Neutral Citation No: [2021] NICA 51	*Ref:* **MOR11598**
	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **31/08/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

FRANCIS LANIGAN

_____

Mr Lyttle QC with Mr Gibson (instructed by MSM Law) for the Appellant
Mr Murphy QC with Mr Steer (instructed by PPS) for the Prosecution

_____

Before: Morgan LCJ, O'Hara J and McFarland J

_____

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant appeals against his conviction for the murder of John Stephen Knocker ("the deceased") at around 2am on 31 May 1998 at the Glengannon Court Hotel, Dungannon ("the hotel") and for possession of a firearm and ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable some other persons by means thereof to endanger life or property contrary to Article 17 of the Firearms (Northern Ireland) Order 1981. As the Director of Public Prosecutions certified pursuant to section 1 of the Justice and Security (Northern Ireland) Act 2007 that the trial should be conducted without a jury, it proceeded at Belfast Crown Court before Horner J.

[2] The appellant left Northern Ireland shortly after the death of the deceased. He resided in the Republic of Ireland and subsequent to his detection in that jurisdiction a warrant for his arrest was issued on 17 December 2012. He was arrested in the Republic of Ireland under a European Arrest Warrant and formal proceedings were commenced to have him brought to Northern Ireland to face trial. On 23 January 2019 he made his first appearance in Northern Ireland before Dungannon Magistrates Court.

Background

[3] The appellant is known as "Frankie" or "Studs" Lanigan. In the early hours of 31 May 1998 he left a disco at the hotel exiting into the car park. A short time later he was assaulted by the deceased, wearing a red top, in the car park close to the turnstile governing access and egress to the disco. The assault took place approximately 10 or 12 feet away from two door staff who were positioned on the inside of the turnstile. It lasted a couple of minutes and while the appellant had his hands up to his face protecting himself, the deceased was hitting and kicking him. The appellant asked the door staff to let him back in through the turnstile but they refused. Each of the door staff confirmed that the appellant was bleeding and one described a cut above his eye. None of that is in dispute.

[4] Padraig Mulryan was an Ulsterbus driver parked on the Old Eglish Road alongside the railings of the car park waiting to take patrons from the disco back to Omagh. From his position in the bus he was able to see the encounter at the turnstile between the deceased in the red top and another taller man in a light-coloured T-shirt. Once the attack ceased the deceased ran off to the exit of the car park and turned left to go up the hill.

[5] The bus driver then became aware of a man wearing a light-coloured grey T-shirt who looked like he was pointing up the road towards the man who was running and as the male in the red top was crossing in front of that man he heard a couple of cracks. The deceased then dropped to the road shortly after the bus driver heard the first couple of cracks. The bus driver saw that the man in the light grey T-shirt was holding what appeared to be a gun down to his side and that there was smoke around the lower half of the gun.

[6] The man in the light top had been standing and then took off running through the car park and out through the gateway in the same direction as the deceased. The deceased was lying on the road and appeared to be badly injured. The man in the grey T-shirt ran up to him, moved his head with his left hand and shot the deceased from a distance which the forensic scientist estimated was about 4 inches from the side of his head. The autopsy established that the deceased has suffered a gunshot wound to the back of the head and a further gunshot wound to the temple.

[7] At that stage the bus driver became aware of a grey or light coloured Vauxhall Cavalier with its wheels spinning on the gravel. The car stopped in front of the bus and was being driven by a male. A female in a red or pink top and short skirt with blonde hair got into the rear driver side of the car and the gunman got into the front passenger side door. The car then sped off.

[8] There were a number of other witnesses who were in the car park at the relevant time. They saw the gunman as he made his way through the carpark and a number of them gave a description of him as 6 foot tall, slim build in his early 30s with dark hair. Two witnesses described the demeanour of the gunman as he came

back to the Vauxhall Cavalier motor vehicle stating that he walked relatively slowly with his right arm leaning on his shoulder holding a small gun.

[9] Neither the bus driver nor the witnesses in the car park described the gunman having a cut to his face. There was lighting in various parts of the car park and a number of witnesses indicated that there was nothing obstructing their view. The bus driver said that the lights in the car park made everything very "yellowy."

