Neutral Citation No : [2009] NICC 19 | *Ref:* **HAR7433**

Not for general release – judicial intranet only

Judgment: approved by the Court for handing down | *Delivered:* **6/3/2009**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

_____

BELFAST CROWN COURT

_____

THE QUEEN

-v-

JOHN RICHARD STEWART, PAUL ERIC JOHNSTON, DEAN MILLIGAN AND RODNEY THOMAS COLGAN

_____

HART J

[1] The defendants are jointly charged on a single count with the murder of Ronald Mackie on 29 July 2006 and each has applied for No Bill in relation to that count. The circumstances giving rise to the charge raise unusual issues of causation, questions as to the withdrawal of a defendant from a joint enterprise, and the power of the court to deal with alternative charges at the No Bill stage under the Grand Jury (Abolition) Act (Northern Ireland) 1969. (The 1969 Act).

[2] Before considering the evidence relied upon in support of the charge it is appropriate to repeat the test to be applied when an application for No Bill is made under the 1969 Act as summarised in R v McCartan and Skinner [2005] NICC 20. Section 2(3) provides that the judge may enter a No Bill if the committal papers "do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented." From R v Adams [1978] 5 NIJB and Re Macklin's Application [1999] NI 106 the following principles can be extracted.

(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty, and in doing so should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in Practice Note [1962] 1 All ER 448.

[3] Because of the unusual nature of the issues that arise in this case it is necessary to set out the relevant evidence at some length, and in the following account I take the prosecution evidence at its best. The committal papers show that whilst Ronald Mackie was a native of Scotland he had relatives in Maghera, County Londonderry whom he visited several times a year. He was keen on band parades, and on 28 July 2006 on one of his regular visits to Maghera he joined his second cousin Christina (Tina) Jones and her husband Trevor (Teddy) Jones. Having spent some time watching a band parade they went to a bar in the town, and then he suggested that they go to a disco to be held at Tobermore United Football Club on the outskirts of Tobermore where it was expected that a number of the bands which had taken place in the parade would be attending. All three got a lift on a minibus from Maghera to the football club and arrived there shortly before midnight. The premises of Tobermore United FC are on the outskirts of Tobermore beside the A29 Tobermore to Maghera road.

[4] As the evening drew to an end Tina Jones decided that it was time for herself, her husband and Mr Mackie to leave the football club, but as they needed a lift back to Maghera she waited at a table near the door when they were offered a lift. At about 1.45 am on 29 July she saw Mr Mackie throw a drink over the defendant Richard Stewart. So concerned was she about the likely reaction of Stewart and his companions that she decided that she, her husband and Mr Mackie should leave immediately and they went outside. Because there was a large crowd outside they decided that it was better to start walking away from Tobermore towards Maghera along the Tobermore to Maghera Road.

[5] They therefore turned left at the entrance and headed countrywards. As can be seen from the pictures of the road in Exhibit 109 the A29 is a wide straight road at that point with wide grass verges. There is no street lighting, and therefore at the time the only light was from passing cars. On the left hand side of the road going towards Maghera there is a large layby, and although not readily visible in the photographs there is a tarmac footpath at the edge of the layby close to the hedge. Teddy Jones described how he thought that they had gone about 200 yards from the football club when he heard the sound of people running on the footpath, and he could hear them saying "come on, come on, we'll get them, we'll get them". He estimated that there were at least 8 or 9 people in the group running towards them and the group were saying "There they are there, let's get them". Although he, his wife and Mackie tried to run, the group caught up with him almost

immediately. Teddy Jones said that he recognised two of the group to be Richard Stewart and Rodney Colgan, both of whom he knew well.

[6] Teddy Jones alleges that Stewart and Colgan stopped whilst the remainder of the group proceeded to attack Mr Mackie. Teddy Jones said that whilst the others were attacking Mackie Stewart held him back as he tried to go to Mackie's aid, and Colgan held his wife back at the same time. He tried to break away from Stewart's grip to try to get some of the attackers away from Mackie, but Stewart held him back by pinning his arms behind his back. He struggled and got one arm free and turned round, and he alleges that at that point Stewart punched him in the face and cut the bridge of his nose. As the attack on Mackie was continuing Teddy Jones says Stewart said to him "Stay out of it, it has fuck all to do with you", to which Jones said "What do you mean it has nothing to do with me, yous are fucking killing my friend". He says that Stewart responded "It has nothing fucking to do with you, stay out of it", and repeated over and over again "I'm warning yous to fucking stay out of it".

[7] He also says that as Colgan was holding his wife back Colgan said more or less to her, "Stay you out of it, stay you out of it". He went on to describe how he had bad bruising on his arms and clear finger marks on his left arm as a result of Stewart holding him back. He found it difficult to estimate how long this episode lasted but the attackers acted very quickly.

[8] Tina Jones gives a broadly similar account, saying that when Colgan came up he told her "What's going to happen is nothing to do with you here", and when Colgan was holding her and would not let her go, he said "It's nothing to do with you". She also described how in the lights of a passing car she recognised one of the crowd as the defendant Johnston, whom she knew from seeing around Maghera.

