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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ROBERT BLACK and JONATHAN SMYTH

Before Kerr LCJ, Weir J and Sir Michael Nicholson

KERR LCJ

Introduction

[1] This is an appeal by Robert Black and Jonathan Smyth against their conviction on three charges by Weatherup J, sitting at Belfast Crown Court on 9 May 2007without a jury. The learned trial judge found the appellants guilty of (i) the attempted murder of David Waring on 6 June 2005; (ii) unlawfully and maliciously causing grievous bodily harm to David Waring on the same date with intent to do him grievous bodily harm; and (iii) possession of a firearm with intent to endanger life or cause serious damage to property or to enable any other person to do so.

The facts

[2] In broad summary, the prosecution case against the appellants was that they and another man called William Hill spent the evening of Sunday 5 June 2005 with the victim David Waring in a flat at West Green, Holywood, County Down. In the early hours of the morning of 6 June 2005 all four set off together in Hill's car, ostensibly to purchase alcohol. Instead, in the course of the journey and on the instruction of Black, Hill, who was driving the car, drove to a car park in the area of Redburn Cemetery, Holywood. Hill brought the car to a halt and Black and Smyth alighted. Hill and Waring exchanged

remarks to the effect that the two others were "up to something" and Waring, at Hill's suggestion, left the car to find out what Black and Smyth were doing. As he approached them, Black pointed a weapon at Waring and discharged a shot which struck him in the chest. According to Waring, Black was some five to six feet away when he fired the shot. The motor vehicle was driven away at great speed immediately after this and the injured Waring was able to attract the attention of residents in the area by crying out for help. Police and emergency services were called to the scene and Waring made some statements either to or in the presence of police officers about the circumstances in which he had been shot. Some of his accounts were quite at odds with his evidence at trial.

[3] Both Black and Smyth denied having been with Waring in the flat in West Green, Holywood on the evening of Sunday 5 June. They also denied that they had been in a motor vehicle in the early hours of 6 June 2005. They asserted that they had not been involved in the shooting of Waring. They were both convicted of all three charges. Hill, who had been jointly charged with all three offences, was acquitted.

The Notices of Appeal

[4] The notices of appeal in this case were extensive. No fewer than seventeen grounds of appeal were set out in the notice of appeal filed on behalf of Black and eight were pleaded in the case of Smyth. There were, in essence however, three grounds of appeal: -

1. The learned trial judge should have acceded to an application for a direction that the appellants had no case to answer;
2. The judge failed to have sufficient regard to the inherent frailties of Waring's evidence and its inconsistency with other evidence;
3. The judge failed to recognise the need for caution in acting on the unsupported evidence of Waring.

Although several specific submissions about various aspects of the case were made, each of these can be related to one or more of these three broad themes.

The refusal of a direction

[5] It was argued that this case fell within "the second limb of *Galbraith*" (*R v Galbraith* [1981] 1 WLR 1039). This is the shorthand expression commonly used to describe the principle that a judge should withdraw the case from the jury where he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it. The Court of Appeal in *Galbraith* was careful to confine the principle in this way and warned that where there was evidence whose reliability fell to be

assessed by the jury, it would not be right to stop the case, whatever view the judge had formed of it. At page 1062, Lord Lane CJ said: -

> "Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[6] In *Chief Constable of PSNI v LO* [2006] NICA 3 this court considered the proper approach to be taken to the application of the second limb of *Galbraith* in a non jury trial. At paragraph [14] we said: -

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

[7] In this case there was unquestionably evidence that the appellants had committed the offences charged. It is true that Waring (the source of that evidence) had given conflicting versions of what had happened on the night of the shooting. He had said at first that he had been abducted by unknown masked men and taken to the spot where he was shot. In a subsequent criminal injury application he adhered to the story that he had been abducted but suggested that the abduction took place at a different location from that originally identified by him. It was not until some six weeks after the shooting that he eventually told the police that he had been shot by Black and that he had been taken to the place where he was found in a car driven by Hill and that Smyth had been present when he was shot. The reasons given by Waring for his earlier failure to give what he later claimed to be the true

account of the shooting might at first sight be regarded as less than compelling. He claimed that he feared for the safety of his family if he named the appellants. The learned trial judge had the distinct advantage of hearing and observing Waring while he gave this evidence, however, and his conclusion that the explanation was plausible is one that could not possibly be gainsaid.

