

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

RONALD J CRAIG AND JAMES D H SPEERS

Before: Kerr LCJ, Campbell LJ and Sir Michael Nicholson

_____ **v**

Sir Michael Nicholson

[1] The appellants were convicted of the murder of Trevor Lowry ("the deceased") by Girvan J (as he then was) sitting without a jury at Belfast Crown Court on 23 March 2004. We have read the entirety of the transcripts of the evidence in this case and made our own summary of what we regarded as the relevant evidence against Craig and Speers and the evidence which Craig gave after the close of the Crown case. We have compared our summary with that of the trial judge. Some parts of our summary are more detailed than his. Where his is more detailed, we have looked at the transcript to check that it is correct. We have found it to be so. His is a masterly overview of the evidence with comments where appropriate. Ours contains no comments as we did not hear or see the witnesses. We carried out our task because there had been an interval of time between the giving of evidence and the judgment on the one hand and the giving of judgment on appeal on the other.

The Crown case against Craig

[2] The deceased was seen by local residents around 11.40 pm on 31 March 2001 in a badly injured state, lying on the pavement outside 1 Harmin Parade, Belfast. He was unconscious, was bleeding and his face was badly swollen and bloody. The deceased was transferred by ambulance to the Royal Victoria Hospital, Belfast. On 2 April at 2.10 pm brain stem death was diagnosed. A blood sample from the deceased indicated that he had a blood

alcohol count of 260 mgs to every 100 millilitres of blood, showing a high degree of intoxication.

[3] The Deputy State Pathologist, Dr Bentley gave evidence in relation to the post-mortem examination, establishing that the deceased died as the result of blunt force trauma to the head. The pattern of injury indicated multiple blunt injuries, possibly inflicted by kicking or stamping with a shod foot. Some of the injuries could have been inflicted by punches. However, there was nothing to suggest that a weapon had been used. Some of the bruising of the face and left shoulder exhibited linear patterning. Dr Bentley stated that the marking was virtually diagnostic of stamping of footwear. The whole of the centre and upper part of the face was bruised. The right ear, jaw, neck, left shoulder and subclavicular area, right arm, right elbow, right wrist and left leg had extensive bruising as well.

[4] It was not possible to say how many assailants were involved from the medical evidence. However, the injuries could have been inflicted by one individual. There were no defensive type injuries. Dr Bentley could not think of any possibility other than footwear as the cause of the injuries to the deceased. He invited counsel for Craig to suggest some other cause. Neither counsel for Craig nor counsel for Speers suggested any other cause.

[5] Examination of the scene by the police and by the Scenes of Crime Officer established that outside 1 Harmin Parade there was an area of blood where an ambulanceman had found the deceased's head to have rested. There was blood on the left hand pillar of the gateway at 1 Harmin Parade. The top plank of the wooden fence outside it had been recently broken and there was a spot of what appeared to be bloodstaining on the top edge. Below this on the ground was a dark sleeveless fleece jacket belonging to the deceased which was bloodstained. There were several areas of blood, subsequently identified as the blood of the deceased. There were some drops of blood along the laneway leading from the Antrim Road alongside the car park of Madaghan's Bar ("the bar") leading into Harmin Parade. The blood marks found outside 1 Harmin Parade were consistent with blood coming from the deceased during and as a result of the assault on him and pointed to his being on the ground with his head lying face up close to the lefthand pillar of the gateway at 1 Harmin Parade.

[6] An inner cordon to protect the integrity of the scene was not established until 10.30 am on 1 April 2001. Girvan J ('the trial judge') found as a fact that such breaches of proper procedure as occurred did not distort the evidence. We endorse that finding.

[7] The deceased had been drinking in the bar some time after 9 pm on 31 March. A barmaid said that she saw him in the bar and gave evidence that Craig and Speers and a young man called Moore were also there before she

left about 9.30 pm. But the trial judge was not satisfied that Craig was in the bar before 11 pm.

[8] Gualter Conceicao worked at the bar as a doorman. He gave evidence that he knew the deceased and Speers. He had known Speers for years. He was in the bar on Saturday, 31 March. So was the deceased. He saw them there shortly after 8 pm. He saw Speers leave around 10.30 pm-11 pm. Speers went to Papa's Kitchen to get something to eat. He left with two young fellows. It became apparent that there was difficulty in understanding this witness and the trial judge arranged for a Portuguese interpreter. Mr Conceicao resumed his evidence. He said that two young boys came into the bar to look for Speers around 10.45 pm. They were 18 or 19 years of age. Speers and the two young boys left ten minutes later at about 11-11.20 pm. He saw Speers coming back from Papa's Kitchen. He locked the door of the bar because Speers had had too much to drink. He was with the same two young fellows. He did not see the deceased leave the bar. At a later date he went to an identification parade at Donegall Pass police station and picked out Craig as having been one of the young boys who came to the bar to look for Speers and left with him. He knew this boy beforehand.

[9] He also said that he saw Sammy Crosett dressed in a black motorcycle jacket in the bar. He had to put him out of the bar for inappropriate behaviour. He said he saw the deceased about ten feet from Speers in the bar. Speers was annoying people by touching them on the shoulders and joking. Under cross-examination by counsel for Speers he said that it was possible that the two young boys were not in Speers' company. It was possible that he assumed Speers was going to get something to eat at Papa's kitchen. He then repeated that he saw Speers go into Papa's Kitchen and saw him eating what appeared to be a kebab. He saw two young men with Speers. It was put to him that he might have seen someone who was like Speers coming back and answered: "Probably". The young men were wearing baseball caps. He saw the young men after they went to Papa's Kitchen at a Ford car where he had also seen Speers. He repeated that it was Speers whom he saw go into Papa's Kitchen and come back up. The same people that left the bar were the same people that he saw at the car. Again it was suggested that he could be mistaken and said: "Probably". He said he did not think he was wrong.

[10] A teenager, Christopher Morrow, gave evidence for the Crown that he met Craig at 1.20 pm to 2.00 pm on 1 April. Craig said to him that he had got himself into a bit of bother and that he needed Morrow and another teenager called Smith to help him. Smith also gave evidence for the Crown to the same effect. Morrow and Smith stated that they each took one of the two Reebok trainers which Craig gave to them and subsequently the trainers and tracksuit bottoms which Craig had also given to them were thrown behind a fence at St Anne's Crescent, Belfast. The following day, Morrow stated, Craig told him

that he would knock his bollocks off if he told anyone. The deceased died in hospital that day, 2 April.

[11] In interviews under caution with the police Craig initially maintained that the trainers that he had been wearing on 31 March 2001 had disappeared. He claimed that he had been wearing Nike trainers. It was established that he was in fact wearing Reebok trainers on the night of 31 March which were brand new and had been bought by his mother for him on 30 March.

[12] After seven of the interviews referred to at para [4] during which he maintained that he was wearing Nike trainers which had disappeared, he admitted that he was in fact wearing the Reebok trainers and tracksuit on the night of the murderous attack on the deceased and that he had asked Morrow and Smith to help him to hide them, as they testified at the trial. He told the police that he had done that because he had been warned to get rid of his clothes.

[13] The Reebok trainers were found by the police and sent for forensic analysis. This analysis established that both trainers had blood on them and DNA analysis established that the blood on the trainers was the blood of the deceased. They and the tracksuit bottoms were found by the police on 4 April under a bush at the back of St Anne's Crescent. The two training shoes were packed by the Scenes of Crime Officer in one bag, contrary to good practice. The bag was subsequently opened and the shoes were taken out and shown to Craig at an interview. This was also bad practice.

[14] Dr Ruth Griffin, an expert in body fluids, gave evidence of examining bloodstaining at 1 Harmin Parade. She found blood spots had been projected onto a gatepost at low level, radiating outwards to a height of approximately 550 mm to the left and approximately 660 mm from the centre of the gatepost and to the right onto the side of the post and onto the edge of the gate. A pool of blood was on the ground in front of the gatepost and the blood appeared to be radiating from this point. The spots were quite small and indicated quite a bit of force. DNA tests indicated that the blood was from the deceased. She examined the Reebok trainers. On the right shoe there were small spots and light smears. On the left shoe there was a smear and a spot. DNA analysis indicated that the blood was the blood of the deceased. Some force had been used to project the blood onto the shoes. There was no evidence of any heavy staining around the toes of the shoes. The two shoes were packed together. She agreed with counsel for Craig that it was a reasonable possibility, that the wearer was a spectator at the scene at 1 Harmin Parade. But in our view although the questioner appeared to be inviting an answer that was legally significant all that the witness could provide as a scientist was that this was a scientific possibility.

[15] Dr Northcott, who gave evidence as a forensic scientist for Craig, agreed with Dr Griffin's analysis. His conclusions reached on the evidence was that the shape and location of the blood on the Reebok trainers was not inconsistent with someone stamping on the deceased. But it was not possible on the evidence of the blood alone to come to any conclusion as to what the wearer of the shoes was doing.

[16] Dr McDowell, a forensic expert on footwear examined the Reebok trainers and found in the heel area a horseshoe shape with a little nick in the bottom which corresponded with an injury to the deceased but concluded that the quality of all the marks was such that little by way of meaningful comparison with the Reebok trainers or other footwear submitted for examination could be made. In his opinion it was a footwear mark on the deceased but he could not be 100 per cent certain. From all the shoes that he was shown he could exclude a significant number of them as not having caused the injury. He could not exclude the Reebok trainers, Nike trainers, Gola and Rockwood because of the heel pattern. Nor could he exclude the possibility that there were other shoes which might have made the mark. This was because of the poor quality of the marks.

[17] Mr Daly, another forensic expert on footwear, stated that he could exclude the Gola and Rockwood but not the Reebok or Nike trainers. There was a U shaped or horse-shoe shaped mark and a triangular mark, each of which would have been made on the deceased's body at different times and possibly by different makes of shoes. He did not claim that they were definitely marks from footwear but no other possibility was put to him by counsel for Craig or Speers.

[18] Craig's police interviews under caution commenced on Wednesday, 4 April. He said that he went to Paul Moore's house at about 6.30 pm-6.45 pm on 31 March. He left there at about 10.30 pm and went to Carnmoney Hill to see James Mason. Then he went to Richmond shops at the top of the street where he lived. He stood there till about 6.30 am. He was wearing navy tracksuit bottoms, a grey and navy Reebok top and Nike trainers. He went home and went to bed. His mother got up shortly after 6.30 am. She took him to his work at about 10.40 am. He worked in 'Jungle Jim's' until 3.00 pm, went home, had his dinner and went back to Richmond shops where he learnt that Paul Moore and Stephen Paulie had been arrested. He was wearing a baseball cap on the Saturday night with the word 'Kickers' on the front. He was in Madaghan's Bar on Friday night with Paul Moore. He described what he did on Friday night. He did not know Harry Speers. He was not in any band. He denied any involvement in the death of the deceased.

[19] His interviews continued. He was asked where his Nike trainers were and said that they were under his bed on Sunday night but were not there on the morning of his arrest (which was a Wednesday). He could not explain

why they had disappeared. He was shown the Reebok trainers and said that they were not his shoes. As already stated, he changed his story after seven interviews. The police had put their case against him in the course of these interviews in a very skilful way.

