

IN THE CROWN COURT SITTING IN BELFAST

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THE QUEEN

-v-

1. ROBERT BLACK
 2. JONATHAN JAMES SMYTH
 3. WILLIAM HILL
-

WEATHERUP J

The charges

[1] The defendants Robert Black, Jonathan James Smyth and William Hill each face three charges.

On the first count they are charged with attempted murder contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law, the particulars of offence being that they on 6th June 2005 attempted to murder David Waring.

On the second count they are charged with causing grievous bodily harm with intent contrary to Section 18 of the Offences Against the Person Act 1861, the particular of offence being that on 6th June 2005 they unlawfully and maliciously caused grievous bodily harm to David Waring with intent to do him grievous bodily harm.

On the third count they are charged with possession of a firearm with intent contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004, the particulars of offence being that they on 6th June 2005 had in their possession a firearm namely a hand gun with intent by that means to

endanger life or cause serious damage to property or to enable any other person by that means to endanger life or cause serious damage to property.

Mr Kerr QC and Mr Magill appeared for the Public Prosecution Service, Mr McDonald QC SC and Mr Brown appeared for Black, Mr Rodgers and Mr Cairns appeared for Smyth and Mr Magee SC and Mr Shields appeared for Hill.

[2] The essence of the prosecution case is that the three defendants spent most of the evening of Sunday 5th June 2005 with the victim David Waring in a flat at West Green, Holywood, County Down. In the early hours of the morning of Monday 6th June 2005 the three defendants and Waring travelled together in Hill's motor vehicle to the car park area of Redburn Cemetery, Holywood. Black and Smyth left the motor vehicle and when Waring followed them some minutes later he was met by Black and Smyth and Black shot Waring. The motor vehicle sped away and Waring attracted the attention of some residents who contacted the ambulance and the police. The essence of the case for each of the defendants is that none of them had been with Waring in the flat in West Green, Holywood on the evening of Sunday 5th June and none of them had been with Waring in any motor vehicle in the early hours of Monday 6th June 2005 and none of them had been involved in the shooting of Waring.

The evidence of Waring as to events on 5 and 6 June 2005.

[3] Waring was 28 years old at the date of the trial and had lived his early life in east Belfast. He had left east Belfast because of intimidation. Waring stated that it was the belief of those intimidating him that he (Waring) was associating with others engaged in anti social behaviour. Waring then lived at various locations in England and Northern Ireland until he came to live in Holywood around January 2005. By June 2005 he had moved to the Upper Newtownards Road, Belfast and had a girlfriend living at 5C West Green, Holywood.

[4] Waring stated in evidence that on Sunday 5th June 2005 at about 6.00pm he left home and went to see his girlfriend at 5C West Green, Holywood. He drove there in his Peugeot 306. Waring arrived at the flat at about 6.15 pm and stayed in the flat until about 8.30pm. At that time he had consumed two tins of beer, one before he went to the flat and one while he was at the flat. He then decided to drive down to the off licence in Holywood to purchase more alcohol. When he left the flat he heard music from another flat, which he described as "Black's flat", which was in the next block. He went to Black's flat and the door was opened by Smyth who also lived there. Waring went into the flat. Those present were the defendants Black, Smyth and Hill and another man whose name was not known to Waring but who

was described as being “a baldy headed guy from Garnerville”. On leaving his girlfriend’s flat Waring had noticed that his Peugeot had a flat tyre and he asked Hill if he could borrow Hill’s motor vehicle to go to the off licence and Hill agreed. He asked the men in the flat whether anyone wanted any drink and Black ordered three bottles of Bacardi Breezer and gave him £5. Waring then went to the off licence where he bought a bottle of Buckfast Wine and a bottle of Old English Cider for himself and three Bacardi Breezers for Black. He then returned to Black’s flat. Waring stayed in the flat drinking his wine and cider and talking to Hill.

[5] Waring stated that he had known Black from the time he had been living in Holywood, that he had spoken to Black 10 or 15 times and that he had been in Black’s flat a number of times before that evening. Waring stated that he was more friendly with Smyth and had also got to know him during the time he had been living in Holywood. Smyth would have called at his flat in the next block or he would have called with Smyth a couple of times a week during that period. Waring stated that he had known Hill for about 12 years as they had grown up together in east Belfast and had socialised together almost every other day.

[6] At about midnight on Sunday 5 June 2005 Black and Smyth left the flat together for about 45 minutes. Waring remained in the flat with Hill and the man from Garnerville. When Black and Smyth returned the man from Garnerville left. During the evening Waring had consumed the bottle of wine and most of the two litre bottle of cider. Waring was on prescription drugs and earlier in the day had taken diazepam and fluoxetine. In Black’s flat he took a line or two of cocaine and smoked one or two cannabis cigarettes. He stated that his object that evening was to get “blitzed”.

[7] At around 1.00am to 1.30am on Monday 6 June Smyth suggested to Waring that they might go and get a carry out and Waring agreed. By this it was intended that they would go to premises on the Castlereagh Road, Belfast where it was known to be possible to buy alcohol out of hours. Black, Smyth, Hill and Waring got into Hill’s car, a red Seat Ibiza. Waring was in the rear seat on the passenger side, Smyth was in the rear seat on the driver’s side. Black was in the front passenger seat and Hill was driving.