[8] It was also claimed that Waring's account was irreconcilable with the evidence of Geolin Hoy, a care assistant, who had gone to bed in her mother's home nearby shortly before hearing a car in the area where the injured Waring was subsequently found. Mr Barry Macdonald QC, who appeared with Mr Browne for Black, conducted a painstaking analysis of Ms Hoy's evidence and contrasted this with Waring's version of events in order, he said, to illustrate how the two accounts were irredeemably in conflict. Since Ms Hoy was accepted by the trial judge to have given an honest account of her recollection of events and, as no doubt had been cast on her reliability, Mr Macdonald argued that the effect of her evidence was to discredit the testimony of Waring to a point beyond rescue.

[9] Mr Macdonald's claims as to the effect of Ms Hoy's evidence must be examined in their constituent parts, but, by way of preface to that consideration, we should point out that, given the circumstances in which Ms Hoy's observations were made, there is an obvious danger in regarding her evidence as an immutable and infallible template against which any other testimony is to be tested for its acceptability. Although she was still awake when she heard the car approach and leave, Ms Hoy was (at least) preparing for sleep. There was nothing outstandingly different about the noises that it generated from other car noises that she regularly heard in that vicinity. It was not until after the car had left and she heard Waring's cries for help that the occasion for a more acute registering of what was happening arose.

[10] Mr Macdonald claimed that Ms Hoy's evidence established that the car screeched to a halt as it entered the car park near the cemetery, that three car doors were banged (or that there was the sound of car doors being slammed on three occasions) and that it left immediately after this with the tyres of the car again screeching as it was driven away at high speed. She was fully alert at the time and, although she had retired to bed, she was not asleep nor was she going to sleep.

[11] It is necessary to examine each element of this version in the context of Ms Hoy's evidence in direct examination, under cross examination by Mr Macdonald and her further cross examination by Mr Magee SC, on behalf of Hill. In her direct evidence the following passage appears: -

> "Q. You heard something to do with a car?
> A. Yes.

Q. Do you remember, as best you can, can you help us as to approximately what time that was?
A. Around 2/2.15, around that time.

Q. 2/2.15. And what exactly did you hear again, please?
A. I heard a car. I heard what I think is doors slamming and then I heard a car like screeching off at speed.

Q. Right. Did you hear door or doors slamming?
A. I heard doors slamming.

Q. Doors slamming. And a car screeching off at speed?
A. Yes.

Q. Can you help us as to whether all this happened very quickly or was there a gap or anything like that, as best you can recollect?
A. I'm not sure.

Q. All right. Now can you remember – if you can't, please say so – can you remember how many doors you heard slam?
A. I heard three doors slam.

Q. And where was this noise coming from?
A. It was coming from the car park.

Q. At the back of your house?
A. Yes.

Q. What was the next thing you heard?
A. You could hear the car going away, quite echo-ey, and then there wasn't anything for a few minutes. And then I heard somebody screaming, somebody shouting, a male voice shouting and screaming."

[12] From this passage it would appear that Ms Hoy first noticed the activity of the car when the doors slammed and that she heard the screeching of the tyres as it was leaving the scene. She gave no description whatever of the car's arrival at the car park. She was unsure as to whether there was a gap between the doors being slammed and the departure of the car.

[13] Mr Macdonald's third question to the witness in cross examination (and the first about the car) was this: -

> "Q. In terms of the sequence of events concerning this car, the car arrived with its tyres screeching, as I understand it, is that right?"

[14] Of course, the witness had not given evidence to that effect at all. On the contrary, she had not given any description of how the car had arrived or, even, any indication that she had heard it arrive. But counsel's suggestion that he had understood a witness to have said something is always liable to cause that witness to agree and, if the premise on which the suggestion has been made is plainly wrong, any answers thereafter given must be treated with caution. In fact, Ms Hoy did not espouse Mr Macdonald's description of the car's arrival immediately, for she answered: -

> "A. The car arrived noisily. It was revving. That's what alerted me to it with the window being open. It wasn't just like a car just casually pulling in. It was revving."

[15] Mr Macdonald pursued the theme of the screeching tyres: -

> "Q. It wasn't like a car driving along that road normally and stopping normally?
> A. No.
>
> Q. It was a car with its tyres screeching?
> A. Yes."

[16] It will be seen, therefore, that the first time that the witness said that the car arrived with its tyres screeching was in response to a repeated suggestion by counsel that this was so. While Ms Hoy's honesty is not in question, one must, we believe, be circumspect about the claim that her evidence unalterably established that the car arrived with its tyres screeching so that any account of the incident that did not include this element was immediately suspect.