[20] The eighth interview was on Saturday 7 April at 2.48 pm. His mother was present as was his solicitor. He said that he was very sorry for being quiet. He was in Glengormley on Saturday night and was wearing the tracksuit bottoms found by the police with the Reebok trainers previously shown to him. He also said that he was at the scene of the incident on Saturday night.

He recounted how he and Paul Moore went down to the bonfire on Saturday night about 10.00 pm and how he left the bonfire, headed to Glengormley and went into the bar and had a few drinks. He came out of the bar, walked into the Harmin estate and witnessed a fellow getting beaten and jumped on. His face was jumped on and the blood was flying everywhere. He told people to leave the man alone. He left and went to a Ford Escort and with others went up the Hightown [Road] and after that was told to get rid of his clothes, which he did. He did not want to mention any names, he said. He came out of the bar with others and entered Harmin Lane with them. This fellow (referring to the deceased) was coming out of the bar and walked up the lane beside the bar and got a beating. He did not know why. The deceased walked with him and the others up the lane and then he was attacked. He himself was right beside where the man was attacked. The two people who were with him were jumping up and down on the man's head.

[21] He remembered the incident involving a Ford Escort where a man was crossing the Hightown Road and the car was driven at him. After that incident at the Hightown Road he went on his own to Richmond shops. He had got out of the car in Harmin Parade. The driver, an older man, and the other passenger who was about his own age go out as well.

[22] He was not drunk but he was tipsy. When they went into the Harmin estate their intention was to visit a man called Chris. In order to get the keys for the Ford Escort the older man had to get the keys from Chris. The clothes that were got rid of were as described in the statements of Mason, Morrow and Smith which had been read to him in earlier interviews. His tracksuit bottoms were washed by his mother on the Sunday.

[23] The older man punched the deceased several times until he fell to the ground. His association with the older man was because his younger companion met the older man through the Whitewell Defenders' band. He had seen the deceased in the bar standing beside the older man.

[24] At the next interview the police case against him and Speers and another man was put fairly and squarely to him. He said that he was not saying anything, he was too afraid.

[25] In cross-examination of Detective Constable McDonald who gave evidence about these interviews counsel for Craig put to him that Craig was subsequently interviewed in Lisnevin. Craig named the two persons who were with him at the time of the attack on the deceased. He named them as Harry Speers, his co-appellant, and Paul Moore.

Application for a Direction that there was no case to answer in respect of Craig

[26] Mr Cinnamond QC applied for a Direction based on the principles in Galbraith's case. He submitted that there was no evidence of participation in the physical attack on the deceased. The trial judge ruled against this submission. We fully support the ruling.

The Crown case against Speers

[27] It is unnecessary to repeat again the description of the scene at 1 Harmin Parade where the deceased was found lying by local residents around 11.40 pm on 31 March 2001. Nor is it necessary to describe the findings of the Deputy State Pathologist as to the cause of death or the evidence of the forensic witnesses already set out.

[28] Arguments were advanced about the admissibility of evidence as against Speers with which we will deal in due course. We have rejected these arguments but it will be necessary to give our reasons after examining the evidence given on behalf of the Crown against Speers.

[29] In making one's way through the morass of evidence, objections to evidence, submissions and so forth running to more than 5000 pages it would have been helpful to have a comprehensive index covering all the volumes or files that were prepared. This is not to say that counsel were unhelpful in assisting us. Far from it. But when the judgment is being written one sometimes has to search through a number of files in order to find the relevant material which does justice to the argument presented to us and this was particularly evident in dealing with the Crown case against Speers.

[30] Ms Claire Fulton's statement was read. She stated that she was a Scenes of Crime Officer, that she arrived at 1 Harmin Parade at 1.10 am on 1 April 2001 and carried out an examination outside those premises. She observed that the top plank of wooden fence running along the top of the wall surrounding the garden had been recently broken and that there was a spot of apparent bloodstaining on the top edge. Below this, on the ground were

found a jacket with apparent bloodstaining. To the right of the jacket there was a cigarette butt and a lighter. There was a second cigarette butt further along the pavement towards the T-junction of Harmin Parade and Harmin Park. There were several areas of apparent bloodstaining on the pavement in front of the house and on the left hand gate and gate post. Amongst other things she recovered, packaged and labelled the cigarette butts. Later she returned to the scene with Dr Griffin.

[31] It is clear that the blood which Dr Griffin found at the scene came from the body of the deceased. She received cigarette stubs with a laboratory submission form. There was a poly bag which was integrity sealed with a label signed by Ms Fulton, folded and sellotaped at the top. The cigarette butts were individually packaged within the main bag and were individually labelled. One of them was labelled "butt on road, Harmin Parade, 010401" and the other was labelled "butt beside jacket, Harmin Parade, 010401". The jacket belonged to the deceased.

[32] Buccal swabs were taken from Speers for DNA purposes. The cigarettes had been smoked down to the filter. DNA profiles were obtained from both butts. No one was matched to the butt labelled "butt on the road". The butt labelled "butt beside jacket" appeared to be clean and unaffected by weather. It was analysed by the SGM plus system which carries out eleven independent tests simultaneously. A mixed profile was obtained. The main profile matched the profile of Speers. Using the Northern Ireland frequency data it was calculated that this would be expected to occur in less than one in a thousand million males unrelated to Speers. More than ninety per cent of the total DNA or possibly ninety percent of the DNA matched Speers.

[33] Fragments of another DNA profile consisting of components present in a DNA profile of the deceased were also found. This was only a partial profile. Dr Griffin did not obtain blood from the minor profile. She gave evidence that two profiles were often obtained when a cigarette had been shared. It might be that the body fluids of the deceased got onto the butt.

[34] Cross-examination of Dr Griffin established that the scene was degraded but this did not detract from the fact that the blood was the blood of the deceased and that the main profile on the cigarette butt stated to be beside the jacket of the deceased was that of Speers. The object of cross-examining Dr Griffin on behalf of Craig appears to have been to establish that there was no evidence that Craig kicked the deceased. But the forensic evidence was that the deceased had been stamped on. Cross-examination on behalf of Speers was somewhat more relevant.

[35] An attack was made on the bona fides and competence of Ms Fulton on behalf of Speers. It was suggested that one particular bag should have been packed and sent to Dr Griffin. She would not accept that it should have been

as it was used to cover or protect bloodstained items. She said that it would not be normal practice because she would expect the bag to be a clean object placed on top of an item to protect it.

[36] Criticism was made of Dr Griffin's original statement for committal proceedings on the grounds that no reference was made to Speer's profile being found on a cigarette butt. She pointed out that the DNA work carrying Speers' DNA was already in existence at the time of committal but there was a gap in time between analysing the DNA on the cigarette butts and comparing them with Speers' DNA. Other persons' DNA results were compared with the DNA on the cigarette butts and ruled out before comparison was made with Speers' DNA. Thus at an early stage she had written that the DNA profiles from four people including the deceased did not match the major DNA profile on the cigarette butts. When she made that statement, it did not mention Speers' DNA profile; his had not been analysed and compared with the cigarette butts.

[37] When Dr Griffin stated that the DNA profile could not have emanated from the deceased she was dealing solely with the main profile. The minor profile was not discussed. She had referred in her notes to one of the cigarette butts as being "under the jacket" of the deceased. If there was contact at all with the jacket or the deceased, then a finding of the deceased's profile as a minor contribution to the DNA analysis was all the more likely. The statistical significance in relation to the three areas where the minor profile [of the deceased] was found was one in sixteen. It would be described as "weak support" for the presence of the deceased's DNA on the cigarette butt. She could not discount completely that apart from Mr Speers there had been more than one human contact with the cigarette butt. She had assessed three elements in the minor profile and combined them. These matched the deceased's profile.

[38] She instructed the DNA section to examine the "cigarette butt on road" and the cigarette butt which she had written as "under jacket" and to analyse them, using the SGM plus system. At that stage she had not seen the actual packaging nor seen the definition or wording on the items. It was her understanding at the time that she made the note that one was "on the road" and the other was "under the jacket". The work on the cigarette butts for DNA purposes started on 20 April. A small strip half a centimetre broad from the lower part of the filter which would have been in contact with the lips of the smoker would be cut off for examination. It was she who excluded the deceased from the main DNA profile on the cigarette butts.

[39] The cigarette butts should have been kept separate. They should have been labelled separately. If they were packaged together there would be a risk of contamination. There were occasions when, instead of packaging them separately, items were sub-packaged within one bag, sub-grouped within that

bag. The cigarette butts were in individual bags within an outer bag. That was acceptable as long as there was a physical division between the items. The cigarette butts were in a package with CEF4 on it and within that package were two sub-packages which were written on. They had a 'write on' strip. They should have had separate reference numbers and been put in separate bags. That would be desirable.

[40] Dr Griffin said that she would refer to CEF4 as 'package A' with two sub-packages 'A1 and A2'. The cardboard item attached to the outer bag was the exhibit label, CEF4 and the two bags in which were the cigarette butts were contained within the larger bag (with the label CEF4). That was the SOCO integrity label. It was to make sure that the item was protected from any other interference. If Ms Fulton had not had little bags available to package the cigarette butts and if she had put them into the bigger package together, she would have had to re-open the sealed bag on which there was an integrity label. She could not then have known which butt was which. Ms Fulton on this scenario would, she accepted, be guilty of gross impropriety in bringing back to the police station a package with an integrity label, re-opening it, taking out two items and putting labels on them without knowing which was which and just guessing which was which. It would be simpler to leave them as cigarette butts from Harmin Parade than act in a completely improper way. These answers were given in response to questions from the trial judge.

[41] In one of her statements for the committal proceedings she expanded the information previously furnished. In it she stated that CEF4 contained two poly bags labelled as (a) butt on road and (b) butt beside jacket. She used the lettering (a) and (b). At that stage she listed the exact notation from the packaging. As earlier noted it had previously been her understanding that one cigarette butt had been under the jacket. The butt from beside the jacket was from a Regal King size cigarette. The other butt appeared to be from a Lambert and Butler cigarette. She agreed with counsel for Speers that the minor DNA profile could have come from the deceased's saliva, spittle, sputum, whatever (known as the "aerosol effect".)

[42] Dr Griffin was re-examined on behalf of the Crown. She said that if the two cigarette butts were presented to the forensic laboratory in the form that they were presented to the court, she would have no concerns about cross-contamination because they were separated from each other. Ten blood swabs were submitted as one item. That the swabs were under one label but separate was unusual. However, it aided persons in the laboratory. One would have a separate tube for each swab. For DNA purposes there would be no different reading. There might be degeneration but not distortion.

[43] In answer to further questions from the trial judge she stated that in one section of the laboratory biology and DNA work were carried out. The

DNA was a specific task. The DNA section provided her with the results of their analysis and these results were used by her to interpret the findings in the case. The person in charge of the DNA section was Mr Irwin. In terms of the DNA, extracted from the cigarette butt and in terms of the DNA from Mr Speers sample she considered that as full and detailed DNA analysis as one could really reasonably ever expect to get had been made. The cigarette had been smoked within a few millimetres of the butt to completion. The butt was usually the repository of saliva from the smoker.

