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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT
IN NORTHERN IRELAND

THE QUEEN

v

KEVIN BARRY JOHN ARTT

Before: Stephens LJ, McCloskey LJ and Colton J

Stephens LJ and McCloskey LJ (delivering the judgment of the court)

Introduction

[1] On 4 August 1983 Kevin Barry John Artt ("the appellant") and Charles McKiernan were convicted in a non-jury trial ("the trial") by Kelly J of the murder at around 8:25 pm on Sunday 26 November 1978 of Albert Myles, the Deputy Governor of HM Prison Maze, in the hallway of his home in front of his wife and son. The appellant and Charles McKiernan were also convicted of possession with intent to endanger life of the two firearms (a .45 Colt pistol and a .38 revolver) and the ammunition that was used in the murder, contrary to section 14 of the Firearms Act (Northern Ireland) 1969. On 5 August 1983 the appellant was sentenced to life imprisonment for the offence of murder and a concurrent sentence of 15 years' imprisonment for possession of the two firearms and the ammunition. On 8 August 1983 the appellant lodged what purported to be a Notice of Appeal identifying the grounds only as "I am appealing against my conviction and the length of my sentence." Before that appeal came on for hearing and on 25 September 1983 the appellant escaped from HM Prison Maze travelling to the USA. At trial thirty eight accused including the appellant were tried on the same indictment before Kelly J. Three of the accused were acquitted and 35, including the appellant, were convicted. Twelve did not appeal but 23 did appeal including the appellant. However, the appellant's appeal against conviction and sentence (which had not been abandoned) did not proceed given that prior to the hearing of the

appeal he had escaped from custody. Now some 37 years later the appellant proceeds with the hearing of his appeal against conviction.

[2] The initial grounds of appeal dated 8 August 1983 were wholly inadequate. That inadequacy raises the question as to whether there was then a valid Notice of Appeal see *R v Baranauskas* [2018] NICA 37 at paragraph [33] (iv) and (viii) and *R v Wilson* [1973] Crim LR 572. If there was not a valid Notice of Appeal then the question arises as to whether this court should extend time see paragraph [8] of the judgment of Morgan LCJ in *R v Brownlee* [2015] NICA 39. The period of extension would be substantial as the appellant took no steps to prosecute his appeal for some 35 years. The appeal against conviction was dormant until 26 March 2018 when proposed amended grounds of appeal were lodged which were followed on 18 February 2020 with yet further proposed amended grounds of appeal.

[3] The questions as to whether there is a valid Notice of Appeal and, if not, whether time should be extended are not the only preliminary issues in respect of this appeal. Issues also arise as to the admission of fresh evidence. By three notices dated 13 September 2019 and by six further notices dated 19 and 25 February 2020 the appellant applied to this court pursuant to section 25 of the Criminal Appeal (Northern Ireland) Act 1980 to admit fresh evidence. It is not necessary for the determination of this appeal to outline all of those applications. The most important application related to evidence as to electronic detection apparatus ("ESDA") testing of the police notes of the appellant's interviews.

[4] Since the revival of the appeal it has had a series of listings in this court, before differently constituted panels of judges, for certain interlocutory and case management purposes. With the exception of routine matters such as dates of listing and particulars of legal representation, the only information available to this panel of judges concerning those earlier listings is that which has been provided by the agreement of the appellant and the prosecution.

[5] Mr Nicholson QC and Mr Harvey appeared on behalf of the appellant at trial. Ms Doherty QC and Mr Moriarty appeared for the appellant in this court. Mr Appleton QC and Mr Higgins appeared on behalf of the prosecution at trial. Mr Simpson QC and Mr Steer appeared for the prosecution in this court.

The murder of Albert Myles and the police investigation

[6] Ms Doherty in opening this appeal on behalf of the appellant described the murder of Albert Myles as "terrible."

[7] The terrible circumstances of the murder commenced with the hijacking by Provisional IRA terrorists of a Ford Cortina car which was then used by the murderers to go to the deceased's home at 8 Evelyn Gardens, Belfast.

[8] The subsequent circumstances can be taken from the opening statement of the prosecution counsel at trial which included the following:

> "The Defendants are Charles McKiernan and Kevin BJ Artt. On the evening of Sunday 26 November 1978 Albert Myles, deputy governor of the Maze Prison, was at his home at 8 Evelyn Gardens, Belfast, that is off the Cliftonville Road. His wife and his son were also at home. At about 8.20 hours his son Alan was in the hallway speaking on the phone when knocks came to the front door. Mrs Myles, the mother, went to the door and asked who was there. Mr Myles went into doorway of the dining room near the door. The voice said 'Buller from across the road.' Mrs Myles opened the door a little and a man pushed open the door and she felt a gloved hand over her mouth. She heard a number of bangs and saw flashes. The gunman made off and Mrs Myles saw her husband lying against the inner door ….
>
> The Defendant John Kevin Barry Artt was arrested on 28 November 1981 (i.e. three years later) and taken to Castlereagh where he made verbal statements and a written statement.…
>
> The Crown say that these two Defendants were the two men who carried out the murder. That McKiernan was the man who first came to the door and put his hand over Mrs Myles' mouth and that he was armed with the pistol and fired one shot, of which both the bullet and cartridge were recovered. Artt was armed with the revolver and fired a number of shots through the door, at least one of which struck Mr Myles. …."

[9] Investigations at the scene and at post mortem revealed ballistic material, in the form of cartridge cases and bullets from two weapons one of which was a .45 Colt type self-loading pistol and the other a .38 revolver. At trial the prosecution case was that Mr McKiernan was in possession of the .45 calibre weapon and fired only one shot and that the appellant used the .38 calibre weapon and fired more than one shot.

[10] The post mortem report revealed that the deceased had been struck by four bullets. The fatal bullet was a .45 which had lacerated the left atrium of the heart, the lower lobe of the right lung and the liver. It had also perforated a segment of small intestine. It led to a massive haemorrhage into the right chest and abdomen. It was fired at the deceased after he had collapsed face down on to the floor as a consequence of being struck by the other bullets or another bullet.

[11] Constable Moffatt carried out an examination of the front door area at 8 Evelyn Gardens. He found 14 fingerprint marks which he submitted to RUC Fingerprints Branch. Seven of these marks contained insufficient ridge detail for comparison with suspects. One was eliminated. One fingerprint from the front door and five from the outside of the vestibule door remained unidentified after comparison with known terrorist suspects. No fingerprint matching the appellant was found.

