Neutral Citation No. [2014] NICC 17

Ref: **MAG9201**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **11/04/2014**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

IVAN McDOWELL

HEARSAY RULING

MAGUIRE J

Introduction

[1] The defendant in the above proceedings is jointly charged with a large number of others in respect of events which occurred in Coleraine on 24 May 2009. The offences alleged are those of manslaughter, attempted murder and affray.

[2] The circumstances giving rise to the charges have been helpfully set out in the prosecution's skeleton argument prepared in respect of the application here under consideration. Necessarily the circumstances have been described only in general terms. The circumstances were these: on the above date two football matches were being played to decide the fate of the Scottish Premier League. One involved Glasgow Rangers and one involved Glasgow Celtic. Some of the supporters of the former in Coleraine watched their team's match in Scott's Bar in the town area while some of the supporters of the latter watched their team at home in the Heights area of Coleraine. Part of this area is in the nature of a Catholic or Nationalist enclave within Coleraine which encompasses, inter alia, Somerset Drive and Pates Lane, both of which feature as within the principal scene of later disturbances.

[3] It seems likely that at least some of the supporters of both teams had been drinking during the day.

[4] At some point that afternoon at the entrance to the Heights area a number of nationalist/Celtic FC flags were erected, it is suspected, by local residents. The police learnt of these but so also did those who were in Scott's Bar. It appears that after the football was over a number of those who had been in the Bar (who might loosely be described as Rangers supporters) made their way over to the Heights area. This did not involve more than a few minutes travel time. When they arrived in the area they proceeded to remove the flags and attack the local residents.

[5] It is the prosecution's case that what they describe as "a mob" entered the Heights area and inflicted violence on local residents there. Those in the mob, the prosecution say, were acting together and were involved in a criminal joint enterprise. Their purpose, it is alleged, was to engage in serious disorder and violence. The prosecution say that the defendant was one of the mob and took an active role in its activities. These activities resulted in the death of one man (Kevin McDaid), serious injury to another (Damien Fleming) and generalised disorder. The manslaughter charge relates to the death of Kevin McDaid; the attempted murder charge relates to the serious injury to Damien Fleming and the affray charge covers the defendant's alleged involvement in the general disorder.

[6] A feature of the incident overall is that it appears to have lasted only for a relatively short period of time – around 10-15 minutes. During that period the mob attacked those local residents who were in its path. The main scene of the disorder appears to have been a cul de sac off Pates Lane. A number of houses fronted on to the cul de sac, including No 30, which was the house of Mr Jason Mann.

[7] The prosecution case against the defendant involves evidence of the general scene but, in particular, relies on eye witness evidence identifying him as being present and being involved in what was going on. Damien Fleming, who was one of those attacked, has under oath stated that the defendant was present when he was attacked. He refers to him as "Beady" McDowell and he says that the defendant was there with his brother. Ryan McDaid, a son of Kevin McDaid (whose death has given rise to the manslaughter charge against the defendant) also places the defendant and his brother at the scene of the attack. In particular, he refers to the defendant attacking Kevin McDaid and punching and kicking him. Daniel Kennedy, in the course of describing the scene, refers to the defendant and his brother being present. He referred to them running into the Square (believed to be a reference to the cul de sac) and towards Jason Mann's house. Stacey Kennedy gives an account which places the defendant in the cul de sac and refers to him shouting and walking into Jason Mann's garden. Gina Kennedy described the disorder at Somerset Drive/Pates Lane and names a number of those involved, including the defendant who, she says, was wearing a blue Rangers top and jeans. In particular she says she saw the defendant shouting outside Jason Mann's house and having in his possession a baseball bat. There is, in addition to the above, some forensic evidence which may link the defendant to the events that evening. This was in the form of a Chelsea

football shirt which was recovered from Scott's Bar. It had spots of blood on it which could be connected to the defendant.