[44] Mr Brian Irwin gave evidence that he was the team leader for DNA profiling at the Forensic Science Institute (or laboratory). His team was responsible for the examination of the cigarette butts. The butt having 50 nanogrammes of DNA on it was a Regal King size butt marked as having come from the vicinity of a jacket. The end product of testing was a DNA trace or plot which took the form of peaks shown on trace lines. By international convention the positions in which those peaks were found were given numerical labels. Item 25 which related to the cigarette butt "in the vicinity of the jacket" had a major and minor profile with the minor profile having the figures D2, D3 and D19 in brackets. The techniques for producing the profiles and for their interpretation were in universal use throughout the world. He confirmed that a profile in a degenerated form would not change its characteristics. It deteriorated so that one did not get a result. That quantity of DNA was much more likely to arise as a result of direct contact than by secondary or tertiary means.

[45] In cross-examination on behalf of Speers he stated that the issue of shredding of DNA did not seem to extend to blood, saliva or semen. In relation to the quantities of DNA on the 50 nanogramme butt the ratio of DNA as between major and minor profile appeared to be 95 per cent and 5 per cent, he stated in re-examination. They would indicate strongly against the 'inversion' theory propounded in cross-examination that the major profile was not of the smoker but of a person who had handed the cigarette to the smoker.

[46] In answer to the trial judge he said that the presence of the major profile could have occurred by someone smoking the cigarette. He would think it unlikely that the minor profile could have been caused by smoking although it was not possible to rule it out entirely. If the minor profile had arisen through that mechanism he would have expected to see a greater contribution from that donor. He was asked whether the major profile could have got on by the donor handling the cigarette without smoking it or touching it. His answer was: "Again that might be remotely possible but I would deem it to be quite unlikely". At the levels of DNA recovered the minor profile could have come from touching. If the minor donor was coughing or had spit saliva out of his mouth and the butt was on the ground, it could certainly explain the finding. If the minor donor had been wearing

his jacket in a pub and the major donor had put his hand on or touched the jacket he would think it an extremely unlikely explanation for the presence of the major profile. Dandruff or skin flakes from the major donor were unlikely explanations. Mixtures would arise where one individual lit a cigarette and passed it to another to be smoked. One butt touching another in the same ashtray was another possible means of transfer. Dr Holmes recorded the results from Speers' DNA. He also carried out the relevant tests in relation to the cigarette butts.

The evidence of identification

[47] Michael Bellew gave evidence that he went to the GAA club known as St Enda's off the Hightown Road at 8.30 pm on 31 January. There was a laneway that led from the club to the Hightown Road. He left the club after having four drinks and went along the laneway to the Hightown Road and citywards towards Glengormley, having crossed over the Hightown Road because there was no pavement on the side of that road nearer the GAA club. A white Ford Escort car came slowly past him going countrywards. As it came level with him it slowed down, travelling at about 5 mph. There were three people in the car. They looked out at him. The driver stared at him. He walked on and saw, glancing back, that the car had done a U-turn. He crossed back to the other side of the Hightown Road where there was a grassy bank because he was suspicious about the car. He kept an eye on the car. It veered towards his side of the road, quickening its speed. He tried to move to the higher part of the grass bank. The car mounted the kerb that went onto the grass verge. He made a dive onto the bank so that the car would not hit him. It was about two or three feet away and then went into reverse and drove off towards Glengormley. The car did another U-turn. He lifted a large shaft of a brush and a piece of tarmac to defend himself. The car started to mount the verge again towards him, increasing speed to 40 mph. He was about a foot away from the very front of the car. It got caught on the verge and the kerb. It was not physically possible for the car to get any closer to him. He could see into the car. There were three persons. He could see the driver very clearly. The driver would have been three or four feet away from him. The car had to go into reverse, again went countrywards, again made a U-turn, then sped away in the direction of Glengormley. He had a very clear view of the driver the first time the car came past and slowed down when it came level with him. The driver was staring at him and he had a full frontal view of him. He did not get a view of the driver on the first occasion that it mounted the kerb. He did get a view on the second occasion for ten to fifteen seconds. He was later shown a white Ford Escort by the police at Seapark. It was the exact same car. He gave further details as to the identification of the car. He later went to Donegall Pass police station for an identification parade. He was taken to a room where procedures about identification parades were explained to him. He did not speak to any police officer except those involved in the identification procedures. He went into the ID parade. He

was asked whether he recognised anyone. He said that he did and gave the policeman the number of the person in the parade whom he recognised. It was the person standing at number 5. He was the driver of the white Ford Escort. The people on the parade were in a different room from him. He was behind a glass screen.

[48] He was cross-examined on behalf of Speers whom he had picked out as the driver of the car. A police Land Rover had passed him shortly before the incident, about a minute before. He was taken home by the manager of the GAA club before midnight. The car which mounted the kerb got stuck in the muck. (He had already given direct evidence that the car he was shown by the police at Seapark had muck at the front). The window on the rear passenger side of the car was down. (He had already given direct evidence to that effect about the car shown to him by the police). He described the driver. It was put to him that when he reported the incident to the police he placed the time of the incident as being between 11.30 pm to midnight on 31 January. He said that the two young fellows in the back of the car were wearing baseball caps, not the driver. He could not remember any facial hair on the driver. He told the police that he did not think that the driver had facial hair but that he would not swear on it.

[49] Reserve Constable J A Whyte gave evidence that he was on duty in the early hours of the morning of 1 April 2001. He was on mobile patrol in a marked police car with Constable Brown. They went to Harmin Parade and spoke to police at a cordon. He was not familiar with the area. The police were at the junction of Harmin Parade and Harmin Park. They then went to the junction between Harmin Park and Harmin Drive. He looked left and observed a white Ford Escort outside 62 Harmin Drive. The side lights were on the vehicle. He observed three males walking from the direction of the vehicle. They paid attention to these persons. There was something that just did not look right about the whole thing. The men walked into Harmin Drive into the cul-de-sac and disappeared. He and Constable Browne searched the vehicle, the registration number of which was MXI 4115 and found a set of number plates below the driver's seat not relating to the vehicle. The men did not come back to the vehicle. He got a fairly good view of the three men. There was street lighting and the car lights of the police vehicle lit up the men. At the closest point they were five to eight feet away from the front of the police vehicle. One of the three was taller and heavier set than the other two. He was in his 40s with white greying hair and a darker moustache. The other two were younger. He concentrated more on the older man in front of the other two. He got a good view of the older man from the side. He had him under view for a matter of seconds. On 5 April he went to Donegall Pass police station, attended an identification parade, picked out number 5 on the parade as the older man. This was Speers.

[50] In cross-examination on behalf of Speers he said that he did not connect the three men with the vehicle at first. The description of the man became relevant after what was found in the vehicle. When challenged about the identification parade, he said: "I would safely say that [No. 5] was the same person. It was suggested that he had a fleeting glimpse." He replied: "Yes, if you call it a fleeting glimpse". He had no discussion with anyone except Constable Brown about the identification parade.

[51] Constable Brown gave evidence that he was on mobile patrol with Reserve Constable Whyte. They drove along Harmin Park and at the junction of Harmin Park and Harmin Drive saw a white Escort car with side lights on which aroused suspicion. The car was outside 62 Harmin Drive. They saw three persons when they first saw the car. The first person was at the front just coming off the kerb at the front nearside of the car walking onto the road. He was in his 40s. He was of heavy build, had white greyish hair and a dark moustache. The police car lights illuminated him for a brief period and then he walked down the side of the police car. He would have been in view for approximately five seconds. The man walked into a cul-de-sac in Harmin Drive. He also attended the identification parade which Detective Constable Whyte attended but picked out a person other than Speers as the older man.

[52] A witness known as Mr H gave evidence that just after midnight on 1 April he went to the bar to pick up a friend. He parked his car in the car park, went into the bar, came out again and drove his car countrywards heading towards Burney's Lane. He drove down Burney's Lane into Mountainvale Road, drove to the junction of Harmin Park and Harmin Drive, turned right into Harmin Drive, left into Harmin Avenue and found a white Ford Escort blocking Harmin Avenue. It was heading out towards Harmin Drive as he was turning in. It was being pushed towards the junction with Harmin Drive. Two young men were pushing it and a person was steering it. He was at the junction for three to five minutes before he was able to drive into Harmin Avenue. He spoke to the people at the vehicle. Both young men were wearing baseball caps. They had their sweatshirts pulled down over their hands. He was suspicious. The driver was three feet away from him. He described him as of medium build with grey hair, going grey and a small moustache with a scar on his face. He was not wearing anything on his head.

[53] Mr H turned in the cul-de-sac of Harmin Avenue. He had got lost. The white Ford Escort had gone. He went back to Burney's Lane. He did a U-turn to try and find the place he wanted to go to. Eventually he passed the corner of Mountainvale Crescent where he saw a police car on the footpath.

[54] Mr H subsequently went to Donegall Pass police station for the purposes of an identification parade in June 2001 and picked out number 7 in the line-up as the driver of the white Ford Escort. This was Speers. He was cross-examined on behalf of Speers and agreed with the suggestion that the

scar was the most distinctive feature. It was in around his check somewhere, an old healed scar. When he went to the ID parade he picked the person out that he had seen in the car. It was not hard to do. He did not need a second look. He picked out Speers.

[55] Mr Glen Newell gave evidence that he was with his wife at 11.30 pm on 31 March 2001. They decided to take their dog for a walk. They walked down Harmin Drive into Cherryvale Park and noticed a white car sitting between two shops. The car was sitting at an angle facing Burney's Lane. The car looked as if it had broken down and the reversing lights were on. Two people were trying to push it from the front. They were aged about 25. There was a man in the driver's seat. The car was a white Ford Escort. They walked on to Cherryvale Avenue. The white car drove past them at normal speed a few minute after they had seen the two young men pushing it, travelling towards Burney's Lane. It had been sitting at an angle in the middle of Cherryvale Park. He had a mental picture in the witness box of the two males pushing with their hands at the front of the car.

Speers' interviews

[56] Speers was interviewed under caution on 4 April 2001. His solicitor was present. At the second interview he said that he was 42 years of age. He stated that he knew Craig and Paul Moore. Craig was in a band that he started in 2000 and Moore was still in the band. This was the Whitewell Defenders flute band. The two young fellows ran about together. To the best of his recollection he did not see them on 31 March. He left Madaghan's bar before closing time. He had no reason to be in the area of Harmin Park. In his third interview he said he had a white Ford Escort which he had sold to a Christopher Bell a couple of weeks or so before the death of Mr Lowry and the incident involving Michael Bellew. He thought Bell lived in Harmin Drive. He said that he was very drunk on the Saturday night, 31 March.

[57] The taping equipment for Speers' first interview on 4 April 2001 did not function. Detective Constable Hunter's note of that interview was put to Speers at an interview on 26 October 2001. At around 6 pm on 31 March, it was put, he said that he had gone to Crossett's house, returned to the bar and remained there for the rest of the evening. He said that he went home past the arcade and garage onto the Ballyclare Road, went into his house, had a drink and went to bed. In the bar he was with Andrew and Harper. He had described the clothes that he was wearing in the bar, talked about cars which he had owned including a Metro which he had sold a month previously and a Ford Escort which he had given to Chris Bell (who lived in the Harmin area) for £30. It was put to him that he parked a small white van in the car park of the bar about 2 pm.

[58] At this interview on 26 October he was told that there was forensic evidence against him and asked if he had been in the Harmin area on 31 March. He said that he was making no comment on any of these matters on the advice of his solicitor. It was put to him that he had Regal cigarettes delivered to him while he was in custody and he was told that a cigarette butt with his DNA was found at the scene of the attack on the deceased. His solicitor then asked for the interview to be terminated.