[8] The Seat Ibiza travelled south towards Belfast to Jackson’s Road which is at the perimeter of the army base at Palace Barracks where security cameras cover passing traffic. The vehicle turned into Old Holywood Road and continued travelling south towards Belfast. Along the Old Holywood Road on the right while travelling south is Russell’s off licence and then a Maxol garage. Behind the off licence and the garage on the right is Palace Barracks. Further down the Old Holywood Road, on the right, is the main entrance to Palace Barracks. However just past the Maxol garage and on the left is an access road that leads along the edge of the Firmount housing estate to

Redburn Cemetery. The route to Castlereagh Road, Belfast was to continue south along the Old Hollywood Road. However the vehicle turned left into the access road to Redburn Cemetery. When the motor vehicle turned left off the Old Hollywood Road into the access road to Redburn Cemetery Hill stated, "What's going on here". Along the access road a vehicle going to the cemetery would turn right into a cul de sac along the back of the Firmount houses where there are parking spaces and the entrance to the cemetery. Hill turned right towards the cemetery entrance and then turned the car round in the direction from which he had come and stopped the vehicle adjacent to the car parking area.

[9] The car was parked on the roadway with a grass verge on either side. Where the car was parked there was a 20 foot wide grass verge to the left and then the boundary hedges at the rear of the houses in the Firmount estate. To the right was a grass verge into which had been cut the car parking spaces and beyond that was Redburn Cemetery. The cul de sac was a total of 270 feet long and there were four street lamps at intervals along the cemetery side of the roadway at 21 to 25 metre intervals. Three of the street lamps were working and one was flickering.

[10] Black got out of the front passenger seat of the vehicle. Smyth got out of the rear seat on the driver's side by crossing in front of Waring and getting out the same door as Black. This suggested that this was a two door vehicle although Waring could not remember. Waring got into the front passenger seat and Hill remained in the driver's seat. After some minutes, which Waring estimated as 5 minutes but accepted the possibility of it being 10 minutes, Hill suggested that Waring should go and see what the other two men were doing. Waring had walked about 8 yards from the car when he saw Black holding up his right hand and Waring saw the point of a gun. Smyth was standing behind Black and to his right as Waring looked at them. Waring was shot in the chest by Black from about 5 or 6 feet. Waring heard the shot and he heard the sound of Hill's car screeching as it drove off. Waring stumbled and ran in the opposite direction. He then alerted some residents who came to his assistance.

The evidence of those attending Waring at the scene.

[11] Geolin Hoy lives with her mother in a house in the Firmount estate that backs on to the entrance to the cemetery. Around 2.00am she was in her bedroom at the back of the house which overlooks the cemetery car park and a bedroom window was open. She heard a car in the lane and three car doors slamming and the screeching of the car as it moved off at speed. A few minutes later she heard the sound of cries for help and she awakened her mother, obtained a torch and went outside and found Waring lying on the grass verge. The arrival of the car and the slamming of the doors and the

departure of the car had all happened fairly quickly and she heard no gunshot. Ms Hoy spoke to Waring and he gave his name, age, details of his brother and stated that he was on his way to see one of his girlfriends in West Green.

[12] Linda Hoy, Geolin's mother, was present with her daughter and police when Waring spoke about a garage and a white building and going to see a girl in West Green. She had the impression that Waring was walking on the Old Hollywood Road when something happened at the garage and Waring referred to there being four men in a car. She also described black marks like a burn around Waring's wound.

[13] Reserve Constable Clarke attended the scene at 2.28am. Waring gave his name and address and the particulars of his brother. He did not answer a number of questions asked by RC Clarke but he did reply to questions from Ms Hoy and said that he had been with a girl and that he had been out walking down Old Hollywood Road when he had been abducted by men in a car from the garage near Russell's Cellars and had been shot at the scene. RC Clarke described the situation as dark but that there was reasonable light to make out clothing and people. The faulty light was the second light along the cul de sac and the one nearest to where the car had stopped. That light had been flicking on and off every 30 to 40 seconds. By this RC Clarke meant that there were 30 to 40 seconds of flashing and then the lights stayed on rather than a flickering light that went off for 30 or 40 seconds. However it was still necessary to use a torch. RC Clarke also believed there were black powder marks around the wound on Waring's chest. In addition RC Clarke observed skid marks at the end of the access road into the cemetery which he believed were recent marks.

[14] David Lowe, a paramedic who attended with the ambulance service, described the location as very dark and it was necessary to use torches and ambulance lights. He ascertained from Waring that his last meal had been at 1.00am.

The evidence of those in the vicinity of the cemetery.

[15] Lee John Stephenson is a special constable with the Northern Ireland Security Guard Service based at Palace Barracks, Holywood. He was on guard duty at the main entrance gate to Palace Barracks on the Old Hollywood Road at about 2.15 am on Monday 6th June 2005. He was located in a sentry box to monitor traffic seeking entry to Palace Barracks and this was about 40 to 50 yards from the main gate. While sitting in the sentry box he heard a bang which he thought was a car back firing and then he heard the spinning of car wheels. He left the sentry box and walked towards the main gate and when he was half way he saw a car travelling very fast from his left,

which was the Holywood direction, towards his right which was the Belfast direction. He heard the bang while he was in the sentry box and he heard the wheels spin after he had left the sentry box and after a time lapse of about 6 seconds. The car was described as dark in colour, a Honda Civic type with rear spoiler and riding low to the ground carrying passengers.

[16] Charlotte Beck lived in the Firmount estate, although her house did not back onto the cemetery cul de sac. She went to sleep around midnight on Sunday 5 June 2005 and was awakened by the sound of a shot. She could not place the time of the shot. However she did not take much notice of the shot as she related it to Palace barracks where she said they practiced shooting day and night.

Waring in hospital.

[17] Detective Sergeant Clarke saw Waring in hospital on three occasions. In the early hours of 6th June 2005 Waring stated that he was confused about what had happened but that he had been going to his girlfriend Paula's. On 10th June 2005 Waring could not remember having spoken to police on 6th June but on that occasion he was told that he would be asked for a statement. On 17th June 2005 he stated to police that he had been standing up and had been facing in the direction of the houses in the Firmount estate when he had been shot and that he had not been shot at the spot where he was found as he had run away and fallen.

