Neutral Citation no. [2005] NICC 28 | *Ref:* **DEEC5244**

Judgment: approved by the Court for handing down | *Delivered:* **28/06/05**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

THE QUEEN

- v -

GARY DAVIDSON, ROBIN NEESON AND GILLIAN ROSE AGNEW

CROWN APPLICATION TO ADMIT IN EVIDENCE AGAINST THE ACCUSED THE TRANSCRIPT OF THE EVIDENCE OF D AT THE PREVIOUS TRIAL OF THE ACCUSED IN 2004

DEENY J

Introduction

[1] Gary Davidson, Robin Neeson and Gillian Rose Agnew were jointly indicted for the murder of Christopher Whitson ("the deceased") in the carpark of a nightclub called Lush beside the Golf Links Hotel, Portrush, on 4 August 2002. An important witness against the first two accused was a man to whom I will refer as witness D. He worked part-time as a door steward for the proprietor of the nightclub and was on duty on the night in question.

[2] The accused were tried before Lord Justice Nicholson and a jury at Ballymena on 27, 28, 29 and 30 September and the 4, 5, 6 and 7 October 2004 during which time some twenty prosecution witnesses were called to give evidence.

[3] D gave evidence and was cross-examined on 4 and 5 October 2004. He was followed as a witness by a man to whom I shall refer as witness M, who gave evidence on 5 and 6 October 2004. Although he had earlier identified the accused at a police identification parade his evidence in chief for the Crown did not assist the prosecution. In cross-examination he went further

and expressly gave evidence that Mr Neeson was not present at the scene of the fatal assault upon Mr Whitson in the carpark of the club.

[4] Mrs Tessa Kitson, Junior Counsel for the prosecution sought to re-examine him on some of these points. Mr Charles Adair QC for the defendant Neeson objected and she did not press the matter.

[5] Lord Justice Nicholson appears to have formed the view that there might be something untoward behind M's exoneration of Neeson. At the end of the re-examination he directed the jury to retire and he then proceeded to put a number of questions to M. Defence counsel characterised this as cross-examination of the witness by the judge and Crown counsel did not dissent from that description.

[6] Furthermore at one point in the course of this questioning of the witness by the judge the learned judge called for the investigating officer in the case. A detective came forward and he was directed by the learned judge to go to the home of the witness M and interview his wife with a view to establishing whether M was telling the truth about his lack of friendship or familiarity with the accused Robin Neeson. He subsequently directed M not to return home himself but to remain in the presence of the court. At the conclusion of the judge's questioning of M the senior counsel for Robin Neeson immediately objected to what had taken place. He submitted that what had occurred was unprecedented, including the cross-examination of a witness by a judge to discredit that witness. The judge was invited by counsel to discharge the jury and recuse himself. Mr Weir QC, senior counsel for the prosecution, did not feel able to stand over what the judge had done.

[7] The following day 7 October Lord Justice Nicholson acceded to this application to recuse himself and discharge the jury but without giving any reasons for his decision.

[8] The trial of the three accused was then re-listed for the following Monday 11 October 2004 before myself. While I was swearing a jury in another murder trial counsel for the Crown sought to consult with their two principal witnesses D and M. Unfortunately they found both of them in a state of considerable distress. Although both were described as robust middle aged men who were, indeed, working as "doormen" at this nightclub at the time of the fatal incident, both were very upset at the prospect of giving evidence for a second time. One showed signs of hypertension, which he suffered from and angina, and the other of considerable psychological distress. In the event they were both taken to Antrim Hospital. They were released after being examined by doctors. The case was adjourned to the following day. On that occasion the prosecuting counsel produced a short note from one witness indicating that he was unfit to give evidence and promising a further report with regard to the other witness. He applied to

adjourn the case for a month to allow for the recovery of the two men. He described D's evidence as "by far and away in a sense the most important evidence from the Crown's point of view." He did however indicate that D had said he was not prepared to give evidence again. I heard evidence from a Detective Constable Adrian Clarke at the request of the prosecution. He had witnessed the condition of the two witnesses on the previous day. I noted that witness D was an essential witness for the prosecution who had identified two of the accused at identity parades and had given evidence against them. I adjourned the matter until Friday 15 October to allow more information to be obtained with regard to the fitness of the two witnesses. In light of the information then obtained I further adjourned the matter until the month of November.

[9] The Crown considered on application to the court for a subpoena to compel the attendance of witness D, in particular, who had indicated an unwillingness to give evidence. However in the light of the medical advice received, they, quite properly, formed the view that they should not press the court for the grant of a subpoena in the circumstances. Rather they concluded that they might in time obtain the willing assistance of the two witnesses but that that might not transpire because of their unfitness to give evidence. They therefore wished to apply to the court under the Criminal Justice (Evidence etc) (NI) Order 1988 to give in evidence statements or other documentary evidence in the absence of the witnesses. In support of that application the Crown provided a skeleton argument dated 25 November 2004. The defence were to have furnished replies within two weeks but in the fluid and unusual circumstances existing asked for an extension of time in which to do so. I granted these extensions of time and skeleton arguments on behalf of each defendant were subsequently served. The first hearing of the application ultimately took place on Friday 14 January 2005 although it was not concluded on that occasion. In dealing with these matters I am conscious of the fact that neither witness D nor witness M have committed any offence. They were citizens who were co-operating with the authorities in giving evidence regarding the most serious of offences. It appears to me that they enjoy rights under the European Convention on Human Rights to privacy which I should respect. I will therefore confine my remarks to a very short summary of a relatively protracted series of hearings.

