

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

Delivered: 27/6/08

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

-v-

TERENCE MALACHY DAVISON
JAMES McCORMICK
JOSEPH GERARD FITZPATRICK

GILLEN J

Introduction

[1] This trial arises out of the events leading up to the death of Robert McCartney on 31 January 2005. Mr McCartney died as a result of a stab wound in the lower left abdomen. Terence Malachy Davison has been indicted on a charge of murder and affray. James McCormick and Joseph Gerard Fitzpatrick have both been indicted on charges of affray and Joseph Gerard Fitzpatrick has been charged with a further offence of assault on Edward Gowdy. Much of the evidence in this case was not in dispute and can be briefly summarised in the factual background that I will shortly set out. I am indebted to counsel for both defence and prosecution who have processed this case in exemplary fashion agreeing that virtually all of the uncontested evidence be proved by written statements under the Criminal Justice (Miscellaneous Provisions) Act (NI) 1968.

[2] I make it clear at the outset that I have borne in mind that in a criminal case the tribunal of fact has to be satisfied beyond reasonable doubt of the material facts which have to be proved in order to establish the commission of the particular offence (the *facta probanda*, as distinct from the *facta probantia* which when put together go to make up the matters to be proved). Accordingly when in this judgment I state that I am satisfied about a particular fact or conclusion, I mean that I am so satisfied beyond reasonable doubt.

[3] The present task of deciding whether the prosecution has established guilt beyond reasonable doubt is wholly different from that which I performed at the end of the prosecution case in deciding whether there was evidence that could conceivably support a guilty verdict.

Factual background

[4] The deceased and some of his friends, including Ed Gowdy and Brendan Devine, were drinking in Magennis's Bar in May Street, Belfast during the course of 30 January 2005. It is clear that a great deal of alcohol had been consumed. Terence Davison was also present in the Bar in the company of his partner and others including perhaps his nephew Gerard "Jock" Davison.

[5] At some stage after about 10 pm a quarrel broke out involving the deceased allegedly arising out of certain gestures which he had made. Whether these were gestures of a sexual nature in the direction of the women who were in the company of Mr Davison or whether they were gestures made in the course of discussions about a football match that had been on the television and which were misinterpreted I am not required to determine. Suffice to say that at some point Terence Davison engaged in acrimonious exchanges with the deceased over the matter. Mr Davison told police in the course of interviews with him that these exchanges so far as he was concerned ended amicably with handshakes. Given the affray that clearly erupted in the bar as evidenced by the injuries Brendan Devine sustained to his throat and the amount of blood subsequently seen by PSNI SOCO throughout the bar I doubt the truth of this assertion.

[6] At some stage Gerard Davison engaged in the quarrel with the deceased and Brendan Devine. Matters appear to have developed into a brawl within the Bar in the course of which Brendan Devine alleges he was hit over the head with a bottle and received injuries to his neck which bled profusely. Gerard Davison also received a fairly severe injury to his hand.

[7] The dispute appears to have spilled out into the street in front of the Bar and continued there.

[8] In the street outside Magennis's Bar, it seems clear that at least Brendan Devine and Gerard Davison exchanged in further rancorous dispute. Ed Gowdy gave his black tee-shirt to Mr Devine and cleaned up some of the blood that was on him.

[9] Thereafter the matter becomes one of disputed fact save that it is clear that Mr McCartney and Mr Devine made their way down Market Street towards the area of East Bridge Street/Cromac Street. It is the prosecution

case that they were followed by a group of men bearing weapons from outside the bar in May street.

[10] The events that occurred in Market Street and thereafter in Cromac Square have been the subject of close analysis in this case and I will turn to them in some detail later in this judgment.

[11] It is clear however that eventually both Mr Devine and Mr McCartney were found in Cromac Square. Mr Devine had a single stab wound to the abdomen as did the deceased who had also sustained injuries to his face.

[12] Reports came into the police and to the Ambulance Service reporting an incident and the injuries. Ambulance Control received two calls in relation to the incident at 10.50pm and at 10.51pm. An ambulance arrived at the scene at 10.59pm where police were already administering first aid to Mr McCartney and Mr Devine.