The criminal injury compensation claim.

[18] On his release from hospital Waring attended his solicitor to make an application under the Criminal Injuries Compensation Scheme. In his application dated 21st June 2005 events were described as follows:-

“Applicant was abducted at West Green and shot at Holywood Graveyard, Redburn, Holywood.

“I had been at a small house party at West Green in Holywood. No trouble at all. I had drink taken. I left just after 1.00 am. I left by myself. I couldn't get a taxi so I was going to walk home.

I got about 100 - 200 yds when a car pulled up. I think 4 masked men got out. I was bundled into the car and driven to the grave yard. I was taken out of the car and then saw the gun. I was then shot once in the chest.

I wasn't beaten or threatened or told why this was happening. After the men left I think a local resident rang for the emergency services and I was taken to hospital. I was lucky to survive."

Waring's account to police.

[19] Waring did not make a written statement to police. On 20th July 2005 Waring indicated to police that he was prepared to make a statement about the events of 6th June. Waring requested police protection and was told that he could go on a programme if he gave an account of what had happened and named the people involved. On 20th July 2005 Detective Constables McManus and Dixon spoke to Waring at his house and he gave his first account to police of the evidence he was to give to the Court. DC McManus noted his account. On that occasion Waring made what Mr Rodgers for Smyth described as three mistakes. First, Waring stated that Black's flat was opposite his girlfriend's flat. Black's flat was not opposite his girlfriend's flat but was in the next block of flats. The flat opposite his girlfriend's flat had been Samuel Hill's flat where Waring had lived during his time in Holywood. Secondly Waring stated that he had arrived at Black's flat at 10.30 pm, whereas his evidence to the Court was that he had arrived at 8.30 pm. Thirdly Waring stated that when he returned from his trip to the off licence Black and Smyth had left the flat. His evidence to the Court was that Black and Smyth were present when he returned to the flat and they only left around midnight.

[20] Waring's explanation in evidence for the three differences between his first account to police and his evidence was that, while he could not remember stating the matters to police on 20th July, when he spoke to police he had been nervous and panicky and feared for his life.

[21] Waring gave a police interview on video on 21st July 2005. In respect of the three matters referred to by Mr Rodgers in relation to the police interview on the previous day Waring's account to police corresponded with that given in evidence to the Court.

[22] During the police video interview of Waring he was asked whether he had seen Black's face whenever he held his hand out with the gun but he could not remember; he was about 100% sure it was Black who shot him; as to what made him so sure, Waring said it was his height or size or build; in addition he remembered sandy boots such as those Black had been wearing in the flat; when asked whether he had seen Black's face he said the gun was more or less blocking everything; as to whether it could have been any one else that shot him he thought not in the space of time involved; he repeated that recognised the size and build and features of Black; Waring knew by the figure and the

features but could not remember seeing his actual face; the features he explained as being the size of Black and the sandy boots; he did not see his face but relied on his general size and his features, by which he meant his size and his boots.

[23] In his evidence Waring stated that when he walked away from the car to look for Black and Smyth he had seen Black with his fist at the point of the gun and Smyth behind him and to his right. He described Black as wearing light denim jeans and sandy coloured boots and this was the same clothing as the person who had shot him. Waring described Smyth as wearing a grey hooded top.

[24] His description in evidence of those involved in the shooting went further than that given during the police video interview. He saw the light coloured jeans of Black and the grey hooded top of Smyth. He had a glimpse of Black's face and he heard the shot. Waring's explanation for the additional information was that while he could not remember those matters at the time of the police interview he remembered them at the time of giving evidence as "afterwards it came back to me". He had been a bit panicky when he had been talking to the police but when he thought about it afterwards he did see part of Black's face.

[25] In his direct evidence Waring stated that when the motor vehicle turned left off the Old Holywood Road into the access road to Redburn Cemetery, Hill stated, "What's going on here". This was developed in cross examination. Waring stated that the headlights of the vehicle had not been switched off. When Black and Smyth left the vehicle Hill said to Waring, "There's something dodgy going on here". Waring described Hill as being panicky. Mr Magee for Hill referred to Waring's video recorded interview of 21st July 2005. Waring told the police during the video interview that, when the car came to turn left off the Holywood Road into the access road to Redburn Cemetery, Hill had said, "What's happening here" and on being asked whether Hill was being directed to go in a certain direction Waring agreed that Hill had been directed to take a 90 degree turn and go left. On going down the access road Hill was directed to turn right into the lane to the cemetery entrance. It was Black who was giving directions. Waring felt something was going to happen but he thought it may happen to Hill and did not think it would happen to himself. Waring got into the front passenger seat beside Hill and said, "What's going on here, this is a bit dodgy here, isn't it" to which Hill responded to Waring, "Go and see what they are up to". Waring agreed that Hill appeared to be as anxious as Waring.

The police interviews of the defendants.

[26] Black was interviewed on three occasions on 22nd July and two occasions on 23rd July and denied involvement in the attempted murder of Waring. He made no reply to many of the questions asked by police but stated that he did not know Waring and did not remember where he had been on the night of 5th/6th June. At an identification parade held on 6th September 2005 Black was identified by Waring as the person involved in the attempted murder.

[27] Smyth was interviewed on three occasions on 22nd July and on two occasions on 23rd July and he too denied the attempted murder of Waring and had no recollection of his whereabouts on 5th/6th June. He did not answer many of the questions asked by police. At an identification parade on 23rd July 2005 Smyth was identified by Waring as one of those involved in the attempted murder.