[9] Teddy Jones describes how the crowd repeatedly kicked Mr Mackie.

> "Well the rest of the fellas ran past and started to lay into Ronald. They proceeded to punch him, kick him and at this stage I made a run to try, I know it mightn't have done any good, I was going to try and get a ween of the boys off him. … Ronald tried to get up and fight back a bit you know trying to get up every time they put him down. They proceeded to kick him in the face and round the groin area and every time he got up they were trailing him down and kicking him again and trailing him out on the road, the side of the road where they still proceeded to punch and kick Ronald about the head and face and about the body, you know and they were saying,

> 'kill the fucker, kill him'. I don't know who was saying it. They more or less kicked him out onto the middle of the road and there was still dents on his face with there (sic) feet."

[10] Tina Jones' account of the attack is similar.

> "They got him down and then they were kicking and kicking and kicking and they were all kicking. There were no fists it was just all feet. … I knew these boys had Ronald beat from the side of the kerb, you know from the footpath right out onto the middle of the road."

[11] There is other evidence of the severity of the assault upon Mr Mackie from Witnesses C and D. These two young ladies were in a car approaching Tobermore from the Maghera direction which stopped because of the crowd on the road, and in the headlights of their car they also witnessed the attack upon Mr Mackie. Both describe a vicious assault upon him. Two quotations from their accounts will suffice. Witness C says at p. 2017.

> "I realised on the left hand side of [Witness D] there was a young man on the ground, getting kicked and jumped on and the most horrendous thing I've ever seen, you think it's on TV and then you see it in front of you, it's scary, but they just continuously kicked and punched. They actually didn't even punch him. It wasn't punches at all, it was three guys actually putting their boot into him basically and my first impression was we'll have to get out of here and then I thought I can't leave this guy. As this continued and continued on I remember one guy who kicked that guy so hard that I just thought no way is that man alive after that. Now in that whole time that was happening, which was a couple of minutes, but it was going on that whole time as we drove up the road, 'cause it looked like he'd been on the ground for quite a while, curled up in a ball. He was not moving whatsoever and [Witness D], my friend had said to me he's definitely unconscious, what will we do."

[12] At p. 2050 witness D describes what she saw.

> "I say just the first thing I noticed, it probably was the men standing at the road, kicking and then the man lying on the road I say he had his arms up, obviously

> trying to protect his head, they were really taking at his head, he seemed very very still, there wasn't much movement out of him at that time, he maybe was unconscious at that stage with the force of what he was getting. The only way probably was moving was the force of the feet hitting into him that was what maybe was moving about. I couldn't honestly tell you what the fellas looked like that was doing it, 'cause I was just concentrating on him on the ground. As I say it just happened so quickly and then the next thing I would of (sic) seen was the car coming the other road and I nearly knew what was going to happen. … There was no way that man would have been fit to get out of that road, you know, the guy who was maybe hitting him was fit to run, I'm sure, but there was no way that guy was fit to get up off that road before the car would have come. Definitely not."

[13] The reference to the oncoming car by Witness D and other witnesses is to the approach of the car which ran over Mr Mackie and I shall refer to the car in further detail later in this judgment. However, a number of witnesses say that at this stage one of those present tried to stop the approaching car. Witness D at p. 2054 said

> "These guys are still kicking at him and then this man appears, it wasn't one of the three men that done this here, this was another man, that came out and started to wave his arms up like this here to get the man's attention to get the car stopped and at that then you could hear the screeching on the road where he had been braking, but it was too late, he had just he had just run into him at that time and obviously the other three guys had cleared off the road then whenever it hit into him."

[14] The evidence of Witness J, who has now been identified as Paul Houston, was that the person who waved his hands to stop the car was Colgan. At p. 2229 he said that Colgan "…tried to wave the car down to stop", and when he was making his deposition he confirmed in cross-examination that Colgan waved his hands to stop the car. Houston also describes the attack, saying at p. 2274 that there were about 6 or 7 figures kicking "the man on the road lying in the middle of road"… "like as if the way you would kick a football". At p. 2276 he says "It was very violent", and "He [Mr Mackie] was kind of like in a ball" with his hands at the side of his head. At p. 2281 he says "I'm not sure I think they were still kicking him and

Rodney [Colgan] was waving the car down". He went on to describe how the attackers scattered when they realised that the car was not going to stop. The car started skidding and continued to skid past him in the direction of Mr Mackie. When asked at p. 2284 which way Mr Mackie was facing at the time when he was hit by the car he replied "His face, he had his back to the car" and he didn't think that he was moving before the car hit him.

[15] There is therefore abundant evidence on the committal papers from Teddy and Tina Jones, Witness C, Witness D and Paul Houston that Ronald Mackie was pursued by a group of men who then subjected him to a violent attack, and as a result he was knocked to the ground a number of times. Whilst lying upon the ground he was repeatedly kicked and lay in a curled up position. Whilst the attack was taking place Stewart held Teddy Jones, and Colgan held Tina Jones. The remarks attributed to Stewart and Colgan indicate that both were well aware before the attacks started that something violent was going to happen, and they held Mr and Mrs Jones to prevent them intervening to save Mr Mackie from being attacked.