[12] The hijacked Ford Cortina was examined by a Scenes of Crime Officer on 13 December 1978 and he recovered samples from it. There was no forensic evidence connecting the appellant to that vehicle.

[13] The murderous attack on the deceased caused glass at the entrance to the deceased's home to be broken but there was no indication that blood from any person other than the deceased was found at the scene. In this respect it is noted that in his written statement of admission dated 30 November 1981 the appellant stated that at the scene he received a cut to his left wrist which left a scar. At trial he gave evidence that the admissions were untrue and that the account of a cut to his left wrist was also untrue being an embellishment in which he stated that the scar was a reminder of what he had done thereby seeking to show remorse.

[14] There was an immediate police response to the murder and in December 1978 Detectives arrested and questioned at least 11 people in their follow-up investigation.

[15] Approximately two weeks after the murder and on 12 December 1978 the appellant, then 19 years of age and who lived at an address close to that of the deceased, was arrested and detained at Castlereagh Police Station on suspicion of committing the murder. He was interviewed by police. He denied all involvement in the murder asserting that at the time he had been at the house of his then girlfriend, Lorraine Keenan and her family. He was released on 18 December 1978 without being charged with any offence.

[16] Some six weeks after the murder and on 5 January 1979 an explosion occurred in Northwick Drive, Ardoyne, Belfast, killing two Provisional IRA men, Lawrence Montgomery and Francis Donnelly. They died when an improvised explosive device they had been moving exploded prematurely. The security forces responded to the scene and recovered other bomb making equipment and five handguns in a follow-up search of a house in Ardoyne near the explosion. One of the guns found was a .45 calibre Colt automatic pistol, serial number 816045. Forensically it was identified as one of the weapons used in the murder. Another gun found in this house was a Colt .38 revolver. The Historical Enquiries Team Review Summary into the murder concluded that the Colt .38 revolver was the second weapon used in the murder though the bullet heads recovered after the murder were too badly damaged for comparison purposes. We agree with that

conclusion given that the .38 was found in the same house as the weapon that was definitely used in the murder; the discovery of both weapons was within some 6 weeks of the murder; and both weapons were recovered some 1 mile from the scene of the murder.

[17] On 22 May 1981 the RUC Force Order No. 43/81 was issued. Under the rubric "Authentication of CID interview notes" it provided:

> "1. The authenticity of contemporaneous interview notes is frequently questioned by defence counsel during trials. This is particularly so in non-jury courts. *In future the following procedure will be observed* in connection with cases of arrests under Section 11 of the Northern Ireland (Emergency Provisions) Act 1978, and Section 12 of the Prevention of Terrorism Act, 1976.
>
> 2. On completion of each interview of a suspect, the interviewing officers will, as soon as possible after such interview, hand their completed interview notes, properly signed, to the Detective Inspector in charge of the operation. This will apply, irrespective of rank and will include both notes made during interview, and those made immediately after the interview has terminated.
>
> 3. On receipt of the notes, the Detective Inspector will annotate thereon the number of pages, the time and date and append his signature before handing them to the duty collator for the operation. If, for any reason, the Detective Inspector is not present, the notes should be handed to the senior CID officer present who will authenticate them as set out above.
>
> 4. The purpose of this instruction is to enable police to counter allegations that notes may have been concocted between groups of interviewing officers to the detriment of a defendant. In addition, the procedure will serve to further authenticate oral admissions, particularly where a crown case depends wholly, or to a large extent on such evidence."

It can be seen that (a) the procedure was to be followed as from 22 May 1981 which was after the first interviews of the appellant in December 1978 but before his further interviews in November and December 1981; (b) the procedure required that on completion of each interview of a suspect, the interviewing officers will, as soon as possible after such interview, hand their completed interview notes, properly signed, to the Detective Inspector in charge of the operation; (c) on receipt

of the notes, the Detective Inspector will annotate thereon the number of pages, the time and date and append his signature before handing them to the duty collator for the operation. The purpose of the Force Order was clear from paragraph 4.

[18] On 21 November 1981 Christopher Peter Black was arrested by detectives investigating terrorist crimes carried out by the Provisional IRA in North Belfast. During his detention Black admitted his involvement in a number of terrorist offences. He confessed to membership of the Ardoyne/Old Park Unit of the Provisional IRA. He said he had joined the IRA in 1975. He started to name other IRA men and to provide information as to what they had been involved in. He indicated his intention to give evidence against them. In the event his evidence was the principal and, in many cases, the only evidence against 37 of the 38 accused at the trial before Kelly J. The exception was the appellant against whom Black did not give evidence.

[19] Following Black's arrest on 21 November 1981 the police arrested a number of individuals including the appellant on 28 November 1981. He was detained and interviewed at Castlereagh Police Station on suspicion of involvement in the murder. The appellant was interviewed on 17 occasions over 5 days between 28 November 1981 and 2 December 1981. The cumulative length of the 17 interviews was 32 hours and 11 minutes. The appellant did not have access to a solicitor until the fifth day after interview 16.

[20] At the time the police interviews were not audio recorded. However, during each of the interviews the police were required to take contemporaneous notes as the interview proceeded and then in accordance with the Force Order those notes were required to be annotated and signed by a Detective Inspector. We will describe the documents upon which those notes were required to be taken.

[21] The first page of the notes was on a pre-prepared form No.C1.11. It is headed "Royal Ulster Constabulary" and then on the next line there is a sub-heading "Interview Notes." Under those headings there is an area which contains printed headings prompting details to be inserted in handwriting. The prompts included "Suspect's Name …," "Interview at …," "Date …," "Time Commenced … am/pm," "Time Concluded … am/pm" and "Interviewing Police Officers …." In this way details of the interview are recorded including the identity of the officers conducting the interviews. We shall call these details on the first page "the header details." All of the header details can and ought to have been completed at the start of the interview except for the "Time Concluded … am/pm." The majority of the first page then continues with "Particulars of Interview." It is in the space below this heading that the police officer who is recording the notes commences to insert contemporaneously in handwriting what occurs during the interview. At the bottom of the first page there is another printed prompt namely "Initials of Interviewer(s) …" so as to require the insertion of initials at the end of the first page. Again, in this way not only are the officers conducting the interview identified but

they are required by their initials to confirm the first page as being a reliable and accurate record.