[28] Hill was interviewed on three occasions on 22nd July and on one occasion on 23rd July. He denied any involvement in the attempted murder of Waring. He accepted that he was a good friend of Waring, that he had no reason to be involved in any attempted murder of Waring, that he had no recollection of events on 5th/6th June, that at that time he was taking prescribed medication, had been drinking heavily and was of no fixed abode.

Medical evidence.

[29] Dr Byrne, Specialist Registrar in General Surgery in the Ulster Hospital, was involved in the treatment of Waring. Waring sustained a gun shot wound to the left chest and an exist wound to the left loin, occasioning injury to the lung, liver, stomach, bowel and renal vein. This would have caused significant bleeding, mostly internal. Dr Byrne was of the opinion that there may not necessarily have been a lot of external blood. There was an obvious downward trajectory of the bullet with no evidence of bullet striking bone. Dr Byrne stated that the path of a bullet within the body was notoriously unpredictable and that various internal organs would have influenced the trajectory of the bullet.

[30] Accordingly, the absence of blood, or a trail of blood, at the scene was not inconsistent with Waring being shot at the cemetery. Further, the downward trajectory of the bullet through the body was not inconsistent with Waring being shot as he described.

Forensic evidence.

[31] Leo Rossi, a Senior Scientific Officer and member of staff of the Forensic Science Northern Ireland, examined Waring's clothing. It was an agreed fact that the clothing of Waring contained no evidence of powder burns. Witnesses had referred to the appearance of powder burns around the chest wound of Waring. Whether the references were intended to be to Waring's skin adjacent to the entry point or to his clothing at the entry point, such dark marks as might have been observed by the witnesses would not have been powder burns.

[32] Accordingly there was no evidence of close range shooting of Waring that would be inconsistent with his evidence that the weapon was discharged from 5 or 6 feet.

Objective evidence.

[33] There was no objective evidence to support the prosecution case against the defendants. Examinations in a number of areas that might have provided support for the prosecution case were all negative. CCTV cameras along Jackson's Road were examined to determine if Hill's motor vehicle passed along Jackson's Road at the relevant time. The vehicle was not shown on video. DS Clarke stated that there was a time delay on the videos and the vehicle may have passed along Jackson's Road without being caught on camera.

[34] There was no forensic link between Waring and the defendants or Hill's vehicle. Tape lifts had been taken from the vehicle and swabs and prints had been examined but no link had been established. Searches had been conducted and clothes and other items seized, but no link established.

[35] The tyre marks on the access road to the cemetery were examined but did not match Hill's vehicle.

[36] Searches were conducted at the scene with a view to the recovery of the bullet or bullet case. A rummage search in the undergrowth on 6th June was unsuccessful. Metal detector searches on 6th June and 2nd November 2005 did not locate the bullet. No bullet case was recovered from the scene although had a revolver been used there would have been no case to recover. It was not possible to establish whether the weapon used had been a revolver.

Application for directions of no case to answer.

[37] At the conclusion of the prosecution case the defendants applied for a direction that the charges be dismissed in reliance of R v. Galbraith 73 CAR 124.

The first limb of Galbraith applies if there is no evidence that the crime alleged has been committed by the defendant, in which event the Judge will stop the case.

The second limb of Galbraith arises where “there is some evidence but it is of a tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence.” Lord Lane CJ at page 127 stated that, in that event -

“(a) Where the Judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty.”

[38] The Court of Appeal in Northern Ireland has applied this approach to non jury proceedings in Chief Constable of Police Service of Northern Ireland v. LO (2006) NICA 3 at paragraphs 13 and 14 and R v. Courtney (2007) NICA 6 at paragraph 19 as follows -

“In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of *Galbraith* but with the modification that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the accused’s guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it

could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, (R v Hassan (1973) NIJB) that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith*. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

[39] The first defendant relied on the second limb of *Galbraith* and advanced two broad grounds. First that the evidence was so discredited and intrinsically weak that it could not support a conviction and secondly that even if the evidence could be relied on it depended upon an identification that was made in circumstances that were so unsatisfactory that it would be impossible to convict, relying on R v Turnbull [1977] QB 224.

[40] The second defendant also relied on the second limb of *Galbraith* and on the matters identified by the first defendant and certain additional matters relating to Waring's different versions of events, his explanations for those different versions of events, the circumstances in which the versions were given as well as certain unexplained facts, inconsistent facts and the absence of supporting evidence.

[41] The third defendant relied on the first and second limbs of *Galbraith* to contend for the absence of any evidence involving Hill in attempted murder and on those aspects of Waring's evidence which it was contended were internally inconsistent with the prosecution case that Hill was party to a prearranged plan to kill Waring.

[42] Applying the above test to the evidence, the application of each defendant was rejected.

Defence evidence.

[43] Black gave evidence. He was 37 years old at the date of the hearing and lived in east Belfast. He did not have a flat in West Green although he had stayed occasionally in the flat referred to by Waring. The flat was occupied by Black's niece who was a girlfriend of the defendant Smyth. He denied knowing Waring and denied being with Waring on 5th or 6th June 2005 and denied any involvement in any attempted murder of Waring. He declared that he had no reason to harm Waring. Black had not answered questions during police interview and gave the explanation that he was scared to answer questions because of the allegations that he was involved in the attempted murder. He denied that Waring would have been in the West Green flat as Smyth would have told him had that been the case. Smyth had told him that he did not know Waring. Black did not know where he had been on 5th or 6th June 2005. Hill had told Black that Waring had been a life long friend but Hill did not have a clue why Waring had involving them in the shooting. Black agreed that Smyth was a good friend of his but that Hill was not a friend. It was possible that he had asked Hill where Hill was on 5th and 6th June 2005 but he could not remember and questioned why he would have asked him where he had been on those dates.