[16] When the oncoming car caused his attackers to scatter one of those present, identified by Paul Houston as Colgan, came out into the path of the oncoming car and tried to stop it from hitting Mr Mackie. Therefore three prosecution witnesses agree that only one man made an effort to stop the oncoming car, and that man has been identified by Houston as Colgan. Colgan's effort proved unsuccessful but it is evident that he tried to stop the car running over Mr Mackie's body as it lay in the centre of the road.

[17] The car approaching from the Tobermore direction did not stop in time to avoid running over Mr Mackie. In his written submissions Mr Fowler QC (who appears on behalf of the prosecution with Mrs McKay) names the driver, but there is no statement from him nor indeed does there appear to be any other evidence on the committal papers to identify him as the driver of the vehicle. There is, however, a lengthy witness statement from Stephen Quinn of Forensic Science Northern Ireland who went to the scene and carried out an extensive investigation of the accident scene and the Fiesta car which ran over Mr Mackie. No point has been taken about the identification of that car as the car which ran over Mr Mackie, and indeed a number of defence counsel referred to Mr Quinn's report in their submissions, and I therefore have regard to it.

[18] I do not propose to refer to all of Mr Quinn's findings, it is sufficient to refer to the following extracts from his conclusions.

- "The headlight beams from the Fiesta car in conjunction with the headlight beams of a car facing towards the Fiesta could have prevented the Fiesta driver from observing upright pedestrians on the road and in the path of the Fiesta in sufficient time to avoid an impact;

even if the car was travelling at a modest speed. It is therefore highly probable that an impact was avoided with the upright pedestrians because they had the ability to observe the car and move aside.

- The headlight beams from the Fiesta car in conjunction with the headlight beams of a car facing towards the Fiesta and the distraction of the movement of the upright pedestrians would have prevented the Fiesta driver from observing the prone pedestrian in sufficient time to avoid an impact; even if the Fiesta car was travelling at a modest speed. The prone pedestrian did not have the ability to move aside.

- The maximum achievable speed for the Fiesta car was 70 mph although a more realistic maximum speed would have been around 66 mph from the tests carried out at Ballykelly Airfield.

- It is feasible that the Fiesta car could have been travelling at a speed within the range 40-50 mph on impact with the prone pedestrian if this car came to a stop at the end or close to the end of the drag marks made by the prone pedestrian. However it is highly probable that the speed of the Fiesta car was higher if the Fiesta car was able to apply the brakes prior to reaching the position of the prone pedestrian in response to the upright pedestrian(s).

- The damage to the Fiesta and the position of the start of the scrape marks on the road surface indicated that the pedestrian lying prone on the Maghera bound lane when he struck by the front off-side of the Fiesta and then dragged at least partially underneath the car.

- Upright pedestrians at the collision scene should have realised that the prone pedestrian may not have been in a condition to help himself off the road surface.

- Upright pedestrians in the immediate vicinity of the prone pedestrian had ample opportunity to move the prone pedestrian onto the adjacent lay-by if there was car approaching from the direction of Maghera and it had come to stop with its headlights still shining [ie. the car containing Witness C and Witness D].

- The presence of a stationary car should have been a powerful indicator to upright pedestrians as to the dangers of leaving a prone pedestrian in the road even though this prone pedestrian was not in the direct path of the stationary car. At the very least upright pedestrians in the immediate vicinity of the prone pedestrian should have been watching for approaching vehicles."

[19] A post mortem on Mr Mackie was performed by Dr Bentley, the Deputy State Pathologist for Northern Ireland. At para. 8 of his commentary (p. 2014) he summarises his findings in this passage.

> "In conclusion, Ronald Mackie died as a consequence of multiple injuries. Many of the injuries on the surface of the body were consistent with his being involved in a collision with a motor vehicle, probably being dragged for a distance by the vehicle and probably being run over by the vehicle. Some of the injuries were non-specific and the possibility that they were sustained as a consequence of blows delivered by, for example, punches, kicks or stamps cannot be excluded, however neither can it be confirmed."

[20] Dr Bentley's evidence, taken at its height for present purposes, supports the conclusion that the cause of death was probably because Mr Mackie was struck by, dragged for some distance by, and then run over by the approaching motor vehicle coming from Tobermore. It is also consistent with, and certainly not inconsistent with, the evidence that Mr Mackie was knocked to the ground where he was repeatedly kicked about the head and body by several attackers, ultimately ending up lying on the Maghera-bound side of the carriageway close to the middle of the road. The attack to which Mr Mackie was subjected was clearly of such violence that, whether or not he was unconscious as the oncoming car approached, he was unable to appreciate the danger in which he was from that car as he lay on the road, or, if he did appreciate that a car was approaching and that he was in danger, was unable to get to his feet in an effort to avoid being struck by the car.