[10] Under Article 3(2) of the Criminal Justice Order 1988 the Crown had to satisfy the court that the person who had made the statement which they wish to have admitted was by reason of his bodily or mental condition unfit to attend as a witness. I received a number of written medical reports in this case. I also heard oral evidence from two medical practitioners of consultant status. They had seen the witness on several occasions. One such consultation was closely proximate to my decision on this point, so as to enable me to make a decision under Article 3(2)(a) ie that "the person who made the statement is …by reason of his bodily or mental condition unfit to

attend as a witness." They were examined in chief by Crown counsel and cross-examined by counsel for the defence. Counsel for the defence were given an opportunity to take instructions from a consultant in the same field to assist them in their task. It is right to say that witness D declined to be examined by the defendants' consultant but that given he had been seen by two other consultants in the same field and given the opportunity to cross-examine on the points that were put I was able to reach a conclusion. That conclusion was that witness D was indeed unfit to attend as a witness at the trial. Witness M made a better recovery from the stress of being asked to go through the rigours of a trial for a second time and ultimately was available to give evidence although, in the events, this was not necessary. The medical evidence regarding him differed significantly from that regarding witness D. I was firmly advised that forcing him to give evidence gave rise to a significant risk of the utmost gravity to him.

Admissibility of documentary evidence in criminal proceedings

[11] Having ruled on the unfitness of the witness, I then turned to consider whether any statements of his, in whatever form, could be admitted under Article 5 or Article 6 of the Criminal Justice (Evidence etc) (NI) Order 1988.

[12] Article 3 of that Order provides that: "a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by them would be admissible" subject to it satisfying certain other paragraphs or sub-paragraphs. One of these is Article 3(2)(a) ie that the person who made the statement is…. "By reason of his bodily or mental condition unfit to attend as a witness." This is the situation with witness D, as I have found.

[13] I noted that the application also complied with Article 3(4) in that it is not rendering admissible a statement that would not be admissible under Article 74 of the Police and Criminal Evidence (Northern Ireland) Order 1989. This is not a situation covered by Schedule 1(3A) to the Criminal Appeal (Northern Ireland) Act 1980 but it is perhaps helpful to bear in mind that that provision enables a judge on a re-trial to have a transcript of the shorthand notes of the evidence given by any witness at the original trial read as evidence if he is satisfied that the witness is dead or unfit to give evidence or to attend for that purpose or that all reasonable efforts to find him or to secure his attendance have been made without success.

[14] This points to the important point of relevance in this case that the witness in question did give evidence. It is not merely that he made statements to police, important although that in itself may be. He gave evidence in open court before a judge and jury and was cross-examined by senior counsel on behalf of the defendants. The availability of the transcripts

of his evidence should logically be readily more admissible in evidence at a further trial than statements or depositions by the police would be.

[15] It also inclined me to the view that the proper thing is to have the transcripts only and not the original police statements or depositions. Counsel assented to that suggestion from the court. To read both to the jury would be unfair to the defendants as the mere repetition might be misunderstood as corroboration.

[16] One important aspect of this matter is, of course, that these statements and transcripts will deal with issues of identification. They will of course have to be accompanied by any warning that is appropriate in the circumstances, if they were admitted.

[17] The risk of unfairness to the accused is lessened to some limited degree by the recovery in health of Mr McKay whose evidence was not ultimately helpful to the prosecution but to the defence. Inter alia his presence will mean that only one long piece of transcript will be read to the jury and not two. The defence had earlier expressed concern at the combined effect of both men being absent.

Burden and standard of proof

[18] One issue that was debated before me on the submissions with regard to the application was the appropriate standard of proof. It was not in dispute that the burden of proof was on the party seeking to adduce the statement under the 1988 Order. In this case that was the prosecution.

[19] The first matter on which they had to satisfy the court was that witness D was in fact "by reason of his bodily or mentally condition unfit to attend as a witness," in accordance with Article 3(1) and (2)(a) of the 1988 Order. As previously indicated I was so satisfied. Although it is not so expressly set out in the Order it was common case that the Crown had to satisfy me beyond reasonable doubt that he was so unfit: see R v Case [1991] Crim. LR 192. (Court of Appeal in England, Criminal Division).

[20] It was also common case that there was an onus on them to satisfy me in regard to Article 6 of the 1988 Order for the purposes of admitting the transcript of the evidence of witness D. There was dispute however as to the standard which they had to achieve. Mr McCrudden QC for Davidson submitted that the standard of proof was again beyond reasonable doubt. When I asked him of what the Crown had to persuade me to that standard he said that the Crown had to persuade me to a high standard in the interests of justice to displace the presumption against hearsay evidence. (I observe that this discussion took place on 7 April 2005). He made the point that the normal burden of proof on the prosecution in a criminal trial was beyond

reasonable doubt and that that should apply here also. Mr Adair QC for Neeson felt that this issue was a difficult one that I might not need to resolve. Prosecuting counsel submitted that that was not the appropriate test but that I was required to carry out a balancing exercise. Under Article 6, which it was agreed was the Article which the Crown did have to satisfy, it is provided that the statement:

> "Shall not be given in evidence in any criminal proceedings without the leave of the court…".

[21] To stop there, that makes it clear that there is indeed an onus on the party wishing to prove a statement under the Article. It goes on:

> "…. and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard –
>
> (i) to the contents of the statement;
> (ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and
> (iii) to any other circumstances that appear to the court to be relevant."

[22] I begin by observing, with relation to the possible distinction between Neeson and Davidson, that the Order expressly contemplates a ruling in a case of multiple defendants. That is obviously wise. It does seem silent on the particular difficulty the court faces here ie the admission of the transcript, as here, against one defendant but not another. I think that possible difficulty here is resolved by the fact that if I refuse the Crown application against Neeson he will not be before the court at all. If I accede to it with regard to Davidson it will be on the basis that the risk of unfairness to him is small and is outweighed by the interests of justice.