[13] A paramedic who arrived on the scene found Mr McCartney lying on his back. Police had already applied field dressings to his head and stomach. An incision wound was found on Mr McCartney who was sufficiently conscious at that stage to be able to give his name. The deceased then starting drifting into unconsciousness and was transferred into an ambulance which left the scene at 23.09. Mr Devine was also attended to and similarly required transfer by ambulance to hospital.

[14] On arrival at the hospital the duty consultant identified a stab wound on the left groin and cardio pulmonary resuscitation was commenced. The abdominal injury was treated in the course of an operation by a consultant surgeon. Following surgery Mr McCartney was transferred to Intensive Care but he died at 8.12 am.

[15] A post mortem on Mr McCartney's remains was conducted by Dr Bentley the Deputy State Pathologist who concluded that Mr McCartney had died from a stab wound to the abdomen. He found that the track of the wound was left to right, front to back and slightly downwards. The configuration of the wound suggests that the weapon used had a flat shape with one sharp edge such as a knife. In addition he found injuries to the face which included a broken nose and a laceration to the right lower eyelid. There were further non-specific injuries to his arms and legs.

[16] Extensive evidence was given by scenes of crime police officers and other police who attended the scene. Again, much of this was not in dispute.

[17] Examination of the Bar by police in the aftermath of the incident revealed that the CCTV cameras had not been recording at the time of the

incident in the Bar and it looked as if the condition of the Bar was not as it was at that time as chairs, stools and tables having been moved.

[18] Examination of the Bar area however showed significant bloodstaining throughout.

[19] Blood marks were recovered from the area where Mr McCartney and Mr Devine were treated in Cromac Square and, what the Crown described as significant blood marks, were found between Market Street and Cromac Square. Blood, identified as that of Mr Devine, was recovered from clothing from Cromac Street where he and Mr McCartney were found. One part of the upper clothing showed cuts and tears to the left side of the neck, the mid-front and the lower sleeve.

[20] Another piece of upper clothing had a major profile from Mr McCartney and a minor profile from Mr Devine.

[21] An orange red tee-shirt recovered in the street outside Magennis's had profiles of blood of Devine and Mr Jock Davison

[22] So far as the deceased was concerned, a tee-shirt was recovered from Cromac Street with a major profile of his blood. The major staining was on the left side and corresponded to a sharp edged cut in the garment on the left side. Mr McCartney's blood was also recovered from Mr Devine's clothing.

[23] There was one stain of Mr McCartney's blood recovered in Market Street depicted on exhibit 6E (a map prepared by the PSNI mapping section) about $\frac{3}{4}$ of the way up Market Street towards East Bridge Street.

[24] Four areas of blood belonging to the accused James McCormick were found in a wall in Market Street. Some of his blood was also found outside the door of the Bar.

[25] There was a mixed profile of the blood of Jock Davison and Brendan Devine on the red/orange tee-shirt recovered outside the Bar.

[26] The blood of Jock Davison was found on Devine's jeans. There was also a profile of his blood on broken glass outside the Bar.

The disputed evidence

[27] I turn now to those areas of the evidence which were disputed and which formed the core of the prosecution case. Three key witnesses gave evidence in chief on behalf of the prosecution as follows.

Ed Gowdy

[28] Mr Gowdy, aged 40, said he had known Robert McCartney for the last twelve years before he died and was good friends with him.

[29] On Sunday 30 January 2005 at about 1.00 pm he had gone to the St Matthew's Club in Short Strand. He had remained there for about 1-2 hours and had taken what he initially described as about two drinks namely big bottles of cider. There he met Terry McKay and Daniel Reid. He left that club at about 2.00pm with these two men.

[30] They had gone by taxi to Magennis's Bar. When he got there he sat down with some other men he knew. He was in the Whiskey Café part of Magennis's Bar.