Nuala Delaney

[10] Nuala Delaney was the appellant's girlfriend at the time. She was interviewed by police in connection with these matters on 6 April 1999 and those interviews were served as part of the papers. She did not, however, make a statement prior to the trial. An application was made to admit her interviews by way of hearsay and in parallel with that, an application was made by way of a summons in the Republic of Ireland for her to appear to give evidence before a judge for the purpose of these proceedings. She attended a live link from Dublin and gave her evidence in the presence of a District Judge. Her evidence broadly accorded with the material in her interviews.

[11] She stated that she had gone to the hotel on the evening of 30 May 1998 with the appellant, Gregory Fox and Cathy Keenan in Mr Fox's car. She said that the appellant had been attacked by a group of lads coming out of the disco and was being beaten violently with breeze blocks smashed on his head. There is no other evidence to support the allegation that bricks or blocks were used. She said that she remembered that the appellant's face was swollen with cuts and bruises the next day.

[12] Her evidence was that Cathy had shouted "get the shooter." She said that Fox handed the appellant a bundle of newspapers of some kind. She ran after Fox to the car and saw the appellant in another part of the car park. She heard shots being fired. She remembered the appellant coming to the car and getting into the front passenger seat. He was sitting with a gun in his lap and she reached in and took the gun off him and put it on the floor at her feet. She said that his face was beaten badly and he was bleeding.

[13] She stated that they drove off and pulled up at a grass bank where the appellant asked her to get out, take the gun and put it beside one of the poles at the top of a hill. Delaney said that she was not able to get up the hill and Fox actually disposed of the gun. This was consistent with where it was found.

[14] They went to the Antrim Road and she and the appellant stayed there overnight. The appellant had some friends who collected them and brought them to Twinbrook in Belfast where they stayed for a few nights. After that they went to stay in Dublin and she stayed with the appellant for a couple of months. When asked the reason for moving from place to place she said that she did not remember

really asking but obviously the appellant knew that he had murdered somebody and needed to either lie low or stay away.

[15] This witness was cross-examined on whether she was the person who said "get the shooter" and whether she had passed the package that she alleged Fox had passed. She was never charged with murder but she pleaded guilty to assisting offenders on 28 March 2021 in that knowing or believing the appellant to be guilty of the offence of murder or some other arrestable offence she did without lawful authority or reasonable excuse certain acts with intent to impede his apprehension or prosecution, namely, assisted in the disposal of the firearm used, and obtained a change of clothing for the said appellant. Further, she pleaded guilty to possession of a firearm, namely the 9 mm Browning pistol, under such circumstances to give rise to reasonable suspicion that she did not have it in her possession for a lawful object and thirdly, she had it in her possession without holding a firearm certificate.

Forensic evidence

[16] A Browning pistol was retrieved from the base of the telegraph pole as indicated in the evidence of Ms Delaney in June 1998. A police officer had retrieved a spent case "JM1" beside a pool of blood on the Old Eglish Road shortly after the killing. He also retrieved four spent cases, "JM3", in the car park close to the fence on the Old Eglish Road. These were examined by Mr Rossi of the Forensic Science Agency who established that they had been discharged from the pistol found at the telegraph pole. Further bullet heads and impact damaged lead bullets were recovered but these were devoid of rifling detailed as a result of which it could not be said that they were discharged from the barrel of the Browning pistol. They were, however, of the same type as those in the ammunition which accompanied the pistol.

[17] A post-mortem examination was carried out by Professor Crane. He concluded that the cause of death was bullet wounds to the head, one to the back of the head and one to the left side of the head but behind the ear. He was of the view that the first shot was likely to have been fired at long-range and that the second was likely to have been fired at close range given that it left sooting, soiling and punctate discharge abrasions. Other injuries were consistent with the deceased having fallen forward onto the ground having been shot first at long-range.

[18] Mr Brian Irwin, forensic scientist and Senior Scientific Officer at Forensic Science Northern Ireland, accepted when cross-examined by the defence that there had been a failure to adequately examine the gun and in particular the barrel and the slide. There were no fingerprints found on the handle which was crosshatched. Mr Irwin agreed that an explanation for neither fingerprints nor DNA being present in the gun which was found on 2 June 1998 was that mechanical washing coupled with fungal and bacterial elements in the natural environment could have caused the DNA to be broken down and destroyed. He also considered that the handling of the

weapon by others would have affected the retention of DNA. The original swab carried out in 2007 would have tested for DNA from blood, skin and saliva.