[23] I observe that Article 6(ii) is in the same terms as Article 5(ii)(d) and indeed Article 10(iii) of the same Order. Prosecuting counsel submit that what is clearly envisaged by the statute here is a balancing exercise which is inconsistent with the application of the standard beyond reasonable doubt.

[24] I observe that the Order is not worded to say that the statement shall not be admitted in evidence unless the court is satisfied that there is no risk of unfairness to the accused. If it did say that the application of the criminal standard might well be applicable but Parliament has laid down a different test.

[25] I think that a valid distinction can be drawn between the first issue which I had to consider ie unfitness to attend as a witness and the second issue. The first issue is ultimately a decision or assessment by the court of a factual position ie is somebody unfit by reason of their bodily or mental condition. Either they are fit or they are not fit. The same cannot be said of the test here which does expressly permit the court, having had regard to a risk of unfairness, nevertheless to form the opinion that the statement ought to be admitted "in the interests of justice."

[26] The matter is not one on which there has been any definitive ruling of law but I will refer to a number of authorities where some assistance can be garnered.

[27] In R v Thomas [1998] Crim.LR 887 the Court of Appeal considered the Strasbourg authorities and applied them to the statement made by a witness in fear which was admitted in evidence. Roch LJ, giving the judgment of the court concluded (at para.41):

> "In our opinion, the narrow ground which the trial judge has to be sure exists before he can allow a statement to be read to the jury coupled with the balancing exercise that he has to perform and the requirement that having performed that exercise he should be of the opinion that it is in the interest of justice to admit the statement having paid due regard to the risk of unfairness to the accused means that the provisions of Section 23 to 26 of the 1988 Act are not in themselves contrary to Article 6 of the Convention."

[28] The narrow ground would appear to be that the witness was not available to give evidence under Article 3. The reference to the balancing exercise is clearly helpful to the Crown submission on the standard of proof.

[29] The above passage was quoted with approval by Sir Robert Carswell LCJ, as he then was, at paras.17 and 18 of R v Singleton [2004] NI 21 at p.79. The views of the Lord Chief Justice there, as they emerge, appear to be consistent with his judgment in the decision of the court in R v Allen and Others Application [1998] NI 46.

> "Having assessed the quality of the evidence from the contents of the statement, so far as it was feasible, the court then had to carry out the balancing process involved in considering whether it was in the interests of justice that the statement should be admitted." (P.54(f)).

[30] That seems inconsistent with Mr McCrudden's submission. Mr McCrudden relied on a passage in the judgement of Stuart Smyth LJ on behalf of the Court of Appeal in England in Patel (1993) 97 Crim.App.R. 294 at p.299:

> "It is important to notice that the onus is upon the party seeking to admit the document to satisfy the court that it should be admitted in the interests of justice, otherwise it must be excluded. No doubt at any rate so far as the situation here is concerned, where it was the defence who were seeking to have the document admitted the court merely had to be satisfied on the balance of probability."

[31] He drew from that the inference that the standard would be higher if it was the prosecution. But I have to say that it is also consistent with the view that the Lord Justice was leaving open the possibility that the standard for the prosecution would be higher without giving any indication of his view upon that. Reference was made to R v Raddick [1999] 1 Crim.App.R. 187. It is right to say that at p.199 May LJ records that the trial judge said that the Crown had proved the matter to a criminal standard before him. But he does not expressly adopt that as the correct standard. Indeed at the conclusion of this judgment at p.203(e) he says that the court concluded the matter "on balance."

[32] I therefore conclude in the light of the existing Article 6 and the authorities and observations above that the process which I am carrying out is a balancing exercise in accordance with the statute.

[33] I do not have to be satisfied that there is no risk at all of any unfairness to the accused. But the onus is on the party wishing to adduce the statement in evidence to satisfy the court that the statement ought to be admitted in the interests of justice. I think it unlikely that any court would do so if the risk of unfairness was such as to lead to a finely balanced decision. Having considered the relevant criteria, the court would wish to be clearly and firmly of the opinion that the interests of justice required the admission of the statement.

Quality of Evidence

[34] One notes that the expression the "quality of evidence" is not in the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988. However it has been considered as a matter that the court should take into account in a number of leading authorities.

[35] Before considering the four headings under which the defence sought to attack the quality of the evidence of witness D, I remind myself that the Crown will ultimately have to satisfy the jury beyond reasonable doubt to obtain convictions against any of the accused. As has been said that does not involve the Crown proving every single element of the case beyond reasonable doubt. The prosecution case is of the nature of a rope made up of different strands rather than a chain made up of different links. Some of the strands may be stronger than others.

[36] In the case of Neeson the Crown case consists of a single strand, the transcript of the evidence of witness D. If any significant weakness is identified in that strand it is most unlikely that a jury would be satisfied beyond reasonable doubt of his guilt. To apply the test annunciated in the 1988 Order the risk of unfairness to Neeson would outweigh the interests of justice ie a very unlikely chance of conviction, although that would not be the only factor to take into account in considering the interests of justice.

[37] Both Mr Weir QC in opening the matter and Mrs Kitson in closing it for the Crown submitted that, if necessary, a distinction could be drawn between Neeson and Davidson. The evidence of witness D would be the principal strand in the rope of the Crown case. But there is, at least, one other strand to add strength to it, that is Davidson's own admission to the police that he was not only present at the fatal assault upon Christopher Whitson but that he himself kicked him at one point. Mr McCrudden QC validly points out that that admission was only of a kick on the lower leg somewhat in self-defence. He also points out that the post mortem report would indicate an abrasion just belong the right patella which might be consistent with that single kick. Nevertheless it does support D's identification of Davidson at the scene. Furthermore is it an admission by Davidson that he was involved in assaulting the victim, while, perhaps, nevertheless minimising his role?. This a jury could consider.