[22] The second and subsequent pages of the notes are on a pre-prepared form No.C1.12. Printed at the top of those pages are the words "Continuation – Interview Notes." There is another printed prompt "Suspect …" with a space to insert in handwriting the name of the person being interviewed. There is also a printed prompt "Page No …" with a space to insert in handwriting "2" or whatever subsequent number is appropriate. There is then space for the officer recording the notes to insert contemporaneously in handwriting what occurs during the course of the interview. At the bottom of each continuation page there is a final printed prompt "Signature of Interviewer(s) …." Again, in this way not only are the officers conducting the interview identified but they are required to sign, rather than initial the second and each subsequent page as being a reliable and accurate record.

[23] Forms No.C1.11 and No.C1.12 are supplied in pads bound together at the top edge by an adhesive strip. This means that there is a pad of forms No.C1.11 and a separate pad of forms No.C1.12. In principle the sheets can be separated from their respective pads either before or after the notes are written. In turn this means that if the first page is left on its pad then an impression of what is written on that pad can be formed on the next page of that pad. Alternatively, if the first page is left on the pad, written on but then discarded an impression of what had been written on the discarded page can be formed on the next first page which then could have been used as the first page of the interview notes. Also if the first page is removed from its pad and is on top of a continuation page then an impression of what was written on the first page can be formed on the continuation page.

[24] As we have indicated there were 17 interviews of the appellant. Ms Doherty in her meticulous presentation of this appeal demonstrated to us that in respect of those interviews and at trial the police officer stated that the notes were made "at the time." It is not necessary for us to set out all the occasions on which this occurred. We conclude that all the police officers who gave evidence on this topic unequivocally stated that the notes were made "at the time."

[25] There was a failure in relation to all the notes of the appellant's police interviews to comply with paragraphs 2 and 3 of the RUC Force Order number 43/81. There was no annotation or signature by a Detective Inspector. This is in contrast to the interview notes in respect of Mr McKiernan. However, the failure to comply with a Force Order would have been known at trial. There could have been but there was no reference to this failure at trial. There may have been an explanation at the time which led counsel not to raise this point and we are not prepared to take it into account in determining this appeal given the principle of finality and/or given the passage of time that has occurred.

[26] At interviews 1-9 the appellant denied involvement in the murder and relied on the alibi that at the time of the murder he was at the home of his then girlfriend Lorraine Keenan.

[27] During interview number 6 on 29 November 1981 Mr McKiernan was brought by police to the interview room. It was the appellant's evidence at trial that Detective Constable Whitehead conducted a countdown prior to McKiernan being brought to the interview room so as to add drama and to heighten a feeling of dread in the appellant. The police denied this had occurred. In any event it was common case at trial that McKiernan stated that he knew the appellant and that McKiernan also stated that "I have told them the heap about the shooting." The evidence of Detective Sergeant Hewitt was that Detective Inspector Caskey asked McKiernan which shooting was that and that McKiernan replied "the prison officer, Myles." Detective Sergeant Hewitt gave evidence that the Detective Inspector then asked McKiernan "who was it that fired the shots?" and that McKiernan replied "Barry fired 6 and I fired one." McKiernan then left the interview room. The police evidence at trial was that the appellant never spoke whilst McKiernan was in the room. The appellant's evidence at trial was that he shouted "What the hell are you talking about? Are you crazy or something? You know I had nothing to do with this. Have I done something to you for you to involve me?" The police evidence was that this did not occur.

[28] On the third day of the interviews (30 November 1981) the appellant made verbal admissions and then a written statement admitting his involvement in the murder.

[29] His statement contains two printed signatures "B Artt." It documents that it was made in the presence of two named police detectives at Castlereagh police office. It is dated 30 November 1981.

[30] The statement describes in a little detail the following: being equipped, with two others, with two guns; an instruction to "*go to Evelyn Gardens and we were to shoot a jail warden*"; travelling to the address in question by car; alighting from the vehicle with the rear seat passenger; entering the curtilage of the dwelling; a shot being fired by an accomplice; the appellant then shooting the victim; the escape from the scene by vehicle; returning the two weapons to an unidentified person at a specified location thereafter and then returning to the appellant's flat. His statement describes two other matters. First, a cut in the area of his left wrist caused by the glass which was broken in the inner door of the house in question which he treated by a dressing and with a resulting permanent scar. Second, his subsequent refusal to participate in another terrorist operation and his dissociation from the organisation in consequence.

[31] After the appellant's admissions the interviews continued for another two days until 2 December 1981 at which time he was charged with the murder and membership of a proscribed organisation, the IRA.

The indictment, the trial and the convictions

[32] The indictment contained 184 counts against 38 accused persons (33 men and 5 women) relating to terrorist charges allegedly committed by most of the accused as members of a Provisional IRA unit in the Ardoyne/Oldpark area of Belfast and by the others as persons giving support to those activities. The offences were alleged to have been committed, with a few exceptions, between December 1980 and February 1982, most of them during the summer and autumn of 1981 at a time of extreme tension and disorder against a background of hunger strikes and the death of ten hunger strikers who died on different dates between 5 May and 8 August 1981. As we have indicated the principal, and in many cases the only, evidence against 37 of the accused was that of a self-confessed member of the Ardoyne/Oldpark unit of the Provisional IRA, Christopher Peter Black.

[33] The Appellant was one of the 38 accused. He was accused of the following offences:

(i) The murder of Albert Myles on 26 November 1978: the 90th count.

(ii) Possessing of firearms and ammunition with intent: the 91st count.

(iii) Belonging to a proscribed organisation, namely the Irish Republican Army: the 166th count.

The first and second of these three offences were alleged to have been committed jointly with Charles McKiernan. There were other counts against Charles McKiernan including separate possession offences, conspiracy to murder and membership. The judge acceded to an application for a direction in relation to count 166.

[34] On 11 November 1982 at a preliminary hearing before the trial judge there was an application that the counts against the appellant had been misjoined in the indictment and in the alternative that they should be severed. The material before this court includes a note compiled by junior prosecuting counsel which records an application by defence counsel in respect of counts 90 and 91. It is testament to that counsel that the note survives and we are grateful for it. There is no other record of the application, of the submissions advanced to the judge or of the judge's reasons except that contained in the note. From that note it appears that the judge was asked to rule that the appellant be tried separately from Mr McKiernan. The note states that the application was refused, the judge considering it "*self-evident*" that the two should be tried together.

[35] The trial commenced on 7 December 1982. The hearing occupied 117 days and involved taking the evidence of over 550 witnesses. Black did not give

evidence against the appellant or in relation to the murder or the other charges faced by the appellant.