[44] On being informed by Counsel for Smyth that it was not intended that he should give evidence, I inquired of Counsel in the terms of the Practice Direction issued by the Lord Chief Justice on 11 April 1997 for the purposes of the Criminal Evidence (Northern Ireland) Order 1988 Article 4 -

“Have you advised your client that the stage has not been reached at which he may give evidence, and if he chooses not to do so, having been sworn, without good cause refuses to answer any question, the court may draw such inferences as appear proper from his failure to do so?”

Counsel for the defendant replied that the defendant had been so advised. Smyth did not give evidence.

[45] Mr Magee for Hill renewed his application for a direction on the same grounds as before and with the additional evidence of Black supporting Hill's case. A defendant's application for a direction that the trial judge removes the case from the tribunal of fact is not limited to the conclusion of the prosecution case or the defendant's case. Further the trial judge in his capacity as the tribunal of fact in a non jury trial may exercise the power to stop the case against a defendant. On reviewing the earlier ruling and taking into account the additional evidence the application made on behalf of Hill was refused.

[46] On being informed by Counsel for Hill that it was not intended that he should give evidence, I inquired of Counsel in the terms of the Practice Direction issued by the Lord Chief Justice on 11 April 1997 as set out above. Counsel for the defendant replied that the defendant had been so advised. Hill did not give evidence.

The challenge to the prosecution case.

[47] The defendants contend that the evidence for the prosecution was so discredited and intrinsically weak that it could not support a conviction of any defendant on any of the charges to the requisite standard that the Court be satisfied of the guilt of each defendant beyond reasonable doubt. The grounds relied on are first of all the different versions of events given by Waring namely that given at the scene, in the criminal injury application form, in the interview with police on 20th July 2005 and in the evidence presented in Court. Secondly that the offence occurred when Waring was intoxicated by drink and drugs. Thirdly that Waring had difficulties with his memory of events as there were matters in respect of which he had no recollection and some in respect of which he had declared no recollection and later gave an account of events so that his account became unconvincing. Fourthly that he was in general not an impressive witness. Fifthly that there was no objective evidence to support Waring's account. Sixthly that there was no other testimony to support Waring's account. Seventhly that Waring's evidence was inconsistent with other evidence such as Ms Hoy's description of events, the paramedic evidence that Waring had eaten at 1.00am and the trajectory of the bullet.

[48] The second defendant adopted the above grounds and added to the different versions of events the different explanations for the different versions of events. Waring described himself as nervous and panicky in relation to his first version of events given to the police. He agreed that he had just made up the description he gave at the scene and that he was prepared to tell lies for the purposes of his compensation claim. In addition there were the different circumstances in which the different versions of events were given, so that at the scene Waring agreed that he believed he was dying and he might have been expected to give a true version of events, even if he did not identify the offenders. It was contended that there was no plausible explanation for the version given for his criminal injury claim or the police interview on 20th July 2005 or for the different abduction locations.

[49] Further. it was alleged that there were certain unexplained facts which offended common sense namely Waring getting into the front seat of the vehicle, failing to plead for his life before he was shot, failing to disclose the identity of assailants if he believed he was going to die, the unlikelihood of Waring and the others being in a vehicle travelling into east Belfast to obtain drink, Waring's presence in the flat of the others who were not drinkers, the

suggestion to the paramedic that he had eaten at 1.00 am and getting out of the car at Hill's suggestion. Further, certain facts were said to be inconsistent with the prosecution case, namely the evidence of the presence of powder burns at the wound, the absence of blood at the scene, the absence of a trail of blood and the trajectory of the bullet, the absence of motive, the absence of CCTV film of the vehicle, the evidence of Ms Hoy of events at the scene, the absence of a match between the tyre marks at the scene and Hill's vehicle, the absence of fibres to place Waring in Hill's vehicle, the absence of evidence from Waring's mother and brother that he had earlier given them the version of events he later gave to the police and the failure to recover the bullet or the casing. Further Waring was not supported by other evidence. He had admitted to making up an account and to giving an untruthful account to his solicitor. He had a motive for giving an untruthful account namely to obtain a placement on a witness protection scheme and to obtain financial gain from the witness protection scheme and the criminal injury claim. It was contended that he relied on lack of memory when there was a conflict between his evidence and earlier records. His consumption of drink and drugs on the evening rendered him unreliable. There was no explanation for his later recall of certain details he had not given to police and on occasions he claimed misunderstanding when he sought to resile from earlier evidence.

[50] The third defendant adopted the criticisms made by the other defendants and added the absence of any evidence involving the third defendant in attempted murder and the aspects of Waring's evidence which it was contended were internally inconsistent with the third defendant being a party to a prearranged plan to kill Waring.

The evidence against the defendants.

[51] I have to be satisfied beyond reasonable doubt of the guilt of each of the defendants on each of the charges. When I refer below to being satisfied I mean being satisfied beyond reasonable doubt.

[52] Waring gave a number of different accounts of the events of Sunday 5th and Monday 6th June 2005. When discovered at the scene at the cemetery he gave the account of abduction on the Old Hollywood Road. In the hospital he confirmed that he was going to his girlfriend's when the incident began. To the solicitor for the purposes of the criminal injuries compensation claim he was abducted while walking in West Green. To the police on 20th July 2005 he gave the account which was to be developed in video interview and in evidence, but subject to the variations highlighted above by Mr Rodgers.

[53] Waring's explanation for the abduction account was that he was nervous and panicky and concerned for the safety of his family. Accordingly his first approach was not to report the true version of events because of fear of reprisals on his family. Although he thought he was dying at the scene he nevertheless gave a false version of events to civilians and police. He maintained that approach when he was in the hospital. On his release from hospital he attended with his solicitor in order to make a criminal injuries compensation claim but again maintained his false account in the interests of the safety of his family. Initially he was not going to give the police a true version of events but he later decided that he would make a statement to police. Accordingly he contacted police on 20th July 2005 and sought and received assurances about police protection. At that stage Waring says that he gave the true account to police and that account formed the basis of his evidence in Court.