[59] At the next interview Speers said that he had not been entirely truthful about the white van from the start. He had in fact parked it at the car park. On a previous occasion he had parked it at the car park all night; a window was smashed and a carpet cleaning machine worth £4500 had been stolen from it. When he returned from Crossett's on 31 March he moved the van and parked it in Harmin Drive. The van stayed there till the next morning. He claimed that at the first interview he had said that he parked the white van in Harmin before he went to the bar. That was contradicted in a statement made by Crossett. He had not wanted to admit to drunken driving. He went on to say that he previously had a car window smashed at the car park and that on 31 March there was a machine worth £4500 in the van which he did not want stolen. He also said that he had always given a reason for leaving the van in Harmin Drive because he had had a window broken in a vehicle previously. He said that he usually smoked small Regal. On 31 March he had walked through Harmin Parade and that it was possible that he had thrown down a cigarette. He described the route which he took after parking the car in Harmin Drive. The interviewer implied by his questions that this would not have caused him to drop a cigarette butt where it was found. At a later stage he said that he did know the deceased vaguely, that he was a smoker, that he could have given him a cigarette on the night of 31 March. In the next interview he said that he would not share a cigarette with anyone.

Application for a Direction on behalf of Speers

[60] An application was made on behalf of Speers for a direction of No Case to Answer in respect of both counts of the indictment. It was argued that the procedural irregularities, the contradictions, and the inconsistencies in the evidence of identification deprived that evidence of any weight in a criminal trial and could not safely be relied on but, more fundamentally, meant that the evidence should be ruled out.

Reference was made to *Turnbull, Hassan and Anderson*. The last related to cases of circumstantial evidence. The case against Speers comprised essentially identification evidence and forensic evidence. There was a detailed analysis of the alleged imperfections in the identifications by Mr Bellew, H, Detective Constable Whyte and Constable Black. There was a comprehensive review of the alleged procedural irregularities. The forensic evidence was heavily criticised and a submission was made that the DNA

evidence in relation to the cigarette butt should not be admitted. Every conceivable argument was advanced on behalf of Speers. Nothing was overlooked.

[61] The trial judge ruled that the case should proceed on the first count against Speers but gave him a direction on the second count on the grounds that there was insufficient evidence of mens rea. The actions of the driver of the car was equally or more consistent with an intent to frighten Mr Bellew than an attempt to cause him actual physical harm.

Craig's evidence

[62] Craig gave evidence on his own behalf. He was born on 3 June 1985. He had known Speers for about six months in March/April 2001 as he lived in the Glengormley area and was involved in the Whitewell Defenders flute band of which Craig was a member for two weeks. Speers started it up. Craig had known Paul Moore from school and ran around with him as a friend. He worked part-time in Jungle Jims looking after children in a play area. He was at work on 31 March 2001 until 6 pm, went home, went out and met friends at Richmond shops at the top of his street. He was wearing a pair of brand new Reebok trainers, light blue tracksuit bottoms and a grey top. He had a monkey hat on. He got a lift to Paul Moore's house. He had a carry-out with him, vodka based. He drank his carry-out there and stayed till 10 pm. He and Paul Moore went to a bonfire site on the Ballyclare Road. Later they went to Madaghan's bar about 11 pm. He was tipsy. He drank a pint of beer or two, saw Speers and saw the deceased, whose name he did not know. Moore was speaking to Speers. He and Moore left the bar, followed by Speers. They ended up walking to the Shell garage, crossing the road towards Papa's Kitchen and an arcade of shops. It was suggested that they should go to Chris Bell's house in Harmin Drive. The deceased came out of the bar. He joined the group at the entrance to a laneway leading to Harmin Drive. Speers had stopped to talk to the deceased and he and Moore stopped as well. Speers asked the deceased to walk up the laneway and the deceased said 'No'. He said that he was walking up the Hightown Road. Speers asked him to walk up the laneway for a bit of company. Craig said that he and Moore were in front of the other two. They were en route to Chris Bell's house. He, Craig, turned round and saw Speers hitting the deceased several times on the face. The deceased fell to the ground. Speers got on top of him with his two feet, holding on to the fence, tramping up and down on the face of the deceased. He and Moore walked down and Moore started kicking the deceased on the head. He, Craig, told them to leave the man alone. He was right beside the deceased. The response he got was: "The cunt's still breathing". Speers said that. He, Craig, was in a state of shock. They left the scene. He stayed with the other two in case they turned on him. Speers' van was parked in Madaghan's car park. All three got into the van. Speers was driving. They went round to Chris Bell's house. All three went to Bell's

house and were brought in by his wife. Speers went in to the living room to get keys for a white Ford Escort car. They went out to the car which was parked outside Bell's house. They got into the car. It would not start. He and Moore had to push it. Speers asked them to do it. He was in the driver's seat. The car started eventually. He and Moore got into the car in Harmin Drive. Both he and Moore got into the back seat. Speers drove onto the Hightown Road. Speers was driving up kerbs on the Hightown Road. Craig did not know what he was doing. Speers said: "Did you see him?" Craig did not see anybody. Speers did a U-turn and drove across onto the other side of the road and up the kerb, reversed the car, went to the bus terminal, turned around and it happened again. Craig thought he was after somebody. Speers then drove the car into Harkin Drive and parked it. He, Craig, saw the police as they were walking away from the car. Speers told him to get rid of his clothes as his house was going to be raided. He was scared. They split up. He went to Richmond Shops. He was too scared to go home. He stood there for a couple of hours. Eventually he went home. His mother opened the door. He went straight to bed. He left his clothes on the floor. He had to go to work the next morning at Jungle Jim's. He started work at 11 am and finished at 3 pm. He was confused and scared. He saw Speers again who told him again to get rid of his clothes. He went home and got his training shoes. His tracksuit bottoms had been put in the wash. He lost the monkey hat. He went to Richmond shops, met Gareth Smith and Christopher Morrow and asked them to hide his trainers for him. Later he and Morrow threw the trainers and the pair of tracksuit bottoms over the fence at No. 1 St Anne's Crescent.

[63] On Monday morning the police came to his house and asked him to make a witness statement. It was not a true statement. Bell had threatened him, telling him that Speers told Bell to tell him that he had to keep his mouth shut or he would be found in a skip. Bell said this after the police spoke to him. He was arrested on the morning of Wednesday 4 April. He told the truth in his eighth interview with the police. He was taken to Lisnevin Juvenile Centre where he told the police about Speers and Moore.

[64] He was cross-examined on behalf of Speers about his criminal activities and the night of 31 March. It was put to him that he was not in the company of Speers. He was questioned about his interview with police at Lisnevin. It was put to him that he said he saw Speers kick the head off a boy at the arcade on 31 March. He agreed. Then he said Speers was kicking the boy but not around the head. He denied telling the police at Lisnevin that Speers had gone to the Hightown Road to look for a Catholic.

[65] He said that the Ford Escort had been parked on the hill of Harmin Drive at the cul-de-sac, that he and Moore pushed it past Harmin Park junction. He believed they turned into Cherryvale Park, the second junction with Harmin Drive, onto Cherryvale Avenue. He believed that they got it

started at the shops in Cherryvale Park. The car was driven into Burney's Lane, went left onto the Derry Road up to where it met the Hightown Road, right and up the Hightown Road countrywards. At some stage Speers said: "Did you see him?" It was put to him that anything he had said about Speers was false.

[66] He was cross-examined on behalf of the Crown. He said Speers followed Moore and himself out of the bar by accident rather than design. Speers joined their company. Without warning he attacked a boy at the arcade. Then the three of them walked on towards the Shell garage. Someone mentioned Bell's house. Both Bell and Speers were considerably senior to him. It would have been easier for him and Moore to have walked home. They walked to the bar. Then they met the deceased. Then the four of them went up the laneway leading into the Harmin estate. There was a murderous attack on the deceased. The others intended to kill him, out of the blue so far as he was concerned. He never asked Speers what it was about. He was terrified to leave them. He wanted a lift home. It was put to him that he was part of a team. They got into Speers' van at Madaghan's after the attack on the deceased. They went in the van to Bell's house. The three went inside. Speers went into the living room. He did not ask Moore: "What on earth was all that about?" He did not know whether it occurred to him as strange that instead of going home in the white van Speers was taking them in a white Ford Escort which was difficult to start and needed to be pushed. It would not occur to him that Speers was going to go off in a white car that could not be traced to him in order to have a go at someone. It was put to him that he told police that Speers had told him that they were going up the Hightown to get a Catholic.

[67] He accepted that there were sectarian flashpoints in the Glengormley area. He agreed there were Protestant estates. It was put to him that they included Harmin, Richmond, New Mossley. He said Richmond was mixed. He agreed that the area to the south such as the Hightown Road area was predominantly Catholic. He did not ask for a lift home after the Ford Escort was returned to the Harmin estate. The car was parked at 62 Harmin Drive. The white van was parked at 114 Harmin Drive on the other side of the road to the white Ford Escort. Speers left in the direction of Bell's house. Speers lived in New Mossley. If he was going home, he would have been going in the same direction as Craig. Moore lived in the same direction as he did. He did not know where Moore went when they parted company. Moore was heading in the direction of Bell's house.

Other evidence

[68] We have not dealt with the meteorological evidence referred to by the trial judge but confirm that it is an accurate resume. Nor have we summarised the evidence of Chris Bell which is set out in the judgment of the

trial judge. But again we have checked it against the transcript. The reference to the sighting of the white Ford Escort by a local resident, Robert Cunningham, between 2 pm and 4 pm on 31 March was also given in evidence. The finding by the trial judge that the white Ford Escort had been the property of Speers is borne out by his own admissions and the evidence of Bell. The further findings that it was parked outside Bell's house on the night of 31 March, that access to the keys of the car was obtained, that the car was moved, driven away and brought back to 62 Harmin Drive and that three people were seen coming away from it, one of whom matched Speers' description and was identified by one of two police officers nearby as Speers were established in evidence. That the car had a battery problem which would have necessitated push starting was also proved positively in evidence.

[69] As we have already stated Craig was convicted of murder by the trial judge. He found that Craig had stamped on the deceased as he lay on the ground outside 1 Harmin Parade, with intent to kill or cause serious bodily harm.

The appeal

Submissions on behalf of Craig

[70] There is a right to appeal without leave in a non-jury trial and both Craig and Speers exercised that right. We had the opportunity not merely of reading the voluminous transcript of evidence but also the many and lengthy submissions of counsel, including their speeches. We listened to and noted their arguments on the appeal and a member of the court listened to an audio-recording of their submissions to this court over a period of three days. We also had a wealth of written submissions to this court. We were left in no doubt that every conceivable point had been made on behalf of Craig and Speers to the trial judge and to this court.

[71] One of the grounds of appeal on behalf of Craig was that the trial judge should not have accepted the role attributed by the Crown to Craig. It was suggested that the forensic evidence did not established it and that it was in any event unreliable; that there was insufficient evidence that Craig had "jumped on the deceased" intending to cause of death or really serious bodily harm and that if Craig had a role, there was a reasonable possibility that it did not amount to murder.