[17] Mr Macdonald then took up the subject of the slamming doors: -

> "Q. And then after that you heard these car doors slamming?
> A. Yes.

> Q. Again that wasn't normal opening or closing of doors?
> A. No.
>
> Q. That was very obviously heavy slamming of the doors?
> A. Yes.
>
> Q. Maybe three doors?
> A. Yes.
>
> Q. Was that in fairly quick succession? Do you know what I mean, these doors were slammed fairly quickly one after the other?
> A. Yes.
>
> Q. And that happened, the car's doors slamming had happened very quickly after the car had arrived with its tyres screeching?
> A. Yes.
>
> Q. And then it revved off at speed?
> A. Yes.
>
> Q. So this was really one continuous episode; the car arriving at speed, doing something that sounded like a handbrake turn, car doors slamming and then it sped off again?
> A. It arrived at speed and then the doors slammed and then it screeched away at speed and then there wasn't anything after that."

[18] It is to be noted that the witness did not answer directly the suggestion that this was "one continuous episode". In so far as she is to be taken as having accepted Mr Macdonald's suggestion to this effect, however, it must be remembered that earlier she had said that she was not sure whether "all this happened very quickly or there was a gap" between the various elements of the incident. It must also be borne in mind that she is unlikely to have been aware of the crucial significance that the defence would seek to place on these aspects of her evidence. Agreeing to seemingly neutral suggestions by counsel produces evidence of a quite different calibre from that which is volunteered and strongly adhered to.

[19] Mr Magee took up the sequence of the various parts of the episode early in his cross examination of Ms Hoy: -

> "Q. … you would obviously have been distressed about what you had seen the night before, would that be right?
> A. Yes.
>
> Q. And I suppose sometimes it is hard to get sequencing right, you know, whether you hear a car door before a screech or a screech before a car door, would you agree with that, sometimes?
> A. Sometimes.
>
> Q. You see, you said in examination in chief by Mr Magill, you said you heard a car and you heard car doors slamming. You said something about the sound at that time of night, the window was open and the bedroom was at the back of the house. I heard what sounded like doors slamming, is that right, and a car screeching off at speed?
> A. Yes, when it was leaving.
>
> Q. So the car was screeching off when it was leaving at speed, is that right?
> A. Yes.
>
> Q. Well, the door slamming would have been some time before that?
> A. It was."

[20] After this series of questions, Ms Hoy's position on the sequence of events; whether the car arrived with its tyres screeching; and whether any significant time had elapsed between the car doors being slammed and its being driven off was, at best, unclear. We cannot therefore accept the proposition that any conflict between her account and that of Waring must render his version unbelievable.

[21] In any event, it must be remembered that Waring's account of the incident was necessarily affected by his consumption of a substantial amount of alcohol and drugs and by his reaction to the trauma of the attack on him. He had said that as much as ten minutes might have elapsed between the arrival of the car in the car park and his alighting from it and Mr Macdonald has claimed that this cannot be correct since the slamming of the car doors that Ms Hoy heard occurred immediately before the car sped off. But it is clear from the analysis of the evidence that we have undertaken that it is at least distinctly possible that Ms Hoy did not hear the car arrive and that the slamming of the doors occurred when Black and Hill re-entered the car. It is, of course, the case that Waring gave evidence that the car sped off before they

could have got back into it but, at the time that he was making that judgment, he had just been shot and was trying to run away. We do not consider, therefore, that an error on his part about that aspect of events is in any way untoward.

[22] In summary, therefore, we do not consider that the lack of congruence between Ms Hoy's account and Waring's renders his evidence unworthy of belief. The differences in their evidence are readily explicable by the fraught circumstances in which this episode occurred.

[23] Mr Macdonald criticised the judge for having 'dismissed' Ms Hoy's evidence on the basis that she was going to sleep. At paragraph [61] Weatherup J said: -

> "Ms Hoy heard a car and three doors slamming and the car speeding off quickly after arrival. She heard no gunshot. I accept that she gave an honest account of her recollection of events. Ms Hoy had been working that evening and had returned home at 1.00 am. She was awake when the car arrived but this occurred at a time when she was going to sleep and would not have been at her most alert."

and at paragraph [69] he said: -

> "I am satisfied that Ms Hoy was going to sleep when the events occurred and that those circumstances account for her mistaken estimate of the period over which events occurred and her not hearing a shot."