[19] Blood was recovered from the turnstile, from a stone, from the wall at the scene of the murder, a piece of glass recovered from the Vauxhall Cavalier, a profile from the front nearside door handle and sun visor of the Vauxhall Cavalier and multiple profiles from samples taken from the deceased's hand. Nothing of evidential value was established when these were examined in 1998 but they were re-profiled against a sample of DNA obtained from a paper coffee cup which the prosecution say was discarded by the appellant in a gym in Dublin. All of the blood samples were a match for the coffee cup DNA.

Dublin DNA

[20] In August 2005 officers attached to the National Bureau of Criminal Investigation, Harcourt Square, Dublin ("AGS") received confidential information that the appellant, who was suspected of involvement in the murder of the deceased, was working in a barbershop attached to a gym and using the name Ciaran McCrory. He was subsequently located at the Carlisle Gym, Kimmage Road West, Dublin.

[21] In February 2009 PSNI detectives investigating the murder met with Detective Superintendent John McMahon to request that AGS carry out further enquiries and try to uplift any sample which had been in the defendant's possession and discarded by him which would be suitable for the recovery of a DNA sample for evidential purposes. The PSNI obtained permission to carry out directed surveillance of the appellant for that purpose between 10 September 2009 and 9 December 2009.

[22] On 10 October 2009 Detective Supt. McMahon was informed that Garda B had retrieved a paper coffee cup discarded by the appellant at the Carlisle gym where the appellant was working as a barber. A DNA profile from the rim of the paper was obtained by Dr Stephen Doak. The evidence was duly handed over on 30 March 2011 following a formal request under the Criminal Justice (Mutual Assistance) Act 2008 ("the 2008 Act"), a Republic of Ireland statute.

[23] The 2008 Act was passed to give legal effect to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union made on 29 May 2000. Article 1(2) of the Convention indicates that the Convention shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States. This reflects a similar provision in an Agreement on Mutual Assistance in Criminal Matters made between the UK and Ireland in November 1988.

[24] The PSNI cross border policing manual operative at the time notes that evidence should be processed with a view to its potential use in either jurisdiction. Intelligence material can be exchanged on a police to police basis but if it is intended

to rely on material as evidence it should be exchanged in accordance with mutual legal assistance procedures. The same provisions are found in the cross border manual for AGS.

[25] In The People (DPP) v Keith Wilson [2019] IR 96, the accused was arrested on suspicion of murder on foot of confidential information. While he was in custody he refused to cooperate with a request for a bodily sample for the purpose of forensic testing against DNA analysis in relation to items connected to the scene of the crime. The Gardai decided to obtain samples by means of collecting items that came into contact with his mouth while he was in the station, including cigarette butts that he had discarded. On the basis of DNA analysis conducted in respect of those items he was convicted of murder.

[26] The case was concerned with the constitutional right to privacy but, for the purposes of this case, the Irish Supreme Court held that a person who was in custody for the purpose of investigation did not have a more extensive privacy protection than a person at liberty and that the Gardai were entitled to pick up items discarded by persons in detention in a Garda station in the same way that they would in a more public place.

[27] In this case Garda B had placed paper in the receptacle into which the paper coffee cup from which the appellant had been drinking was placed in order to ensure that there was no contamination. The forensic testing was properly carried out. This was a straightforward application of the principle approved by the Supreme Court in Wilson.

[28] The appellant submitted that the evidence from the coffee cup should be excluded. He relied on section 75 of the Criminal Justice (Mutual Assistance) Act 2008 which provides:

> "75.—(1) Subject to *subsections (2)* and *(3)*, this section applies to a request for assistance in obtaining specified evidential material or evidential material of a specified description for the purposes of criminal proceedings, or a criminal investigation, in a designated state, where there is power under any enactment to issue a warrant for the search of a place in respect of an offence constituted by the conduct giving rise to the request.
>
> (2) This section does not apply to such a request from a member state unless the act is punishable—
>
> (*a*) under the law of the State and the member state by imprisonment for a maximum period of at least 6 months, or

(b) under the law of the State by such imprisonment and under the law of the member state by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

(3) This section does not apply to such a request from a designated state (other than a member state) unless the conduct giving rise to the request is punishable under both the law of the State and the law of that state."

The side note of the section indicates that it is concerned with the search for particular evidence for use outside the State. It envisages the use of coercive powers. Garda B was in a café connected to a gym. The gym also provided hairdressing services. There is nothing to indicate the presence of Garda B was unlawful.

