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ANALYSIS OF THE OPERATION OF THE CRIMINAL EVIDENCE

(NORTHERN IRELAND) ORDER 1988

The operation of the Order will be analysed separately for scheduled and non-scheduled offences tried on indictment, in respect of returns received by 12 May 1993. The information furnished covers the period from the inception of the Order (21 November 1988) to 12 May 1993.

SCHEDULED OFFENCES

2. At 12 May 1993, Criminal Evidence reports have been received in respect of 367 defendants tried for scheduled offences, with one defendant having been tried on two separate bills.
3. Only very limited use has been made of Article 3 of the Order for trials in respect of scheduled offences. There have been 43 instances in 33 cases (Bateson 5685/88, Breslin & Forbes 171/89, McLernon 601/89, Muldrew 786/89, Murray 1349/89, Campbell 2856/89, Doherty & McCool 4780/89, Murray, O'Carroll, Caldwell & Morrison 154/90, Jordan, McKay & McCartan 476/90, Cosgrove & Doherty 1910/90, Meehan 2230/90, McAuley & McAllister 2485/90, Braniff & Magee 1656/89, Quinn 2070/88, Allen 5173/89, McKee 5703/89, Campbell 144/90, Quinn 4662/90, Devine 4855/90, Wylie 1872/91 and Bradley 92/91, Mathers & Hillen 2879/90, McCartney & Connolly 3418/90, Cunningham 1100/91, Duffy 1223/91, Hanigan 1498/91, Adams 2319/91, McElduff 2364/91, Connolly 459/92, Thompson 1042/91, Walsh 2831/91, Fitzsimmons 3085/91, Fitzpatrick 3475/91), where Article 3 has been a live issue.

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cases

Adverse inferences were drawn in Morrison 154/90 (trial Judge, Hutton LCJ), McLernon 601/89 (trial Judge, Kelly LJ), Cosgrove & Doherty 1910/90 (trial Judge, Babington CCJ), Murray 1349/89 (trial Judge, Kelly LJ), Campbell 2856/89 (trial Judge, Kelly LJ), Quinn 2070/88 (trial Judge, Hutton LCJ), McKee 5703/89 (trial Judge, Carswell J), Campbell 144/90 (Carswell J), Devine 4855/90 (trial Judge, Russell CCJ) and Wylie 1872/91 (trial Judge, Curran CCJ), Connolly 3418/90 (trial Judge Carswell J), McElduff 2364/91 (trial Judge Higgins CCJ), Mathers & Hillen 2879/90 (trial Judge Pringle CCJ), 1042/91 Thompson (trial Judge Russell CCJ), 2319/91 Adams (trial Judge Martin CCJ), 2831/92 Walsh (trial Judge Petrie CCJ) all the defendants were convicted except Campbell 2856/89; Duffy CF 1223/91 and Hanigan 1498/91.

No inferences were drawn by the trial Judges in the remaining cases mentioned at 3 above. Of these cases, all defendants were convicted except Braniff & Magee 1656/89, Quinn 4662/90, Bradley 92/91, Duffy 1223/91, Hanigan 1498/91 and Fitzpatrick 3475/91.

It should be noted only those defendants who were interviewed after the introduction of the new caution on 13 December 1988 would have been subject to the provisions of Article 3. As the date of interview is not recorded in statistical data held by the Department it is not possible without disproportionate effort to provide an accurate figure for those defendants who would have been subject to the provisions of Article 3. This paragraph is also applicable to Articles 5 and 6.

4. As far as the provisions of Article 4 are concerned defendants arraigned prior to 23 November 1988 were not subject to its provisions. Article 4 has been a live issue during the trial of 192 defendants, 186 refused to be sworn and 6 refused to answer questions.

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If the 192 defendants who refused to be sworn, or to answer questions only in respect of 53 defendants did the trial Judge draw an inference from the defendants refusal to be sworn.

In Fegan (1318/88) a defendant in the 'Corporals' murder trial, the trial Judge, Mr Justice McCollum, drew inference from the defendant's refusal to be sworn.

In Kelly (1318/88) a defendant in a second trial arising out of the 'Corporals' murder case, the trial Judge, Mr Justice Carswell, drew an adverse inference from the defendant's refusal to give evidence and assessed this with other evidence when reaching his verdict.

In Bell, Bell, Watson, Watson, Curlett and Peacock (2668/88) the trial Judge, Lord Justice O'Donnell, stated that he had no grounds to disbelieve the written statements made by the six defendants and found them to be true. He did not expressly state that he was drawing inferences from their refusal to give evidence and treating such inferences as corroboration.