[54] Thus there are two stages to Waring's description of events. The first stage is between the shooting on Monday 6th June 2005 and notification to the police on 20th July 2005. During that period he maintained versions of an abduction account to civilians, police and solicitor, although he claims that during that period he gave the true version of events to his brother and his mother. During the period he acted out of concern for the safety of his family. The second period began on 20th July 2005 when Waring says that he decided to co-operate with police and give a true version of events and this he did when he obtained assurances about a placement on a witness protection scheme. He and his family have left Northern Ireland and remain in protection.

[55] In respect of the first period when Waring was giving a false account the defendants contend that his explanation cannot be accepted because it was not necessary to make up a version of events relating to the shooting. If he was nervous and panicky and concerned for the safety of his family, the concern could have been addressed if he simply did not identify any offenders, without the need for him to make up a false account. I do not accept this contention as a ground for rejecting Waring's explanation. If his evidence is correct he could not have given that version of events and also denied knowledge of the identity of the perpetrators without in effect leading police to the defendants. Any reference to the flats at West Green would have led to a line of enquiry that would inevitably have uncovered the defendants. If Waring decided to give a false account in order to protect his family from reprisals I am satisfied that it would not have been sufficient to describe the actual events and not identify the defendants as the perpetrators. Rejecting this contention of the defendants does not provide a basis for supposing that Waring's evidence was correct.

[56] It is noted that Waring was either lying about what occurred during the evening of the shooting or was demonstrating an alertness in extreme circumstances that involved him lying to civilians and police and later maintaining a lying account to his solicitor.

[57] The defendants contend that Waring could not have given a reliable account of events as he was intoxicated by drink and drugs. That Waring had consumed a substantial cocktail of alcohol, prescription drugs and illegal drugs is not in doubt. He stated that his intention had been to become “blitzed” that evening. Whilst admitting that he had been affected by the alcohol and drugs, Waring denied that the alcohol and drugs impacted on his ability to recall the events of that evening. His description of events was unclear on certain matters, such as whether the motor vehicle in which he travelled to the cemetery had two doors or four doors. However, when questioned by the civilians and police shortly after the shooting, whether his answers were true or false, he was coherent and able to understand the questions and provide answers and describe his movements. I am satisfied that despite the cocktail of alcohol and drugs ingested by Waring he had at the time a recollection of the events of that evening and was able to give an account of himself.

[58] Waring had an uneven recollection of events. There were instances where Waring’s description of events varied from time to time or was incomplete but I am satisfied that each was an instance of faulty recollection or inability to recollect. However the position in relation to his evidence as to his conversations at the scene is more complicated. At first his evidence was that he had no recollection of the contents of the conversations with those who came to his aid at the scene. Later in evidence he agreed that he had given the abduction account to those at the scene. His explanation for an initial lack of memory of events at the scene was “it’s coming back to me a bit”. It would be understandable that in the aftermath of the trauma of the shooting Waring could not recall the details of what occurred at the scene. However, if the version of events given by him in evidence is true, he can have been in no doubt that he had given what he regarded as a false account in the weeks after the event, including that given at the scene and later maintained to police and to the solicitor. Waring was aware that what he described as his false account during the weeks after the event was known. There was no need to deny any memory of his account at the scene as it was essentially the account repeated on later occasions and in respect of which he had an explanation to offer. I am satisfied that Waring was not being untruthful when he stated initially that he had no recollection of his conversations at the scene and later stated that he had a recollection of the conversations.

[59] A number of inconsistencies in the evidence were referred to by the defendants. Some have been addressed above and are not accepted as being inconsistencies but rather amount to the absence of confirming evidence. They are the issues about the absence of blood, a trail of blood, CCTV recording of Hill’s vehicle, fibres, fingerprints, a bullet or a casing. The absence of objective evidence is not, either as individual items or collectively, supportive of the case for the prosecution, but neither is it inconsistent with that case. I accept the evidence of Dr Byrne that the injuries need not have produced blood, or a trail

of blood, at the scene. The motor vehicle could have passed along the road without being detected by CCTV. The failure to establish a forensic link between the defendants, Waring and the vehicle is not supportive of the prosecution case but neither is it inconsistent. If a shot was fired at the scene the bullet may not have been recovered if it lodged in the ground or in another item. There would have been no casing to recover if a revolver had been used.

[60] Nor does the evidence about the presence of the powder burns or the tyre marks or that concerning the trajectory of the bullet give rise to inconsistency. Whatever may have been the appearance of the marks around Waring's wound the forensic evidence establishes that there were no powder burns that would have indicated close range shooting. That the tyre marks some distance from the cemetery were not those of the suspected motor vehicle does not speak to the identity of the vehicle that left Waring at the cemetery. The trajectory of the bullet from entry to exit was on a decline from the front chest to the lower back around the waist. Waring's evidence was that he was standing up when he was shot and that Black was holding his arm straight out in front when he fired the shot. Dr Byrne described the track of a bullet through a body as notoriously unpredictable. Some degree of deflection of the bullet would have been occasioned by passing through the various organs. I am satisfied that the track of the bullet was consistent with Waring's account.