[36] The prosecution case against the appellant was wholly dependent on his statements of admission. The appellant did not dispute that he had, in general terms, made the admissions recorded by police (although he did not accept that he had told them certain details about his background which were included in the written statement). However, he contended that the admissions were not true and had been made because he considered he had no choice but to confess. The appellant's evidence at trial was that he had no involvement in Mr Myles' murder and that the admissions were not true. The judge was asked to exclude the admissions in summary on the following basis:

a) The appellant was verbally abused by the police officers who initially called him a lying and murdering bastard (he was born illegitimately and adopted and he thought that they were intentionally using the word 'bastard');

b) He was told that someone had squealed on him;

c) On the second day of his interrogation (29 November 1981) the police staged a confrontation between the appellant and Mr McKiernan who was brought into the interview room and identified the appellant as the gunman. In doing so, McKiernan said *"I have told them the heap about the shooting….The prison officer Myles…. Barry fired six shots and I fired one"*;

d) The appellant was later told that a Mr Frank Steele was going to implicate him;

e) The police officers told him that McKiernan and Steele were going to turn "Queen's Evidence" against him;

f) Detective Inspector Caskey threatened to see him rot in jail – "*Mark my words, I'll get you 30 years 'stip' "*, namely, a recommended period by a judge for release under the Criminal Law Act;

g) The appellant was told that he would get a 30-year "stipulated" sentence if he did not make a statement and if he did he could be out of prison in seven years;

h) The appellant was refused access to a solicitor despite several requests;

i) On the third day of the interrogation (30 November 1981), D/Con Rutledge hit him four or five times on the head. The appellant said that the Detective Constable later apologised for losing his temper;

j) The appellant was presented with a Daily Mirror headline that referred to an IRA supergrass (with the implication that there was evidence being provided against him);

k) Detective Chief Superintendent Hylands confronted the appellant and told him that the deceased Mr Myles was a personal friend and that he was going to *"see to it personally"* that the appellant rotted in jail for the rest of his life.

l) The detectives began saying "Make a good remorseful statement. We'll help you to do this to get the sympathy of the court. We'll stand up and speak for you";

m) From an early stage in the interview process police outlined to the appellant the facts of the murder, and his alleged role in it so that when the appellant eventually reached the stage where he felt that he had no choice but to confess the appellant stated that he took his lead from the information that had been provided to him by interviewing police and embellished his account in certain places to make it sound remorseful.

The appellant stated in evidence that he made the admissions "Because I honestly believed that I had no other choice but to make these, otherwise I was going to jail for the rest of my life and I was going to lose my wife and child. That's why …."

[37] At trial the police officers accepted some of the matters put forward by the appellant but there was a major conflict of evidence in relation to certain aspects of the interviews. For instance the police officers denied that Detective Inspector Caskey threatened to see the appellant rot in jail. The police officers stated that appellant was not told that he would get a 30-year "stipulated" sentence if he did not make a statement and if he did he could be out of prison in seven years; they gave evidence that the appellant did not request a solicitor until after he had confessed; they denied refusing him access to a solicitor; and D/Con Rutledge denied hitting the appellant and denied losing his temper or apologising for doing so.

[38] The appellant's admissions, their admissibility and reliability, were therefore the focus of the defence case and in particular, the *voir dire* that was held in respect of their admissibility which took place between 7 and 15 February 1983. During the *voir dire*, it was submitted on behalf of the appellant that the admissions were induced by torture, inhuman or degrading treatment contrary to section 8 of the Northern Ireland (Emergency Provisions) Act 1978. However, the main focus of the submissions was that the court should exercise its discretion to exclude the admissions on the basis of (i) oppressive conduct/circumstances; (ii) the confession being unfairly obtained; and (iii) prejudice to a fair trial.

[39] In the event the judge admitted the statements and convicted the appellant on counts 90 and 91 on the basis of his admissions.

The ESDA Evidence

[40] There was no ESDA examination at the time of the trial. The technology was not then in standard use.

[41] The first ESDA examination of the police interview notes was carried out by Dr David Baxendale in 1996 for the purposes of providing evidence to the courts in the USA in respect of extradition proceedings relating to the appellant. Dr Baxendale prepared a report dated 23 October 1996 and he gave evidence-in-chief and was cross-examined in the extradition proceedings on 6 November 1996. There is a transcript of that evidence. Dr Baxendale retired in July 2006.

[42] The second ESDA examination was carried out by Stephen Cosslett BSc in 2019 on the instructions of the appellant's solicitors for the purposes of this appeal. Mr Cosslett's report is dated 12 September 2019.

[43] The third ESDA examination was carried out by Brian William Craythorne of Forensic Science NI on the instructions of the prosecution. His witness statements are dated 29 January 2020 and 2 March 2020.

[44] The appellant's application to admit fresh evidence encompasses the reports of Dr Baxendale and Mr Cosslett, the witness statements of Mr Craythorne, the transcript of the evidence of Dr Baxendale in the extradition proceedings in the USA, together with the original police interview notes and the appellant's 7 page signed confession statement dated 30 November 1981.

[45] ESDA is a scientific technique which allows for the testing of documents. If one document is written out while resting on another then indented impressions of the handwriting may be created on the document beneath. The ESDA apparatus renders faint impressions visible in the form of black particles attached to a clear plastic sheet. In certain circumstances this can allow conclusions to be reached as to the relevant timing of the authorship of documents and/or whether, as a consequence, different versions of those documents existed.

[46] There was a large measure of agreement between the experts as to the findings of the ESDA examination of the documents. On that basis the prosecution did not request that Mr Cosslett be called as a witness but rather was content that this court proceeded on the basis of the reports of Dr Baxendale, Mr Cosslett and the witness statements of Mr Craythorne together with the original police interview notes and the appellant's 7 page signed confession statement. In effect this meant there was no evidence in rebuttal from the prosecution in relation to the reports of Dr Baxendale and Mr Cosslett.

[47] The findings of concern emanating from the ESDA evidence related to interviews 5, 11, 14 and 16. We set out the findings in relation to each of those interviews.

[48] Interview 5 took place on 29 November 1981. The interviewing officers were Detective Constable Hill and D/Constable McCollum. Impressions on the presented page 2 of the interview notes were found on header details from page 1 which do not match the header details on the presented page 1. Significantly, the impression of the end time of the interview is different from the end time on the presented page 1. The conclusion is that there was an earlier version of page 1 which had been on top of the presented page 2 and that this had left the impression on the presented page 2. The earlier version of page 1 had then been discarded. We have considered as a potential explanation that this was merely the interviewing officer filling in the header details on an earlier version of page 1 and then discarding it before writing any interview notes. We reject that explanation on the basis that the earlier version had a different time for the conclusion of the interview. That time could only be written at the end of the interview which must have been after all the notes should have been written on the earlier page 1. We consider that the presented page 1 could not have been the original page 1 and that the original page 1 would have had original contemporaneous notes of the interview under the heading "Particulars of Interview." The initials at the end of the presented page 1 should not have been added by the interviewing officers as they create the impression that this was the original page 1. The notes on the presented page 1 were not "made at the time."