[29] The request for the evidence was in accordance with the informal arrangements properly put in place between the PSNI and AGS. Having been notified that the evidence was available the PSNI properly sought to use the mutual legal assistance procedures with a view to effecting its recovery to this jurisdiction. There is nothing to indicate that there was anything about the approach of the PSNI that was other than in accordance with the relevant procedures for obtaining such evidence.

Belfast DNA

[30] The appellant did not consent to the taking of a sample for the purpose of determining his DNA profile. The power to take non-intimate samples for the purpose of DNA without consent is governed by Articles 63 and 63A of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE"). Article 63(2A) provides that a non-intimate sample may be taken from a person without the appropriate consent if he is in police detention in consequence of his arrest for a recordable offence and either has not had a non-intimate sample of the same type and from the same part of the body taken in the court of the investigation of the offence by the police or has had such a sample taken but it proved insufficient.

[31] That power was not exercised by the PSNI at the time of the appellant's arrest. Article 63A(4) of PACE provides that a constable may within the allowed period require a person who is neither in police detention nor held in custody by the police on the authority of a court to attend a police station in order to have a sample taken if that person has been charged with a recordable offence and has not had a sample taken from him in the course of the investigation of the offence by the police. Article 63A(5) provides that the allowed period is one month beginning with the date of the charge. That period expired at the end of February 1999.

[32] Article 63(3A) provides that a non-intimate sample may be taken from a person whether or not he is in police detention or held in custody by the police on the authority of the court without the appropriate consent if he has been charged with a recordable offence and has not had a non-intimate sample taken by the police. In David Wood's Application [2014] NIQB 119 the Divisional Court held that this power was also caught by the one month time limit:

> "[27] The power to take a non-intimate sample under Article 63(3A) from a person who is not in police detention, not held in custody by the police on the authority of a court, not in a police station and not in a custodial establishment, is to be exercised by requiring that person to attend a police station for the sample to be taken, as provided by Article 63A(4). The power to require attendance at a police station for the sample to be taken must be exercised within one month of the person being charged or one month from notice to the police officer that any prior sample was unsuitable or insufficient. In the present case the time limit for the requirement to attend the police station had expired when the applicant was requested to provide a non-intimate sample."

[33] The net effect of these provisions was that by the beginning of March 2019 there was no lawful basis under PACE to obtain a DNA sample from the appellant without his consent. The appellant had been interviewed in 2004 in respect of other alleged offences. DNA had been taken from him but was of a quality which could not be used in evidence. On 17 September 2019 the appellant was removed from Maghaberry prison and interviewed under caution in relation to the 2004 matters. Two DNA samples were taken from him. Unsurprisingly these matched the Dublin DNA.

[34] The prosecution sought to introduce the samples on the basis that they were lawfully taken under the Terrorism Act 2000. That was challenged on the basis that the arrest on 17 September 2019 under the Terrorism Act was a pretext with a view to obtaining a comparable DNA sample in this jurisdiction in case the Dublin DNA sample was excluded. Detective Inspector Harris gave evidence about the circumstances in which the DNA was obtained. She claimed that she was unaware that there was an old DNA sample on file. She could not explain why she would not have checked the DNA database in Northern Ireland. The judge found it difficult to accept that she did not know that an attempt had been made to make a comparison between that sample and the defendant's DNA.

[35] The judge also heard evidence from Detective Sergeant McMullen and Detective Constable Collins. He was told that there was a discussion on 18

September 2019, the day after the Terrorism Act arrest, about this case in Castlereagh police station when the admissibility of newly obtained DNA samples relating to another investigation came up. Detective Constable Collins claims to have volunteered that lawfully obtained samples in another investigation should not be excluded from this case as new evidence.

[36] As a result of an effective cross examination by Mr Lyttle the judge concluded that it was unlikely that this discussion had actually occurred or if it did that it had taken place as originally described by the witnesses. He was not satisfied that he was told the truth. He concluded that it was more likely that the DNA was being taken in September 2019 in respect of the 2004 criminal investigation so as to ensure that there was a fall-back evidential sample that could be compared with the defendant's DNA if the Dublin DNA was held to be inadmissible.

Abuse of Process

[37] The basis upon which to stay criminal proceedings as an abuse of process was set out by Lord Dyson in R v Maxwell [2011] 1 WLR 1837 at para 13:

> "13. It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will 'offend the court's sense of justice and propriety' (per Lord Lowry in R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in R v Latif [1996] 1 WLR 104, 112F)."