In Walsh (5061/88) the trial Judge, Mr Justice Higgins, in deciding the case against Walsh pointed out that Walsh's unexplained presence in a garage where the constituent parts of motor tubes were being assembled for use, powerful forensic evidence, and, Walsh's failure to give evidence confirmed Walsh's guilt.

In McLaughlin, Barkley and O'Neill (5279/88), the trial Judge, Mr Justice Shiel, drew an inference although he stated the case did not require it and he would have convicted the defendants even if he had not drawn an inference.

In McLernon (601/89) the trial Judge, Lord Justice Kelly stated that the statement made by the Defendant whilst being questioned by Police was a poor attempt to meet the provisions of section 9 of the Northern Ireland (Emergency Provisions) Act 1978 and that it was without truth. He therefore drew an inference from this attempt and further drew an inference from the defendant's refusal to give evidence in court, this inference corroborated the evidence already existing against the Defendant.

In Murray (1349/89), the trial Judge, Lord Justice Kelly stated that he found it remarkable that the accused remained silent in the face of the evidence against him and that the inference he drew was stronger and much more to the defendant's detriment than that drawn from his refusal to answer questions whilst in police custody.

In Ferguson (2595/89), the trial Judge, Mr Justice Shiel, stated that from the defendant's refusal to be sworn he drew the proper inference that the defendant was indeed one of the three men present on that road.

In Sloan (3141/89), the trial Judge, Mr Justice Nicholson, stated that because of the defendant's refusal to be sworn he drew the inference that he could offer no credible explanation for the presence of his fingerprints other than the obvious explanation that they were placed there on the evening of 28 May 1989. He further stated that the powerful case against Sloan at the close of the Crown Case is supported by his refusal to give evidence and by the evidence of the co-defendants Armstrong and Smith.

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In Martin, Martin, Caldwell, O'Carroll and Murray (154/90), the trial Judge, Lord Chief Justice Hutton stated that he drew strong inferences from the fact that the accused refused to be sworn. Such inferences he treated as corroboration of the evidence already existing against each of the accused.

In McKay, Jordan and McCartan (476/90), the trial Judge, Mr Justice McCollum, drew an adverse inference from the accused's refusal to be sworn and stated that the situation of their presence in the car park cried out for evidence from them if their reason for being there was for a reason other than involvement in a joint enterprise with each other which involved the weapons.

In Cosgrove and Doherty (1910/90), the trial Judge, Judge Babington, drew an adverse inference from the defendants refusal to give evidence and treated such refusal as corroboration.

In Hamill (2002/90), the trial Judge, Judge Babington, drew an adverse inference from the accused's refusal to give evidence.

In Baker (2150/90), the trial Judge, Judge Curran, drew an adverse inference from the accused's refusal to give evidence.

In McCleave (4518/90), the trial Judge, Lord Justice McDermott, drew an adverse inference from the defendant's refusal to give evidence and treated such refusal as corroboration.

In Devine (4855/90), the trial Judge, Judge Russell drew an adverse inference from the defendant's refusal to give evidence and treated such refusal as corroboration.

In McCusker (4821/90), the trial Judge, Mr Justice Carswell, drew an adverse inference from the defendant's refusal to give evidence.

In O'Dwyer (2129/90), the trial Judge, Lord Justice Kelly, stated that the case against the defendant was overwhelming and that the fact that he did not give evidence strengthened the evidence that the contents of his admissions were true.

In Murphy & McKinley (3457/90) the trial Judge, Lord Chief Justice Hutton, drew adverse inferences from the defendants' refusal to be sworn stating that there was a strong prima facie case and no reasonable possibility of an explanation as to why the defendants were at the scene.

In McCartan & McManus (1071/91) the trial Judge, Judge Petrie, drew an adverse inference from the defendants' refusal to account for their movements.

In O'Neill, McVeigh & Wilson (17/92) the trial Judge, Judge Nicholson, drew an adverse inference from the accused's refusal to be sworn and treated the refusal as corroboration.

In Connolly (459/92) the trial Judge, Judge Curran, drew an inference although in the face of the evidence already against the accused he would have convicted him only.

In Bennett, Masterson & Lynch (3846/91), the trial Judge, Judge Nicholson, drew an adverse inference from the defendants' refusal to defend themselves and treated it as corroboration.

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In McLaughlin & Owens (4085/91), the trial Judge, Judge Martin, drew an inference from refusal to give evidence but stated that this alone was not sufficient.