[38] The jury may have an opportunity depending on the decision of Mr Davidson, to assess his own evidence about this limited admission on his part.

[39] A jury would be able to put in the balance the attack on the quality of witness D's evidence against the fact that he was clearly right in saying that

Davidson was there. The issue then would be what Mr Davidson did and what the legal significance or consequence of his actions and his intent were.

[40] There are a number of relevant authorities of appellate courts which are of assistance to the court in this matter. Neill v North Antrim Magistrates' Courts [1992] 4 All ER 846 at 855 is a decision of the House of Lords arising from this jurisdiction. It related to a decision of a Resident Magistrate to commit the accused for trial on the basis of statements. The principal issue was whether he could take second hand hearsay evidence of the fear of the Crown witnesses upon which the Crown relied for the admission of their statements under Article 3 of the Criminal Justice (Northern Ireland) Order 1988. However in the course of his judgment with which the other members of the house agreed Lord Mustill said at p. 855;

> "…Even on a committal, as distinct from a trial, the court would be cautious about admitting in evidence and founding a decision upon documentary evidence of identification…where this is the principal element in the prosecution case."

[41] It can be seen that on the basis of this dictum a distinction could validly be drawn between Robin Neeson and the other accused where there is corroboration of their immediate involvement in an assault upon the deceased. There is no such corroboration nor even supportive evidence with regard to the accused Neeson.

[42] The matter was also considered by the Court of Appeal in Northern Ireland in Re Allen's Application [1998] NI 46 upon which the defendants relied. The judgment of Sir Robert Carswell LCJ is at many points of considerable assistance to the court. One particular short passage might be quoted from p54;

> "It is obvious that the possibility of assessing the credibility of a witness from his witness statements must be very limited…".

[43] Furthermore he followed the view of Lord Mustill in Neill's case that any court in applying Article 3 must be cautious in admitting such statements.

[44] I observe that the prosecution here must be in a stronger position in having the transcript of the evidence of the witness who has been subjected to cross-examination as well as examination in chief than they would be if they only had statements to the police. By definition the latter would not have involved the witness being subject to any critical or hostile questioning although, no doubt, the police would seek to ascertain the truth of what was

being said to them. But the fact that the witness was cross-examined by leading counsel highly experienced in criminal trials must add weight to the text which it is sought to admit in evidence.

[45] I also refer to the case of R v Singleton [2003] NICA 29 which is again a judgment of Sir Robert Carswell LCJ in our Court of Appeal.

[46] There is a helpful review of the jurisprudence of the European Court of Human Rights which lead the Lord Chief Justice to conclude, as the Court of Appeal in England had done in Gokal that the Criminal Justice Order 1988 (and its English equivalent of the same year) conform with the European Convention on Human Rights. I will not rehearse that matter in detail but it is interesting to note that in some European legal systems defendants have no right to cross-examine witnesses for the State at all.

[47] I bear in mind other dicta of the Lord Chief Justice expressed in this case eg at para 18;

> "…The prosecution case must not be founded solely or to a decisive extent upon the statement admitted."

It is relevant to note the Lord Chief Justice went on to point out that in the instant case there was "other evidence directly implicating the appellant." Again this points to a distinction to be drawn between Neeson and Davidson. The prosecution case against Davidson is founded solely on the evidence of D in effect. There is no other evidence implicating him in the offences with which he is charged.

[48] Davidson on the other hand has made admissions the accumulative effect of which is acknowledged by his counsel to amount to kicking Mr Whitson once on the leg on the ground. That puts him at the scene taking part in an assault with at least one other person on a person who died. It seems to me to create a very clear division between him and the accused Neeson who consistently denied any involvement in the assault upon Mr Whitson and who was not seen by any other person to take part in that assault. Indeed M expressly excluded him from the assault in his evidence.

[49] Appellate courts are often slow to interfere with the decision of a judge at first instance or a jury which has had the opportunity of hearing and evaluating the evidence of a witness. This is despite the fact that the appellate court is likely to have a full transcript of that evidence.

There is a recognition that an element of the judgment of the reliability of witnesses goes beyond the mere reading of a transcript. To see and hear the witness gives the original tribunal an advantage.

In this context the jury will not see or hear the witness D.

Consideration

[50] I heard submissions for 3 days on this matter from counsel for the prosecution, Davidson and Neeson. The Crown accepted the contention of counsel for Ms Agnew that D's evidence did not refer to Ms Agnew and that it was not relevant to her. As D did refer to a female at one point it was agreed that I should tell the jury to ignore his evidence as it did not refer to her.

[51] At one point it was suggested by Mrs Kitson for the Crown that the evidence of Darren McCabe was supportive of the case against Davidson. It does not seem to me that this is the case. He clearly described a blonde haired man taller than the injured party. From the evidence of other witnesses and the contentions of counsel it seems clear that this was David Gaston and that he was the initial figure who knocked down Christopher Whitson. He was not before the court. However Mrs Kitson expressly accepted on behalf of the Crown, when asked, that Mr Adair QC was right in saying that it was Gaston whom McCabe was describing. McCabe does describe another witness in his deposition whom he says "appeared to be a good bit older possibly 35 years, tall and skinny. He had dark hair, short and a moustache. He had a white shirt and black trousers." This does not seem to be Davidson. He has a distinctive appearance with prominent ears. I do not think he could be described as skinny although he is clearly tall. Reading the evidence of Mr McCabe the second man is said to have kicked Christopher Whitson in the face as well. (P.252 Q.28 A.29) "I think so, yeah." McCabe accepted in cross-examination from Mr McCrudden at p.258 that he could not have failed to see Davidson if he was there. In answer to questions from the judge Mr McCabe could not exclude the fact that the black-haired man was wearing a dark tea-shirt with a white 7. That does not seem to me to justify saying that his evidence is supportive of the Crown case against Davidson.