[31] They were watching some football on television. While there he received a call on his mobile from Robert McCartney who said he would join them. Shortly thereafter he arrived and was sober and in good form.

[32] Brendan Devine arrived some time later, the witness saying it could have been 7pm or 8pm. Brendan Devine was not a close friend of his but was a close friend of Robert McCartney's. He joined them for a drink. He described Brendan Devine as not being overly drunk at that time.

[33] Bobby Fitzsimmons joined the company for a while.

[34] His evidence was that between 10.30 and 11.00 pm there was an outbreak of fighting in the bar. By this stage he had taken about ten bottles of cider or maybe more. He remembered a lot of shouting, blood everywhere, and people swearing. The witness said that his next clear memory was of standing outside the Whiskey Café doors with Brendan Devine and Robert McCartney. He was nearly positive that himself and Robert McCartney had ushered Devine out of the bar but he could not really be sure about that. Brendan Devine was covered with blood.

[35] The witness described a large number of people outside the bar at this time but he could not really remember anybody 100%.

[36] Devine was trying to get back into the fight that he must have been originally involved in and Gowdy and McCartney were trying to hold him back. Gerard Davison and Devine were shouting at each other. Gerard Davison had his hand cut and there was something wrapped around it.

[37] Mr Gowdy said that he approached Gerard Davison to relax him but there was no talking to him.

[38] At this stage Devine's head, hair and neck were covered in blood. To enable him to get a taxi Mr Gowdy took off his tee-shirt and wiped the blood off Mr Devine. By this time he knew his throat had been cut. After he cleaned his face McCartney and himself ushered Devine up Market Street.

[39] As the three of them were about half way up Market Street, Mr Gowdy gave evidence that he looked back and saw a crowd of people walking up behind. Some had bottles and some had sticks. They were possibly 10/12 feet behind his group although he could not remember the exact distance. He thought there were about 10 or 12 people.

[40] Mr Gowdy said that he thought he might have known some of them so he told McCartney to take Mr Devine away and he would go and speak to them.

[41] He claimed that as he walked back down Market Street towards May Street he was confronted by Joe Fitzpatrick and Jim McCormick. He also remembered Terry Davison being there.

[42] He noted that Fitzpatrick was carrying some sort of a stick.

[43] In relation to Mr Fitzpatrick he said that he had not known him very long. He just thought he worked the door in Magennis's and he had seen him from the door.

[44] The witness said that he knew Terry Davison but not very well. He would never have spoken much to him but had known him perhaps 5-6 years.

[45] Gowdy said he had never spoken to Jim McCormick but he knew his face over 10 or 12 years in the area.

[46] In his evidence in chief he described Mr Fitzpatrick as having a stick but neither Mr Davison nor Mr McCormick had any weapons. He had an idea of the other people but he could not be 100% certain. He said something such as "what's happening here". Joe Fitzpatrick lifted a stick that he had in his hand and cracked him across the face with it. Mr Gowdy's reaction was to hit back but because there were too many there and it was a dangerous situation he kept his hands down.

[47] He described being struck along the cheek bone and was bruised for a couple of days with something like a sewer rod. It was a thin stick like a whip.

[48] Mr Fitzsimmons then grabbed him and pulled him down the street towards May Street.

[49] The witness said that as he was walking down Market Street with Bobby Fitzsimmons in the direction of May Street he looked up to see where Mr McCartney and Mr Devine were. He saw them turning the corner into Cromac Street although they had not actually turned yet. It looked as if that was the direction in which they were going. They were at the top of Market Street. At that time the other men were not far behind Mr Gowdy.

[50] He then went back to Magennis's Bar with Mr Ftizsimmons. There he argued with Mr Fitzsimmons about what had happened and what was going on.

[51] He then obtained two bottles of alcohol and decided to go to a friend's house which was not too far away from Magennis's in the Markets area. He said he took a taxi there.

[52] He claimed that he tried to phone Mr McCartney at 11.10pm but was unable to make any contact because the phone was on answer machine mode.

[53] He then received a text from his wife saying that Robert McCartney was bad. As a result of this he took a taxi to the hospital arriving there between 4.30 and 5.00 am.