[21] There is also evidence that the attack continued as the oncoming car approached at speed, with his attackers only scattering at the last moment. At that point the prosecution evidence indicates that Colgan made a vain attempt to prevent the oncoming car from striking the prone body of Mr Mackie as it lay in its path, whereas the other attackers made no effort to do so, nor to prevent him being struck. Indeed, there is some evidence to suggest that someone appreciated the nature of the risk and encouraged them to leave Mr Mackie in the path of the oncoming car, as an unidentified voice was heard to shout "let him lie there" as the car approached, but this has not been specifically attributed to any of the defendants.

[22] That vehicles could be expected on that road – an A class road between Tobermore and Maghera – was confirmed, if need be, by the vehicle which passed as the group chased Teddy and Tina Jones and Mr Mackie, and by the approach of the car in which C and D were travelling.

Causation

[23] Was the death of Ronald Mackie due to being run over by the car within the scope of the joint enterprise alleged by the Crown, or was his being run over a new intervening act (novus actus interveniens) such as to exempt the defendants from a charge of murder, whatever other offence they may have committed? This requires consideration of a number of issues.

[24] What was the joint enterprise upon which the defendants were engaged before the appearance of the car which ran over Mr Mackie? The evidence already referred to gives rise to a very strong inference that the attackers intended to subject Mr Mackie to a severe assault, assaulted him by knocking him to the ground, and then repeatedly kicked him with very considerable force until he was rendered unaware of the danger posed to him by the approach of the oncoming car, or if he was aware of the danger, was unable to attempt to get out of the path of the oncoming car.

[25] There is therefore ample evidence that those who took part in this attack by punching or kicking Mr Mackie as he lay on the ground intended to inflict grievous bodily harm, that is really serious bodily harm, because of the force with which he was kicked as described by the witnesses. It was suggested by Mr O'Rourke (who appears with Mr Des Fahy on behalf of Colgan) that the post mortem report does not provide a "basis to conclude that any assault caused or contributed to his death or indeed caused him really serious injury". However, the passage from Dr Bentley's report already cited is not, in my opinion, inconsistent with the attacks having caused really serious harm, but in any event the attackers clearly intended to cause really serious harm, even if no such harm can be proved to have been inflicted by them.

[26] Is there sufficient evidence that Stewart and Colgan were party to a joint enterprise to inflict grievous bodily harm on Mr Mackie? For the reasons I shall set out more fully later in this judgment I am satisfied that there is ample evidence that they both participated in that joint enterprise by holding back Tina and Trevor Jones, thereby preventing them from going to Mr Mackie's aid, and as they were doing so telling Tina and Trevor Jones that they should not interfere. These actions are clearly capable of establishing that Stewart and Colgan knew and approved of what was intended and of the attack that actually took place.

[27] Can the death of Mr Mackie because he was struck by a car be said to have been a consequence of the joint enterprise to inflict really serious bodily harm upon him? There is evidence that the defendants (except for Colgan whose case I shall consider separately) took no steps whatever to prevent the car striking Mr Mackie's body as he lay motionless on the road. The others did not try to wave down the car, or try to pull Mr Mackie out of its path.

Indeed the evidence suggests that so intent were they in kicking him that initially they may have been oblivious of the approaching car, but in any event they only ceased kicking him and scattered moments before the car struck Mr Mackie.

[28] Was it dangerous to leave Mr Mackie on the roadway? The evidence shows that the final stages of the assault took place on the roadway. This was an A road and to attack and then leave a man lying motionless on a road is extremely dangerous because of the obvious risk that he might be struck by an oncoming car. It is true that whether he would be struck would depend upon a number of factors such as the speed of any oncoming vehicle; the extent to which the driver was keeping, or able to keep, a sufficient look out in order to stop in time; the speed of the driver's reaction; the weather conditions; how visible the body would be to an oncoming vehicle; whether he would later be able to get off the road unaided, or whether others might remove him from danger by taking him off the road. Nevertheless, the danger must be regarded as self-evident and very considerable.

[29] What consequences in law follow from the above conclusions? Was the death of Mr Mackie caused by the attacks upon him, and in that case could the defendants be convicted of murder? Does the death of Mr Mackie because he was run over by the car amount to a new intervening act breaking the chain of causation between the attack upon him and his death as the defendants contend? Even if the car running over Mr Mackie does not amount to a new intervening act breaking the chain of causation, is there evidence that any of the defendants involved in the attack contemplated that a vehicle would run over Mr Mackie?

[30] In order to be guilty of murder a defendant has to be proved to have killed with intent to kill or cause grievous bodily harm. With the exception of perjury any act which is a significant cause of death renders the doer of the act responsible for the death of the victim if the other elements of murder are proved. It is not necessary that there should be any contact between the killer and his victim, or that any weapon is used, and therefore murder may be caused by an unlawful omission. See Smith and Hogan's Criminal Law 12th Edition, p. 478.

[31] It is well established that the act or omission of a defendant need not be a substantial cause of a criminal result such as death in order to render the defendant guilty, see R v Malcherek [1981] 2 All ER 422 at 428. In R v Cheshire [1991] 93 Cr. App. R. 251 upon which Mr Fowler QC (who appears for the prosecution with Mrs McKay) relies, the court considered the authorities and concluded at p. 258:

> "It is not the function of the jury to evaluate competing causes or to choose which is dominant

> provided that the accused's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible."