[49] Interview 11 took place on 30 November 1981. The interviewing officers were D/Sergeant McLaughlin and D/Constable Turner. Ms Doherty expressed tentativeness in relation to any adverse conclusions which could be drawn from the impressions found on the notes in relation to this interview. We consider that she was correct to do so. On occasions at the top of a page of the interview notes the interviewing officer will do a small sketch which shows the position of the table and where the suspect and the officers are sitting. There is such a sketch on the top left hand corner of the presented page 1 of the notes in relation to Interview 11. There was an impression on the presented page 1 of another diagram/seating plan similar to but not identical to that found on the presented page 1. There are no particulars given of the differences so no assessment can be made as to whether the differences are material. This impression may only lead to the conclusion that at some stage there was another document on top of the presented page 1 on which a similar sketch was drawn. It does not lead to the conclusion that the notes on the presented page 1 were not "made at the time." Another impression that requires analysis is of the header details. That impression of the header details is found on the presented page 1. That impression does not match the header details on the presented page 1. The possible explanation is that the header details were written out on an original page which was then on top of the presented page 1 and then that original page was destroyed and the presented page 1 was created before any interview notes were recorded under "Particulars of Interview." It is of significance that the impression of

the header details on the presented page 1 did not contain the interview conclusion time.

[50] Interview 14 took place on 1 December 1981. The interviewing officers were D/Constable Hill and D/Sergeant McLaughlin. There are 3 pages of notes in relation to this interview. There are a number of matters which support the conclusion that these notes were not prepared "at the time." We illustrate by reference to a sentence which appears on the presented page 2 of the notes which commence 6 lines up from the end of that page. The sentence is as follows:

> "Det. Sergeant McLaughlin then asked him if he would tell us the names of the persons involved in the operation but *still* he declined." (Emphasis added)

An impression is found on the presented page 2 of that sentence but without the word "still." One conclusion is that there was an earlier page 2 which had been completed when it was on top of the presented page 2 and that the earlier page has been discarded. Another conclusion is that the interviewing officers were making notes on some other document when it was on top of the presented page 2 and that other document was then discarded. However, if that was the case then deliberately the officers were not using Forms No. C1. 11 and 12 (though there was no Force Order then in place making the use of those forms obligatory), the record made at the time would have been on that other document and there would have been a deliberate decision to destroy that other document.

[51] Other impressions on the presented page 2 are as follows:-

(a) An impression on the presented page 2 is of the words "involved in anything else" which impression contrasts with the words "involved in any other crime" on the presented page 1 lines 12 and 13.

(b) An impression on the presented page 2 is of the words "4.20pm brought in a cup of coffee" which impression contrasts with the words "4.20pm and returned a short time later with a cup of coffee" on the presented page 2 lines 17-19.

(c) An impression on the presented page 2 is of the words "he was allowed to smoke" which impression contrasts with the words "he was allowed to smoke frequently" on the presented page 2 lines 19 and 20.

(d) An impression on the presented page 2 is of the words "We put the question of what sort of car he was using" which impression contrasts with the words "Was then asked what sort of car was used" on the presented page 3 line 7.

All these impressions on the presented page 2 could lead to the conclusion that not only was there an earlier page 2 which had been completed on top of the presented page 2 but also that there had been earlier versions of the presented pages 1 and 3 and that all of the earlier pages had been discarded. An alternative is that the impressions on the presented page 2 are taken from just one earlier page. Under this alternative the impressions on the presented page 2 were formed from writing on a single original page. If that was so then as the words discerned from the impressions are to be found ranging over all three of the presented pages then the presented pages include more text than in the earlier one page version. This is the conclusion of Mr Cosslett. However, in either case the presented pages were not made "at the time."

[52] Also in relation to interview 14 an impression is found on the presented page 2 of header details from page 1 including a conclusion time for the interview of 5:30 pm. However, the conclusion time of the interview on the presented page 1 is 5:40 pm which is different from the impression on presented page 2. The conclusion time can only be written at the end of the interview by which stage there should be notes of the interview under "Particulars of Interview" on page 1. We conclude that there was an earlier and different version of presented page 1 which deliberately has been discarded.

[53] In any event in relation to interview 14 whether there were earlier versions of pages 1 - 3 or whether there was some other document we consider that the ESDA evidence establishes that the presented pages were not made "at the time."

[54] Interview 16 took place on 2 December 1981. The interviewing officers were D/ Constable Hill and D/ Constable Turner. Impressions were found on the presented page 1. It was during this interview that a record is made of a request by the appellant to see his solicitor. The presented page 1 contains the following:

> "He asked: 'When can I see a solicitor?' (Time 10.40am) he was asked who he wanted and replied 'Ted Jones from Nurse and Jones.' D/C Hill left the room and returned shortly afterwards and told subject that arrangements were made."

[55] The focus of the report from Mr Cosslett is on the words "replied Ted Jones from" which is the same wording as in line 12 of presented page 1. However, on the presented page those words are at the start of line 12. The impression shows the words in the middle of a line. Mr Cosslett concludes that there was a previous version of presented page 1 which was started but not completed and has been replaced by the current version. We accept that conclusion.

Legal principles

(a) Validity of a Notice of Appeal

[56] A Notice of Appeal such as the appellant's Notice dated 8 August 1983 which baldly states "I am appealing against my conviction …" is not a valid Notice of Appeal, see *R v Baranauskas* [2018] NICA 37 at paragraph [33] (iv) and (viii) and *R v Wilson* [1973] Crim LR 572.

(b) Extension of time

[57] By virtue of section 16(1) of the Criminal Appeal (NI) Act 1980 notice of an application for leave to appeal against conviction is required to be given within 28 days from the date of the conviction. That statutory requirement is an aspect of the principle of finality, see *R v Guinness* [2017] NICA 47 and *R v Smith* [2013] EWCA Crim 2388. A valid notice in this case was given on 26 March 2018, not 28 days, but rather some 35 years from the date of the applicant's conviction. We consider that in order to obtain an extension of time the merits of the appeal would have to be such that it would probably succeed (paragraph [8] (vi) of *Brownlee*).

