Neutral Citation no. [2007] NICC 28 | *Ref:* **GILC5867**

Judgment: approved by the Court for handing down | *Delivered:* **13.06.07**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

AARON THOMAS WHITE

_____

Gillen J

At the end of the prosecution case, the defence made an application that there was no case to answer in this matter.

Legal Principles Governing the Application

[1] In instances where a judge sits with a jury the principles governing submissions of no case are to found in R v. Galbraith 73 CR.App.R124 and R v. Shippey [1998] Crim LR 767. In the case of Galbraith Lord Lane CJ described the principles in determining whether a direction of no case to answer should be made as follows:

> "How then should the judge approach a submission of "no case"? –
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence -

(a) where the judge comes to the conclusion that the Crown's 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 Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness' 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 a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".

[2] In R v. William Courtney (unreported KERG5734) the Court of Appeal in Northern Ireland expressly adopted the approach of the Chief Constable of the PSNI v. LO (2005) NICA 3 in discussing the application of these principles in the context of a non jury trial. The following passages from that judgment were approved:

> "(13) 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, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

> (14) 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 of Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is a 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".

[3] Chief Constable of the PSNI v. LO encapsulates the principles which I intend to adopt in this case.

[4] As in the Courtney case and as submitted by both prosecution and defence counsel essential elements of the case now before me rely on circumstantial evidence to establish the defendant's guilt. I therefore again borrow the approach adopted by the Court of Appeal and the Lord Chief Justice in Courtney's case as set out at paragraph 20:

> "Where, as in this case, the prosecution rely on circumstantial evidence to establish the defendant's guilt, it is well established that a particular approach to the evaluation of the evidence is required. This is perhaps still best encapsulated in the well known passage from the judgment of Pollock CB in R v. Exall [1866] 4 F&F 922 at 928; 176 ER 850 at 853 (endorsed in this jurisdiction by the Court of Appeal in R v. Meehan No 2 (1991) 6 NIJB 1);
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> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them and whether they believed the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise . . . Thus it is that all these circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain and each piece of evidence as a link in the chain, but that it is not so, for then, if any one link broke, the

> chain would fall. It is more likely the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.""

THE CONCLUSION

[5] I have come to the conclusion that I must refuse the application of the defence. Having asked myself whether I am convinced that there are no circumstances in which I could properly convict, I have come to the conclusion that the evidence is not so weak or so discredited that it could not conceivably support a guilty verdict. Since as a judge sitting alone, I will ultimately have to determine the outcome of this case both on fact and law, it is inappropriate at this stage that I should go in detail, particularly on issues of credibility, as to my reasons for so deciding. Accordingly, having raised the matter with both counsel, I am satisfied that the approach to be adopted in non jury cases is for the judge to give only a brief summary of the reasons where he is refusing the application. In brief my reasons are as follows.

[6] There is evidence before me that the accused was present at the scene of the attack:

> (1) Michael Reid says a man calling himself Aaron White came into an address in street X in Harryville ("address A in Harryville") where he was and was part of a joint enterprise to attack him. This man was wearing round tinted glasses. Mr Mateer strongly questions his reliability inter alia because he had drink taken, he said at one stage he did know what was going on and he described him wearing clothes (a yellow top with writing on it) that no one else described. In contrast those that did describe his clothing said he was wearing a zipped up coat. In addition Mr Mateer relies on the fact that he did not tell police initially that the accused had nodded to one of the other assailants, his evidence of struggling outside with another man was not evidenced by smearing of blood and his identification of the accused as the man who had suggested that he cut the body up as a result of watching his lips speaking, did not appear in his initial police statements. Weighing up this evidence against the evidence of Mr Reid, I could not say that there are no circumstances in which I would accept Mr Reid's evidence.

(2) Michael Reid alleged the accused's brother was present at the attack. He was in fact present at the attack and indeed has pleaded guilty to attempted murder.

(3) A pair of glasses which can be connected to the accused – tinted prescription glasses were found outside address A in Harryville with Reid's blood on them. Mr Mateer says these could be a spare pair left at Mr Hodge's house at address A in Harryville some other time.

(4) A mobile telephone which can be connected to the accused by virtue of messages thereon was found inside address A in Harryville at the scene of the attack. Again Mr Mateer says this could have been left some other time.

(5) Mr Agnew (now deceased) made a statement that he had known the accused for 14 years and that he saw him in another address in street X in Harryville ("address B in Harryville") at a relevant time that evening wearing tinted glasses. He heard him to say to Aidy Mitchell words similar to, "He was going to kill Taig". Mr Mateer points out that Mr Agnew had been drinking, that he was unsure of the precise words and reminds me of all the frailties of relying on evidence that has not been tested by cross examination. In addition Mr Mitchell, who gave oral evidence, had no recollection of seeing the accused that night and by implication had not heard any such words being spoken to him by the accused.

(6) Sarah Macaulay, who alleged she knew the accused for 2 years, alleged she saw the accused that evening with his brother and two others in street X in Harryville and she spoke to him. He was wearing tinted glasses. Thereafter she heard him make comments inside address A in Harryville to Aidy Mitchell similar to those contained in Mr Agnew's statement. Mr Mateer challenges her evidence as confused and unreliable e.g. she initially recalled only three men in the street, she identified Michael Reid, who she did not know, as the fourth man in the street by virtue of the fact that she subsequently described him as the fourth man in the house speaking to her and White and she denied discussing the events after the incident. I make it clear that I have formed no fixed view on the totality of this witness's evidence in terms of the credibility and for the purpose of this application I make it clear that I would have reached the same conclusion even had her evidence been dismissed by me.

(7) Emma Thompson describes a man at address A in Harryville that evening wearing tinted glasses and speaking to her friends about them being young and looking like a kindergarten – a phrase which Ms Macaulay alleges the accused used to her earlier on in the street.

[7] This material satisfies me that I could not say at this stage I was convinced that there are not circumstances in which I could properly conclude that the accused was present in address A in Harryville at the relevant time and attacked Michael Reid.

[8] I consider there is evidence before me of the necessary intent to kill as follows.

[9] The nature of the attack on Reid – the use of a ligature to attempt to strangle him, lacerations with a knife to his body and a decision to cut up his body by the assailants after he feigned death all would suggest an intent to kill. This ties in with the accused's brother already admitting an intention to kill although of course this does not fix Aaron White necessarily with that intent.

[10] Mr Reid claims they said:

> "We are going to kill you, you Fenian bastard and you are going to die".

[11] The ancillary statements which Agnew says the accused made to Aidy Mitchell are clearly relevant in this regard as they indicate an intent to kill.

[12] The statements which Ms Macaulay said she heard the accused making to Mitchell were also relevant on this question of intent.

[13] Mr Mateer contrasts all this with the assailant saying, "Oh shit we have killed him", the lacerations not being keep wounds and the possibility that the knives could have been plunged into his organs if they wished. Mr Murphy counters this by postulating the ambiguity of such a phrase – had the victim "died" before they intended? – compared to the unequivocal nature of the earlier murderous sentiments.

[14] Weighing all this evidence up I am satisfied that the evidence relied on by the prosecution is not so weak or so discredited that it could not conceivably support a guilty verdict. Having asked myself whether I am convinced there are no circumstances in which I could properly convict, I have concluded that such circumstances do exist on the evidence before me. Accordingly I reject the application of the defence at this stage.