[38] In Warren v Attorney General for Jersey [2012] 1 AC 22 the Privy Council considered the second category of cases and the approach to the use of the power was helpfully set out in the head note:

> "…in determining whether to stay criminal proceedings in the second category on the ground of executive misconduct, the court would take into account the particular circumstances of the individual case and,

> exercising a broad discretion, would strike a balance between the public interest in ensuring that those accused of serious crime were prosecuted and the competing public interest in ensuring that the misconduct did not undermine public confidence in the criminal justice system and bring it into disrepute; that, given the infinite variety of case in which such an issue might arise, rigid classifications as to the circumstances in which stay might be ordered were inappropriate and the fact that "but for" the executive misconduct the defendant would not have stood trial was no more than a relevant factor which the court would consider; and that the court's jurisdiction to order a stay was not disciplinary in character was not to be used to punish, or to mark the court's disapproval of, police misconduct."

[39] In the case of the Belfast DNA there was a deliberate decision made by the investigating police officers, on the findings of the learned trial judge, to evade the protections put in place by PACE to prevent the arbitrary use by police of the power to take non-intimate samples. That abuse of power was compounded by the fact that the police officers sought to mislead the court with a view to persuading the judge to accept that the sample had been lawfully obtained. The trial judge suggested that the police could have lawfully obtained a sample of the defendant's DNA under Article 63 of PACE but for the reasons we have set out there was no lawful basis upon which the PSNI could have done so in September 2019. The characterisation of the actions of the police officers as ill-judged seems to us to be very generous.

[40] We recognise, however, the strength of the public interest in ensuring that those accused of serious crime were prosecuted. There is no doubt that what was at issue here was a very serious crime. Secondly, this is not a case where the trial would not have proceeded save for the introduction of the unlawfully obtained evidence. The prosecution pursued the case on a wider basis as a strong circumstantial case. Thirdly, we recognise that it is not the function of court to order a stay as a way of punishing or marking the court's disapproval of police misconduct. Taking all of those factors into account we agree that the learned trial judge was correct to refuse the application for a stay of the proceedings as an abuse of process in respect of the Belfast DNA.

[41] A similar application was made in respect of the Dublin DNA. We set out above the manner in which that evidence was obtained. The PSNI in our view acted entirely within the bounds of the informal arrangements with AGS in requesting the material. An authorisation for directed surveillance was properly obtained. Once the material was recovered by AGS a formal application under the 2008 Act was made. In our view there was no unlawful activity within this jurisdiction.

[42] We also doubt whether there was any unlawful activity in the Republic of Ireland. The AGS were acting in accordance with the established informal protocols. DPP v Keith Wilson provides a proper basis for the recovery by the AGS of material that has been discarded in order to secure a DNA profile. The AGS were properly advised by the PSNI of the directed surveillance authorisation. We see no basis upon which the circumstances could constitute an abuse of process requiring a stay of the proceedings.

PACE Article 76

[43] The appellant submitted that the learned trial judge ought to have excluded the DNA evidence in the exercise of his discretion under Article 76(1) of PACE:

> "76.-(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[44] We see no proper basis upon which the application to exclude the Dublin DNA could have succeeded in light of the factors set out above. This court should not interfere with the discretion of the trial judge where he has taken all relevant matters into account and it cannot be said that the exercise of discretion is perverse (see R v O'Leary (1988) 87 Cr App R 387 at 391). Since the Dublin DNA and the Belfast DNA prove the same thing the exclusion of the Belfast DNA would not affect the safety of the conviction. We proceed, however, to consider whether it should have been admitted.

[45] We consider that there were significant and substantial issues to consider in respect of the manner in which the Belfast DNA evidence was obtained. In exercising its discretion the court was also obliged to take into account the manner in which the police officers sought to cover up what had actually happened. The learned trial judge does not seem to have had his attention drawn to the detailed provisions in Article 63 and 63A of PACE and does not seem to have appreciated that the PSNI could no longer use Article 63 in order to lawfully obtain DNA after the one month time limit.

[46] If the learned trial judge had appreciated that by reason of the failure to take DNA at an early stage the PSNI were no longer in a position to take a non-intimate sample without the consent of the appellant he would have appreciated the extent to which the obtaining and introduction of the evidence affected the fairness of the proceedings. In our view that was a factor which was of such importance that in the context of this case it should have led to the exclusion of the Belfast DNA evidence.