That the prosecution only have to show that the acts of a defendant significantly contributed to the victim's death was re-affirmed in R v Warburton and Hubbersley [2006] EWCA Crim. 627 at [23].

[32] The argument by counsel for each of the defendants was that the actions of their clients did not contribute to the death of Mr Mackie because his death was due to his being run over by the oncoming car, and that was to be regarded as a new intervening act breaking the chain of causation between the attack on Mr Mackie and his death. They relied upon the formulation of the principle in Blackstone 2009 at A1.27.

> "D will not be regarded as having caused the consequence for which it is sought to make him liable if there was a novus actus interveniens (or new intervening act) sufficient to break the chain of causation between his original action and the consequence in question. Although his original act may remain a factual cause, but for which the consequence would never have occurred, the intervening act may supplant it as the imputable or legal cause for the purpose of criminal liability. This intervening act may be the act of a third party, an act of the victim or an unforeseeable natural event, sometimes called an 'act of God'."

[33] Reference was also made to the decisions in R v Gamble [1989] NI 268, R v Gilmour [2000] NI 367 and R v Powell, R v English [1999] AC 1. These decisions on the scope of a joint enterprise have recently been considered by the House of Lords in R v Rahman and Others [2008] 4 All ER 351, where the majority of the House approved the following formulation of the rule by Lord Brown at [68] based upon R v Hyde [1991] 1 QB 134:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the court of the venture unless: (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than

> any weapon which B contemplates that A or any other participant may be carrying; and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

[34] However, it will be a matter for the tribunal of fact whether the arrival of the car was sufficient to break the chain of causation because it should be regarded as something fundamentally different from anything foreseen by those who attacked Mr Mackie and left him lying on the road. As the evidence presently stands I am satisfied that to attack a man with such severity that he is left motionless on the roadway in the path of, and unable to get out of the way of, an oncoming vehicle and is then run over and killed, is to make a significant contribution to his death. In such circumstances there is sufficient evidence upon which the attackers could be convicted of murder. I will now consider the evidence against each defendant in turn.

Stewart

[35] In addition to the evidence to which I have already referred relating to his alleged role in these events, there is other evidence of Stewart's actions before he left the club which suggests that he was well aware of, and intended to take part in, an assault on Mr Mackie. Thus at page 2138 Witness G said:

> "… but as I came up towards the door to go out into the wee foyer place like I know Richard Stewart was definitely there and I heard Richard say ahm you, you, you come with me, this boy in the red T-shirt has to be got or this boy in the red T-shirt has to be sorted and after that there I don't know any more."

[36] At page 150 of the interviews Stewart said:

> "So I goes to myself there they're away but there was people heading out the gate the same time as them, so I got it into my head right I'll go here and I'll see what the crack is way them you know why, why he's trying to pick a fight way me. You know what's, whats the crack like so I, I headed out towards the gate as well."

[37] Finally, his DNA was found on Johnston's jacket, together with DNA from the deceased. This is consistent with his being at the scene of the attack and close to one of the attackers as the attack was carried out.

[38] I am satisfied that there is sufficient evidence to establish that Stewart was one of those who pursued Mr Mackie, and may have been the instigator

of that pursuit after the incident in the bar; that he held Mr Jones back and prevented him from going to the assistance of Mr Mackie; that he was present during the attack on Mr Mackie; and that he approved of that attack.

[39] Mr O'Donoghue QC (who appears for Stewart with Mr Best) recognised in his written submission that Stewart was guilty of a joint enterprise "to give Ronald Mackie 'a kicking'," and in his oral submissions accepted that on one view there was evidence of a joint enterprise by his client to cause grievous bodily harm with intent to cause grievous bodily harm.

[40] Mr O'Donoghue argued that there was no evidence that Stewart was present when the car was approaching. However, Trevor Jones alleges at p. 55 that at the point where he got one arm free from Stewart's grasp:

> "… that's when I think he hit me on the bridge of the nose at this stage and told me to stay fucking out of it, it has nothing to do with me. So it was roughly about that point when the car was coming and I seen the lights and the boy said, 'There's a car coming, let the fucker lie'. It wasn't Stewart or Colgan said that, it was one of the others in the group."

[41] These allegations place Stewart at the scene and still attempting to prevent Trevor Jones from going to Mr Mackie's aid at the time when the car approaches at speed. Therefore if Stewart left the scene (as to which there is no evidence and he denies being present at the attack) it could only have been seconds before the impact, and there is nothing to show that he attempted to save Mr Mackie from being struck, unlike Colgan.

[42] I am therefore satisfied that there is sufficient evidence to show that Stewart played an active part in the joint enterprise to severely attack Mr Mackie, that he knew Mr Mackie was in danger lying on the road and did nothing to prevent his being run over by the approaching car. For the reasons I have given I am satisfied that there is sufficient evidence to justify his being put on trial for murder and I refuse a No Bill in his case.

