take evidence from the Republic of Ireland) and Breslin & Ors .v. Colm Murphy & Seamus Daly [2013] NIQB 15 (on hearsay evidence).

those acts would be joint tortfeasors. As indicated earlier in this judgment at [55] I find it unnecessary to proceed to consider the case of conspiracy to trespass.

First named defendant Murphy

[232] I am satisfied that on the balance of probabilities the plaintiffs have proved the case of trespass to the person against the first-named defendant Colm Murphy to the requisite standard for the following reasons.

[233] There is compelling circumstantial evidence that phones 585 and 980 were used in the Omagh bombing. Anyone operating on a plane of reason could not fail to discern the pattern and structure of the use of these two phones on the day in question. A study of LKP5 reveals a picture of phone movement, which infers movement in vehicles, in the same direction, from the Republic of Ireland roaming into the Vodafone UK area. The bomb was clearly delivered to Omagh sometime after 2.00pm and the movement and timing of the calls emanating from these two phones lead me to the irresistible inference that the sequence of events set out by me in [63]-[80] are wholly consistent with a bomb car and probably a scout car participating in this bombing.

[234] There is therefore a reasonable inference that this bombing was carried out by people who set a pattern of telephone calls both prior to and subsequent to the bombings including telephone warnings wholly consistent with the pattern of telephone calls made by 585 and 980. I am satisfied that those who provided or who used these mobile phones played a central role in the tort of trespass to the person. They have been joint tortfeasors. Having examined this evidence critically and anxiously I am satisfied that the strength and quality of the information contained in LKP5 and the map of the Omagh cell sites by Mr Telford are of sufficient quality and strength to justify the inferences I have drawn. For the removal of doubt I reiterate that I have determined that anyone such as Murphy who knowingly lent his phone to those involved in the bombing played a vital role in this joint enterprise, assisted in the bombing and was a joint tortfeasor.

[235] This pattern of movement demands explanation from Murphy who clearly is in a position to provide information as to how it came about that his mobile phone was located to and from Omagh on the day of the bombing, and in

whose possession it was or to provide a rational explanation as to how that phone came to be there.

[236] Secondly, the interview with the Garda on 21 and 22 February 1999 as set out by me at paragraphs [82]-[97] of this judgment, underline the inferences I have drawn. He denies lending his 585 phone to anyone on that occasion, making any 585 calls to 980 on 15 August, ever being in Omagh, and he has no rational explanation for how the 585 phone came to be used without his knowledge on the day in question.

[237] I agree entirely with the submission of the plaintiffs that it is fanciful to contemplate that the phone was mysteriously stolen and equally mysteriously returned without his knowledge. He certainly knew the identity of the people who were contacted on that date by his 585 phone because they worked for him. Indeed if I am right in my conclusion that the person who was using his phone on that day was his associate Daly it becomes all the more unlikely that the phone was somehow spirited away without his knowledge. His explanation in the Garda interviews are therefore wholly implausible and in my view amount to lies. I have searched for innocent reasons as to why those lies might have been given based on Lucas principles but it seems to me that there is no innocent explanation that can be found.

[238] Mr Fee contended that there was no evidence that Murphy knew the purpose for which his phone was to be used. I disagree. His failure to provide any rational explanation whatsoever as to the presence of that phone on the day of the bombing and the untruths which he told to the police about this matter in the context of the enormity of the crime about which he was being questioned all serve to convince me that there was a strong prima facie case that he was fully aware of the use to which that phone which he had provided was to be put.

[239] As I have determined in paragraph[198] et seq, this coincidence of a similar unexplained use by the same phone 585 in the Banbridge bombing in similar circumstances is further probative evidence of his involvement in the Omagh bombing. To suggest that for a second time his phone had been mysteriously used without his knowledge moves one into the realm of fantasy. I pause to

repeat that even without the modest weight of the Banbridge similar evidence I would have come to exactly the same decision on liability.

[240] On the basis of these matters, I decided that there was a strong prima facie case to be answered and I refused the application of no case to answer.

[241] Thereafter, as indicated in paragraph [216] et seq Murphy failed to give evidence or call any witnesses on his behalf and for the reasons therein set out I was satisfied that I should draw an adverse inference against him in light of this failure to explain the presence of his 585 phone in Omagh or for that matter in Banbridge on the day of that bombing. That strengthened the overall evidence against him in this case and satisfied me, taking all the factors cumulatively, that I should now make a finding in the favour of the plaintiffs against Murphy on the grounds of trespass to the person.

The second-named defendant Daly

[242] I am satisfied that on the balance of probabilities the plaintiffs have proved the case of trespass to the person against the second-named defendant Seamus Daly to the requisite standard on the basis that he was directly involved in the Omagh bombing on the 15 August 1998. As in the case of Murphy, I therefore find it unnecessary to proceed to consider the case of conspiracy to trespass.