[8] The defendant was interviewed by the police following arrest on a number of occasions in the aftermath of the events of the 24 May 2009. In his interviews he indicated that he had been in Scott's Bar that day. He admitted that he had at one point made his way over to the Heights area. He said he went over there to look for his girlfriend. The defendant says that he did witness fighting in Pates Lane and that he saw scuffling for 3-5 minutes. He says he turned and walked away and got a taxi back to Scott's Bar where he found his girlfriend. The defendant also accepted that his nickname was "Beady" and that he had heard about the rumours of flags being put up at Somerset Drive and a tricolour flag being put up over the River Bann. He agreed that he knew Kevin McDaid, Damien Fleming and Jason Mann, who he knew had the nickname "Rhubarb".

[9] Many of the accounts given of the incident refer to the presence at the scene of Jason Mann who was one of the local residents in the Heights area. As noted above, he lived at 30 Pates Lane within the cul de sac already referred to. Damien Fleming and Marc McDaid refer to Jason Mann as being with them during the events they describe.

The Application before the Court

[10] The application before the court relates to the evidence of Jason Mann. Unfortunately Mr Mann died on 17 May 2011. His death was unrelated to the matters with which the prosecution of the defendant is concerned. He had been interviewed by police on 26 May 2009 and on some later dates. He signed a witness statement on 1 September 2009. It included the usual declaration of truth. The statement consists of some nine pages. It describes what he had being doing on 24 May 2009 – the day of the incident giving rise to the charges against the defendant. At various points the statement contains references to the defendant. He says he saw a group of 3, 4 or 5 men walking up Somerset Drive:

> "… they were climbing up the lamp post to pull the flag down. One of these was Beadie McDowell, I've known them for years cause he used to live up in our area. I know him, about 10 years, he'd a baton, it was a pickaxe or a lump of wood, when I saw Beadie there was nothing obstructing my view, also his brother Burbur, but I don't know their real names."

Mr Mann then goes on to describe how events unfolded. He later describes 8 or 9 men running towards his house. At his point he goes on:

> "That's when it all kicked off just out the front. We had a bit of a scuffle with 2 of them at the front, we said we want no fucking bother right and started backing off a bit and then that's when the rest just attacked, just came bolting across and then there was too many of them then, Damien was knocked out at the front. He fell straight away I think it was a punch, he just completely fell, knocked clean out. John Thompson, he came running down that way I think he'd a bat or something way him, there was other ones coming from different directions. There were bottles threw and I got hit with a bottle. We ran back into the house again, me and Peter were standing at the door, we opened it a couple of times to throw tins of beer at them and I got a couple of bottles, they were standing out the front and they were attacking Damien. Peter ran out, he was fighting way them trying to get Damien back in again and I threw a couple of tins of beer but there were too many of them there for us to do really much good. Peter even grabbed Damien's legs, trying to pull him in but there was nothing anybody could do, Damien was lying just outside my gate his feet pointing in towards my house, he's on his back, totally defenceless, he's not a fighter, he can hardly even walk."

Later he refers to the next stage of the incident:

> "They were all in the front garden so me and Peter ran back in again. They were trying to get in the door and we were trying to shut it… we got it shut and walked into the kitchen and looked out… Damien was completely knocked out. One of them was shouting "come out Skeets" that's Peter's second name… these two boys, one of them was at one side the other boy was at the other side and were just constantly beating Damien in the face, he was out coul. The blood was beating out of him and Peter said "can we not talk about this, you're going to kill that man out there" he shouted out to them. John Thompson he was standing leaning over the railings, but there was a boy Beadie McDowell, he cracked, when Damien was lying on the ground he just swung like that there way a pickaxe handle, he hit him straight across the head, he's hit him once, you know a bad thing like but there

> were still two boys, while they were trying to get in the door, they couldn't get in when the door locked. They must have decided we'll boot, keep on booting Damien so they attacked Damien again and they were still booting him straight in the face, they weren't kicking him round the body or anything".