[72] In a written skeleton argument reference was made to the forensic evidence about blood coming from the deceased and blood distribution. This included evidence about stamping on the deceased. It was contended that the evidence on which the Crown relied, as set out in the skeleton argument, did not support the findings of the trial judge. Reference was made to the

evidence of Dr Ruth Griffin that it was a reasonable possibility from the forensic evidence relating to blood that Craig was present at the scene, close to the source of the blood, as a spectator. Reliance was placed on expert evidence given by Dr Northcott on behalf of Craig. Exception was taken to the findings of the trial judge on this issue. It was claimed that this was a circumstantial case. It was submitted that the evidence of Dr Bentley did not support a finding of stamp marks or if there were stamp marks, they would have been made, as Craig stated in evidence, by Speers and Moore.

[73] It was further contended that the trial judge drew an inference upon an inference that rendered the conviction of Craig unsafe. There was a reasonable possibility; counsel suggested; that Craig conducted himself in the aftermath of the assault out of fear and the influence of Speers.

[74] Reliance was placed on the fact that the trial judge accepted substantial parts of Craig's evidence. It was contended that he relied on Craig's evidence only when there was corroborative evidence and that this was too narrow an approach. The inference could not be drawn that he jumped on the deceased in such a way that he intended to kill or cause really serious bodily injury to the deceased.

[75] In his oral submissions Mr O'Donoghue QC (who did not appear for Craig before Girvan J) argued again that this was a circumstantial case. He contended that the role played by Craig was benign. The forensic evidence established that he was a foot or so away from the deceased, as he conceded. The marks on the deceased could have been made by the Reebok trainers, which he disposed of afterwards but were equally consistent with marks made by other footwear such as the footwear of Speers and Moore. Dr Griffin had said that he could have been a spectator and the trial judge was not entitled to make the findings that he did against Craig. He had found him guilty of stamping but the circumstantial evidence did not bear this out. Mr O'Donoghue argued there was no evidence as to what Speers and Moore were wearing on their feet so that it was impossible to rule out that they had done the stamping and kicking, as Craig had stated in evidence.

[76] Counsel then referred to the evidence against Craig in relation to the white Ford Escort and getting rid of his Reebok trainers. He made the following submissions. Craig's conduct subsequent to the assault on the deceased was consistent with the reason which he gave for his actions. He had a concern or fear of what Speers was capable of doing to him. He had been threatened by Chris Bell that Speers would kill him.

There was no direct evidence that he did what he did other than out of fear as he alleged. The police conceded that he was in fear of Speers. He was a young boy of sixteen. In order to convict him the trial judge had drawn an inference from another inference. He was not entitled to do so. That his

evidence was unconvincing did not justify the finding as to his role in the assault on the deceased.

[77] On the scientific evidence Mr O'Donoghue presented the following arguments. When one examined in detail the scientific evidence about the blood on the shoes, combining the evidence of Dr Griffin and Dr Northcott the blood on the shoes was consistent with his role as a bystander vainly attempting to prevent the other two from attacking the deceased. None of the circumstantial evidence was conclusive.

[78] Counsel also submitted that the trial judge had been wrong to rely on his lies. There was a reasonable possibility that Craig was telling the truth. No tribunal of fact could have ruled out that reasonable possibility. Finally it was suggested that the trial judge could not have found it established that he had fulfilled the precise role that he had ascribed to him. The evidence could not constitute proof to the requisite standard that he had played the specific part that the trial judge attributed to him. It might have been more difficult to argue against a finding that he actively encouraged the others.

The judge's findings against Craig

[79] We have already commented on the accuracy of the trial judge's summary of the evidence in the case. He began by recounting the finding of the body of the deceased by local residents and the transporting of the body to hospital where the deceased was pronounced dead at 3.10 pm on 2 April.

He dealt next with the evidence of the Deputy State Pathologist referring to the pattern of injury as possibly inflicted by kicking or stamping with a shod foot. The marking was, said Dr Bentley, virtually diagnostic of stamping of footwear.

He then dealt with the expert evidence on footwear. Some of the marking on the body of the deceased could be indicative of the mark of a heel bearing a horseshoe shaped inset in the moulding with a small spur in it. Reebok trainers, amongst other makes of shoes, could have caused this mark. If shoes were the cause of marking stamping would have been necessary.

[80] The trial judge described the finding of the blood and the cigarette butts. He accepted that the scene was not properly cordoned off until 10.30 am on 1 April but found that the breaches did not in fact distort the evidence material to the case to such an extent that it would be wrong to draw conclusions. We wholly endorse this finding, as we have already stated. He described what had happened before the assault. We consider that he was correct in discounting the evidence of a barmaid that Craig was in Madaghan's bar between 7.30 pm and 9 pm. He accepted Mr Conceicao's evidence that Craig was there, as Craig, admitted, at about 11 pm on 31

March. He summarised Mr Conceicao's evidence which included an unchallenged identification of Craig as being in the company of Speers. He explained that there were difficulties with his testimony because he moved between Portuguese and English and indicated that he had forgotten Portuguese as well as English words. An interpreter was brought to court at the direction of the trial judge. He set out in detail the criticism of his evidence by counsel.

[81] The trial judge stated that the evidence of Craig must be approached with the gravest caution, summarising what he said about events before the assault on the deceased. He said that he would be slow to rely on any evidence of Craig unless it was supported in a material way by other evidence. In view of the evidence of the doorman, Mr Conceicao he was satisfied that Speers and Craig left the bar in each other's company, as Craig testified, remained for the most part in each other's company while across the road from the bar and came back with Moore in the direction of the bar together. He was thus satisfied that they were together shortly before the incident which happened in Harmin Parade and were together when the deceased came out of the bar. A perusal of the evidence of the doorman, coupled with Craig's admissions to the police and subsequent evidence to the court fully support these findings.

[82] The trial judge then dealt with the evidence relating to Craig's Reebok trainers, having pointed out that Craig admitted that he was at the scene and was wearing the trainers. He recounted the evidence of Morrow and Smith as to their receiving the trainers from Craig in order to dispose of them and how Craig and Morrow subsequently threw them and his tracksuit bottoms behind a fence at St Anne's Crescent. He referred to Craig's first seven interviews with the police in which he maintained that he was wearing Nike trainers and his subsequent admission that he was wearing the Reebok trainers which his mother had bought for him the day before. He claimed in his eighth interview that he had been warned by Speers to get rid of his clothes as his house would be raided by the police. Forensic analysis of the Reebok trainers established that blood on them was the blood of the deceased.

[83] The trial judge criticised the Scenes of Crime Officer (who was not Ms Fulton) for packing the two shoes in one bag and a detective for opening the bag to show the trainers to Craig at interview. He recounted Dr Griffin's evidence of her findings of blood on the shoes including spots of blood. She was able to say that the wearer of the shoes was present at and close to the scene of the blood of the deceased. He noted her acceptance that it was a reasonable possibility that the blood marking on the shoes was consistent with the wearer being a spectator. He recorded Dr Northcott's evidence to the same effect. The findings were not, Dr Northcott said, inconsistent with someone stamping on the deceased.

[84] The trial judge referred to Craig's eighth interview with the police in which he stated that he witnessed a fellow getting a beating and a person jumping on his face and blood flying everywhere. He recounted in detail Craig's account to the police of what happened. He also set out what was alleged to have been said at the "intelligence interview" after Craig had been charged. He then set out Craig's evidence in his own defence in considerable detail. It is unnecessary at this stage to repeat it other than to record that it was as accurate a summary as all the other evidence which he summarised.

[85] The trial judge reminded himself that in approaching Craig's evidence it was important to bear in mind that it had been demonstrated that he was capable of considerable dishonesty, creating for himself false alibis to cover up involvement in offences or at least a difficult situation and in this case he sought to induce a third party to provide him with a false alibi. He was capable of consistently and persistently lying throughout seven interviews. He was prepared on occasions to steal, another sign of dishonesty. He was prepared to cover up material evidence. His evidence must, said the trial judge, be approached with enormous caution in so far as he purported to implicate Speers and in relation to his exculpatory version of events.

[86] Girvan J found that it had been proved to the necessary standard that Craig went to the bar around 11 pm with another young man who was probably Moore, that he came into contact with Speers at the bar, that it was likely that he spoke to Speers, that the three left together or in each other's company and crossed the road together. What actually happened across the road remained unclear. He was satisfied that Conceiceo locked the door of the bar because he thought the three of them were coming back to the bar.

[87] The trial judge inferred that the decision of the deceased to walk up the darkened laneway in a very troubled part of north Belfast which would not be the natural route to his home was as the result of some form of menace even on Craig's evidence. He accepted Craig's evidence that after the assault on the deceased the trio went to Speer's white van and then to the white Ford Escort. He stuck to the group, got into the van with them and participated in an outing in the Ford Escort car in the course of which the car was driven at or towards Bellew. It was probable that this expedition was with an intent to injure a third party picked at random in an area frequented by Catholics. The trial judge accepted the police evidence that Craig told them at the intelligence interview that Speers had said he was going to get a Catholic before they set out in the white Ford Escort. Craig denied that he had told them that Speers had said this.

[88] The trial judge was satisfied that Craig's persistent, serial and deliberate lying at various stages of the inquiry his disposal of evidence and his attempted creation of a false alibi supported the Crown case against him.

He stated that he was satisfied beyond reasonable doubt that Craig was guilty of murder. He participated in the assault by jumping on the deceased in a circumstance in which he intended to cause him death or really serious bodily harm. In arriving at that conclusion, he stated, he had borne in mind that this was a case based on circumstantial evidence and had reminded himself of the legal propositions in this context discussed in Blackstone at F1.10 et seq.

[89] We consider that the findings and conclusions of Girvan J are flawless and it follows that Craig's conviction is safe. If we had not agreed with the finding that Craig jumped on the deceased we would not have hesitated to find that he was part of a joint enterprise to kill the deceased.

[90] Mr O'Donoghue QC had a thankless task before this court. His submissions were clear and concise and to the point and he made as much as he could out of material which told against him at every point on the journey.

The submissions on behalf of Speers

[91] The grounds of appeal of Speers (as amended) were:-

“(1) The Learned Trial Judge erred in failing to exclude the evidence of identification of witnesses Bellew, H and White, and each of them, in that he admitted their evidence:

- (a) in finding reliable their sightings, despite the purposed reliability of each said sighting being against the evidence and against the weight of the evidence.
- (b) In spite of cumulative, significant and substantial breaches of the applicable Codes of Practice relating to identification procedures.

and

- (c) despite the manifest and unextinguished risk of contamination of the identification procedures as applied and prepared for at the identification suite.
- (5) The Learned Trial Judge erred in giving the weight which he did to the disputed identification evidence of the reasons indicated at (1) above, and, in any event, in all the circumstances.”

[92] The court was presented with a detailed written skeleton argument running to 24 pages, a very helpful Appendix of 40 pages and almost two days of oral argument by Mr John McCrudden QC who had appeared for Speers at the trial. This is testimony, if testimony were needed that every possible argument in favour of Speers was presented to this court.

[93] The grounds of appeal relating to the evidence of identification may be taken together. There was a voir dire hearing into whether this evidence should be admitted in the course of which Speers gave evidence. He did not give evidence in the trial itself.

Mr Michael Bellew was the first witness called in the voir dire. His evidence has been summarised under the heading of the Crown case against Speers. His evidence was treated as evidence in the trial as well and it is unnecessary to repeat it.

