Neutral Citation No. [2010] NICC 31 | *Ref:* **TRE7931**

Judgment: approved by the Court for handing down | *Delivered:* **3/9/2010**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

CHRISTOPHER PATRICK STOKES,
MARTIN STOKES AND
EDWARD GABRIEL STOKES

_____

TREACY J

Introduction

[1] Counsel for all of the accused made submissions of No Case to Answer at the conclusion of the prosecution case which I refused.

[2] In essence the application was based on the mendacity of the principal prosecution witness Julia Mongan and of the alleged worthlessness of her identification evidence against the three accused. The application was supported by a detailed examination of her evidence and the transcripts thereof which had been made available.

[3] This case stands or falls on the evidence of Julia Mongan and her alleged visual identification by alleged recognition of the three defendants.

Legal Principles Governing Applications

[4] The principles governing such an application, although well established, are not, in some circumstances, free from difficulty. They are set out at **Blackstone at paras.D15.53 – D15.58** and in ***R v Galbraith*** **[1981] 2 All ER 1060.** The relevant passage from ***Galbraith*** is set out in **Blackstone [para.D15.53].**

[5] A case frequently relied upon in this jurisdiction in support of such applications is ***R v Hassan*** **[1981] 9 NIJB.** That was a non-jury trial of four members of the RUC who were charged with assaulting a detainee at Omagh Police Station

causing him actual bodily harm. Thus a not unimportant part of the context of that case was that Lord Lowry LCJ was speaking both as the Judge of both law *and* fact– a point taken up by the Chief Justice at pp16-18 of the Judgment. Like Magistrates hearing a complaint the Crown Court in ***Hassan*** was also the tribunal of fact. In that context Lord Lowry referred to a note of the practice in England in respect of submissions of No Case before Magistrates with which he expressly agreed and adopted. Having set the relevant extracts he stated:

> **"My own impression is therefore important in a further way which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution, there can be no justification for allowing the trial to continue. I have, incidentally, looked in vain for any evidence which might corroborate *Rs* version of what happened. I find him an entirely unsatisfactory witness, avowedly clear at one moment and hazy the next – often on the same point, offering one different explanation after another as he is driven by cross-examination from one insecure foothold to the next until finally his testimony on every important point breaks down in a welter of confusion and unbelief. In other words, the manner of giving the evidence, on the frailties of which I have commented, condemns also the giver of that evidence as himself unworthy of belief."**

[6] And later on the same theme he stated:

> **"Speaking as the Judge of both fact and law in this case, I shall do better to state my overall impression, which is that *R.*, and not merely his evidence, is unworthy and incapable of being accepted as a witness of truth."**

[7] At the beginning of the Judgment Lord Lowry set out the governing principles of ***Galbraith*** and stated:

> **"I entirely accept the principles as stated by Lord Lane, always remembering that 'no evidence' does not mean literally no evidence but rather no evidence on which a reasonable Jury properly directed could (I emphasise that word) return a verdict of guilty. This test does not depend on the unacceptable practice of assessing the credibility of a witness; the key words**

> **in Lord Widgery's statement are, *'it is not the Judge's job ... to stop the case merely because he thinks that the witness is lying'*[1] but it is still open to the Trial Judge to say that the evidence reveals inconsistencies and absurdities so gross that, as a rational person, he could not allow a jury to say that it satisfied them of the prisoner's guilt beyond reasonable doubt. If that is his clear view, he should direct a verdict of Not Guilty."** [Emphasis added]

[8] In ***Turnbull*** **[1976] 63 Cr App R 132, [1977] 1 QB 224** Lord Widgery stated at p138 and p229:

> **"When, in the judgment of the Trial Judge, the *quality* of the identifying evidence is *poor*, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the Jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."**

Thus the Trial Judge's duty to withdraw the case from the Jury in an identification case is *wider* than the general duty of a Trial Judge in respect of a submission of No Case to Answer under ***Galbraith*** principles.

[9] In ***Daly*** **[1993] 3 WLR 666** the Privy Council held that where the Trial Judge considered that the *quality* of the identification evidence was poor and insufficient to found a conviction and there was no other evidence to support that identification evidence he should withdraw the case from the Jury at the end of the prosecution case; but where the strength of the prosecution evidence depended on the determination of a witnesses *reliability*, and on one possible view of the facts there was evidence upon which a jury could properly convict, the Judge should *not* stop the trial *even if* he regarded the prosecution evidence as uncreditworthy but should leave the case to the Jury.

[10] As the Court pointed out in ***Daly*** the practice which the Court in ***Galbraith*** was primarily concerned to proscribe was one whereby a Judge who considered the prosecution evidence as unworthy of credit would make sure that the Jury did not

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[1] *R v Barker* [1977] 65 Cr App R 287 at p288 - Lord Widgery stated: **"It cannot be too clearly stated that the Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. *To do that is to usurp the function of the Jury.* ..."** [Emphasis added]

have the opportunity to give effect to different opinion. By following this practice the Judge was doing something which, as Lord Widgery had put it, was not his job. By contrast, in the kind of identification dealt with by ***Turnbull*** the case is withdrawn from the Jury *not* because the Judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to confound a conviction: and indeed, as ***Turnbull*** itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence under the ***Turnbull*** doctrine, the Court is prevented from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. The rationale of the ***Turnbull*** principle was the need to eliminate this "ghastly risk" run in certain types of identification cases.

[11] In the light of ***Hassan,*** if I had considered that no reasonable jury could believe Julia Mongan then the case would have been withdrawn. But since I did not consider this to be the case I left the case to the Jury. This is not an exercise of discretion. If I had adjudged the case to fall within the exceptional category identified in ***Hassan*** it would, in this case, have been my duty to withdraw it from the jury. But I did not form such a judgment.

[12] Applying the approach of the Privy Council in ***Daly,*** so far as the quality threshold is concerned, her identification evidence was capable of being supported by the DNA and phone evidence and accordingly applying what I might call the first limb of ***Daly*** the case should not on that account be withdrawn from the jury. On the reliability issue, on one possible view on the facts, the jury could believe Julia Mongan and convict.

Conclusion

[13] Accordingly the applications must be dismissed.