Later still Mr Mann refers to other ones appearing. He provides a list of names. One was the defendant whom, he says, came from the direction of Somerset Drive.

[11] In its application to the court the prosecution seek to have Mr Mann's statement of 1 September 2009 adduced at the trial of the defendant notwithstanding that it constitutes hearsay evidence.

[12] It is common case as between the prosecution and the defence that the former's application meets the tests found in Article 20(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). The evidence would be admissible if Mr Mann was available to give it; Mr Mann's identity as the author of the evidence is clearly ascertainable; and the reason why he is unable to testify is that he is now dead.

[13] In these circumstances the statement, it is agreed between the parties, is automatically admissible, but this is not the end of the matter as it is contended on behalf of the Defendant that the court should exclude the statement by reason of either the terms of Article 30 of the 2004 Order or Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order").

[14] Article 30 *supra*, in its material part, reads:

> "(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if –
>
> (a) the statement was made otherwise than in oral evidence in the proceedings, and
>
> (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it taking account of the value of the evidence."

[15] Article 76 of the 1989 Order *supra*, in its material part, reads:

> "In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to

> rely to be given if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

The court's approach to the issue of exclusion

[16] In approaching the issue of the exclusion of what is otherwise an automatically admissible hearsay statement the court has considered the extensive case law in respect of this subject. The statement of Mr Mann plainly cannot be viewed as being in the category of "sole or decisive" evidence whose admissibility or otherwise would make or break the prosecution of the defendant. Even without his statement, there is other evidence which tends to support the case against the defendant. The case therefore is not one which calls for detailed consideration of the state of the law as it applies in cases where the evidence at issue falls into the "sole or decisive" category. Rather, it appears to the court that in a context such as the present, in considering the issue of exclusion, the court is involved in an exercise in determining where the interests of justice lie as between admission and exclusion of the statement. This was the view of Gillen J in R v Brown [2009] NICC 11. He states at paragraph [13] that:

> "The interests of justice seem to me to be a relevant test."

In reaching this conclusion, Gillen J appears to have placed weight on the view of Lord Phillips CJ in R v Cole and Kerr [2007] 1 WLR 2716 where the "interests of justice" test was linked to an analysis of the factors referred to in Section 114(1)(d) of the Criminal Justice Act 2003, which is the English equivalent of Article 18(1)(d) in the Northern Ireland 2004 Order. While those particular provisions are concerned with the interests of justice in the context of the admissibility (not the exclusion) of certain hearsay evidence, both Lord Phillips and Gillen J regarded them as a useful guide to the issue now under consideration. This court sees no reason to deviate from that approach which was not disputed by either counsel when the application was being argued. However, the court is of the view that the elements to be considered under Article 18(2) should not be seen as, and were never intended to be, an exhaustive statement of what may be relevant in considering the issue now under discussion.

[17] Article 18(2) reads as follows:

> "(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)

> (d) the court must have regard to the following factors (and to any others it considers relevant) –
>
> (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) What other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) How important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) The circumstances in which the statement was made;
>
> (e) How reliable the maker of the statement appears to be;
>
> (f) How reliable the evidence of the making of the statement appears to be;
>
> (g) Whether oral evidence of the matter stated can be given and, if not, why it cannot;
>
> (h) The amount of difficulty involved in challenging the statement;
>
> (i) The extent to which that difficulty would be likely to prejudice the party facing it".

[18] Other ways of approaching the interests of justice, in the court's view, should also be considered. One of these is the well-known triangulation of interests' principle. This was explained by Lord Steyn in Attorney General's Reference (No. 3 of 1999) [2001] AC 91 at 118 where he stated:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of justice that serious crime should be effectively investigated and prosecuted. There must be fairness

> to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public".

