ANALYSIS OF THE OPERATION OF THE CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

CONFIDENTIAL

1. The operation of the Order will be analysed separately for scheduled and non-scheduled offences tried on indictment, in respect of returns received by 30 August 1992. The information furnished covers the period from the inception of the Order (21 November 1988) to 30 August 1992.

SCHEDULED OFFENCES

2. At 12 May 1992, 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 40 instances in 28 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) where Article 3 has been a live issue.

   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 2879/90 (trial Judge Pringle 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 and Bradley 92/91; Duffy 1223/91 and Hanigan 1498/91.

   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 139 defendants, 133 refused to be sworn and 6 refused to answer questions.

   Of the 139 defendants who refused to be sworn, or to answer questions only in respect of 41 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 powe ful 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.

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.

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 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 139 defendants who refused to be sworn or to answer questions 25 were acquitted.

Of the remaining 228 defendants, 124 agreed to be sworn and did not refuse to answer questions. In addition there were 104 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 49 instances in 32 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 5685/88 and Sinclair 5723/89) where Article 5 has been a live issue. In only 9 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 did the trial Judge draw an inference.

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".

All 46 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.

The second paragraph at (3) above applies.

6. There has only been limited use made of Article 6. There has been 45 instances in 26 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 Sinclair 5723/89, McElduff 2364/91, Hannigan 1498/91, McManus & McCartan 1071/91, McKinley & Murphy 3457/90, Connolly 3418/90) where Article 6 has been a live issue.

Adverse inferences were drawn by the trial Judges in 14 out of 45 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 corroborat on.

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".

All 45 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.

NON-SCHEDULED OFFENCES

7. At 28 February 1992, Criminal Evidence reports have been received in respect of 513 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 12 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 & McCaugher E/5003/91, Martin E2246/91). In all but two of these cases (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 five of the defendants (Kerr 1161/89, Adamson 4136/89, McGuigan 5284/89, Henry S/2383/90, McLoughlin S/5020/90, Martin E2246/91) were found not guilty.

10. Article 4 of the Order has been an issue during the trials of 60 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 17 instances involving 9 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 8 cases (Houston E/5016/91, McHugh B/821/91, Nicholson & Larmour E/462/89, Nicholson & Notario E/1012/90, Morrison & Weir P/790/90, McNama, O'Neill & Bonner P/4703/90, Duffy, Duffy, Duffy & Duffy E/2239/91 and Hylands P/2525/91), the trial Judges did not direct the jury in relation to Article 4.

Of the 60 defendants, 28 were found not guilty, 32 were found guilty including 4 (Tohill 4729/89, McGivern 4378/90, Bonner & McNama 4703/90), where the jury disagreed at their first trials and 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 454 defendants, 26 of whom were tried twice, 348 agreed to be sworn and did not refuse to answer questions, 11 during oth trials, a total of 359 occasions. In addition there were 109 occasions on which the defendant was not required to give evidence. 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. No use appears to have been made of Article 5 of the Order.

12. In relation to Article 6 only 3 instances have been recorded where evidence was given that an accused refused to account for his presence at a particular place (Adamson 4136/89, Kerr 4681/90 & Kelly 1629/91). Of these 3, only Kelly was convicted the others were acquitted.

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CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

TABLE 1 - USAGE OF ARTICLES 3, 5 AND 6

21 NOVEMBER 1988 - 12 MAY 1992

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	40	13	10
Non-scheduled	15	-	-

CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988

TABLE 2 - USAGE OF ARTICLE 4

21 NOVEMBER 1988 - 12 MAY 1992

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	260	139	82	42	25
Non-Scheduled	408 (see note 2)	60	42	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.