(c) Application to receive evidence not adduced at trial

[58] In so far as relevant section 25(1) of the Criminal Appeal (NI) Act 1980 provides that for "the purposes of an appeal, …, under this Part of this Act, the Court of Appeal *may, if it thinks it necessary or expedient in the interests of justice*— … (c) *receive any evidence which was not adduced at the trial*" (emphasis added). It is clear from the terms of section 25(1) that there is discretion in this court to receive any evidence which was not adduced at the trial and that the test for the exercise of discretion is whether this court thinks it necessary or expedient in the interests of justice. In deciding whether to exercise its powers under section 25(1)(c) the court is obliged (by section 25(2)) to take account of a number of matters. Section 25(2) provides that this court "shall, in considering whether to receive any evidence, have regard in particular to— (a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings." In *R v Walsh* [2007] NICA 4 at paragraph [25] Kerr LCJ in delivering the judgment of this Court stated that the power to admit fresh evidence was fettered only by what was necessary or expedient in the interests of justice and the factors listed in section 25(2) are merely factors that are to be taken particularly into account. It is clear however that not only must this court consider these factors but it must also address the question of what the interests of justice require in relation to possible fresh evidence.

[59] We also consider that it is appropriate to repeat what was stated in *R v BJ* [2020] NICA 5 at paragraph [32] namely that:

> "The admission of evidence under section 25 is a matter of discretion. This Court will admit evidence if it is necessary or expedient in the interests of justice. The factors listed in section 25(2) are not preconditions for the admission of evidence, but are merely factors to take into account in deciding whether evidence should be received. Lord Judge stated in *Erskine* [2009] EWCA Crim 1425, [2009] 2 Cr App R 29 (461) (at [39]) that "[v]irtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice." Lord Bingham stated in *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498 that:
>
> > "The Court of Appeal would ordinarily be less ready, and in some cases much less ready, to receive evidence which the appellant had failed without reasonable explanation to adduce at the trial, since receipt of such evidence on appeal tends to subvert our system of jury trial by depriving the decision-making tribunal of the opportunity to review and assess the strength of that fresh evidence in the context of the case as a whole, and retrials, although sometimes necessary, are never desirable."

(d) The task of this court on an appeal

[60] Before considering the various grounds of appeal we set out the task to be performed by this court when determining an appeal. That task has been clearly and authoritatively expounded by Kerr LCJ in *R v Pollock* [2004] NICA 34 after a review of the relevant authorities. At paragraph [32] of his judgment the Lord Chief Justice set out the following principles to be distilled from the authorities:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where a conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

Those are the principles which we will apply.

Submissions and ruling in relation to the reception of the ESDA evidence

[61] In support of the applications to admit the fresh evidence in respect of ESDA testing Ms Doherty on behalf of the appellant, submitted that the admission of this evidence was necessary or expedient in the interests of justice as it was directed at demonstrating that the admissions made by the appellant during interview were unreliable. She submitted that the evidence in relation to ESDA testing shows that, contrary to the evidence given by police officers at trial, some of the interview notes were not made "at the time," calling into question the credibility of those police officers and the veracity of the evidence they gave about what took place during interview. Ms Doherty submitted, in summary, that if ESDA technology had been in standard use at the time of the trial, it would have allowed the defence to challenge the contemporaneity of certain interview notes. This would have had the clear potential to alter the trial Judge's view of the credibility and reliability of these officers as witnesses and quite possibly that of their colleagues. As a consequence, the Judge may have formed a different view on the highly material issues upon which these officers were challenged and he may then have placed more weight on the appellant's evidence, all of which spoke to the reliability of the admissions made by the appellant. The ESDA reports, it was submitted, are from experienced expert witnesses in this field, the prosecution's expert is in essential agreement and all of this material is therefore capable of belief. It was submitted, therefore, that the evidence clearly affords grounds for allowing the appeal; it would have been admissible at the trial on the critical issue about the reliability of the admissions made by the appellant during interview; and this type of evidence was not in standard use or therefore available to the appellant at the time of his trial. Consequently, considering the gateway for the admission of fresh evidence set out by section 25(1) of the Criminal Appeal (NI) Act 1980, namely whether its admission was necessary or expedient in the interests of justice and applying the factors to which the Court must have regard in section 25(2), reception of this new evidence was appropriate.

[62] We have considered whether it is necessary or expedient in the interests of justice to admit the ESDA evidence. We have taken into account not only the particular factors in section 25(2) but also the overall interests of justice. We admit that evidence.

The further applications to receive other evidence not adduced at trial

[63] There are a number of further applications to receive other evidence not adduced at trial. Those applications are in relation to:

(i) Police interview notes and statements generated by the appellant's initial arrest on 12 December 1978 making no mention of his left wrist scar.

(ii) A police record generated at the time of the appellant's arrest on 1 May 1979, which is said to make no mention of his left wrist scar.

(iii) An army "medical referral form" dated 10 January 1979 to the same effect.

(iv) A police "charging record" dated 1 May 1979 to the same effect.

(v) The ballistics report of Mark Mastaglio of Forensic Firearms Consultancy dated 13 February 2020 relating to (a) certain characteristics of a revolver "*recovered*" on 5 January 1979 and (b) the "*weapon origins*" of two bullets recovered from the hall floor in question and the corpse of the deceased.

(vi) The following four separate items: two NIFSL ballistics files relating to "*murder of Albert Myles 26/11/78*" and "*explosion, arms and ammunition find 05/01/79*"; a redacted "*Disposal Order dated 09/03/89*"; a redacted "*Disposal Authorisation*" dated June 1988 and a PPS letter dated 23 December 2019 attaching those materials. (This application, raises the question of possible non-disclosure of the first of these four items at the appellant's trial.)

[64] It is not necessary for the disposal of this appeal to determine those further applications to receive these items of evidence not adduced at trial and we do not do so.

Grounds of Appeal

[65] The most recent proposed amendment of the appellant's Notice of Appeal was lodged on 18 February 2020. In summary the grounds of appeal include:

(i) The counts alleging the murder should have been severed from the Bill of Indictment, which comprised 184 counts in total, involving 38 defendants. As a result the appellant was prejudiced by the evidence of Christopher Peter Black which was damming of the appellant's co-accused, Charles McKiernan.

(ii) The trial judge erred in admitting the confession attributed to the appellant. This ground is enlarged by five separate particulars, one of which is that if ESDA evidence now available (the subject of two of the nine fresh evidence applications before this court) had then been available "… it is possible that the (judge) would have felt a degree of doubt about his ability to accept the truthfulness of the police evidence in this regard …."