[52] I am enjoined by the authorities including R v Allen to consider the quality of the evidence with the Crown seeks to admit. I will briefly summarise some of the points that seem to me relevant there.

(a) In favour of the Crown is the fact that witness D was sober on this occasion. He was a door steward or bouncer at these premises. He is a man of mature years.

(b) There appears to be no suggestion that his eyesight was defective. This was in the early hours of the morning but in a car park. From the photographs it would appear that there were a number of lights but

they were around the perimeter of the car park by and large. This issue of lighting would therefore appear to be neutral.

(c) It has to be said that Mr Davidson is a tall man of distinctive appearance and one would have thought his appearance might well stick in the memory, particularly as he was wearing a tea-shirt with a distinctive 7 on it.

(d) Witness D did pick out Mr Davidson at a properly conducted identification parade.

(e) This is not merely the question of putting in the statement of D, but as all counsel agreed, if anything was to go in it ought to be the transcript of his evidence at the previous trial. That transcript will include his cross-examination by a number of senior counsel with great experience in criminal trials.

(f) Although it is strictly speaking not relevant to the quality of his evidence one must take into account that Davidson has admitted a kick at the deceased's lower leg albeit in some way in self-defence.

[53] Against that the defendants raise a number of issues relevant to the quality of this evidence, and generally:

(a) This is a jury trial not a trial by judge alone. Mr McCrudden at p.10 (paras. f and g) of his skeleton argument makes the following submissions.

> "(f) The Defendant, in having to try to controvert D's hearsay statement, would be put in the position of having to conduct a prolonged, complex, unwieldy and unreasonably onerous administrative exercise of statement, comment and interpretation of the printed word in it's contextual setting. Counsel would not be permitted to offer any suggestion or opinion as to the manner of giving of any answer.
>
> (g) There exists the distinct danger of a jury (or juror) becoming confused or exasperated with what may be perceived as repeated attempts by Defence Counsel to engage in a transcript-based points scoring exercise and the jury (or a juror) may become over burdened with the volume of transcript pages as the Defence may not wish all (or any) of the transcript to be made available to the jury. If it does, is the prosecution to have some form of 're-examination' facility afforded to it from the document?"

It is difficult to make transcript based points to a jury. I think there was something in this but I would not place undue stress upon it. Certainly a judge sitting alone would find it easier to refer back and forward between different pages of a transcript than members of a jury. However counsel would have the opportunity, and a judge would be likely to draw attention in a more convenient manner to any conflicts that were to be found in the evidence.

(b) There is an onus on the Crown to satisfy the court under Article 6 although the court is carrying out a balancing exercise.

(c) With regard to the exercise of my discretion rather than the quality of the evidence, one does have to acknowledge some unease at the thought of one or more of these accused being convicted of murder on the evidence of witness D while that witness is alive and living and possibly even working in the very county where the trial is taking place. I have accepted that there is a grave risk to his health if he were forced to give evidence and that he is indeed unfit to give evidence in the opinion of two consultant medical practitioners. But one is still left with a sense that this case does differ from a case where the witness had died or disappeared abroad and that that is a relevant circumstance in the case within Article 6(iii).

Contents of evidence

[54] Article 6 expressly requires the court to have regard:

> "(i) to the contents of the statements."

It is agreed that that applies to the contents of the transcript of the evidence. Defence counsel attack this in a number of regards. I will not deal with every point they make but with some salient points.

When interviewed by the police about this matter Davidson marked on an aerial photograph the point B to which he said that he had walked with the boys from Broughshane after they had been put out of the club. The defendants would be among this group. However at the trial he was asked to mark this location on a scale map prepared for the court. He marked it at JND2. This is about 80 feet from point (B) which is obviously significant in the circumstances.

On the same occasion with the police he was asked to mark where he had been when he saw the fatal fight break out. He marked this at (D) on the ariel photograph. At the trial he marked the location

nearly 80 feet away and on the far side of a row of cars compared to his earlier marking.

[55] At volume 2 of the transcript pp.70-74 he says his movements to the police were wrong and to the court correct. But counsel points out that at volume 2 pp.161-167 he reverts to saying that what he said to the police was correct and to the court in evidence in chief incorrect. One has to express a degree of sympathy with the witness on reading the transcript of this cross-examination because, as counsel for the prosecution pointed out, both senior counsel for Davidson and Lord Justice Nicholson actually misled him several times by saying that he had said he was at such and such a place citing the wrong letters or numbers in so doing. I would not place undue stress, therefore, on his confusion in cross-examination about these matters.

[56] I am conscious that this detailed criticism by Mr McCrudden of D's evidence was not traversed in detail by either Mr Weir in opening the Crown application or Mrs Kitson in closing it.

[57] These changes of movement are important as showing a lack of consistency in his memory of what happened but also because if he was at (D) rather than JND4 when the fight broke out he would definitely have had a less good view of what was happening. Counsel points out that he only arrives at the end of the fight. If he is coming from (D) he is coming from behind and like Mr McCabe would not have been able to identify the faces of the persons kicking the deceased.