[24] The judge expressly found that the witness was awake when these events occurred. It may be observed, however, that the fact that she had gone to bed, having worked until 12.15am and returned home at 1am, was not irrelevant to her powers of observation and recall of events that took place more than an hour after she had returned home and after she had retired for the night. We do not consider that the judge placed unwarranted emphasis on this factor and, in any event, for the reasons that we have given, we consider that there was ample ground for disregarding the apparent discrepancies in the two accounts given by her and Waring. We are satisfied that the judge was right to refuse the application for a direction of no case to answer.

The identification evidence

[25] Weatherup J dealt with the evidence of identification of Black and Smyth in the following paragraphs of his judgment: -

> "[71] Waring identified Black and Smyth as being together at the shooting, with Black holding the gun. This is a "recognition" case as Waring claimed to have been with Black and Smyth throughout the evening and to have known them before that day. I am satisfied that Waring had met each of the defendants before 5 July 2005. The guidelines set down by the Court of Appeal in England in *R v Turnbull* [1977] QB 224 also apply to recognition cases. There is a special need for caution before convicting in reliance on the correctness of identification or recognition. Mistakes may be made even in recognition cases. It is necessary to examine closely the circumstances of the recognition.
>
> [72] The initial description of Black to police referred to recognition by height and build and sandy boots, with an absence of any view of Black's face. In his evidence to the Court Waring described Black as wearing light denim jeans and sandy boots and he stated that he had a glimpse of part of Black's face. Waring did not describe to police that he had seen Black's jeans but stated in evidence that he remembered that detail when giving evidence. His explanation for this recall was that "afterwards it came back to me."
>
> [73] Nor had Waring told police that he had caught a glimpse of part of Black's face and his explanation for adding that to his evidence was that he was a bit panicky when he was talking to the police "but when I thought about it afterwards I did see part of his face". The area was dark, although there were street lights along the cul de sac, a faulty street light adjacent to the point where Waring described the shooting and the lights from the vehicle. It is doubtful that Waring caught any glimpse of part of Black's face, as he would be expected to have remembered that when he was giving his explanation to police. Waring's initial

> description indicated that the raised hand holding the gun blocked a view of the face.
>
> [74] I am not satisfied that Waring saw any part of Black's face. In this respect his evidence overstated his recollection of his sighting of Black at the scene of the shooting. I am satisfied that his overstatement of his recollection of seeing a part of Black's face at the time of the shooting was not an intentional misstatement of his memory of events. I conclude that his recognition of Black as described to police has led Waring to believe that he also saw a part of Black's face.
>
> [75] In relation to Smyth, Waring's evidence was that he saw Smyth behind Black and to the right. Smyth was wearing a grey hooded top.
>
> [76] I am satisfied that Black and Smyth confronted Waring after he left the vehicle and that it was Black who shot Waring. I am satisfied that Waring recognised Black in the manner he described to police and in evidence, save that he did not see part of his face. I am satisfied in all the circumstances that Waring's identification of Black is reliable. Further I am satisfied that Waring recognised Smyth standing with Black and that Smyth was party to the shooting of Waring."

[26] The case of *R v Turnbull* remains the *locus classicus* for directions that should be given in an identification case. At page 228 the Court of Appeal gave this guidance: -

> "… whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need

> not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often?"

[27] The judge in the present case expressly recognised the need for caution; he also closely examined the circumstances in which the purported recognition was made. He commented on the conditions of the lighting, on the fact that Black's face was initially said by Waring to have been obscured by the gun and on the observation that Waring claimed to have made of Black's clothing. We are satisfied, therefore, that he carefully took into account the objective and subjective factors that sounded on the reliability of the purported recognition.

[28] The recognition evidence only came into play when the judge was satisfied that Black and Smyth had been present at the scene of the shooting. If he had not been convinced of that central part of Waring's story, an examination of the reliability of the evidence would have been both unnecessary and immaterial. Once he had determined that both appellants were at the scene, that fact became directly relevant to the reliability of the purported recognition, as Mr Macdonald sensibly accepted. The chances of two other people being in that vicinity at that time of the morning and bearing a resemblance (at least in terms of general appearance) to Black and Smyth must weigh strongly in favour of Waring's identification of them being correct.

[29] Mr Macdonald also accepted that, by the time the judge came to reach his final conclusion on the correctness of the recognition evidence, he was entitled to take into account the fact that Black had given evidence which was untruthful and that Smyth had refused to give evidence. Both factors strongly supported the judge's conclusion that Waring's identification of the appellants should be accepted.