[54] At the hospital he saw Robert McCartney's girlfriend, his sisters and Jim Arnold.

[55] On 14 March 2005 he returned to Market Street with Detective Constable Graham and a police photographer and placed markers in the street showing the positions of Mr Devine and Mr McCartney. He placed other markers describing where the group following them were.

[56] At an identification parade on 1 June 2005 he identified James McCormick at Donegall Pass Police Station.

The evidence of Brendan Devine

[57] Mr Devine said he was a friend of Robert McCartney and had known him for 15-20 years at the time of his death. On 30 January 2005, he had initially attended another bar in Ardoyne where he had consumed five pints, then had something to eat and, having made an arrangement over the telephone with Robert McCartney, met him there at Magennis's at about 8.00 pm.

[58] In Magennis's bar he met with Ed Gowdy, Terry McKay, Bert McCartney and one other person who joined them. Later on in the course of the evening he heard a rancorous exchange between Bert McCartney and an

older man. Bert was saying "You're imagining things" and the older man was demanding an apology. He described that man as tall, slim with greyish hair around 50 years of age. He was wearing jeans, a light tee-shirt and a top.

[59] When Brendan Devine intervened the older man described an obscene sexual gesture which he alleged Bert McCartney had made to his wife. Mr Devine told this man that this gesture had been made about half an hour ago during the course of an exchange about Liverpool and Celtic football clubs but the man kept on demanding an apology.

[60] Mr Devine then spoke to the girls. Three of them were smiling but one of them was as he described "ignorant and cheeky" to him. He said that he would buy them a drink.

[61] At that stage Bert was having a heated discussion with another man across the table where they were sitting. This man was pointing at Bert. When Mr Devine asked him if he was sure he had got things right, he told him "mind his own f'ing business". Mr Devine asserted that there had been a misunderstanding but this man then said to him "F off you police informing bastard".

[62] Mr Devine then described a number of people coming at him when he had his hands out asserting that there had been a misunderstanding. He was struck over the head with a bottle and was assaulted about 4-5 times. He felt glass over his head. He remembered someone putting a hand over his face, pulling his head back and his throat was cut three times with what he thought was more like a bottle than a knife. He exhibited a scar on his neck under the chin.

[63] The witness indicated that he had to get out of the Bar. He recalled then standing at the corner of Market Street near the solicitor's office. Blood was seeping through his fingers. Robert McCartney and Ed Gowdy were there with Terry McKay. He said to Bert McCartney "How am I going to go home to her like this now".

[64] One of the girls in the group to whom he had earlier spoken screamed that this was a disgrace. He said this made him think about things and he started shouting at the men outside the Bar that they were cowards. He had heard the name of Jock Davison. The whole group in the bar then seemed to come out. There was a circle around where they were standing with perhaps 50-60 people at that stage.

[65] Mr Devine said that as soon as he mentioned Jock Davison's name he was surrounded with people shouting "You're fucked; you're dead; you're going to get it". Mr Devine was shouting back "You are a pack of cowards, animals".

[66] Someone then handed him a towel and Ed Gowdy gave him a tee-shirt. He told Bert of his concerns about being out on bail after his curfew. He then went into the entry by himself.

[67] The description of him going up the entry and thereafter became a substantial cause of dispute in this case. In the course of his evidence-in-chief before me he described being about half way up the entry when he saw Bert McCartney, Ed Gowdy and Terry McKay about a quarter way up the entry behind him. About 4-6 men were quickly walking up the entry behind them. At this stage the group were at the corner of the entry.

[68] Mr Devine recalled trying to walk fast but Market Street seemed a long street. At that stage he thought he saw one man with a "blade" closest to the wall. He felt he had to get to the traffic as he knew they were looking for trouble. He thought they were coming for him and not for Bert. He added that Bert had not an enemy in the world.