[47] An argument was also raised on the basis of specialty. We do not need to address that argument in these circumstances but in our view the conclusions of the learned trial judge were correct on that issue.

Consideration

[48] The prosecution opened this case as a circumstantial case against a background where it was not clear whether Nuala Delaney would give oral evidence or whether her police interviews would be admitted as hearsay. Those interviews ran to approximately 186 pages and a formal hearsay application had been lodged in respect of them. No statement, however, had been made by the witness. It was submitted on behalf of the appellant that allowing the witness to give evidence without a statement was unfairly prejudicial.

[49] We accept that a defendant can be unfairly prejudiced if witnesses are called in respect of whom no statement has been obtained. It is an essential safeguard of the criminal justice system that the defence are on notice of the evidence which is to be advanced on behalf of the prosecution and in a position to prepare a response to that.

[50] In this case voluminous material relating to the account of the witness as to her actions on the night of the killing had been made available by way of disclosure of the interviews. The appellant had all of those materials and sufficient time to ensure that they could be considered. The questions which the prosecution sought to pose did not introduce any new matter and although the learned trial judge did not give any specific ruling on the application we consider that he was entirely justified in allowing the witness to be called.

[51] The trial judge carefully considered this witness's evidence between paragraphs [41] - [45] of his judgment. He recognised that she had a motive for minimising her role in relation to who handed over the package to the appellant. He took into account that she might be trying to put the blame on the appellant in order to protect Fox. He took into account her previous convictions as evidence of bad character.

[52] Having properly taken those matters into account he was satisfied that the witness's evidence was truthful in relation to the following matters:

> "The defendant got into the front seat of the Cavalier IDZ 1233 and placed the Browning pistol in his lap. She said she took the gun off him and put it on the floor at her feet. If she had been trying to minimise her involvement she could easily have said that Cathy Keenan performed this task. There was no reason for her to volunteer her involvement in this criminal act.

> She then described taking the gun after the car had stopped and trying to hide it at a telegraph pole in the countryside. She was unable to climb the bank because of its steepness. Gregory Fox, aka "Foxy", ultimately had to take the gun off her and conceal it. Again, if she had been lying and seeking to minimise her involvement she could easily have said that Fox had taken the gun from the car and omitted any reference to her role in trying to conceal the murder weapon.
>
> Finally, she has been charged and sentenced. She now lives in the Republic of Ireland. She had no need to give sworn testimony. She could have avoided giving evidence. It was to her credit that she came forward and gave voluntary testimony by video-link to this court from the Republic of Ireland."

[53] The evidence of Nuala Delaney is consistent with other independent evidence. Mr Mulryan identified the gunman as a person in a light grey T-shirt. He saw that person discharge a number of shots from inside the car park towards the deceased which caused the deceased to fall on the other side of the fence. He saw the gunman then run to the exit and make his way up to the deceased where he discharged a further shot into his head. The gunman then walked slowly back to the exit where he got into the front passenger seat of the Vauxhall Cavalier.

[54] Ms Delaney also supported the prosecution case that the appellant was bleeding. That is consistent with the finding of blood on the handle of the front passenger door and the sun visor on the passenger side. Her evidence about how the murder weapon was disposed of is consistent with the circumstances in which it was found on 2 June 1998. A number of the other witnesses in the car park identify the gunman as the person who got into the passenger side of the Vauxhall Cavalier.

[55] There were three principal attacks upon the safety of the conviction advanced on behalf of appellant. First, it was submitted that Ms Delaney's evidence had to be approached with considerable caution. She was a person who had been convicted of criminal offences in connection with the events that night. We accept that this was a case for exercising caution respect of the evidence of this witness (see Archbold 2021 at para 4-476 *et seq*). The trial judge expressly did so at paragraph [41] of his judgment. We find no error in his approach.

[56] Secondly, the appellant pointed out that the prosecution case proceeded on the basis that the appellant had sustained facial injuries causing bleeding at the turnstile. There were approximately nine witnesses including Mr Mulryan who identified the progress of the gunman on the night in question. Some of those witnesses claimed to have had a good view of the gunman. All of the witnesses

were giving their evidence a considerable time after the events but had made statements closer to the time of the killing. None of those witnesses described the gunman as having blood on his face.