The need for caution in convicting on unsupported evidence

[30] It was submitted that the judge was wrong to conclude that the absence of evidence supporting Waring's account did not cast doubt on its essential authenticity. Weatherup J reviewed the type of evidence that might have been available to support the complainant's case in the following paragraphs of his judgment: -

> "[33] There was no objective evidence to support the prosecution case against the defendants. Examinations in a number of areas that might have provided support for the prosecution case were all negative. CCTV cameras along Jackson's Road were examined to determine if Hill's motor vehicle passed along Jackson's Road at the relevant time. The vehicle was not shown on video. DS Clarke stated that there was a time delay on the videos and the vehicle may have passed along Jackson's Road without being caught on camera.
>
> [34] There was no forensic link between Waring and the defendants or Hill's vehicle. Tape lifts had been taken from the vehicle and swabs and prints had been examined but no link had been established. Searches had been conducted and clothes and other items seized, but no link established.
>
> [35] The tyre marks on the access road to the cemetery were examined but did not match Hill's vehicle.
>
> [36] Searches were conducted at the scene with a view to the recovery of the bullet or bullet case. A rummage search in the undergrowth on 6 June was unsuccessful. Metal detector searches on 6 June and 2 November 2005 did not locate the bullet. No bullet case was recovered from the scene although had a revolver been used there would have been no case to recover. It was not possible to establish whether the weapon used had been a revolver."

[31] At paragraph [59] the judge observed that "the absence of objective evidence is not, either as individual items or collectively, supportive of the case for the prosecution, but neither is it inconsistent with that case". The appellants argued that the absence of any evidence supporting Waring's account, where such evidence would normally be available, should be considered inconsistent with that account. But there is a perfectly reasonable explanation that such evidence had not been adduced.

[32] In relation to CCTV evidence, the time delay may be part of the explanation for its not being produced. From exchanges between Mr Macdonald and the court it emerged that such CCTV footage as might have been available may not be of sufficient quality to identify individual vehicles.

It is clear that the matter was not pursued on behalf of the appellants at trial and, in the absence of any investigation of the issue, it simply cannot be said that the fact that video footage was not produced undermines Waring's account.

[33] Likewise, the absence of any forensic link between Waring and Hill's car is readily explicable because of the time that elapsed between the shooting and the forensic examination of the car. It appears that the inspection of the car failed even to establish a forensic link with Hill who owned the vehicle! It is not difficult to envisage why no connection with Waring was found.

[34] Mr Rodgers, who appeared with Mr Cairns for Smyth, dealt with another aspect of this subject, namely the avowed failure of the judge to sufficiently recognise the need for caution in acting on unsupported evidence of a witness whose lack of truthfulness had been amply demonstrated. This claim does not survive careful reading of the judgment, however. After reviewing the evidence, Weatherup J said at paragraph [67]: -

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

[35] Quite apart from this explicit recognition of the need for vigilance in scrutinising Waring's evidence, Weatherup J's thorough examination of that evidence and his readiness to acknowledge Waring's lack of truthfulness and his weaknesses as a witness clearly illustrate the judge's awareness that the evidence had to be carefully weighed and tested before it could be accepted. We reject this criticism of the judge's approach to Waring's testimony.

Further discrete issues

(i) Waring's consumption of alcohol and drugs

[36] It was contended that the judge failed to give sufficient weight to the evidence that Waring had consumed substantial quantities of alcohol and drugs on the evening in question. Again, this is not borne out by a reading of the judgment. In the early sections of his judgment, Weatherup J had accurately recorded Waring's account of how much alcohol and drugs he had consumed and at paragraph [57] he said this on the subject: -

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

[37] These conclusions are entirely unexceptionable in light of the evidence that was given, not only by Waring himself but also by those who attended and conversed with him at the scene. More importantly, the conclusions are the product of careful consideration of the issue by the judge. We reject the contention that this matter was not given sufficient weight.

(ii) The 'powder burns'

[38] It was claimed that the judge was too ready to accept the evidence of a forensic scientist, Leo Rossi, that, because powder burns had not been found on Waring's clothing, he could not have suffered such burns to the skin and tissues surrounding the gunshot wound to the chest. The significance of this issue was that, if Waring had suffered powder burns, this would have

indicated that he had been shot with the muzzle of the gun pressed against or in very close proximity to his body whereas he had testified that Black fired the weapon from a distance of some 5/6 feet.