Johnston

[43] He is described as being struck by something in the club and then falling to the ground. Tina Jones alleges that she recognised him as one of the group pursuing Mr Mackie and then picked him out on DVD. That Johnston had a motive for participating in the attack is shown by the remark Tina Jones says he made to Mr Mackie, namely "did you throw a bottle round my neck or did you throw a bottle at me or something I don't know what he said". A forensic examination revealed blood upon his jacket which matched Mr

Mackie's blood. That links him to the scene and to the attack on Mr Mackie. It also supports the identification by Tina Jones of him as one of the attackers who

> "Got him down then they were kicking and kicking and kicking and they were all kicking. There were no fists it was all just feet."

[44] Mr Farrell (who appears on behalf of Johnston with Mr Berry QC) in both written and oral submissions submitted that the evidence disclosed manslaughter by an unlawful act so far as Johnston was concerned and not murder. In R v Church [1966] 49 Cr. App. R. 206 it was stated that for manslaughter to be established "the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm".

[45] I am satisfied that there is ample evidence to show that Johnston took part in the attack on Mr Mackie; was one of those who repeatedly kicked him as he lay in the middle of the road, and did nothing to prevent his being run over by the approaching car. For the reasons I have given I am satisfied that there is sufficient evidence to justify his being put on trial for murder and I refuse a No Bill in respect of Johnston.

Milligan

[46] According to Witness I, who is now referred to as Graham Lynch, Milligan admitted to him that he took part in the attack, saying "he was standing over crying near enough at the side of the wall … then he said he wished he wouldn't have done it and he wished he'd a eh killed himself or something."

[47] During his interviews Milligan said that he ran up with the others, he denied kicking Mr Mackie, but he did admit that he had punched him on the chest. He said that he only punched him about twice, and at p. 1735 that while he was looking for the knee pad which he had earlier thrown away "then the car hit him and I left". He said that the assault on Mr Mackie was still taking place as he was looking for the knee pad. He initially claimed that he did not know that anyone was going to get hit, but at p. 1754 accepted that he knew there was going to be a fight as he heard shouting to get him or catch him as he ran.

[48] Mr John McCrudden QC (who appears for Milligan with Mr Seamus McNeill), argued that the act of his client in punching Mr Mackie was not evidence of grievous bodily harm. However, Milligan has admitted taking part in a pursuit when he knew that there was going to be fight, and he took

part in that fight by striking at least two blows. Given that the pursers, of whom he was one, considerably outnumbered Mr Mackie, that he knew there was going to be a fight, and that he took part in that fight by punching Mr Mackie, I am satisfied that there is ample evidence that he was part of a joint enterprise, the object of which was to inflict serious injury on Mr Mackie. Whilst he has denied being involved in the kicking, there is evidence that there were three people involved in the kicking, and there is only his self-serving statement that he left the scene. I am satisfied that there is sufficient evidence to put him on trial for murder and I refuse the No Bill application against Milligan.

Colgan

[49] There is ample evidence to show that Colgan was part of the joint enterprise to inflict really serious harm upon Mr Mackie based upon the allegations that he held Tina Jones back as the others repeatedly attacked Mr Mackie, and that he was well aware that Mr Mackie was to be attacked. She alleges that he told her "What's going to happen is nothing to do with you here and to stay out of it". Were that the only evidence relating to him, then for the reasons I have already given I am satisfied that that would be sufficient to justify his being put on trial for murder.

[50] However, I must also take into account the prosecution evidence that Colgan tried to stop the oncoming car; that he did so by emerging onto the carriageway from where he had been holding Tina Jones, and waving his arms as Witness D said

> "To get the man's attention to get the car stopped and at that time you could hear the screeching on the road where he had been breaking, but was too late."

See the accounts at [13] and [14] above.

[51] What are the implications of this so far as Colgan is concerned? Mr O'Rourke argued that

> "Even if the Prosecution could suggest that the use of the car was (a) within the contemplation of the accused and (b) not a fundamentally different act from the method anticipated in the joint venture involving the accused, it is submitted that the evidence points conclusively to a withdrawal from this venture by the accused prior to the fatal act. The evidence that a person identified as the accused made a determined effort to stop the vehicle prior to the collision points irrefutably to the accused no longer

> being part of any joint venture if that included an intention to use the vehicle as a weapon; see Blackstone A5.14."

[52] What is necessary to constitute withdrawal from a joint enterprise has been considered in a number of cases, and is intimately bound up with consideration of the scope of the joint enterprise. In R v O'Flaherty [2004] 2 Cr. App. R. 315 the relevant authorities were examined, and the court reaffirmed the principles expounded by Soan JA in the Canadian case of R v Whitehouse [1941] 1 WWR 112 at p. 115 where he said that after a crime has been committed

> "[I]n the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of location by those associated who wish to disassociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of their crime [must be done]. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw."

[53] Whitehouse therefore establishes that there must be "timely communication of the intention to abandon the common purpose", and that "where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common and lawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw".