[57] The CCTV evidence indicates that the lighting in the car park was variable. Mr Mulryan indicated that the effect of the lighting was to make everything very "yellowy." The judge referred to the presence of neon lighting which could be distorting. The appellant submitted that this was speculation on the part of the judge but there was evidence to support the view that the lighting did have a distorting effect.

[58] There was overwhelming evidence from the car park witnesses that the gunman made his escape by walking down from the scene of the murder and getting into the passenger side of the Vauxhall Cavalier vehicle. The reasonable possibility which the appellant seeks to advance is that Mr Fox was the gunman. Given that there was no challenge that the the group in the car consisted of Fox, Delaney, Keenan and the appellant, that would place the appellant in the driver's seat and Fox in the passenger seat. Mr Mulryan said that the driver was male. That would not explain, however, how the appellant's blood was on the handle of the passenger door and the sun visor on the passenger's side.

[59] That possibility also has to be seen in the context that the appellant decided to leave Northern Ireland and change his name very soon after this incident and chose not to give evidence to deal with any of these matters at his trial. It would necessitate a real possibility that Ms Delaney had contrived to have the appellant convicted of murder. It is difficult to see any motive for that. Mr Fox was not the subject of any accusation of murder at the trial. There was no reason for Ms Delaney to give evidence in order to protect Fox.

[60] The relationship between Ms Delaney and the appellant had been over for nearly 20 years when she gave evidence and there was nothing to suggest that the end of that relationship would have led to the manufacturing of a murder allegation. In our view the judge was correct to reject any such reasonable possibility.

[61] The other criticism which was advanced was the judge's approach to the absence of any DNA or blood on the pistol which was recovered. As indicated above, explanations were advanced as to why the DNA may not have been recovered from the weapon but the appellant complained in particular that in light of the fact that the appellant had been bleeding there was no explanation as to why no evidence of blood in the weapon had been found.

[62] The learned trial judge concluded at paragraph [49] that the absence of evidence of DNA from blood, skin or saliva led to the clear inference that the murder weapon had been washed or wiped clean after the shooting and before it was hidden so as to remove any incriminating traces. That is clearly a reasonable inference to draw but in any event the absence of such evidence could only give rise to a concern

about the conviction in circumstances where that absence undermined the prosecution case.

[63] In order to be satisfied beyond reasonable doubt it is not necessary to come to a conclusion about every aspect of the events on the night in question. The fact that nothing was found on the handle certainly supports the view that the gun was wiped. There is no evidence about the presence of blood on the hand of the gunman. Ms Delaney indicated that she removed the gun from the lap of the appellant but she obviously left no trace on the weapon either. In our view the absence of a finding of blood on the weapon is not material to the safety of the conviction.

[64] For the reasons given we are satisfied the convictions are safe. The appeal against conviction is dismissed.

Sentence

[65] Like the learned trial judge we have read the moving statements from the deceased's mother, his partner at the time and his daughter who was born after his murder. The effect upon the family of any person who has been murdered is always substantial but in this case the lengthy legal process leading to the trial more than 20 years after the murder has undoubtedly added to the stress of the family.

[66] The appellant is, of course, subject to a mandatory life sentence. The judge was required by Article 5 of the Life Sentences (Northern Ireland) Order 2001 to fix the minimum term which the appellant must serve before he can be considered for release by the Parole Commissioners. The judge correctly identified R v McCandless and others [2004] NICA 1 as the guideline case where this court adopted the Practice Statement issued by Lord Woolf CJ on 31 May 2002 in England and Wales.

[67] We set out below the portions of the Practice Statement dealing with the appropriate starting point and aggravating and mitigating factors:

> "***The normal starting point of 12 years***
>
> 10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.
>
> 11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case

came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).

The higher starting point of 15/16 years

12. The higher starting point will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.

Variation of the starting point

13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.

14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene

> and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.
>
> 15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous sentences, to the extent that this is relevant to culpability rather than to risk.
>
> 16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.
>
> 17. Mitigating factors relating to the offender may include: (a) the offender's age; (b) clear evidence of remorse or contrition; (c) a timely plea of guilty."

[68] The purpose of the guideline is to assist the sentencer in arriving at an appropriate outcome and to promote consistency in sentencing. The guideline is not to be applied in a mechanistic matter but the structure involves identifying an appropriate starting point and then applying aggravating and mitigating factors to inform the final outcome. The transparency of the process is an important safeguard in enabling review by this court and protecting against arbitrary decision making.