A second principle derived from the Strasbourg jurisprudence is the fair balance principle. At paragraph [39] of his decision in R v Brown (*supra*) Gillen J indicated, in a dictum this court will bear in mind:

> [39] "Finally I bear in mind, as Strasbourg jurisprudence has recognised, that there is a need for a fair balance between the general interest of the community and the personal rights of the individual. I must not only safeguard the rights of the individual to have a fair trial, but the interests of the community and victims of crime must also be respected."

[19] In the court's view, the overriding factor when considering the interests of justice must be whether there can be a fair trial if the hearsay evidence is admitted. This will involve the court, having considered the totality of relevant factors, making an assessment which, *inter alia*, takes account of the disadvantages which flow from the admission of hearsay evidence and balances these against the advantages which flow from the admission of the hearsay evidence. It appears to be well established that in striking the requisite balance the court should take into account what has been described as the "counterbalancing measures" which are available and which limit or are intended to limit the prejudice caused by the admission of hearsay evidence.

The application of the above approach to the circumstances of this case

[20] It is convenient to begin with a stocktake in relation to the nine factors within Article 18(2) *supra*.

[21] Firstly, on the assumption that Mr Mann's statement is true, the court readily concludes that his statement would have substantial probative value in the proceedings. The statement positions the defendant within the mob and also depicts him as playing an active role in the mob's activities, including identifying him as an assailant of Damien Fleming. Whether the defendant had a role at all in what went on and, if he had, what all it consisted of are matters at issue in the proceedings.

[22] Secondly, in the court's view there is other evidence of at least some of the matters dealt with in the statement. There is other evidence placing the defendant at the scene (including his own his admissions) which tends to show his involvement in the mob. There is, however, only limited other evidence available as to the particular role or part he played.

[23] Thirdly, the court inclines to the view that the statement, when referring to the general scene and to the role of named individuals in that context, deals with issues of importance to the case as a whole.

[24] Fourthly, it seems to the court that the circumstances in which Mr Mann made his statement are clear. The court understands from the prosecution that he was interviewed on several occasions by the police as a witness. The court further understands that at least the main interview with him was video and audio recorded and that a DVD of this interview – which took place on 26 May 2009 - exists. The court assumes that Mr Mann's other interviews were at least audio recorded. Mr Mann has signed the statement which the prosecution seek to adduce in evidence and by his signature he has declared to the truth of it. The provenance of the statement, therefore, is not significantly in doubt.

[25] Fifthly, the court assesses that the question of Mr Mann's reliability is a live issue. It views the matter this way because it appears likely:

(i) That Mr Mann at the time suffered from a significant alcohol problem.

(ii) That he suffered from regular use of cannabis.

(iii) That he was a person who at the time had a criminal record which included a substantial number of convictions for dishonesty offences.

[26] Sixthly, the court is of the view that there is no significant issue about how the statement came to be made. The circumstances of the making of it have been referred to at paragraph [24] above.

[27] Seventhly, it is clear that oral evidence in respect of the matters which the statement covers cannot be given because Mr Mann is dead.

[28] Eighthly, the difficulty or otherwise involved in challenging the statement is a live issue. The defendant can, of course, deny the accuracy of the statement but, it seems to the court, he can also seek to adduce evidence which has the purpose of undermining the credibility of the statement and casting doubt on the reliability of its contents.

[29] Ninthly, the court considers the extent to which the difficulty in challenging the statement would be likely to prejudice the defendant is also a live issue.

The live issues

[30] Clearly, what the court has described above as the live issues requires further discussion in this ruling. Before doing so, however, it is necessary to revert to a

submission of law made to the court on the hearing of this application by Mr Connor, counsel for the defendant. Mr Connor submitted that if the court concluded that Mr Mann's evidence was or may be unreliable this would conclude the matter in favour of its exclusion. He argued that the court should leave out of account any notion of the statement being capable of being tested as a way of off-setting matters which may go to show the statement's unreliability. For this submission he relied on paragraph [107] of the decision of the Court of Appeal in England and Wales in R v Ibrahim [2012] 2 Cr App R 32. In this paragraph Atkins LJ stated:

> "… It is a pre-condition that the untested hearsay evidence be shown to be potentially safely reliable before it can be admitted."