(iii) The trial judge (without particulars) "failed to apply the correct principles … in accepting that he may not have heard the full account of what happened in the interview and in accepting that aggressiveness, bluff, persistence and guile were acceptable police interviewing techniques …"

(iv) (Again without particulars) "In summarising the case against the appellant the (judge) misdirected himself and failed to accord due weight to the extent to which the appellant was misled by the interviewing police in a significant and material way about the existence of informer evidence against him."

(v) Three specified types of fresh evidence, including ESDA testing, demonstrate that "… the admissions made by the appellant during interview were unreliable."

(vi) There was material non-disclosure by the prosecution at the trial, specifically "the recovery on 5 January 1979 of the .38 calibre weapon believed to have been used in the murder" which "… deprived the defence of the opportunity to follow material lines of enquiry and deprived the appellant of his right to a fair trial".

[66] Again it is not necessary for the disposal of this appeal to determine any of the grounds of appeal except the grounds relating to the impact of the ESDA evidence.

Consideration of the impact of the ESDA evidence

[67] This court has given consideration to the impact of ESDA evidence in the cases of *R v Latimer, Hegan, Bell and Allen* [1992] 1 NIJB 89 and *R v Gorman & McKinney* CARF3083 delivered on 21 October 1999.

[68] In *Latimer, Hegan, Bell and Allen* the ESDA findings clearly showed that detective officers gave evidence which was untrue when they told the trial judge that none of the interview notes had been rewritten. Hutton LCJ stated:

"It is important to recognise that ESDA findings may be significant in two ways which we now describe:

1. The ESDA findings may show that a verbal confession which the police say a suspect made in an interview was not made by him but was concocted by the police, or may raise a reasonable doubt as to whether it was made by the suspect. The clearest example of this would be where the original note made in the course of an interview and revealed by ESDA does not contain a confession, but a subsequent note written after the interview, but presented by the police as the original note, contains the confession.

2. Even though there is no material difference between the notes written in the course of the interviews revealed by ESDA and the subsequently rewritten notes containing the same questions and answers as in the original notes, so that there is no ESDA evidence that the police fabricated or concocted confessions which they falsely attributed to the suspect, the ESDA findings may nevertheless show that police officers gave untruthful evidence in the witness box when they said that the notes presented to the court were the notes written in the course of the interviews and that no notes had been rewritten."

[69] In *Latimer, Hegan, Bell and Allen* there was no indication from the ESDA examinations that the police falsely concocted any confessions which they dishonestly attributed to the appellants. The case did not fall within the first way in which ESDA findings may be significant. The position is the same in this case. There is no suggestion that the appellant's admissions were concocted. Rather the appellant accepts that he made an oral confession and signed a written statement which constitutes a confession, but there was disagreement between the interviewing police officers and the appellant as to what was said in the course of the interview or interviews preceding the signing of the written statement and as to whether the police had put improper pressure on the appellant.

[70] The second way set out in paragraph [68] is important in relation to a case of conflicting accounts of what took place during the course of the interviews. In *Latimer, Hegan, Bell* and *Allen* Hutton LCJ stated where "such a case is made by an accused, so that the trial judge had to decide between the police account of the interviews and a very different account of the interviews given by the accused and where the ESDA examination carried out after the trial shows that the police interviewers gave untruthful evidence to the trial judge in saying that the notes had

not been rewritten, this knowledge, derived from ESDA, that the police witnesses gave untruthful evidence at the trial *may* well cause the Court of Appeal to decide that a conviction of the accused based on the written confession and the police account of how it was made, is unsafe and unsatisfactory" (emphasis added). We have emphasized the word "may" as the outcome of each appeal will depend on a detailed examination of the evidence. Thus as Hutton LCJ stated "if it is shown that the police lied at the trial, depending on the rest of the evidence and the circumstances of the case, those lies may cause the court of trial to acquit or the Court of Appeal to quash a conviction. But …, notwithstanding that police officers lied as to certain matters in the course of the trial, the court of trial and the Court of Appeal may be certain of his guilt from other evidence in the case. The lies by the police may not affect the conclusion based on the remainder of the evidence that the accused is guilty beyond a reasonable doubt, …."

[71] In the event the appeal by *Latimer* was not successful. Hutton LCJ stated:

> "Notwithstanding that the police gave untruthful evidence that the notes of Latimer's interviews had not been rewritten, we are satisfied for the reasons which we have stated that Latimer's confession is admissible in evidence against him and that it is true."

[72] However, the appeals by *Bell, Hegan* and *Allen* were successful and the reasoning included that "there was a much greater conflict at the trial between the police and those three accused than between the police and *Latimer* as to what was said in the course of their respective interviews and as to how their confessions came to be made." The court concluded "The fact that the ESDA examination shows that the police gave untruthful evidence at the trial as to the rewriting of the notes relating to *Bell, Hegan* and *Allen* and that some false authentications were appended to those notes causes us to have a reasonable doubt as to the reliability of their confessions which under the rules of evidence constituted the only evidence against them, and we therefore conclude that their convictions must be quashed."

[73] In *Gorman & McKinney* the appellants were tried by Gibson LJ. At their trial each appellant alleged that he had been assaulted by police officers in interview and that this had caused him to make the admissions, which they claimed were false and made to escape further ill-treatment. The trial judge held a *voir dire* to determine the admissibility of the statements, at the conclusion of which he admitted them all in evidence. He held the case proved and convicted the appellants on all counts, save for the charge of attempted murder against *Gorman* on count 3, in respect of which he was not satisfied that the necessary intent had been established. Carswell LCJ in giving the judgment of this court stated that:

> "It is apparent from the judge's judgment that his acceptance of the prosecution case on the matters which took place in the interviews and the admission of the appellants' statements depended to a substantial degree

> on his assessment of the police witnesses as being truthful and reliable in their evidence. At several points in their evidence the issue arose how the interview notes had been taken, and on each occasion the witness replied that they had been taken during the material interview in the interview room."

Carswell LCJ went on to analyse the ESDA evidence in that case which called into question the police evidence that the interview notes had been taken during the material interview in the interview room. One of the points made was in relation to an impression of a different termination time for an interview. Carswell LCJ stated:

> "Counsel made the point that the time "4.20" could not have been written until the end of the interview, therefore the lost page must have been completed at or after that time and could not have been scrapped during its progress and the presented page has been written after the interview was completed."