[69] The first issue is the approach to the starting point. The Practice Statement suggests at paragraph 10 that the starting point of 12 years will normally involve the killing of an adult victim arising from a quarrel or loss of temper between two people known to each other which does not have the characteristics referred to in paragraph 12.

[70] Paragraph 12 indicates that the higher starting point of 15/16 years will apply to cases where the offender's culpability was exceptionally high or the victim was in a particularly vulnerable position. Such cases are generally characterised by features which make the crime especially serious and many of those are then specifically set out. It is important, however, to recognise that the list within paragraph 12 is not comprehensive and the overall test is the assessment the culpability of the offender.

[71] Having identified an appropriate starting point the next stage is to identify the aggravating and mitigating factors and where appropriate to indicate the weight that should be given to them. It is also important in that exercise to ensure that there is no double counting by taking into account a factor as aggravating or mitigating which has already been given full weight in the determination of the appropriate starting point.

[72] The appellant submitted that the judge should have adopted a starting point of 12 years and allowed some mitigation for provocation. We accept that if this had been a case where the appellant had chased after the deceased and killed him in the course of a subsequent attack without a weapon that such an approach might have been possible. This was a case, however, where the appellant chased after the deceased with a loaded firearm. Although it may not directly fall into any of the cases set out in paragraph 12 as making the crime especially serious it is the feature which indicates the particular vulnerability of the deceased and renders the culpability of the offender exceptionally high. For those reasons we consider that a starting point of 16 years was appropriate.

[73] Secondly, as the learned trial judge pointed out, the appellant had previous convictions for possession of a firearm with intent to commit an indictable offence, namely, false imprisonment, and also possession of firearms, namely, a .455 calibre revolver, a .38 special revolver and a 9 mm Browning pistol together with a quantity of ammunition with intent to endanger life. The conviction for these offences was on 2 May 1986 and the appellant was given a sentence of imprisonment of 10 years. This offence was committed 12 years after that conviction and, therefore, was a relatively recent previous conviction in relation to very serious similar offending involving a weapon of the same type. The gravity of gun crime is well described in the remarks of Lord Judge CJ in R v Wilkinson [2009] EWCA Crim 1925 as set out by the learned trial judge.

[74] The judge inferred that the appellant knew that there was a loaded gun available. We are satisfied that he was entitled to draw that inference. The evidence indicated that one or both of the female members of the appellant's group shouted "get the shooter." Ms Delaney denied being that person. This was almost immediately after the deceased had left the turnstile area and supports the view that at least by then the appellant had decided on his course of action.

[75] The evidence indicates that the gun was retrieved from Fox's car and the implication is that Fox was aware of its availability. There was some limited evidence about the transfer of the weapon to the appellant but the circumstances supported the view that the appellant received the package knowing full well what it contained. All of that supports the view that the appellant, like the others in the car, came to the hotel knowing that there was a loaded weapon available. That is plainly an additional aggravating factor.

[76] The use of the weapon in the car park area was always likely to engender fear among the public but the circumstances of its use demonstrate that it was the appellant's intention that the public should be intimidated. The description by Mr Mulryan of the stance adopted by the gunman with an outstretched arm holding the gun as he discharged the first shots demonstrates a level of practised competence in the use of the firearm.

[77] The discharge of the final shot into the side of the deceased's head as he lay on the ground can be described as an execution. It shows his determination to secure the death of the deceased but it also sends an intimidatory message to the watching members of the public. That message was enhanced by the swagger with which he made his way to the getaway vehicle having carried out the execution. That is a further aggravating factor.

[78] The appellant complained that the judge rejected the argument that provocation should have been taken into account as a mitigating factor. In our view the short answer to that submission is that the response of the appellant as identified by the learned trial judge at paragraph 8 of his judgment was so disproportionate that no material weight could be attributed to the earlier attack.

[79] Having regard to the aggravating factors set out above we consider that a tariff of 20 years was entirely within the range available to the learned trial judge. In respect of the sentences on the firearms charges having regard to his previous convictions those sentences were also well within the appropriate range. The sentences imposed upon Fox and Delaney were in respect of different firearms offences and did not act as a guide towards the proper sentencing in the case of the appellant.

Conclusion

[80] The appeal against sentence is also dismissed.