Mr Russell who appeared for the prosecution pointed out, in response, that the Northern Ireland Court of Appeal had put the matter differently in R v Rodgers [2013] NICA 71 when the Lord Chief Justice said (at paragraph [19]):

> "Once the hearsay evidence is admissible through one of the gateways the court needs to examine the apparent reliability of the evidence and the practicability of testing and assessing its reliability. This is because such evidence will generally be admissible where it is either demonstrably reliable or capable of being properly tested."

[31] In the court's assessment, the words quoted above of Atkins LJ do not mean that in considering whether a hearsay statement should be excluded the court does not consider the reliability of the statement along with the question of whether it is capable of being properly tested. In the court's view, the two factors must be looked at together and the view of the Lord Chief Justice in this jurisdiction, in the court's view, is clearly correct. The matter was the subject of consideration in a decision of the Court of Appeal in England and Wales in R v Riat and Others [2013] 1 Cr App R 2. In that case the court was faced with a similar submission to that made in this application by Mr Connor, but this was roundly rejected. Hughes LJ put the matter thus:

> "The written arguments in several of the cases now before us suggest that this language may be understood to mean that hearsay evidence must be demonstrated to be reliable (i.e. accurate) before it can be admitted. This is plainly not what these passages in Horncastle say … This court was far from laying down any general rule that hearsay evidence has to

> be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury."

The same judge went on to say at paragraph [6]:

> "The true position is that in working through the statutory framework in a hearsay case, the court is concerned at several stages with both:
>
> (i) The extent of risk of unreliability; and
>
> (ii) The extent to which the reliability of the evidence can safely be tested and assessed …
>
> The availability of good testing material … concerning the reliability of the witness may show that evidence can be properly tested and assessed. So may independent supporting evidence".

[32] In a later Court of Appeal authority in England and Wales, R v Jabbar [2013] EWCA Crim 801, Treacy LJ stated at paragraph [31]:

> "The essential question for us is whether the judge was right to conclude that the interests of justice test was satisfied. It is clear from Riat that Ibrahim did not require that a judge had to be satisfied that hearsay evidence was demonstrably reliable in order to admit it under the Act. There was no general rule to that effect."

Having quoted part of paragraph [6] in Hughes LJ's judgment in Riat, Treacy LJ went on (still at paragraph [31]):

> "The court stressed the twin alternatives concerning hearsay evidence, which is either demonstrating reliability or is capable of proper testing as referred to in Horncastle. At paragraph [33] the court spoke of a need for the evidence to be shown to be 'potentially' safely reliable before it is admitted. It is not the task of the judge to look for independent complete verification. What the judge must do is to ensure that hearsay evidence can be held to be reliable by a jury. This involves considering its strength and

> weaknesses, the tools available for testing it, and its importance to the case as a whole."

[33] This court is bound by the decision of the Northern Ireland Court of Appeal in Rodgers but in the light of Riat and Jabbar it seems clear that the Northern Ireland Court of Appeal's view is consistent with prevailing authority in England and Wales and that too much is being read into Atkins LJ's dictum in Ibriham. The notion of hearsay evidence needing to be at least "potentially safely reliable" as a form of minimum standard if it is to be admitted in contrast to the statement being completely independently verified seems to the court to be a sensible way to proceed. A judgment of degree will therefore have to be made.

[34] The issue of the tools for testing the reliability of the hearsay statement, it should not be forgotten, is, in part, dealt with in the statutory scheme of the 2004 Order. In this regard the court draws attention to Article 28. This states:

> "28-(1) This articles applies if in criminal proceedings –
>
> (a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and
>
> (b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.
>
> (2) In such a case –
>
> (a) any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;
>
> (b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;
>
> (c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as

> evidence is admissible for the purpose of showing that he contradicted himself."