[61] There were inconsistencies between Waring's evidence and the testimony of other witnesses. Ms Hoy heard a car and three doors slamming and the car speeding off quickly after arrival. She heard no gunshot. I accept that she gave an honest account of her recollection of events. Ms Hoy had been working that evening and had returned home at 1.00 am. She was awake when the car arrived but this occurred at a time when she was going to sleep and would not have been at her most alert. She heard three doors slamming. On Waring's account three people got out of the vehicle, namely Black from the front passenger seat, Smyth from the rear driver's side seat who got out through the front passenger door and then Waring who moved from the rear passenger seat to the front passenger seat. The other two aspects of Ms Hoy's account are not consistent with Waring's account, namely she heard the car speeding off quickly after arrival and she did not hear a shot. These features would be consistent with a version that involved Waring being shot elsewhere and then taken by car to be dumped at the cemetery.

[62] Two other witnesses did hear what may have been a shot. Ms Beck in the Firmount Estate heard a shot which she believed may have come from Palace Barracks but was unable to estimate the time. A single shot would be unlikely to arise from shooting practise so the shot heard by Ms Beck may not have been fired in Palace Barracks. It could have been fired on the Old Hollywood Road or at Redburn Cemetery. Mr Stephenson heard what he thought was a car back firing at around the time of Waring's description of events. He then saw a car driving quickly towards Belfast. Had the sound been

a shot fired on Old Holywood Road I am satisfied that there would not have been sufficient time for a vehicle to travel to Redburn Cemetery and back past the entrance to Palace Barracks between Mr Stephenson hearing the sound and seeing the vehicle. However I can not be satisfied that the vehicle passing the entrance to Palace Barracks had any connection with the sound heard by Mr Stephenson. Neither account supports Waring's account, nor, as the defendants contend, are they inconsistent with that account.

[63] I do not accept the description of certain matters as unexplained facts that offend common sense. That Waring should get into the front of the vehicle seems an entirely acceptable alternative to remaining in the rear of the vehicle when the others left. On Waring's account, if it is accepted, there was no time for any response before he was shot. Again, if his account is accepted, the false account he gave at the scene, when he thought he was going to die, was driven by concern for his family. I do not accept that Waring's presence in the vehicle with others to obtain drink from an illegal outlet could be described as unlikely, nor Waring's presence in the flat with others who were not drinkers. Waring reported to the paramedic at the scene that he had last eaten at 1.00 am but there was no other evidence of this. Waring gave this answer in direct response to a question from the paramedic. He was not asked that question at any other time and I do not accept that there is any inconsistency in that detail not otherwise being mentioned or any significance in his omission to refer to having eaten at 1.00 am when he gave his account to the police or when giving evidence.

[64] Waring's motive was questioned by reason of the financial gains that accrued to him from the witness protection scheme and the criminal injury compensation. The evidence on Waring's financial arrangements in the witness protection scheme was that he received state benefit and he received a payment from police which was an advance on the state invalidity benefit that was being assessed by social security. The advance was to be repaid to police when the assessment was complete. In addition he received £10 per week from police to cover telephone calls. I am satisfied that there was no evidence of a financial incentive from police to maintain evidence against the defendants. Further, Waring made an application for criminal injury compensation. That he sustained a criminal injury is not in doubt, but whether he qualifies for compensation under the criminal injuries compensation scheme has yet to be determined. He might have recovered compensation under the abduction account given in his application form and there is no evidence and no reason for the change of account to have arisen out of consideration for improving his prospects of recovering compensation.

[65] There was no evidence that the Defendants had any motive for shooting Waring. It was established that there were others who had a motive for shooting Waring, namely those paramilitaries who had threatened Waring and others and forced them to leave their homes in east Belfast.

[66] In response to cross examination of Waring about not having given what he described as the true version of events until 20 July 2005 Waring stated that he had reported the version of events that he gave in evidence to his mother and brother before he told the police on 20 July 2005. Neither the mother nor the brother was called as a prosecution witness, a matter noted by the defendants. However the evidence of Waring that he had made an earlier report to his mother and brother was not directly challenged. Any evidence from the mother or brother confirming Waring's evidence on the point would have offended the rule against previous consistent statements.

[67] The matter resolves to whether I am satisfied with the evidence of Waring. All of the matters discussed above are taken into account in assessing the evidence of Waring. In the light of all the circumstances set out above two particular matters give rise to a need for special caution in making that assessment. First, Waring stated his preparedness to give an untrue version of events for some weeks after the event, including an account at the scene and to police and an application for criminal injury compensation that are now claimed to be based on a false account. Second, Waring's account is not consistent with the evidence of Ms Hoy that the vehicle left the cemetery quickly after its arrival and that no shot was heard.

[68] In addition Black's evidence was a denial that he knew Waring or that he had any involvement in the shooting. Black had asked Smyth if he knew Waring but Smyth had said he did not know him. Black knew that Hill was a friend of Waring. While Black and Smyth were friends, Waring was not one of Black's friends. Black did not know where he had been on the night of Sunday 5th June and Monday 6th June 2005. Black accepted that it was possible that he had asked Hill where Hill had been on those dates but he could not remember. Black asked prosecuting Counsel why he would ask Hill where he had been on those dates. It must have been obvious to Black that if either Black or Smyth or Hill had been able to establish their whereabouts during the times that Waring alleged that they had all been together on the night of Sunday 5th June and Monday 6th June 2005 that Waring's version of events could not have been sustained. I did not believe Black's denials. He was particularly unpersuasive when he asked prosecuting Counsel why he would ask Hill where he had been on those dates.

[69] In all the circumstances I am satisfied as to the truthfulness of Waring's evidence as to the events on the evening of Sunday 5 June 2005 when he was in the flat in West Green with the three defendants. Further I am satisfied that in the early hours of Monday 6 June 2005 Waring and the three defendants set off in Hill's car and ended up at the cemetery at Redburn. Further I am satisfied that Waring was shot at that location. I accept Waring's explanation for the false account that he gave of events until he spoke to police on 20 July 2005 and I am satisfied that his initial preparedness to give a false account does not

undermine his evidence. I am satisfied that Ms Hoy was going to sleep when the events occurred and that those circumstances account for her mistaken estimate of the period over which events occurred and her not hearing a shot. I am satisfied that none of the matters discussed in this judgment nor those matters in combination raise any reasonable doubt about Waring's evidence.