[58] At times he refers to the incident lasting some 2 minutes but he agreed in cross-examination with Mr Adair QC that it must have been close to 1 to 2 seconds giving his alleged nearness to the incident ie 3 or 4 yards and his claim that he moved immediately to break it up. There is an inconsistency therefore not only of location but of time. Mr McCrudden points out a further inconsistency in that D on 11 August 2002 when making a statement to the police marked (E) on the photograph as the place where he first saw Christopher Whitson outside the club "but it could have been slightly before this." He is again about 60 to 80 feet from the place that he marked at the trial therefore making a third important discrepancy in the defence's submission. Again one has to say that both judge and counsel misled the witness at times so one places less stress on the fact that he gets confused in cross-examination as opposed to these conflicts between evidence in chief and his police statement. But one is left wondering how a jury is to follow these points let along make a decision on them. It needed some time to explain these matters to me leafing back and forward through the transcript having read the papers at an earlier stage. Will a jury really be able to draw a safe conclusion about these points? Will they be able to do it without seeing the demeanour of the witness?

[59] The detail of Darren McCabe's description of the assault on his friend, which he says he saw clearly from start to finish certainly differs from that of D ie that both men were side by side and were kicking at his face whereas D has Neeson at the face and Davidson at the back of the head as the unfortunate Mr Whitson lay on the ground. A point upon which Mr McCrudden laid considerable stress was an alleged conflict between D's description of the kicking of the injured party and the findings of Professor Jack Crane at his post mortem. He said the description given by D of the head being kicked back and forward should have meant that the face had very severe injuries but that this was completely incompatible with Professor Crane's finding that the deceased:

> "Had little in the way of facial injuries, just a little bruising around the eyes which might even have been as a result of blood tracking down from the fractured skull."

However I think the answer to that particular point, although counsel for the prosecution did not point this out, is that the victim has, according to the same report:

> "bruising to the backs of both hands with that on the back of the right hand associated with fractures of two of the finger bones. These injuries could have been caused by his hands having been kicked or stood on, possibly if he had been attempting to protect his face in the defensive gesture."

I therefore reject this as an inconsistency or weakness in D's evident. I might also add that it would be inconsistent with Darren McCabe's observation of the incident as well.

[60] Mr McCrudden QC and Mr Adair QC both pointed strongly to a further very significant factor. The general manager of the establishment outside which this incident took place, Kelly's Hotel in Portrush which included the Lush nightclub, gave evidence at the trial and said :

> "I couldn't prove how Mr Whitson sustained his injuries after speaking to various people. I wasn't aware whether it was accidental or deliberate so I spoke to Martina and returned to the pay desk and phoned for the ambulance."

Stopping there it is very hard to see how he could have spoken to witness D and then been in that state of ignorance, given that D was later to tell the police and tell the court in a detailed fashion of witnessing exactly how Mr Whitson had come by his injuries. I observe that the video film was handed over but was not apparently of assistance.

[61] In further evidence Mr Wilson confirmed that he kept a journal on the night in question. The relevant extract was proven in court. It confirms that he spoke to D and others. "No one was aware how" Mr Whitson had sustained his injuries. Mrs Kitson suggested that D may have chosen not to disclose what he knew in case his superior blamed him for not preventing the incident. It is a possible explanation. However it was not one that D himself gave. Furthermore he would still have been speaking untruthfully to his superior and saying he did not know how Mr Whitson had sustained his injuries when he did. As Mr Adair QC put it he either lied to Mr Wilson or lied to the court.

[62] Admittedly at p.365 I see, although my attention was not directed to it, that Mr Wilson in cross-examination from Mr McCrudden had learnt from D that the deceased had lunged out with a karate kick:

> "Q: Did he tell you that he had found Mr Whitson knocked out after the incident? A: Yes."

It does seem clear from this that at that time either D had not seen the sequel to Mr Whitson's attack on Gaston and whoever else was with him and that therefore his evidence is invented or that he had seen it and deliberately withheld that information from his superior and told him, untruthfully, that he did not know how Mr Whitson had been injured.

[63] Article 6(ii) requires the court to have regard:

> "To any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not intend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."

In R v Gokal [1997] 2 Cr.App.R.266 the Court of Appeal thought that controversion could be established in a number of different ways eg cross-examination, the evidence of the accused, the evidence of other witnesses or an attack on the credibility of the witness whose statement has been admitted. There has been cross-examination here. The accused could give evidence in accordance with his police statement in controversion also. However I was informed by counsel that they have not and did not have any witness to the accident who could independently controvert D. Nor, he pointed out, was it easy in the circumstances to attack his credibility without him being in the witness box. Nor could they cross-examine him if in the course of the re-trial, as might well happen, a new discrepancy appeared between his transcript

and the evidence of other witnesses. Not all of the Crown witnesses had given evidence in the first trial before it was aborted."

The defence had objected strongly to an implicit suggestion in the Crown application that the questioning of M by Lord Justice Nicholson should not be included. They also objected to the questioning of D by Lord Justice Nicholson being included. Clearly that view was correct.

[64] There was some debate as to whether this was truly identification evidence rather than observation evidence. Mr Davidson had admitted to being there. I think one has to say in fairness to the accused, that it is akin to identification evidence in that the issue is what D saw Davidson doing, if anything. Sometimes in identification evidence the act of the suspect is clear ie firing a shot or ramming a car. The issue would then turn on whether the person carrying out that act was the accused in the dock. Here the accused, Davidson, admits to being beside Christopher Whitson, opposite his lower leg. Is that all that D saw or did he really see him kicking him at the back of his head? I am reminded of the injunction of Carswell LCJ in R v Allen that the court should adopt a cautionary approach where the principal evidence was to be admitted in this way and related to identification. I think a cautionary approach would have to acknowledge that this evidence should be treated as of the nature of identification evidence ie something that depended on the honesty and reliability of a witnesses' visual observations. It is not the case that D knew Davidson. (I note that M did know Neeson and expressly exculpated him in the course of his evidence).