In the case of Maguire (1042/91) the trial Judge, Judge Russell, drew an adverse inference as the accused was not prepared to assert his innocence under oath, this was treated as corroboration.

In Roulston (1580/91) the trial Judge, Judge Nicholson, drew an adverse inference because although the accused made a statement of admission he said nothing in his own defence, this was treated as corroboration.

The inferences drawn from a defendants' failure to give evidence have only been expressly treated as corroborative of other evidence in the cases of Fegan and Kelly, McLernon, Murray, Ferguson, Sloan, O'Carroll & Others and Jordan & Others, McCleave, Devine, O'Neill, McVeigh, Wilson, Connolly, Maguire, Roulston, Bennett, Masterson, Lynch and impliedly in Walsh.

In only one of the six cases involving the six defendants who agreed to be sworn but refused to answer questions did the trial Judge draw an inference.

In Duffy (2374/91), the trial Judge, Judge Babington, drew an adverse inference from the defendant's refusal to explain why the car registration number was present in a book belonging to him, which was seized by police. His Honour treated such refusal and the more credible evidence given by police as amounting to corroboration.

It should be noted that of the 192 defendants who refused to be sworn or to answer questions 45 were acquitted.

Of the remaining 270 defendants, 151 agreed to be sworn and did not refuse to answer questions. In addition there were 119 which the defendant was not required to give evidence. The reasons included inter alia the defendant being acquitted 'by Direction' of the Judge at the end of the Crown Case, the Crown offering 'No Evidence' and the defendant pleading guilty after the start of a trial but prior to being required to give evidence.

5. There has only been limited use made of Article 5. There have been 64 instances in 40 cases. (Forbes & Breslin 171/89, Muldrew 786/89, Quinn 986/89, McNally 5685/88, McLernon 601/89, Murray 1349/89, Sloan 3141/89, Gillen & Adams 223/90, McKay, Jordan & McCartan 476/90, Cosgrove & Doherty 1910/90, Baker 2150/90, Meehan 2230/90, Gilmore, Murphy & Moen 5700/89, McKee 4565/90, Campbell 144/90, Quinn 2070/88, Doherty & McCool 4780/89, Devine 4855/90 and Duffy 2374/91, Bullock, Moore & Quinn 1352/89, Courtney 1868/90, Carroll 2171/89, Bradley 92/91, Caldwell, Hodgins & O'Carroll 154/90, McCorley & Donnelly 438/90, Marley 960/89, Braniff & Magee 1656/89, Wylie 1872/91, Sheehan & Wright 2096/89, O'Hagan 5683/88 and Sinclair 5723/89), O'Neill, McVeigh & Wilson 17/92, Connolly 459/92, Gibson 875/92, McClelland, McMullan, Coggles & Irwin 1198/92, Duffy 1223/91, Hannigan 1498/91, Fitzsimmons 3085/91, McCartan & Connolly 3418/90, Bennett & Lynch 3846/91, Fitzsimmons & McFadden 5312/90 where Article 5 has been a live issue. In only 17 of these instances (Quinn 986/89, Cosgrove & Doherty 1910/90, Baker 2150/90, Devine 4855/90, Duffy 2374/91, McLernon 601/89 & Wylie 1872/91, Duffy CF 1223/91, McCartney & Connolly 3418/90, O'Neill, McVeigh & Wilson 17/92, McClelland, McMullan, Coggles & Irwin 1198/92) did the trial Judge draw an inference.

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In Quinn (986/89), the trial Judge, Judge McKee, stated that it was impossible to believe that a woman as intelligent as Quinn could have been unaware of the 'hide' found in her home or what it contained but he did not expressly treat that as corroboration.

In Cosgrove and Doherty (1910/90), the trial Judge, Judge Babington, stated that the defendants refusal to give evidence amounted to corroboration.

In Baker (2150/90), the trial Judge, Judge Curran, drew an inference from the accused's refusal to give evidence. All 17 defendants were found guilty.

In Devine (4855/90), the trial Judge, Judge Russell, drew an adverse inference from the defendant's refusal to give evidence.

In Duffy (2374/91), the trial Judge, Judge Babington, drew an adverse inference from the defendant's refusal to explain why the car registration number was written in a book belonging to him which was seized by police and treated this fact and the evidence given by police as amounting to corroboration.

In Wylie (1872/91), the trial Judge, Judge Curran, drew an inference from the fact that the story the defendant gave to the police ie a denial of knowledge of the articles, differed from that which he gave under oath. He further treated this as amounting to corroboration.