[39] Linda Hoy, Geolin's mother, and Reserve Constable Clarke (who spoke to Waring at the scene) gave evidence that they saw what they thought might be powder burns in the vicinity of the wound. It was not clear from their evidence that either had looked at the actual wound as opposed to the place on the clothing where the bullet had entered. The police officer's committal statement suggests that he was able to observe the skin but it is clear from the evidence of both witnesses that they professed no expertise in the identification of powder burns. The issue was not explored with them to any extent in cross examination, no evidence was led for the appellants on the matter and no challenge to Mr Rossi's evidence was given. Indeed his statement had been read into the evidence by consent. We are satisfied that the judge was correct to accept Mr Rossi's evidence.

(iii) The track of the bullet wound

[40] It was submitted that, although the injured party's description of the shooting indicated that the bullet passed through his body at roughly ninety degrees to the ground, the track of the bullet followed a markedly downward trajectory. There was no evidence, it was claimed, to suggest that the bullet had struck a bone or any other organ of a kind that would have caused the bullet to be deflected to any significant degree.

[41] Doctor Coleman Byrne, a specialist registrar in general surgery, gave evidence on this topic as part of the prosecution case. He was asked whether he would expect the bullet to take "a relatively straight path" through the body and he replied that he would not; the trajectory of a bullet within the body was "notoriously unpredictable". Although no rib fracture was detected on X-ray or CT scan, it was possible that the bullet had struck a rib and had been deflected.

[42] The learned trial judge concluded that the downward trajectory of the bullet through the body was not inconsistent with Waring being shot as he described. We entirely agree with that finding.

(iv) The meal at 1am

[43] David Lowe, a paramedic who attended the scene of the shooting as part of the ambulance team, spoke to Waring and was told by him that his last meal had been at 1.00am. There was simply no room in Waring's account for his having eaten then, Mr Macdonald claimed. The judge was therefore wrong, he said, to have described this as merely an omission on Waring's

part. It was positively inconsistent with the account that he had given of events of the evening of 5 June and the early hours of 6 June.

[44] This issue was not raised with Waring in evidence. We find it quite impossible in those circumstances to accept the proposition that no explanation of his omission from his account of any reference to having eaten at 1am is feasible.

(v) The failure to adduce evidence from Waring's mother and brother

[45] Waring had claimed in evidence that he had given what he said was the truthful account of the shooting to his mother and brother before going to the police. The judge dealt with this in paragraph [66], where he said: -

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

[46] Mr Kerr QC, who appeared with Mr Peter Magill for the prosecution, accepted that previous statements made by Waring to his mother and his brother were *prima facie* admissible under article 24 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

[47] We do not consider that any weight can be attached to the failure of the appellants to challenge Waring's assertions on this point. It might have been a perilous course for a cross-examiner to embark on unless he had concrete evidence (perhaps obtained from non-used disclosed material) on which to directly challenge it. Moreover, in so far as the judge discounted the point on the basis that these witnesses could not have been called, we do not consider that he was correct to do so. It is clear, however, that Weatherup J attached no significance to this matter. There is no reason to suppose that he concluded that Waring's evidence was fortified by his claim to have provided his relatives with the account that he gave on trial.

Conclusions

[48] None of the arguments made on behalf of the appellants has been made out. We are satisfied of the safety of the convictions which the learned trial judge returned after a scrupulous examination of the evidence and the issues that had been raised with him. Moreover, we consider that it is impossible to suppose that Waring would have concocted a lying account of this incident to implicate three innocent people all of whom he knew and one (Hill) who had been a lifelong friend. The suggestion that he might have been motivated by a desire to be received on to a witness protection programme we find impossible to accept.

[49] The judge concluded that Black was lying, particularly when dealing with questions from Mr Kerr in cross examination about speaking to Hill after their arrest on the subject of where Hill had been on 5 and 6 June. The judge did not say that he had been reinforced in his conclusion as to Black's guilt on account of those lies. We consider that he would have been justified in doing so and our consideration of his evidence has fortified us in our decision that the verdicts in his case are safe.

[50] Likewise, although the judge stated that an inference could have been drawn against Smyth on account of his failure to give evidence, he does not appear to have done so. In our judgment he would have been justified in doing so and Smyth's failure to give evidence in face of the clear evidence implicating him in these serious crimes raises a clear inference of his guilt and again reinforces us in our conclusion that the verdicts in his case are also safe.