[54] O'Flaherty also confirms that for a withdrawal to be effective it is not necessary that reasonable steps must have been taken to prevent the crime, see [61]. Nevertheless, it is clear that if a defendant wishes to withdraw where the offence is imminent, in the words of Roskill LJ in R v Becerra (1976) 62 Cr. App. R. 212

> "he would have to 'countermand' to use the word that is used in some of the cases or 'repent' to use another word so used, in some manner vastly different and vastly more effective than merely to say 'come on, lets go' and go out through the window.

In that case one of the burglars heard the tenant coming and called to his companion, 'there's a bloke coming up lets go', jumped out of a window and fled. His companion remained and stabbed and killed the tenant. Both were convicted of murder and the defendant who fled was refused leave to appeal.

[55] I agree with the learned editor of Smith and Hogan Criminal Law 12th Edition at p. 227 that if a defendant does take all reasonable steps to prevent a crime this should be a sufficient basis for an effective withdrawal. Where the actions relied upon are an unequivocal attempt to prevent, and amount to reasonable steps to prevent, the consequences of the criminal joint enterprise in which the defendant has taken part, then I consider that the defendant has shown he has withdrawn from the joint enterprise and so cannot be convicted of an offence committed as a result of the previous actions of a co-accused.

[56] Whether there has been a withdrawal is prima facie a matter for the tribunal of fact, R v Whitefield 79 Cr. App. R. 36. However the test I have to apply at the No Bill stage is whether a reasonable tribunal of fact could, properly directed, convict Colgan of murder where the only inference that could be properly drawn from the prosecution evidence is that Colgan unequivocally demonstrated by his actions that he did everything he reasonably could to prevent the death or injury of Mr Mackie, even though the joint enterprise in which Colgan was involved was a significant cause of the death.

[57] When considering this question at the No Bill stage it is the prosecution evidence that has to be considered at its best. The prosecution evidence establishes the following propositions.

(i) The car approached at a high speed. There are various estimates of the speed, but the most reliable estimate is clearly that of Mr Quinn, who concludes

> "However it is highly probable that the speed of the Fiesta was higher [than 40/50 mph] if the Fiesta car

> was able to apply the brakes prior to reaching the position of the prone pedestrian in response to the upright pedestrian(s)."

(ii) The evidence of Witness D and Paul Houston is that the driver applied the brakes and tried to stop. Witness D said that she could hear the screeching on the road where he had been braking, but was too late. At p. 2281 Paul Houston said:

> "The car hit the brakes … and was skidding for quite a time … it started skidding behind me … and then it skidded by me and then … hit the boy that was lying in the middle of the road."

He said it started skidding about 4 or 5 car lengths behind him and skidded past him.

(iii) The descriptions given by Witness D and Houston already quoted at [13] and [14] above show that Colgan came out onto the carriageway into the path of the oncoming car and waved his hands in an attempt to attract the attention of the driver and to get him to stop.

(iv) Colgan went out onto the carriageway while the other attackers were still kicking Mr Mackie as he lay motionless on the road.

(v) Whether or not the driver could have stopped in time if he had been driving more slowly, he was unable to do so.

(vi) There is nothing to show that there was anything more that Colgan could have done to prevent Mr Mackie being struck by the car in the very short time he had to react to the appearance of the approaching car, nor did Mr Fowler suggest that there was. The only other action that I can see that Colgan could have taken would have been to try to pull Mr Mackie out of the way, but Mr Fowler did not seek to suggest that Colgan had time to attempt that. In my opinion the evidence as to the speed of the oncoming car and the extremely short period of time that elapsed before it struck Mr Mackie's body establishes that it was impracticable to try to drag Mr Mackie out of the path of the car.

[58] Having carefully considered all of the evidence I have come to the conclusion that the prosecution evidence shows that Colgan did everything he reasonably could do to stop the oncoming car, and so he withdrew from the joint enterprise. I have therefore concluded that there is insufficient evidence to justify his being put on trial for murder and I enter a No Bill against Colgan on the joint count of murder.

[59] That is not necessarily the end of the matter so far as Colgan is concerned. It is clear law that a defendant who withdraws from a joint enterprise is not thereby exonerated from any other crime that he may already have committed before he withdrew, for example conspiracy, incitement or attempt. See Archbold 2009 at 18-29. There is ample evidence that before he let go of Mrs Jones and tried to stop the oncoming car Colgan was a party to the joint enterprise to inflict serious bodily harm upon Mr Mackie. There are therefore a number of offences it could be argued that he committed. For example manslaughter by way of an unlawful act because Mackie was rendered motionless on the road by the attack to which Colgan was a party; conspiracy to inflict grievous bodily harm with intent contrary to s. 18 of the Offences Against The Person Act, 1861, or aiding and abetting inflicting grievous bodily harm with intent contrary to s. 18. I should also point out that in his submissions Mr O'Rourke did recognise an argument, although he did not make a formal concession to this effect, that upon the evidence as it presently stands Colgan committed an attempt to commit grievous bodily harm.