The reliability of Mr Mann

[35] As noted at paragraph [25] above an issue in this case arises about the general reliability of Jason Mann as a witness. This arises by virtue of the following points upon which Mr Connor relied on behalf of the defendant. Firstly, it is alleged that Mr Mann is an alcoholic who died of an alcohol related illness. Secondly it is said that he was an habitual drug user. In this regard it is pointed out that his criminal record discloses a number of offences for possession of cannabis. Thirdly it is suggested that Mr Mann was a person infected by dishonesty as his record includes around 13 dishonesty offences (out of some 70 convictions). Fourthly the suggestion is made that Mr Mann was motivated by sectarian hatred. In this respect Mr Connor draws attention to a summary of an incident in July 2008 when Mr Mann referred to others as "orange bastards". Fifthly it is said that Mr Mann had a personal animus towards the defendant. The evidence for this related to the same incident as referred to above in July 2008. In that incident it is alleged that Mr Mann appeared at the front door of the defendant sister's house with a large knife in his hand with the object of threatening to kill the defendant's sister's husband and son. It is alleged that the incident followed upon complaints being made against Mr Mann of anti-social behaviour by members of this household.

[36] In response to these points, Mr Russell, for the prosecution, accepted that Jason Mann had an alcohol problem and did not shrink from this. He also in substance accepted that it is likely that Mr Mann was a cannabis user. The dishonesty offences, since they arose from Mr Mann's criminal record, were not disputed by the prosecution. Nor was the suggestion that Mr Mann did refer to some people in the incident of July 2008 as "orange bastards". As regards the defendant's sister's family, it was not disputed that the incident had occurred but the point was made that this incident did not involve the defendant and appears to have arisen because Mr Mann believed that members of the family of the defendant's sister were responsible for complaints being made against Mr Mann to the authorities about which he had a grievance.

[37] Mr Russell's principal submission on this area of the case was that there was no reason why the tribunal of fact would not be made aware of all of these matters which it could then take into account in assessing the reliability of Mr Mann's statement. The exercise would be much the same as the fact finder would carry out in the case of a witness giving oral evidence. In a case of this nature it could not be denied that alcohol will have played a part or that sectarian attitudes may also have played a part. These facts do not *per se* mean that the witness is automatically to be viewed as unreliable or motivated by spite or animus.

[38] In the court's view, all of the points made by Mr Connor are relevant. A fact finder who is made aware of each of these points, no doubt, would take each into account in shaping a view about the reliability of the evidence giver. The cumulative effect would, equally no doubt, be considered. However, there is no suggestion in this case that the frailties of Mr Mann's character cannot be exposed at the trial and duly considered. When the character of Mr Mann is looked at in the round it cannot, in the court's estimation, be said that the account given in his statement about the events that evening is bound to be viewed as unreliable or below the standard of being potentially safely reliable. Witnesses who are beset with alcohol problems give evidence in criminal courts every day. The same will also be true of witnesses who take drugs. As Mr Connor himself acknowledged, the effect of such activities will be variable and will be measured in degrees. Furthermore, in our society, regrettable though it is to say so, sectarianism is an all too frequent element in everyday life. The use of sectarian insults by one person to others is not uncommon, especially where there are urban sectarian interfaces, as in Coleraine. The court strongly suspects that in the present case many of the witnesses who may be called – on all sides of the events that evening – will be frequent drinkers; will have criminal records; may harbour sectarian attitudes; and may descend to addressing others in a sectarian way. The character of some of these witnesses will, it is foreseeable, be challenged but it will then be for the tribunal of fact to carry out an assessment. The court sees no reason why the same exercise cannot be carried out in the case of Mr Mann. While it must be acknowledged that there remains the loss to the fact finder, if Mr Mann's statement is admitted in evidence in this case, of the ability to observe cross-examination of the witness in respect of points going to character, in the presence of evidence of the type which Mr Connor relies on to impugn Mr Mann's reliability, the court believes the fact finder should not be seriously disadvantaged.