[65] It might be argued, as the Crown did, that a jury could consider these various infirmities in the evidence of D and nevertheless be satisfied that he was an honest, reliable witness. I have to say that I doubt whether that could be true in Neeson's case and I am inclined to think that Mr Adair QC is right in saying that he would have been entitled to a direction at the end of the Crown case. But in the case of Davidson I consider that a direct issue arises. It is whether a new jury could really assess these points and safely reach a conclusion without seeing the demeanour, body language, tone of voice and manner of the witness D. I will return in a moment to Mr Adair QC's comments upon that.

[66] For now I draw attention to the case which was the only authority opened by the Crown to me in opening this application ie R v Lockley and Corah [1995] 2 CAR 554. One of the witnesses in a murder trial was Julie Freestone. She had been in jail with the defendant Corah on demand. She gave evidence that Corah had made certain admissions when they were sharing a cell. The trial was aborted because of illness. Freestone failed to appear at the second trial because she had absconded from an open prison. She had apparently got into the open prison because of her willingness to

give evidence against Corah. She had been interviewed on television and admitted she was a shoplifter. In the words of the Court of Appeal there was:

> "Material evidence to demonstrate that part of her evidence was untrue."

Cell confessions were, it is said, always treated with caution. In those circumstances the court concluded as follows:

> "It was of great importance that the jury should have had the opportunity to assess the demeanour of the witness in question. The potential unfairness to the appellant was such as to require the exclusion of the transcript in the interests of justice.

[67] It seems to me that she was a weaker witness than D or at least her evidence was less likely to be believed for the reasons set out above. But on the other hand the Crown had considerable other evidence in the case of Lockley and Corah which they do not have here.

[68] Mr Fowler, who completed the submissions on behalf of Mr Davidson in the unavoidable absence of Mr McCrudden, laid emphasis on the lengthy, complex and unwieldy exercise, as he put it, of commenting on these various discrepancies in D's evidence. I must acknowledge that I have not set out all of them here – some of them were quite hard to follow and were matters of detail which really may not have amounted to very much. But counsel's point was that any difficulty that I might have would be a fraction of that experienced by a jury.

[69] Furthermore counsel could not give evidence as to how the words had been said by D eg hesitantly or aggressively or after a pause.

[70] Mr Fowler relied on the judgment of Sir Brian Hutton LCJ, as he then was, in R v Quinn [1993] NI 351. At first instance the judge admitted the evidence of three lay witnesses, concluding that they were in fear. The judge was sitting alone hearing a scheduled trial. Mr Fowler pointed out that the learned judge at p.361 said there was:

> "Nothing in the statements to raise any question as to their reliability."

He thought the quality of the statements was excellent. The key members of the Hagan family had a clear view of a car being removed. Each statement supported the other.

[71] It must be acknowledged that the court faces a very different situation here. Admittedly we have a transcript not a statement but there is confusion about locations on D's part in three different respects. There is confusion about whether his first set of locations is correct or his second set. There is the admission that it was difficult to remember exactly what had happened. There is conflict with the evidence of Darren McCabe and there is his failure to tell Mr Wilson what he subsequently said to the police he had seen. Furthermore the O'Hagan evidence in the Quinn case was not evidence of identification.

[72] Mr Adair QC addressed me about the differences between Article 5 and Article 6 but counsel for the prosecution has expressly accepted that I must meet the requirements of Article 6 where the onus is on the Crown. In any event the Crown would be in a position, I consider, to meet the criteria set out at Article 5(ii) at (a), (b) and (c) which only leaves (d) which is to the same effect and is repeated in Article 6. He laid stress on the onus on the Crown while not pressing the view that I had to be satisfied beyond reasonable doubt. He drew attention to the contrast or conflict in D's evidence between this happening over a few minutes and it happening over a few seconds. He noted that as in the leading identity case of Turnbull the court was dealing with a fast moving situation taking place in indifferent light. He drew attention with regard to Mr Wilson that D had said that he had told Wilson all the information he could . Yet that omitted any reference to the two accused against whom he was now giving evidence in a murder trial. Therefore D was lying on one occasion or the other. This was particularly alarming in this case as David Gaston had originally been charged with this murder. Mr Adair made a number of allegations again him only some of which appear in the papers I have seen. As indicated above however, the Crown accepted that McCabe's evidence was that Gaston was the orange blond at the scene seen by McCabe and that therefore this went a very long way to exculpate Mr Adair's client, Mr Neeson, who was also fair-haired. He (Mr Adair) contended that this was a lie on the part of D and not merely an error but was likely to have been designed to take attention away from Gaston. He said it would be very difficult to convey that to a jury in a new trial.

[73] He was concerned about the jury not seeing the demeanour of the witness. When he shrugged as appeared once or twice in the transcript was it a contentious shrug or of another nature.

[74] If D was not lying his failure to tell Wilson what he said makes it a real possibility that he had simply heard gossip that Davidson and Neeson were involved in this and that that is why he identified them but that for some reason not before the court he was keen to clear Gaston who, in Mr Adair's assertion, as in that of Mr McCrudden was really the person responsible. He pointed out that there was considerable confusion as to what was happening

on that night with one or possibly two other fights which may have occurred before or after the fatal incident with Mr Whitson.

[75] One is left wondering how a jury is to decide with regard to D's inconsistencies in changing answers. Whether he has merely been confused by counsel's skills in cross-examination or errors in what was put to him or whether he was confused because he had not witnessed the events he was describing or was indifferent as to whether his account was accurate or not, is a matter difficult to assess without seeing and hearing the witness, as the original jury did.