In Connolly 3418/90 the trial Judge, Judge Carswell, drew an adverse inference from the defendants' refusal to answer questions and stated that Connolly was "determined to sit out his interrogation, assess the strength of police evidence against him and, if charged, present a version of his activities to the Court which would be unembarrassed by any statements to which he might have committed himself".

In O'Neill, McVaigh & Wilson (17/92) the trial Judge, Judge Nicholson, stated that inferences were not necessary in this case but because the accused said nothing he would draw an inference and treat it as corroboration.

In McClelland, McMullan, Coggles and Irwin (1198/92) the trial Judge, Lord Justice Kelly, stated that common sense dictated that he should draw adverse inferences, further stating that when 4 Protestants are found in a car on the Falls Road with guns ready for use and give no explanation, the only inference to be drawn is that they were there to commit murder.

All defendants were found guilty except Courtney 1868/90, Bradley 92/91, Carroll 2171/89, Braniff and Magee 1656/89, Quinn 1352/89 and McKee 4565/90, Duffy 1223/91, Hannigan 1498/91.

The second paragraph at (3) above applies.

6. There has only been limited use made of Article 6. There has been 58 instances in 32 cases; (Bateson/O'Hagan 5685/88, Forbes/Breslin 171/89, McLernon 601/89, Gallagher 4488/89, Martin/Martin/Hodgins/Murray/Morrison/O'Carroll/Caldwell 154/90, Gillen/Adams 223/90, Cosgrove/Doherty 1910/90, Baker 2150/90, Meehan 2230/90, Gilmore/Murphy/Moen 5700/89, McKee 5703/89, Doherty & McCool 4780/89, Devine 4855/90, McCallan & O'Neill 2487/90, Bradley 92/91, McCorley & Donnelly 438/90, Marley 960/89, Braniff & Magee 1656/89, Wylie 1872/91, Sheehan & Wright 2096/89 and

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Finclair 5723/89, McElduff 2364/91, Hannigan 1498/91, McManus & McCartan 1071/91, McKinley & Murphy 3457/90, Connolly 3418/90, O'Neill, McVeigh & Wilson 17/92, Cartmill 56/92, McMullan, Coggles & Irwin 1198/92, Fitzsimmons 3085/91, Bennett & Lynch 3846/91, Fitzsimmons & McFadden 5312/90) where Article 6 has been a live issue.

Adverse inferences were drawn by the trial Judges in 24 out of 58 instances. In Bateson (5685/88), the trial Judge, Murray LJ, drew an adverse inference from the fact that the accused did not give an innocent explanation for his presence in the house.

In McLernon (601/89), the trial Judge, Kelly LJ, drew an unfavourable inference from the accused's refusal to account for his presence in the house namely that no innocent explanation was available to him.

In Murray, O'Carroll and Caldwell (154/90), the trial Judge, Justice Hutton LCJ, drew strong inferences from the accuseds' refusal to account for their presence in the house.

In Cosgrove and Doherty (1910/90), the trial Judge, Judge Babington, stated that the fact that the accused were found 'red handed' in the house with the substances and gave no explanation for their presence there innocent or otherwise amounted to corroboration.

In Baker (2150/90) the trial Judge, Judge Curran, drew an adverse inference from the accused's refusal to answer questions or to give evidence.

In Devine (4855/90), the trial Judge, Judge Russell, drew an adverse inference from the fact that the defendant refused to give evidence and in particular refused to account for his presence in the house. He treated this refusal and the other evidence as amounting to corroboration.

In McCartan & McManus 1071/91 the trial Judge, Judge Petrie CCJ, drew adverse inferences from the defendants' refusal to answer questions or give evidence.

In Murphy & McKinley 3457/90 the trial Judge, Justice Hutton LCJ, drew an adverse inference from the defendants' refusal to account for their presence at the scene. He treated this refusal as amounting to corroboration.

In Connolly 3418/90 the trial Judge, Judge Carswell, drew an adverse inference, stating that "the explanation which he gave in his evidence in court is a recent and false invention".

In O'Neill, McVeigh & Wilson (17/92) the trial Judge, Judge Nicholson, drew an adverse inference from the defendants' refusal to give evidence.

In McMullan, Coggles & Irwin (1198/92) the trial Judge, Lord Justice Kelly, stated that common sense dictated that he should draw adverse inferences, further stating that when 4 protestants are found in a car on the Falls Road with guns ready for use and give no explanation, the only inference to be drawn is that they were there to commit murder.