He concluded that "this argument appears to us irrefutable." In that case the ESDA evidence established that "there was a significant amount of rewriting of pages of interview notes, and the possibility cannot be excluded that on at least one occasion it was done after the end of the interview to which the page related." It was submitted that the judge "would have found it very much more difficult to accept their other testimony as true and reliable if their evidence on rewriting had been successfully challenged." The court concluded:

> "We find ourselves impelled to accept these submissions advanced on behalf of the appellants. Unlike some other reported cases, *the evidence of rewriting does not show the inclusion of any material which was to the detriment of either appellant*. Nor does the fresh evidence afford direct and irrefutable contradiction of considered testimony given by police officers about the circumstances in which rewriting took place. *There might well be an innocent explanation of each instance of rewriting if the evidence were before us.* The *confessions made by the appellants were detailed and circumstantial and the case which each put forward of ill-treatment was wholly unsupported by the medical evidence and contained serious inconsistencies which caused the judge to dismiss their testimony as entirely unconvincing and unreliable.* The fact remains, however, that in order to be satisfied beyond reasonable doubt that neither appellant had been ill-treated *the judge had necessarily to rely heavily on his assessment of the police witnesses as being truthful and reliable*. If the ESDA evidence had been available, *it remains at least possible that he would have felt a degree of*

> *doubt about his ability to accept that evidence*. In the absence of satisfactory explanations for the rewriting of interview notes we cannot be satisfied beyond reasonable doubt that the judge's conclusion would have been the same if the issue had been explored before him. *It follows that we consider that the fresh evidence might have led to a different result in the case and we cannot regard the convictions as safe*. The appeals will therefore be allowed and the convictions quashed." (emphasis added).

[74] We have added emphasis to certain parts of the passage at the end of the preceding paragraph as the conclusions in that case might be read across to this case. In this case as in *Gorman & McKinney*:

(a) The evidence of rewriting does not show the inclusion of any material which was to the detriment of the appellant;

(b) There might well be an innocent explanation of each instance of rewriting if the evidence were before us. No such evidence has been proffered by the prosecution;

(c) The confession made by the appellant was detailed and circumstantial;

(d) The case put forward by the appellant of physical ill-treatment was wholly unsupported by the medical evidence;

(e) The case put forward by the appellant was unconvincing and unreliable. The judge found the appellant to be an intelligent young man whose intelligence was quite above average. He considered that he told a number of lies in the witness box that belied that intelligence. He assessed some of those lies as affronting in their enormity included in which was "his apparent gullibility that he had no alternative but to confess to a murder which he did not do, for which he had an honest alibi and for which there was no independent or untainted evidence of his involvement." Another example of a lie that affronted the judge in its enormity was that "he would get out of prison in seven years if he confessed but not for 30 years if he did not."

(f) The judge in this case had necessarily to rely heavily on his assessment of the police witnesses as being truthful and reliable.

[75] Mr Simpson on behalf of the prosecution at paragraph 24 of his "addendum skeleton" argument stated that "the prosecution accept that if the Learned Trial Judge had had available to him the ESDA evidence now available, it is a matter of conjecture what effect this would have on his assessment of the credibility of the

police witnesses. Nevertheless, in light of (the judge's assessment of the appellant) the Learned Trial Judge (*is likely to have come to the same conclusion*) would have reached the same conclusion." The words in italics were struck through. A significant sense of unease about the correctness of the verdict is the test on appeal. Words such as "conjecture" and "likely" do not dispel a significant sense of unease. Furthermore, "conjecture" and "would" are difficult to reconcile. In addition the response in paragraph 24 of the addendum skeleton argument concentrates on the judge's view of the credibility and reliability of the police officers rather than on the impact that may have had on the judge's view of the appellant's credibility and reliability. The judge's assessment of the appellant may not have stayed the same if he took a different view of the credibility and reliability of the police officers. Mr Simpson accepted that the ESDA evidence might have impacted on the judge's assessment of the appellant and accepted that the struck through words might be the best way in which the case could be articulated by the prosecution. He no longer maintained that "the Learned Trial Judge would have reached the same conclusion." The hearing of this appeal was adjourned as consequence of the coronavirus pandemic. During the period of adjournment and on 5 May 2020 the PPS wrote to the court as follows:

> "The prosecution has considered the evidence of the experts retained by both parties to this appeal, and notes the broad agreement of the conclusions expressed by the experts as to their findings utilising the ESDA techniques.
>
> The prosecution has also considered Court of Appeal authorities identifying the principles relevant to the Court of Appeal's approach to cases involving ESDA findings subsequent to conviction.
>
> In the circumstances of this case the prosecution considers that it is not in a position to argue that there is not a possibility that, had the trial judge had available to him the ESDA evidence, he would felt a degree of doubt about his ability to accept the police evidence as to what occurred during the interviews."

This was followed by a further note from Mr Simpson today as follows:

> "To put it another way, …, if the court was to ask me whether I agree —that it is a possibility that if the trial judge had had available to him the ESDA evidence, he would have felt a degree of doubt about his ability to accept the police evidence as to what occurred during the interviews — I would have to answer "Yes.""

[76] Some of the matters raised by the appellant at trial even if established in evidence or even if the judge entertained a reasonable doubt in relation to them would not have led to the exclusion of the admissions. However, others clearly could have such as whether the appellant was told that he would get a 30-year "stipulated" sentence if he did not make a statement and if he did he could be out of prison in seven years; whether he was denied access to a solicitor and whether he was hit. Accordingly the factual issues as to what occurred during the police interviews were of considerable significance and the judge was required to form an assessment of the truthfulness and reliability of both the police officers and of the appellant. As in *Gorman & McKinney* in order to admit the appellant's confessions the judge had necessarily to rely heavily on his assessment of the police witnesses as being truthful and reliable. In part that was a comparative exercise in which a diminution of the truthfulness and reliability of the police officers might have led to a more favourable impression as to the truthfulness and reliability of the appellant. If the ESDA evidence had been available to the judge, it remains at least possible that he would have felt a degree of doubt about his ability to accept the evidence of the police officers as opposed to the evidence of the appellant. In the absence of satisfactory explanations for the rewriting of interview notes we have a significant sense of unease as to whether the judge's conclusion would have been the same if the issue had been explored before him and therefore as to whether he would have admitted the statements in evidence. Those statements were the only evidence against the appellant. It follows that we consider that the fresh evidence might have led to a different result in the case and we cannot regard the convictions as safe.

Conclusion

[77] We extend the time for bringing the appeal against convictions and we quash the convictions.