[76] According to Mr Adair QC, and there is some support for this on the transcript, whenever D got into difficulties in the witness box he became aggressive or shrugged or said he could not remember. It was therefore vital for a jury informing a view about his honesty and reliability to have seen this because it would be difficult for them to form any clear view from the hints from it in the transcript. He contended that the distances involved of some 60 to 80 feet in the three principal discrepancies were very substantial distances and points out that D admitted they were mistakes. He pointed out a further mistake ie that at p.163 D had not recalled that the group he walked down with to B had included Neeson. He had not recalled, as Samuel McKay did, that some of that group had broken away but that that did not include Neeson. At one point (p.194 of transcript) when tasked with whether he saw the young man whom he was walking down the car park with, he asserted that it might be "that he had been walking backwards and facing us." He could not remember whether he had walked backwards. He had only a scanty recollection. How could a jury assess all of this, said Mr Adair QC, without seeing the witness in the witness box. In the course of the cross-examination and at pp.203 – 205 he claims to be 3 to 5 steps away from the incident, which clearly conflicts with his initial statement to the police, he admits that he had only minimal time for identification and observation. This adds to the risk of error or untruth on his part.

[77] When taxed as to why he did not tell Mr Wilson he said "I wasn't thinking straight." He repeated that several times.

[78] I noted a rather curious piece of his evidence at p.215 line 10. Counsel had been asking him about Mr Wilson and he said:

> "At the end of the night when he asked me, he said why did you not tell me it was serious, I said I wasn't thinking straight. There was a lot happened and that was at the end of the night. I seen what I seen and that is the way I seen it."

This does seem to suggest that he had more than one conversation with Mr Wilson on the night in question which exacerbates his failure to tell Wilson what had happened.

[79] Mr Adair QC also drew attention at p.214 to the remarkable situation that B walked down to the car park and shook hands with the persons who he is telling the court he saw kicking Whitson about the head and leaving him apparently unconscious on the ground. If, as he told Mr Wilson, he had not seen how and who had left Mr Whitson in that state, one might understand him shaking hands but why was he doing that if indeed he had seen the vicious assault that he claims to have seen?

[80] Mr Adair QC was in the strong position regarding Neeson that McCabe makes it quite clear that the blonde man was not Neeson and it really leaves one in no doubt about the unfairness of admitting these statements against Neeson.

[81] Mr Adair QC drew attention to the court being ready to admit statements where there was evidence or a reasonable inference that a witness had been intimidated or worse. But that was not this case. D was absent through no fault of the defendants. He was the principal or only witness against the defendants. The quality of his evidence was impaired. He referred me back to a number of authorities to which I have referred.

[82] I have considered Mrs Kitson's answers which concentrated on Mr Adair and Mr Fowler. It is right to say that a certain amount of inconsistency is inevitable in the description of a confused mêlée and would not be fatal. But how are the jury to access it and how does that explain Mr Wilson? She said it was a balancing exercise. She emphasised that Davidson has admitted he was there. She accepted that Gaston was involved in the fatal assault and was the person described by McCabe. She points out that D at times was demonstrating his honesty by admitting when he had made a mistake.

[83] A number of her points do remind me that we are talking about the evidence of a fight in a dimly lit car park in the early hours of the morning almost 3 years ago. She raised the possibility that Mr Davidson may still be at risk from the principal charge on the basis that he was taking part in an joint enterprise when he kicked at Mr Whitson. She also reviewed the authorities to which I have referred. I have also considered the other authorities such as Dragic [1996] 2 CAR 232. I note the point has been made by Roch LJ that the comments of Lord Griffiths in Scott v The Queen do not refer to this statutory test.

[84] She referred to Kennedy v Bower [1994] CR.L.Rev 50. I note this was a case where the injured party had died. (See my comments above about D

living and working in the county). She understandably laid considerable stress on the fact that D had been cross-examined and that they were now seeking to put in the transcript of this evidence and not merely his statement. She proposed to prove the identification parade through independent witnesses, so that was not part of the Crown's application. Mr McCrudden felt that she had brought in new matters and replied but I do not need to deal with his further comments.

[85] I am left in the position of deciding whether it is in the interests of justice to admit these transcripts having regard to:

(1) the contents of the statement. The contents of the statement covers the transcript here and there are significant and valid criticisms of the reliability of the evidence of D as set out above.

(2) the risk of unfairness to the accused. While D has been cross-examined there is a risk of unfairness to the accused in getting across these criticisms to a jury in his absence. There is a risk of unfairness because in a case of this kind it would be important for them to see the demeanour of the witness and hear him which they are unable to do.

(3) to any other circumstances that appear to the court to be relevant. The defence are not at fault here. The Crown would say that they are not at fault either. It is unfortunate the plaintiff is ill. But I confess to some unease on the conviction of somebody on such a serious charge while the witness is still walking about the county, but not heard by the jury.

[86] It does seem to me therefore that it is not in the interests of justice to accede to these applications by the Crown. There can be no doubt about that in the case of Neeson. In the case of Davidson however I have reached the same conclusion. The Crown have not satisfied me in the way that they must that the interests of justice clearly require the admission of the transcript. The interests of justice it seems to me require the conviction of the guilty and the acquittal of the innocent. To admit the transcripts here would be right if there was a reasonable prospect of obtaining one or more safe convictions without unfairness against the persons accused of the crime. If the contents of the statements are unreliable or the risk of unfairness is significant then a safe conviction is unlikely to be obtained and the transcript should not be admitted. I feel that is the case here and I refuse the application of the Crown with regard to both defendants.