All defendants mentioned above were found guilty, except Bradley 92/91, McCallan and O'Neill 2487/90, Braniff and Magee 1656/89, Hanigan 1498/91.

The second paragraph at (3) above applies.

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SCHEDULED OFFENCES

At 12 May 1993, Criminal Evidence reports have been received in respect of 609 defendants, 28 of whom have been subject to two trials.

8. Only very limited use has been made of Article 3, 5 and 6 of the Order for defendants charged with non-scheduled offences.
9. In relation to Article 3 trial Judges drew inferences in relation to 14 defendants who before being charged failed to mention facts on which they subsequently relied on in their defence (Kerr 1161/89, Adamson 4136/89, McGuigan 5284/89, McCreanor 1086/90, McCreedy 1473/90, Mooney 1683/90, Turley 3317/90, Beattie S/2527/89, Henry S/2383/90, McLoughlin S/5020/90, Duffy & McCaughy E/5003/91, Martin E2246/91, McNulty P2088/92). In all but four of these cases (Duffy E5003/91, McNulty P2088/92, Adamson 4136/89, Turley 3317/90) on being charged the defendants failed to mention a fact upon which they subsequently relied on in their defence. It should be noted that only six of the defendants (Kerr 1161/89, Adamson 4136/89, McGuigan 5284/89, Henry S/2383/90, McLoughlin S/5020/90, Martin E2246/91, McNulty P2088/92) were found not guilty.
10. Article 4 of the Order has been an issue during the trials of 63 defendants, two defendants were tried twice, the jury having disagreed at the first trial.

The trial Judge directed the jury in relation to Article 4 in all but 20 instances involving 11 cases. In one case (McElkerney 5736/88), the trial Judge, Judge Higgins, did not go into detail because of the strength of the Crown Case. In each of the other 10 cases the trial Judges did not direct the jury in relation to Article 4.

Of the 63 defendants, 29 were found not guilty, 33 were found guilty including 4 (Tohill 4729/89, McGivern 4378/90, Bonner & McNama 4703/90), where the jury disagreed at their first trials. No Evidence was offered by the Crown after the jury disagreed at the first trial of the remaining defendant (Girvan 4353/88).

Of the remaining 546 defendants, 420 agreed to be sworn and did not refuse to answer questions. In addition there were 65 occasions in which the defendants were not called to give evidence and 63 occasions when Article 4 was inapplicable. The reasons for this included, inter alia, the defendant being acquitted 'by direction' of the Judge at the end of the Crown Case, the Crown offering 'No Evidence', trials part heard and the jury discharged, the defendant pleading guilty after the start of a trial but prior to being required to give evidence and in one case (Barnes 5719/88) the defendant was not required to give evidence because of his age and mental capability.

11. In relation to Article 5 only one instance has been recorded where the accused refused to account for an object (Loughran P3954/90). This defendant changed his plea to guilty.
12. In relation to Article 6 only 4 instances have been recorded where evidence was given that an accused refused to account for his presence at

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a particular place (Adamson 4136/89, Kerr 4681/90 & Kelly 1629/91, Loughran P3954/90). Of these 4 Kelly was convicted on a not guilty plea, Loughran pleaded guilty after the trial had begun, Kelly and Kerr were both acquitted.

J McINTYRE
Records & Statistics Section

May 1993

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CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

TABLE 2 - USAGE OF ARTICLE 4

21 NOVEMBER 1988 - 12 MAY 1993

Nature of Offence	Number of defendants for whom Article 4 relevant	Number of defendants who refused to be sworn/answer questions	Number of defendants for whom Article 4 considered by Judge or Judge directed Jury	Number of defendants against whom inferences were drawn by Judge	Number of defendants against whom inferences were treated as Corroborations by Judge
Scheduled	332	192	103	53	25
Non-Scheduled	486 (see note 2)	63	43	N/A (see note 1)	N/A (see note 1)

NOTE: 1. Not relevant to Jury Trials.

2. Includes thirteen instances where a defendant was tried twice because Jury disagreed at first trial.

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CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

TABLE 1 - USAGE OF ARTICLES 3, 5 AND 6

21 NOVEMBER 1988 - 12 MAY 1993

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Nature of Offence	Number of defendants for whom Articles 3, 5, 6 relevant	Number of defendants against whom inferences drawn	Number of defendants against whom inferences treated as corroboration
Scheduled	44	18	16
Non-scheduled	14	-	