[60] Is it open to the court at the No Bill stage to add other counts of its own motion when it grants a No Bill? It certainly would be a highly unusual course for this to be done and I am not aware of any occasion on which such a step has ever been taken, nor were counsel. I also raised with counsel whether at this stage I could have recourse to the powers contained in s. 6(2), (3) and (4) of the Criminal Law Act (Northern Ireland) 1967 (the 1967 Act) which provide for the conviction of accused for certain alternative offences. Section 6(4) of the 1967 Act provides that:

> "(4) on an indictment for murder a person found not guilty of murder may be found guilty:
>
> (a) of manslaughter, or of causing grievous bodily harm with intent to do so; or
>
> (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under Section 4(2); or
>
> (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty; but may not be found guilty of any offence not included above."

[61] Section 6(4) refers to the power of a court to convict of an alternative offence, but that power is plainly limited to the tribunal of fact whose task it is to reach a verdict at the conclusion of the trial. That course would not to be

open to the judge at the No Bill stage because the judge's function at this stage is not to arrive at a verdict, but only to consider whether there is sufficient evidence to justify the defendant being put on trial for the charge(s) brought against him.

[62] Some assistance as to the limitation of the judge's role at this stage may be gleaned from s. 2(8) of the 1969 Act which provides:

> "Except as provided by this section, an indictment presented in accordance with the provisions of this Act shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act and (without prejudice to any other provision of this Act) all enactments and rules of law relating to procedure in connection with indictable offences shall have effect subject to such modifications as are necessary to give effect to the provisions of this section."

[63] This suggests that, save insofar as modified by the Act, the previous law and practice in relation to the powers of the grand jury to find a No Bill and the related procedures continue to apply.

[64] In Huband's The Grand Jury in Criminal cases the Coroners Jury and the Petty Jury in Ireland a number of authorities are referred to that show the grand jury could not find a true bill for manslaughter where a bill for murder was preferred. Huband refers to Hale's Pleas of the Crown, vol. 2, 158 and states:

> "Hale says that, if upon a bill for murder being preferred, the grand jury find a true bill for manslaughter they are to blame, because they take upon them to anticipate the evidence that is to be given to the petty jury, and so determine matter of law that belongs to the Court to determine, and by this means many murders may escape under the disguise of manslaughter."

Huband also refers to the statement in Hale at p. 162 that it may be possible for the grand jury to amend an indictment (and hence amend a single count) from a charge of murder to one of manslaughter by striking out the relevant passages and points out that Hale stated

> "But the safest way is to deliver them a new bill for manslaughter and they indorse it generally billa vera."

[65] That the proper course is not for the court to add a new count but to require a new indictment to be lodged alleging manslaughter was stated by Coke CJ in R v Sir Matthew Carew (or Cary) and Others which is quoted in R v Bubb and Hook 4 Cox's Criminal Cases 455. In that case in 1851 a joint bill was preferred against both Bubb and Hook for murder. The grand jury found a true bill against Bubb for murder, but a true bill against Hook for manslaughter. Williams J, having consulted Lord Campbell CJ and Greaves QC (who was acting as a commissioner of assize with them) was of the opinion that the finding of the joint bill was good as in respect of Bubb but bad in respect of the finding of manslaughter for Hook. He then tried Bubb on the joint indictment of murder but tried Hook on a separate bill for manslaughter which had been found against him. At pp. 459 and 460 the report of R v Sir Matthew Carew (or Cary) is included where Coke CJ affirmed that in such circumstances the best way is to have several indictments against the accused and not one indictment.

[66] I therefore conclude that it is not open to the court at the No Bill stage to add a new count of manslaughter where a defendant jointly charged on a single count with murder has a No Bill entered against him in relation to that count. The court's powers, save as provided by the 1969 Act, are limited to the powers of the grand jury before the 1969 Act, and the authorities show that the grand jury had no such power.

[67] In addition, if the count of murder were amended to charge Colgan with manslaughter but the others with murder in the same count that would contravene Rule 22(1) of the Crown Court Rules (Northern Ireland) 1979 which provides:

> "A description of the offence charged in the indictment or, where more than one offence is charged in an indictment, each offence so charged shall be set out in the indictment in a separate paragraph called a count."

[68] In my opinion the proper course is to enter a No Bill against Colgan on the charge of murder. It is open to the prosecution to proceed against him again on such other charge(s) as they think appropriate. It would be possible, but cumbersome and create further delay, to have a fresh committal against Colgan alone, not least because there has already been a very long delay in completing the committal stage of the case. The committal papers were served on the defendants in March 2008 but it took until January 2009 to conclude the committal, and although there were no doubt difficulties because of the complexity of the case and the involvement of anonymous witnesses, to take so long hold a mixed committal was wholly unjustifiable.

[69] There is no reason why a voluntary bill should not be sought under s. 2(e) of the 1969 Act, or the Attorney General could prefer an indictment under s. 2(f). If a fresh indictment were to be presented against Colgan, then, subject to any No Bill application that might be made in respect of any new charge(s), it would be open to the court to amalgamate the two bills so that a joint trial be held with Colgan appearing upon the same indictment as Stewart, Johnston and Milligan, but charged with a different offence or offences in relation to these events. Whether fresh charges should be brought against Colgan in respect of these events, and if so the way by which any such charge(s) should be brought before the court, are matters for the prosecution.