The reliability of Mr Mann's account

[39] Distinct from the issue of the reliability of the character of Mr Mann is the issue of the reliability of Mr Mann's account – what his statement says. In the court's view this element is worthy of separate consideration because what will ultimately be important is not whether a witness has character flaws but whether, notwithstanding those flaws, he or she is telling the truth.

[40] Mr Connor in his submissions attacked the veracity of Mr Mann's account. Firstly, he says that Mr Mann's account is inconsistent with that of other witnesses in the case. Mr Mann's account that the defendant had a pick axe handle in his hand, Mr Connor points out, differs from the account of others who, in some cases, referred to the defendant having no weapon and, in others, referred to him having a different weapon. Mr Connor also took the court to apparent conflicts between differing accounts given by Mr Mann himself. An example was as to what he saw outside his house that night in connection with the assault on Mr Damien Fleming. In his statement Mr Mann gives the impression that he could see Mr Fleming on the

ground outside Mr Mann's house and being assaulted to the head. But in the course of interviews, it is alleged that Mr Mann gave an account inconsistent with that, in the particular respect that he said he could not in fact see Damien Fleming's head. Mr Connor also directed the court to the contents of Mr Mann's account of what he was doing that day to show that on that day he had consumed large amounts of alcohol and had for many hours been drinking. This, he argued, must affect his reliability as a witness.

[41] Mr Russell for the prosecution urged the court to keep in mind that the incident in question involved a substantial number of people and involved the movements of a mob over a short, intense but crucial period. What occurred was bound to be confusing and witnesses would see and appreciate events from different angles. It would be surprising indeed, Mr Russell argued, if every witness's account could be viewed as entirely consistent with every other witness's account. What counted, he argued, were the crucial points at which it could be said that Mr Mann's statement dovetailed with the known evidence of others. Mr Mann's statement painted a similar general scene to that of other witnesses. Mr Mann identified persons involved, including the defendant, who were identified by other witnesses as being present. Of particular importance, Mr Mann's identification of the defendant being at the scene, far from being in conflict with what the defendant himself has said, was broadly consistent with it. While there may be areas of conflict between the various witnesses of events that night, Mr Russell submitted that this did not mean that Mr Mann's evidence was wrong or unreliable. If there are inconsistencies between the statement of Mr Mann and what he said at interviews these could be exposed and explored before and assessed by the tribunal of fact.

[42] The court is of the view that the points relied upon by Mr Connor are all points which will emerge in the course of the trial and will therefore be open for consideration by the tribunal of fact. It can take them fully into account in determining whether Mr Mann's evidence is to be relied on. However, in the court's estimation there is enough in Mr Mann's statement to give grounds for believing that his statement, at least in a broad sense, is accurate. Mr Mann's account in terms of time and place and in terms of who was present and what generally was going on has much in common with other statements of evidence available to the court. As the statement can and will be tested, and any conflicts with other witnesses can be exposed, and any possible inconsistencies with anything Mr Mann has also said can be explored at the trial, the court does not consider that the statement is not at least potentially safely reliable. The tribunal of fact in assessing Mr Mann's statement will be able to take into account the undoubted fact that the witness had been drinking throughout the day.