[94] Inspector Blair described the procedures at an identification parade. The people participating in the parade would arrive about a quarter of an hour before the parade. The identifying witness usually arrives half an hour before hand and enters the station by a different entrance from the volunteers. There are two separate sets of stairs up to the ID area. The suspect will arrive an hour before the parade. There is a room for him to which he is brought directly. The identification parade is held in a room above where the volunteers are placed. The volunteers are then brought from the room where they are placed to the room where the ID parade is to be held. Then the suspect and his solicitor are taken there so as to have an opportunity of choosing whom they want to participate in the parade. In this case there were nineteen people available for the parade. When the actual parade took place there were thirteen persons plus the suspect who was able to take up any position in the parade that he chose. The witness who has been in a holding area, views the parade and then goes into another separate room. He looks through a screen at the parade. Those on the parade cannot see him.

[95] A number of forms must be completed. The inspector spoke to Speers and read from forms to him about the procedures. A bundle of forms was given to the trial judge. A video was available of all that took place. A form was served on Speers in the presence of his solicitor. He was cautioned. The description given by the three witnesses who went to the identification parade were read out to him.

[96] Of the nineteen volunteers six were rejected by Speers and his solicitor. He was asked whether he objected to any of the thirteen remaining volunteers and he said "No" which was recorded. Constable Brown was the first identifying witness. His evidence at the trial has been summarised and it is unnecessary to repeat it. He picked out number 7 who was not Speers.

Reserve Constable Whyte was the second identifying witness. He picked out Speers. Then came Mr Bellew and, as stated, he picked out Speers.

[97] Speers' solicitor stated that as he was driving to park his car outside the police station two or three people who had moustaches and similar builds to his client whom he presumed were intending to be paraded with his client were outside the police station. The solicitor wished it to be noted but did not wish to make an issue of it.

[98] Constable McNally gave evidence that he escorted Speers to the parade at 6 pm. Constable Brown assisted in the conduct of the parade and arranged for Constable Agnew to supervise the witnesses. Constable Hughes was detailed to receive them after they had viewed the identification parade. The witnesses would have had no contact with the suspect or the volunteers or other witnesses.

[99] Constable Agnew escorted Constables Brown and Reserve Constable Whyte to Donegall Pass for identification parades held immediately before Bellew attended. He had to ensure that the case was not discussed and that they were unable to view photographs or any identification of the suspect. He was also put in charge of Mr Bellew at Donegall Pass. Once they left to attend the parade he did not see them together again. He said that he had no involvement with the actual investigation of the case. In cross-examination on behalf of Speers he said that he knew both constables. He knew Speers had been arrested in respect of the murder and that they were going to an identification parade in which Speers would be involved. He had known Speers for a considerable time. He and the constables did not discuss the case. He had no idea who Mr Bellew was at that time. The three witnesses and he sat in the witness room for 45 minutes. Mr Bellew did not speak. He had no involvement in the investigation of the murder.

[100] Reserve Constable Whyte then gave evidence. His evidence in the trial is summarised in the section headed "Crown case against Speers" and need not be repeated. The same applied to Constable Brown. Detective Constable Rutledge gave evidence of taking a statement from Mr Bellew on Monday 2 April. He spoke to him on the telephone on 3 April. He showed him the White Ford Escort at Seapark later that day. Mr Blair was recalled and stated that Constable Alexander stroked out the word "Yes" on a form containing the question: shown photographs. He also stroked out "Yes" in answer to the question "made or shown CD fit".

[101] In relation to Mr Bellew neither Yes nor No was stroked out. They had run out of forms and were using a photocopy. That was an oversight. No one was shown a photograph or CD fit. Detective Inspector Templeton gave evidence that he was involved in investigating the murder of the deceased and the incident involving Mr Bellew. He contacted the identification suite at

Donegall Pass on 5 April 2001. He passed on details about what Constable Brown, Reserve Constable Whyte and Mr Bellew had seen on 31 March. He detailed Constable Hill to go to Donegall Pass to record statements from the three witnesses after the ID parades. None of them were ever shown photographs or photofits. On a message sheet was recorded: "Three males in a white Escort all wearing baseball caps". This was given by Mr Bellew to police at 11.30 am on 1 April. He took the description that was recorded by Detective Constable Rutledge in a witness statement made by Mr Bellew as the first description of the suspect. In that statement he said that the driver was not wearing a baseball cap.

[102] Mr H gave evidence which is summarised in the section: "Crown case against Speers". It is unnecessary to repeat it. He attended at Donegall Pass on three occasions. He could not attend on 23 May as he was busy. On 26 June he picked out Speers. He went to Newtownabbey police station and was driven to Donegall Pass. On two earlier occasions prior to that he was turned away. On those occasions he might have driven to Donegall Pass in a BMW or a Mini, but certainly not an oldish BMW which was re-registered. On those two occasions he parked on the street off Donegall Pass. He went into the police station. It was suggested that he went on 22 May and 13 June. He would have seen the comings and goings of no one, he said. He did not see a marked police car arrive or Speers being taken out handcuffed or taken back into that car. On the first occasion that he arrived, he was told that he was too late. The ID parade had been called off. On the next occasion he parked near the station, was taken in, was told that the ID parade had again been called off because the suspect's solicitor had said that there were not enough people resembling his client on the parade. He saw no one. He did not notice any vehicle.

[103] Constable Joanne Moore gave evidence about escorting Speers to Donegall Pass on 22 May. They were in an unmarked saloon vehicle and drove in through the gates. Speers was taken up to the ID parade suite. There was a waiting period of 45 minutes and then they were told that the ID parade would not be going ahead as the witness (Mr H) had not turned up. They took Speers back to Antrim Road police station.

[104] Detective Inspector Templeton was recalled and cross-examined on behalf of Speers about the identification parades and general set-up at Donegall Pass. After his previous evidence he had become aware that a video photograph of Speers had been taken, had forgotten that it had been taken because it had no bearing on the investigation. Speers was to be videoed covertly without Speers' consent. This was authorised. He was taken through the Code of Practice for Identifications by counsel for Speers in order to show breaches of the Code.

[105] Speers had refused to consent to go on a video identification parade. A covert video identification parade concerning Speers did not take place because of procedural and technical problems. A covert video film of Speers was taken but not used. A copy of it was made and taken from Photography Branch on 11 July. The covert video film was played to the court and Mr Templeton was asked to comment on it. Constable Brown was seen to be accompanying Speers. Had a video identification parade been carried out then other volunteers would have been videoed in the same way. No further videos were taken. The witness to whom this video identification parade would have been shown withdrew his evidence.

[106] Speers was then called on the issue of identification parades on the basis that this was a *voir dire*, not that he was giving evidence in the trial on his own behalf. He said that he consented to going on identification parades. He refused to have his photograph taken on 5 April 2001. Two officers brought him to an ID parade at Donegall Pass on that day. One of them was Sergeant McQuitty. He was asked to attend an ID parade on 22 May. Nobody turned up. On 13 June he attended for an ID parade in place of the aborted parade. He had been charged with the incident relating to Mr Bellew on 6 April and remanded in custody. On 13 June his solicitor objected to the line-up. On 5 April he was brought to the parade in an enclosed van. On the other occasions he was brought in an ordinary police car in handcuffs. On 22 May or 13 June the police car could not get in through the gate of Donegall Pass. Another car was blocking the entrance. He was taken out of the police car and was walked across the footpath to the pedestrian gate. The police officer who was with him was told to wait and he was taken back to the police car. He was then removed from the car a second time in handcuffs. The car which was blocking the way was an old five series BMW. The car was far older than the registration number. There were two people in the front of the car and a third person in the back who had a good look at him. On the occasion of the transfer on the public highway he was de-handcuffed in the portacabin. The covert video tape was played and he identified the portacabin. On other occasions he had entered the yard of the station in the police vehicle.

In cross-examination he said that the BMW was an old or ageing BMW with an inappropriate registration plate. None of the three people in the BMW was dressed as a police officer. There was a blonde haired female in the front passenger seat.

[107] The trial judge was then shown the videos of the ID parades on 5 April and 26 June. Mr H was re-called. He was a 100 per cent sure that he drove to Donegall Pass on the occasions that he went there in his own car. He had no one else in the car. He was 100 per cent sure. His girlfriend did not have fair hair. He did not meet police outside the police station. He parked his car,

went to the police station, did what he had to do. He was on his own. He was not in the back of the car.

[108] For a lengthy period of time before this court Mr McCrudden QC on behalf of Speers maintained that there was a legal principle which led inexorably to the exclusion of the evidence of identification in view of the faults in identification and in identification procedures. Ultimately he disclaimed any legal principle and argued that in the exercise of his discretion under Article 76 of PACE the trial judge was bound to have excluded this evidence. He also conceded that the trial judge had dealt with all or virtually all the points which he was making to this court.

[109] Instead of rehearsing the arguments which he made orally to this court but bearing them in mind we turn, therefore, to the judgment of the trial judge in which he dealt with all or virtually all the points made by Mr McCrudden to us in order to see whether there is any flaw in his findings or reasoning. Otherwise there would be an unnecessary duplication of arguments, responses by the trial judge, arguments before us and our responses. We have found the reasoning of the trial judge and the exercise of his discretion unchallengeable. Therefore we propose only to look at it in conjunction with and bearing in mind the submissions made to us.

[110] The trial judge had indicated that he would give a ruling at the end of the Michaelmas term, following the submissions made about exclusion of evidence. But there is no reference to it in the transcripts placed before us on behalf of Speers. Nor does he appear to have made a ruling before dealing with the applications for a direction. All parties made closing speeches based on the assumption that the evidence of identification was admissible. We, therefore, assume it to be common case that the trial judge indicated that the evidence was admissible and that he would give his reasons in his written judgment. The weight of that evidence was, of course, another matter.

[111] An attempt was made to exclude evidence of identification by Mr Conceiceo but there was never any basis for it. A strong attack was made on its weight. Mr McCrudden argued that it was wholly unreliable, flawed and inconsistent. Girvan J accepted that there were inconsistencies. He referred to the flaws in Mr Bellew's description of Speers who had a small moustache. Mr Bellew said that he could not recall facial hair. Initially he had said that the three men in the white Escort car on the Hightown Road wore baseball caps. Later in a written description and in evidence he said that the driver was not wearing a baseball cap. The trial judge referred to the identification parade at which Mr Bellew identified Speers. In his evidence he said that the face just jumped out at him at the identification parade. He also identified the white Ford Escort car MXI 14115 which Speers had owned as very much like the car that he had seen mounting the grass verge aimed at him. Mud and

grass was found under the car and was noticed by him when he was shown it. It was consistent with it being the same car.

[112] The trial judge recounted the evidence of Reserve Constable Whyte and Constable Brown who saw the white Ford Escort car MXI 4115 parked outside number 62 Harmin Drive with lights on and three males walking from the direction of the car up Harmin Drive. Whyte gave a description of the oldest of the three which matched Speers and picked him out at an identification parade. Brown gave a similar description but said that he was concentrating on the younger two. He did not pick out Speers on the ID parade but picked out another man. He said that he felt that he had identified the wrong person.

[113] The trial judge recalled the evidence of Mr H who described the driver of the white Ford Escort car blocking Harmin Avenue as having a scar round the cheek on the left side.