[70] Accordingly I am satisfied that Waring had the presence of mind to appreciate that he and his family were in danger and gave a false account of events while he was at the scene, a position he maintained until he decided to give his description of events to police on 20 July 2005. However, whether his description of his assailants is reliable is a different issue.

[71] Waring identified Black and Smyth as being together at the shooting, with Black holding the gun. This is a "recognition" case as Waring claimed to have been with Black and Smyth throughout the evening and to have known them before that day. I am satisfied that Waring had met each of the defendants before 5 July 2005. The guidelines set down by the Court of Appeal in England in R v Turbull (1977) QB 224 also apply to recognition cases. There is a special need for caution before convicting in reliance on the correctness of identification or recognition. Mistakes may be made even in recognition cases. It is necessary to examine closely the circumstances of the recognition.

[72] The initial description of Black to police referred to recognition by height and build and sandy boots, with an absence of any view of Black's face. In his evidence to the Court Waring described Black as wearing light denim jeans and sandy boots and he stated that he had a glimpse of part of Black's face. Waring did not describe to police that he had seen Black's jeans but stated in evidence that he remembered that detail when giving evidence. His explanation for this recall was that "afterwards it came back to me."

[73] Nor had Waring told police that he had caught a glimpse of part of Black's face and his explanation for adding that to his evidence was that he was a bit panicky when he was talking to the police "but when I thought about it afterwards I did see part of his face". The area was dark, although there were street lights along the cul de sac, a faulty street light adjacent to the point where Waring described the shooting and the lights from the vehicle. It is doubtful that Waring caught any glimpse of part of Black's face, as he would be expected to have remembered when he was giving his explanation to police. Waring's initial description indicated that the raised hand holding the gun blocked a view of the face.

[74] I am not satisfied that Waring saw any part of Black's face. In this respect his evidence overstated his recollection of his sighting of Black at the scene of the shooting. I am satisfied that his overstatement of his recollection of seeing a part of Black's face at the time of the shooting was not an intentional misstatement of his memory of events. I conclude that his recognition of Black

as described to police has led Waring to believe that he also saw a part of Black's face.

[75] In relation to Smyth, Waring's evidence was that he saw Smyth behind Black and to the right. Smyth was wearing a grey hooded top.

[76] I am satisfied that Black and Smyth confronted Waring after he left the vehicle and that it was Black who shot Waring. I am satisfied that Waring recognised Black in the manner he described to police and in evidence, save that he did not see part of his face. I am satisfied in all the circumstances that Waring's identification of Black is reliable. Further I am satisfied that Waring recognised Smyth standing with Black and that Smyth was party to the shooting of Waring.

[77] If I had concluded that Waring might deliberately have misstated his recollection of his sighting of the gunman in order to bolster what he might have considered was a weakness in his identification of his assailant, which I am satisfied was not the case, I would have had added grounds for caution in accepting any of his evidence. However in that event I would have remained satisfied with Waring's evidence, despite that untruthful and misguided attempt to overstate his recollection of his assailant.

[78] The Court, in determining whether Smyth is guilty of the offences charged, is entitled to draw such inferences as appear proper from the failure of Smyth to give evidence. It has not been necessary to rely on this provision in reaching the conclusion beyond reasonable doubt that Smyth is guilty of the offences charged. In any event I consider that the evidence of Waring as to the events of Sunday 5 and Monday 6 June 2005 calls out for a response from Smyth. He had no explanation for his whereabouts on those dates when interviewed by police, which might be excused as he had limited opportunity at that stage to reconstruct his movements in previous weeks. However he had the opportunity in the period from police interview to trial to recollect his whereabouts or to explain his failure to do so. That he elected not to give evidence entitles the Court to draw the adverse inference that no explanation was available other than that Waring's account was correct.

[79] The prosecution case against Hill is that he was party to a pre arranged plan to kill Waring. This plan would have been pre arranged between Black, Smyth and Hill prior to them leaving the flat in West Green. Waring's evidence was that he had spent most of the evening talking to Hill. Black and Smyth had left the flat together for a period but Hill had remained in the flat with Waring. Waring's visit to the flat on the night of Sunday 5th June 2005 had not been pre arranged. When Hill was driving the vehicle into Belfast, Waring's evidence was that Black gave directions to turn off the expected route. At that point Hill questioned the diversion. While Hill and Waring sat in the car outside the cemetery there were further questions raised by Hill about what was

happening. Either Hill was party to a plan and was seeking to reassure Waring or he was unaware of the plan and was genuinely questioning what the others were doing. I am not satisfied that Hill had knowledge of any pre arranged plan or that he had any intention that Waring should be killed. Hill was originally charged with assisting offenders but the prosecution accepted that if Hill were to be acquitted of the present charges there was not sufficient evidence to convict him on a charge of assisting offenders.

[80] I find the first defendant, Robert Black, guilty of attempted murder on the first count, guilty of causing grievous bodily harm with intent on the second count and guilty of possession of a firearm with intent on the third count.

I find the second defendant, Jonathan James Smyth, guilty of attempted murder on the first count, guilty of causing grievous bodily harm with intent on the second count and guilty of possession of a firearm with intent on the third count.

I find the third defendant, William Hill, not guilty of attempted murder on the first count, not guilty of causing grievous bodily harm with intent on the second count and not guilty of possession of a firearm with intent on the third count.