Cumulative unreliability

[43] The court has given attention to the issue of whether the statement might be at least potentially unreliable by reason both of the issue of Mr Mann's character and motivation and the issue of his accuracy in making the statement. It considers it should address this issue taking both aspects into account together. While the court accepts that it is possible that, for example, a person with a sectarian outlook or a hatred of an individual could deliberately target that individual by placing him at the scene of an incident when he was not there at all or he could portray an individual in a way which heightened that individual's involvement in an incident, the court is unpersuaded that such a possibility alone should cause the court to view the hearsay statement of Mr Mann as not potentially safely reliable. In this case there is clear support for Mr Mann's identification of the defendant as being at the scene, as discussed above. But there is also some support from other witnesses of the defendant being involved in the mob's activities and in particular incidents. Even adopting a cumulative approach, the court does not conclude that there is a sufficient case of unreliability established in this case.

Counterbalancing measures

[44] At paragraph [19] above, the court referred to the need to strike a balance between the advantages of admitting the hearsay evidence and the disadvantages of doing so. It is noted that in reaching a conclusion the court should take into account "counter-balancing measures".

[45] To an extent, the court has already alluded to such measures when considering issues of reliability. The ability of the defence to put before the tribunal of fact evidence about the character, motivation and habits of the statement maker has already been referred to. So also has been the ability of the defence to expose inconsistencies between statements made by the statement maker and conflicts between the statement maker's evidence and the evidence of other witnesses. Article 28 has been referred to which provides machinery by which the tribunal of fact can become appraised of matters which may be used to impugn the witness's evidence. In addition, the court reminds itself of the processes of disclosure, both that between the prosecution and the defendant, and that involving third parties, which can assist in uncovering the truth.

[46] "Counter balancing measures" of relevance do not, however, end with the above.

[47] The statutory scheme for the admission of hearsay evidence contains an important provision which it would be remiss for the court not to mention. Article 29 of the 2004 Order is in the nature of an additional safeguard of general application. It states:

> "Stopping the case where evidence is unconvincing

> 29-(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—
>
> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
>
> (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,
>
> the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."

[48] It is plain from this provision that the judge at trial is under a duty to monitor both the issue of the importance of the hearsay evidence to the case and also the issue of how convincing or otherwise that evidence is. If the judge concludes that at any time after the close of the case for the prosecution both limbs (a) and (b) within Article 29(1) are satisfied he/she must act in the way prescribed.

[49] While the decision to admit or exclude the hearsay evidence must be made consistently with the tests and provisions already discussed, the safeguard contained in Article 29 is of value as it caters for the case where, although there were proper reasons for admitting the hearsay statement, the actuality of what occurs at trial sheds a different light on the hearsay evidence and renders it unconvincing.

[50] The presence of Article 29 does not, of course, mean that a judge considering the admission or exclusion of a hearsay statement should lean towards admission just because problems can be picked up and resolved later under Article 29, but it does offer the reassurance that the statement and the role it in fact plays at the trial will be the subject of careful monitoring by the judge.

[51] Finally, the court reminds itself that another counter-balancing measure relates to how the judge will ultimately direct himself. As put in the prosecution's skeleton argument:

> "The notional jury will be directed in general terms in respect of hearsay that they have not had the chance of observing the witness … [and] will receive a tailored direction from the judge about the treatment of hearsay evidence in [the] particular case."

The notional jury will also be reminded about the inability of the defence to cross examine the witness.

[52] The court accepts that such notional directions will be of assistance and are in the nature of a safeguard in a context where a hearsay statement has been admitted in evidence.

Conclusion

[53] In this case, on its particular facts, the court, having taken into account all of the above, including the "triangulation of interests" and "fair balance" principles referred to *supra*, is of the view that the admission of Mr Mann's statement in evidence under the 2004 Order will not mean that a fair trial of the defendant will not be possible. In the light of considering the various counter-balancing measures to which reference has been made and in the light of the substantial ability of the court to test the issues of reliability, which have been referred to, the court considers that Mr Mann's hearsay statement is potentially safely reliable. It should not, in the court's estimation, be excluded under Article 30 of the 2004 Order or Article 76 of the 1989 Order.

[54] Accordingly, the court rules that the prosecution application to adduce the hearsay statement of Mr Mann dated 1 September 2009 should be granted.