[114] The trial judge proceeded to set out in detail what happened at the various identification parades and attempted parades. The first date was 5 April 2001. Constable McNally was the officer charged with the duty of transporting Speers and Sergeant McQuitty's notebook revealed that he had driven Speers from Antrim Road police station, was at the rear gate of Donegall Pass and remained there until all the volunteers for the parade had entered. The notebook also recorded that he brought Speers to the Magistrates' Court after having performed duty at the ID suite. In evidence he said that he went first to the Magistrates' Court. Speers said that he travelled in a closed van. The police evidence was that he travelled in a saloon car. He referred to Detective Inspector Blair's evidence and inconsistencies in timings. Whyte and Brown were brought to the ID suite by Constable Agnew. He knew both of them and he knew Speers and his appearance and that he was a suspect for the murder of the deceased. Counsel on behalf of Speers contended that this contaminated or potentially contaminated the evidence of identification by them. Mr Bellew was taken to the identification suite by Constable Hughes in an unmarked police car. The car was parked in the police station car park around 6.20 pm and the police officer accompanied Mr Bellew into the station through the front door. There was nobody about and from the Inquiry Office he and Mr Bellew went directly to the Identification Suite.

[115] Hughes had recorded Speers as a suspect and as a community police officer would probably have asked people whether they knew anything about the murder. He had reported and recorded information about it and had taken Moore and a young man called Pauley to the ID suite two days before and knew that Mr Bellew claimed that he had been attacked by a white car. He stated that he had not discussed the case with Mr Bellew. Agnew acted as

a pre-parade custodian of Whyte, Brown and Mr Bellew. Hughes acted as a post-parade custodian.

[116] Three experienced identification suite officers stated in evidence that if they had been in Agnew's position they would have withdrawn from involvement in the ID procedure. Detective Inspector Templeton initially said that if he had known of Agnew's involvement he would have ensured that Agnew was not involved in the ID procedures. Later he retracted that criticism.

[117] On behalf of Speers it was contended that there was a breach of all the provisions of Code D of the Codes of Practice established under Articles 60 and 65 of PACE. The trial judge set out paragraph 2.2 of Code D. The trial judge accepted that the underlying principle of the procedure was to prevent the contamination by investigating officers of identifying witnesses by deliberate or accidental action or remarks that could undermine the reliability of the identification. He set out not merely the contentions by Mr McCrudden as to prejudicial or contaminative sightings by all or some of the witnesses on the day or something which could have been said to some of the police officers concerned which might have led to an incorrect identification. He also set out a number of additional points which, it had been contended, rendered the identifications unsafe and unreliable.

(a) Code D para. 2.15 (xii) required that the accused and his solicitor be provided with details of the description of the suspect as first given by Mr Bellew that the driver was wearing a baseball cap. As a result the defence were not given the opportunity to require the parade participants to wear caps;

(b) Mr Bellew picked out a man with a moustache whereas in his police description he had described a roundish-faced assailant in his 30s without facial hair. This, it was argued, pointed to the likelihood that Mr Bellew would assume that the suspect was moustached as all on the parade had moustaches.

(c) Brown and Whyte had discussed their description of the car driver at the time and after the sighting;

(d) Mr Bellew lived in the same area as Speers. The parade was unbalanced. There was a higher statistical chance of Mr Bellew recognising somebody he may have seen before in the neighbourhood of Glengormley;

(e) The prepared pro-formas used with the yes-no answer to the questions of having seen photographs or not contained pre-existing photocopied terms;

(f) The identification officer had failed to ask Mr Bellew after the parade whether he had seen any broadcast or published film or photograph relating to the offence. Mr Bellew had seen material in which the police referred to a white car;

[118] Reliance was placed on *R v Gill* [1990] 90 Cr App R 64 where the relevant detective sergeant involved in the investigation of the case brought a witness to a parade, knocked the door, looked in and spoke to the inspector in charge of the parade. The witness then entered and identified the suspect. The trial judge ruled the evidence out. The Court of Appeal considered that he was right to do so. This was the strongest case in favour of Speers.

[119] The trial judge referred to the commentary of Professor Birch questioning the correctness of the decision as it was based on the fact that the prisoner might well feel considerably suspicious of what might be going on. In the later case of *Ryan* (1992) Crim. L.R. 187, Girvan J pointed out, the Court of Appeal did not accept as inevitable that although there had been a substantial breach of the code, a judge was debarred from using his discretion under Section 78, [our Article 76], to admit the evidence. There had been cases of substantial breaches where no prejudice had been caused to the defendant and the evidence had been let in.

[120] The trial judge referred to a passage from the judgment of Carswell LCJ in *DHSS v Rodgers* which we need not set out. In effect he stated that in appropriate cases the judge may admit the identification evidence but warn the jury that they may regard its weight as materially less than if the evidence had been obtained in accordance with Code D and may cause them to consider whether they have doubts about the safety of the identification.

[121] The trial judge found that there was no evidence to suggest that Whyte, Brown or Mr Bellew saw Speers at any time before the parade on 5 April. Possible accidental sighting was floated but nothing suggested that this was a concrete reality. He found that Constable Agnew and Hughes had a peripheral involvement in the investigation. There was nothing to suggest that there was a deliberate flouting of the Code or an intention to corrupt the process or an intentional attempt to influence the witness. What had occurred called for even greater vigilance on the part of the court in its assessment of the reliability of the evidence. We entirely agree. Despite the trenchant attack on the judge's findings and comments we can find no justification whatsoever for the criticism.

[122] The trial judge then turned to the evidence relating to the identification and identification procedures followed in relation to Mr H. He recorded that the witness had given evidence that he had gone to Donegall Pass for the purpose of attending an ID parade and was turned away. On the third occasion he was driven there by a police officer. When he drove himself he

parked on the street, rang the doorbell of the police station and went in. He denied seeing Speers in handcuffs or at all. Two aborted ID procedures were set up on 22 May and 13 June. A completed ID parade was set up and completed on 26 June.

[123] The trial judge observed that, according to Speers he attended the ID suite at Donegall Pass on 22 May and 13 June. He understood that Mr H did not turn up on 22 May or 13 June. We are not sure that he said this in relation to 13 June. On 22 May or 13 June there was a car parked partially blocking the gate entrance to the police station. He said that he was taken out of the back of the police car still handcuffed. The trial judge accurately set out Speers' account of what then took place, which we need not set out as it is to be found in the resume of Speers' evidence. The trial judge referred to Mr H's evidence that he was alone in his BMW on 22 May and 13 June. The trial judge found that he was not the person alleged by Speers to have been looking at him from a car outside Donegall Pass. The evidence overwhelmingly supports this finding.

[124] The trial judge recounted that a very considerable amount of time was taken up in an attempt by the defence to make the case that there was a complex ploy on the part of the police to expose Speers to public gaze and to support the claim that there was a the real possibility that he was seen by Mr H. It was clear that the police did decide to set up a covert video recording of Speers for the purpose of showing video evidence to another witness. That procedure was aborted. This appeared to have occurred on 13 June. It was possible that Speers was on the street outside Donegall Pass at some stage. But Mr H did not see him there. The trial judge found that the allegation of a police conspiracy to manipulate the identification procedure was fanciful. Having examined the evidence, studied the submissions written and oral, we are equally satisfied that the allegation was fanciful. But in fairness to counsel for Speers the effort required to elicit all the facts required considerable assiduity and industry. More frankness on the part of the police could have saved considerable time.

[125] The trial judge took the view rightly that the points made on behalf of Speers went to the weight of the identification evidence rather than its admissibility.

[126] As to the identification procedure on 26 June the trial judge accepted the evidence of Woman Constable Logan and found that there was nothing to call that ID procedure into question. We have also examined the evidence and reached the same conclusion. But of course the trial judge had the advantage of seeing and hearing the witnesses and the video of the ID parade. He concluded that all the points relating to identification went to the weight of the evidence and for this reason did not exclude the evidence in the exercise of his discretion under Article 76 of PACE. We consider that the trial

judge exercised his discretion correctly. Grounds 1 and 5 of the Grounds of Appeal are rejected by this court.

[127] The second ground of appeal was that the trial judge erred in permitting the statement of the Scenes of Crime office, Claire Fulton to be read in evidence because the evidence of her general practitioner, Dr Whyte was inadequate, having regard to Article 3 of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988 and the unfairness to the defence of being precluded from cross-examining her on an issue which he ultimately and critically resolved in favour of the prosecution.

[128] At a very early stage of the trial Mr Lynch QC raised with the trial judge the difficulty that the health of Ms Fulton presented and made available a medical report to the judge on the second morning of the trial. At one stage it was proposed that the trial should be adjourned. A previous trial had had to be aborted for reasons unknown to us but which were not the fault of the Crown. The position of counsel for Speers that he wished to cross-examine Ms Fulton was made clear. At that stage the trial judge decided to continue with the case, raising the possibility that there would be an adjournment when the case reached a certain point. The trial which had commenced on Monday 20 October 2003 proceeded and we can find no fault in the decision of the trial judge to proceed with it.

[129] On 29 January 2004 counsel for the Crown raised with the trial judge recent developments in relation to Ms Fulton. Her married name was Busby. She had been examined by her general practitioner on 27 January 2004 and counsel handed up a letter from Dr Whyte who was her general practitioner and had been dealing with her throughout. He did not think that she was fit to attend court and give evidence. The Crown applied for witness summonses to be served on Mrs Busby and Dr Whyte. If the trial judge were to accede to the application that she was not fit to give evidence, an application would be made to have her evidence read to the court. The trial judge gave leave to issue the summonses.

[130] On 9 February the Crown applied to have her evidence read. They relied on Article 3 of the 1988 Order. Article 6 was also relevant. Reference was made to a number of cases such as *R v Laverty* [1998] NI 47, *In re Allen* [1998] NI 47 and *R v Quinn* (December 1991). Mrs Busby was within the precincts of the court but it was not proposed to call her as a witness.

[131] Dr Whyte then gave evidence. He gave his qualifications and stated that he had been in general practice for nine years. He was experienced in post-natal depression and depression and had worked as a psychiatric HSO. Mrs Busby's child had been born at the beginning of August 2003. He first saw her on 17 November and last saw her on 6 February 2004. He had seen her on six occasions in all and she had been referred to Dr Sheena Dynes, a

consultant psychiatrist. Her main difficulties were with low mood, being very tearful and anxious, having problems with sleep, appetite and concentration. They were conditions associated with depression and post-natal depression. Mrs Busby was suffering from both. She was becoming quite tired and fatigued. She was having problems coping with her child and her health visitor had quite a lot of input. Her mental state remained low, she was depressed, continued to have the features of sleep, appetite and concentration problems. Her concentration problems would affect her ability to focus and process information efficiently and would lead to short-term memory problems. In Aylesbury where she resided and he carried on practice there was routinely a test carried out, known as the Edinburgh Post-Natal Depression Score. She was suffering from post-natal depression based on that score. Fitness to give evidence in court would require a score below 12. Her score was 18 to 20. She was on an anti-depressant drug prescribed in November 2003 after discussion with Dr Dynes. It was his opinion that Mrs Busby (who had travelled to Northern Ireland that day) was not fit to give evidence or to be cross-examined on that evidence.