[243] My reasons for so concluding are as follows. First, I am satisfied that he spoke to O'Connor at 3.30pm on the day of the bombing using phone 585. For the reasons I have already given I am satisfied that 585 was used in connection with this bombing. A clear recognition of his voice by O'Connor based on O'Connor's knowledge of him by virtue of the previous telephone calls between them together with personal meetings and his identification to Garda Grennan all satisfy me on the balance of probabilities that it was Daly who made the call to O'Connor on the day of the Omagh bombing using phone 585.

[244] Secondly, he readily admitted the dealings with Murphy through work for a number of years and that highlights the coincidence of him being in possession of Murphy's phone 585.

[245] Whilst the conversation with O'Connor would have been sufficient to have established a case against him, I have also taken into account his plea of

guilty in 2004 to an offence of membership of a terrorist organisation on 20 November 2000. I was satisfied that the plea of guilty amounted to a public confession of his involvement with IRA terrorist activity. This was relevant not just to propensity but was logically probative in determining the issue of liability in this case.

[246] He has given no explanation at any time to Garda or anyone else for his possession of 585 on the day of the bombing even though the circumstances of his possession of it cry out for an explanation.

[247] As I have determined in paragraph [202] et seq, this coincidence of a similar unexplained use of his phone 213 in the Lisburn bombing in similar circumstances is further probative evidence of his involvement in the Omagh bombing. I pause to repeat that even without the modest weight of the Lisburn similar fact evidence I would have come to exactly the same decision on liability

[248] That evidence was sufficient to satisfy me at the conclusion of the plaintiffs' case that there was a strong prima facie against him and accordingly I refused the application of no case to answer.

[249] The second-named defendant failed to give evidence or call witnesses in this case. I was satisfied that it was open to me to draw an adverse inference from the defendant's absence from the witness box. I am satisfied he was in possession of evidence within his own knowledge about which he would have been expected to give evidence. I find no credible explanation for him failing to do so. He could have provided an explanation why it was that he was in possession of the 585 phone on the day of the Omagh bombing or for that matter why his 213 phone was present in Lisburn on the date of the Lisburn bombing. Alternatively he could have called evidence as to what he was doing on that day i.e. to strengthen the alibi which he outlined to police.

[250] On the basis of this evidence therefore I was satisfied on the balance of probabilities that Daly was liable in this action to the plaintiffs on the grounds of trespass to person.

Breslin & Ors. v. Colm Murphy & Seamus Daly [2013] NICA 75

290. In a judgment delivered on 19 December 2013, the Court of Appeal dismissed the appeals of Colm Murphy and Seamus Daly, stating:

> *"In the result neither Murphy nor Daly have persuaded us that the trial judge was in error in concluding that the plaintiffs/respondents had proved their case to the requisite standard."*

Part XII – European Court of Human Rights

291. Both Michael McKevitt and Liam Campbell brought proceedings before the European Court of Human Rights. The essential complaint by both Michael McKevitt and Liam Campbell was that the civil proceedings brought by Mr Breslin and others in the High Court in Northern Ireland contravened Article 6 of the European Convention on Human Rights ("ECHR"). The applications related to the use of evidence from Michael McKevitt's trial before the Special Criminal Court in Dublin in 2003 and from criminal proceedings in England, known as the Woolwich proceedings, and the issue of hearsay evidence, in particular of David Rupert, in the High Court proceedings brought by Mr Breslin and others in Northern Ireland. The Applicants claimed that the proceedings against them had been fundamentally criminal in nature and they maintained that they had not been given the procedural protections necessary in criminal prosecutions. In the alternative, if the proceedings had indeed been of a civil nature, they argued that the use of hearsay evidence had violated their right to a fair trial. Their complaints can be seen in the Statement of Facts dated 4 March 2024:

> *COMPLAINTS*
>
> *The applicants complain under Article 6 of the Convention that the civil proceedings did not amount to a "fair hearing". In particular, they submit that the proceedings were essentially criminal in nature, that the appropriate standard of proof should have been the criminal one, and that the admission of the hearsay evidence of David Rupert violated Article 6 § 3(d) of the Convention. In the alternative, if the proceedings could not be described as criminal in nature, they*

submit that the admission of the hearsay evidence violated Article 6 § 1 of the Convention.

292. The Court issued a decision rejecting the applications and found them manifestly ill-founded and inadmissible, determining that the proceedings were civil (as opposed to criminal) and that the argument that different procedures should have applied should be rejected. The Court also found that adequate safeguards had been applied in order for hearsay evidence to be adduced at trial. The Applicants have been given an opportunity to challenge David Rupert's credibility through investigations before the trial and in evidence during the proceedings. The Court had also had due regard to appropriate considerations when deciding what weight to attach to hearsay evidence. It noted that the Court of Appeal proceedings had found that the trial judge had been justified in reaching his conclusion.

The Inquiry Legal Team, 6 November 2026.