[132] Dr Whyte was cross-examined on behalf of Speers. He said that Mrs Busby's symptoms were consistent with depression. She looked as if she had lost half a stone to a stone in weight. There were objective signs of low mood. She showed features of that, gave monosyllabic answers, maintenance poor eye contact, did not smile. The present condition of the patient was somewhat unusually longstanding. If she was asked in the witness-box questions about her ability to give evidence, he believed that she would or might break down. The nature of depression was quite unpredictable. It could be affected by external stresses and an increase in anxiety could make the recovery more protracted.

[133] After hearing lengthy submissions from counsel on behalf of Speers the trial judge ruled that he was satisfied beyond a reasonable doubt that Ms Fulton (Mrs Busby) was unfit to attend as a witness and that it was not in the interests of justice to further adjourn the case. We entirely endorse that ruling.

[134] Consideration was then given as to whether her evidence should be read, having regard to Article 6 of the 1988 Order. Again there were lengthy submissions. The trial judge ruled that he must be persuaded that it was in the interests of justice that it should be admitted. The evidence was obtained by a professional SOCO, confirmed in some aspects by other police witnesses. The defence had her working notes. The weight of her evidence would be affected by the fact that she had not given oral evidence. Constable Murphy liaised with Ms Fulton at the scene and was available for cross-examination. Accordingly he granted leave to the Crown to adduce the evidence.

[135] Despite Mr McCrudden's best endeavours we are satisfied that the ruling was soundly based, as was demonstrated in the course of Dr Griffin's evidence and in the conclusions which the trial judge reached during his judgment.

[136] The third ground related to the weight of that evidence. We consider that the trial judge gave proper consideration to the weight of the evidence. We remind ourselves that Ms Fulton had no means of knowing which cigarette butt bore Speers' DNA as well as the disgraceful conduct of which she would have been guilty, had she placed both cigarette butts together in the first instance and then, without means of knowing which had been close to the deceased, had separated them and labelled them in sub-packets in such a way as to describe one as beside the body of the deceased and the other as being elsewhere in Harmin Parade. This disposes of ground (3).

[137] The eighth ground related to the components of the minor DNA profile on the cigarette butt found at the scene. It is plain from the evidence that Speers smoked the entirety of the Regal cigarette, thus accounting for 95 per cent of the DNA profiles. He said in interview that he would not allow anyone else to smoke a cigarette which he smoked. The minor profile did not assist Speers. Craig admitted that he was beside the face of the deceased and was found guilty of stamping on him. Moore was nearby. The deceased was knocked to the ground and lay beside the cigarette butt. It was not a reasonable possibility that the minor profile was on the cigarette in Madaghan's pub. This disposes of ground (8).

[138] The fourth ground of appeal was that the trial judge should have acceded to the application for a direction at the close of the Crown case. Once one had concluded that the statement of Claire Fulton was rightly read to the court and that the evidence of identification was rightly admitted, the case against Speers was a powerful one. We have had no difficulty in rejecting that ground of appeal.

[139] As to ground (5) we have indicated our approval of the reasoning of the trial judge on the admissibility of the evidence of identification. He dealt in detail with the attack on the reliability of Mr Bellew's evidence, noting all the points made by Mr McCrudden. The trial judge having seen and heard Mr Bellew stated that he found him in the main to be a credible witness, who had been subjected to a frightening and traumatic experience which could account for confusion and lack of clarity as to the precise sequence of events, locations and so forth. He indicated that he approached the identification of Speers very cautiously. He stated that Speers' face was a memorable one. He had regard to the evidence about the white Ford Escort including Bell's evidence, Craig's evidence, Cunningham's evidence and the other evidence which he set out in detail, not least the description of the man seen by Constable Brown and Reserve Constable Whyte walking from the direction of

the white Ford Escort parked at 62 Harmin Drive after the incident on the Hightown Road. Again he analysed the criticisms of Whyte's identification of Speers made by Mc McCrudden. He analysed the evidence of Mr H in detail. He acknowledged that Mr H might have been mistaken in thinking that the white Ford Estate was in Harmin Avenue, having regard to his own lack of knowledge of the locality and the evidence about Cherryvale Road including the evidence of Mr Newell. We are entirely satisfied that he was justified in his conclusions about the identifications which fixed Speers as the driver of the white Ford Escort. That disposes of ground (5).

[140] Ground (6) was based on the unreliability of Gualter Conceiceo and the reliance by the trial judge on Craig's evidence. We can find no fault with the former's evidence and in so far as Craig's evidence was concerned, the trial judge indicated over and over again that he would not act on it unless supported by independent corroborative evidence. He was entirely justified in doing so because Craig did himself no favours by admitting his involvement with Speers until the alleged parting of the ways in Harmin Drive after the incident on the Hightown Road.

[141] As to ground (7) that the trial judge erred in law in rejecting the proposition that Craig's previous convictions and misconduct were relevant to propensity, we share the trial judge's view that the evidence of Craig's previous bad character and misconduct were relevant only to his credibility.

Counsel on behalf of Speers relied on the assault on one Telford. Craig gave evidence that Speers assaulted Telford. The evidence was unconvincing and the trial judge ignored it. Speers did not give evidence at all, let alone give evidence that Craig assaulted Telford. There may or may not have been an incident at the arcade involving Speers or Craig. There was no evidence that Craig assaulted Telford.

[142] The incidents in which Craig had been involved bore no similarity to the attack on the deceased. *R v Randall* [2004] 1 All ER 467 was relied upon. In that case the co-accused ran cut throat defences and gave evidence against each other. They both exposed their previous bad character. In the present case Speers gave no evidence. In cross-examination on his behalf it was disputed that he was at the scene of the crime. This was not a case in which the co-accused ran cut-throat defences. Craig sought to blame Speers. Speers did not expose himself to cross-examination. No authority was cited to us which led us to consider that the trial judge was wrong in disregarding Craig's previous bad character or misconduct as tending to show that he was guilty and Speers was innocent. Their roles in the attack on the deceased were found to be different. Ground (7) is rejected. Ground (3) has already been rejected.

[143] Ground (9) was that the trial judge wrongly concluded that Speers had lied during interview. But Speers admitted that he had lied. He said that he had lied in order to avoid a prosecution for being “drunk in charge” or driving while drunk.

[144] Ground (10) was that a ‘Lucas’ direction should have been given in respect of Speers’ lies. But the trial judge did not need to give a ‘Lucas’ direction in respect of Speers. He had already given a ‘Lucas’ direction and his findings about Speers’ lies accorded with the principle in that case.

It follows from what we have already said that the trial judge was right to infer guilt in this circumstantial case against Speers and that there was no alternative reasonable inference than that he was guilty.

[145] Grounds (12) and (13) are so general that they do not merit comment. As to ground (14) we have already pointed to the fact that the trial judge treated Craig’s evidence with the utmost caution. Indeed he rejected Craig’s allegation that it was Speers who jumped on the deceased and found that it was Craig who did so.

[146] It was submitted to us that there were fundamental errors made by the trial judge. We have dealt with them in the course of this judgment. We have been unable to find any flaw, let alone a fundamental flaw.

[147] We return finally to consider the conclusions of the trial judge as against Speers. He dealt with his interviews. He pointed out that Speers admitted smoking Regal cigarettes. He set out his reasons for refusing him a direction. He stated that in the case against Speers he was satisfied that Speers while he was in the bar was in contact with Moore and Craig who came to the bar about 11 pm. He had denied having any conversation or contact with Moore and Craig and suggested that they would not have been in the bar. He denied ever being in their company in the bar or leaving with them. He accepted Craig’s evidence confirmed by Conceiceo that he did have such contact and left with them. An adverse inference was to be drawn against Speers for denying this. We bear in mind that Speers did not give evidence to account for his movements.

[148] The trial judge found, as he was entitled to do, that Speers crossed the Antrim Road with Craig and Moore and was in their company on the other side for some time. The evidence of Conceiceo coupled with the evidence of Craig established this in our view. He found that they returned as a group as seen by Conceiceo. The cigarette butt bearing Speers’ DNA in Harmin Parade was evidence from which one could legitimately infer that Speers was there on 31 March, he held. He told the police that he was not in Harmin Parade after leaving the bar and had no reason to be there. His explanation for the

false timing of the parking of the white van was wholly unconvincing, he held, in the absence of going into the witness box to support such a story.

[149] The trial judge accepted Craig's evidence that Speers, Moore and Craig travelled in the white van to Harmin Parade (or Drive) near Bell's home and got access to the white Ford Escort thereby. Speers was giving false information about when the van was moved because if the actual time of removal was established it would confirm his presence with Craig and Moore after the murder and link into the Hightown Road episode. He opportunistically used the location of the van in Harmin to enable him to create the impression that he walked through Harmin Parade and was probably smoking a cigarette earlier in the day.

[150] The major profile of the cigarette satisfied the trial judge that he was the smoker of the cigarette. If it had been dropped earlier and had moved in the wind, it would be a remarkable coincidence that the cigarette just happened to land up in such close proximity to the scene of the assault. If he was at the scene of the assault but some distance from it, it would have been a remarkable coincidence that it had actually then moved over to the scene of the assault.

[151] The trial judge was satisfied that following the events at Harmin Parade Speers was seen by Mr Bellew and Constable Whyte. Their identifications were supported by Craig's evidence, suspect as it was for the reasons described; Craig and Moore were clearly in the company of an older man; the older man was driving the car; the car was not being stolen or dumped as it was returned close to where it was taken from; the driver must have known where to get the keys; Craig and Moore had left the bar in the company of the man who had owned the car and who knew where it was and where the keys were to be found; Craig and Moore went to Bell's house in the company of an older man; if that older man was not Speers it would have to have been somebody else who planned or agreed to become involved in going to Bell's house to get the keys and participate in the driving of the car; in that event the unknown older man would have had to know where the car was located and where the keys were; the older man would have had to have had a moustache and greyish white hair as seen by Whyte and Brown and thereby coincidentally look like Speers. He knew where the car was and where the keys were. If the car seen by Mr H and the driver later identified by Mr H as Speers was not the Ford car and was not Speers, then coincidentally another white Ford Escort car with a starting problem was being driven by somebody who Mr H thought looked like Speers, pushed by two different younger men.

[152] This masterly and flawless analysis of the facts led inevitably to the conclusion reached by the trial judge that the older man in the Bellew incident and as seen by Whyte and Black was Speers. Tying all the pieces of the

evidence together he was satisfied that Speers was with Craig and Moore throughout the time that the deceased was assaulted in Harmin Parade, the movement back to the white van in the car park, the drive to Harmin Drive, getting into the Ford Escort and driving at an innocent third party in what had all the hallmarks of a sectarian assault and returning to Harmin Drive. He rejected the submission of Mr McCrudden on the part of Speers that he might still not have been guilty of murder. He concluded that on the totality of the evidence Speers was shown to be an intelligent and dominant older man with two teenagers, who consistently lied to exclude himself from any contact with them. The overwhelming inference must be that the older man was involved in luring the deceased down the laneway and orchestrated the departure from the scene to his van and then orchestrated the Hightown Road incident.

[153] The picture that emerged of Speers clearly pointed to someone who was not merely a callous bystander but was a participant or encourager. The trial judge concluded that Speers was guilty as a principal or as an accessory. There was no adequate explanation for his absence from the witness box. He considered that Speers would have gone into the witness box to give an explanation or an answer to the case against him if he had one. The only sensible explanation was that he had no answer to the case against him or one that could stand up to cross-examination. We find the reasoning of the judge overwhelming and we have no hesitation in upholding the conviction of Speers as safe.