[69] The witness then looked back a second time and Bert was as he described it, "at the start of the fence". He had his hands up saying "no one deserves this". Ed Gowdy was about to be hit with a stick. Terry McKay was standing up against the wall with Ed Gowdy in the middle. Bert McCartney was about four feet behind Gowdy.

[70] Mr Devine described himself being 15-20 yards behind Bert. He was maybe two thirds up the entry.

[71] Mr Devine said he then walked a further ten yards. He recalled old brick beside new brick. This coincides with what is shown in the photographs of Market Street in the exhibits before me.

[72] At that stage in his evidence the witness looked at Exhibit 8 which was a collection of photographs taken in March 2005 by police when he had attended at the scene with them. Photograph 5 recorded where he was in relation to McCartney Gowdy and McKay. Photograph 7 recorded where McCartney, Gowdy and McKay were at the time the man was about to hit Gowdy. He described photograph 9 as indicating, at number 1, where he was stabbed.

[73] Mr Devine asserted that when he was at the point depicted in Exhibit 8 photograph 9, he felt a plunge coming from his right side. He turned around and saw a man grinning at him with a bad set of teeth which were inward or crooked. He described it as an evil grin. He then pointed out where the stab wound had occurred to his right side indicating a scar. He felt a sharp pain but was more in shock. He described later picking out at an identification

parade the man who had stabbed him as the accused McCormick. He remembered him as small and chubby with a receding hairline.

[74] Mr Devine described how he then kept walking and said he had to get to traffic. He did not remember any cars. He recalled looking back and saw Bert McCartney up against a fence with two people over him. He was now not sure if this was the fence depicted in photograph 8 of Exhibit 8.

[75] Looking at Exhibit 6A (a map of the Markets area), he pointed out where he thought Bert was when he looked at him. This was in Market Street. He was low down and two people were over him. He shouted to the men to leave Mr McCartney alone and walked down towards them. As he was getting closer he saw him on his bottom sitting against a fence. The first time he had looked back he thought he saw two men at him but as he got closer there was only one there. His head was rolling around. Before that he had seen this man hit him with a right handed punch. As he got closer he saw this man standing over him gouging at his face and eye in a really evil way. When Mr Devine got within five yards he said "Not you, not you". He said this because this was the older man who had demanded the apology. He had seemed more respectable than the others although he had seemed a bit cocky. He observed the evil expression on his face standing over Bert.

[76] When Mr Devine got within two yards this man walked away. Subsequently in his evidence he said this man walked back towards May Street. McCartney was on his bottom and unconscious. Mr Devine did not know where Terence McKay and Ed Gowdy were at this stage. Mr Devine then slapped his face to waken him up and put his nail into his gum to bring him round.

[77] The witness then described how he got Mr McCartney up and they started walking. He had his arm around his waist. He said they walked 20-40 yards.

[78] Mr Devine then described getting a sharp pain where he had been stabbed and he was doubled over.

[79] At that point Mr Devine remembered letting go of Mr McCartney. He said he was at a small traffic island in East Bridge Street at that time. He fell at the traffic island. Then he went to the large traffic island. He described Robert McCartney lying on his back in the middle of the traffic island.

[80] On Exhibit 6A, the witness marked certain matters which were of some significance in this case. With "X" he marked the footpath where he had been. At "X1" he marked the small traffic island where he said he fell. At "X2" he marked the long traffic island where Bert was lying.

[81] Mr Devine then said that he picked up McCartney and they walked to the other side of the road in Cromac Square where there was a green electric box. He remembers Bert falling onto his back. There was blood all over his tee-shirt. He asked McCartney had he been stabbed. He then sat and lay beside him. He then recalled Mr McCartney saying "Our Gerard needs me. I'm not going to make it". An ambulance then arrived.

[82] On 1 June 2005 at an identification parade in Donegal Pass Police Station he picked out the accused McCormick as the man who had been grinning at him after he had been stabbed. He could not be sure if he had seen him at the Magennis's bar. Subsequently at another identification parade on the same date he picked out the accused Terence Davison as the man who had been demanding the apology and who had been standing over Mr McCartney and gouging him.

The Evidence of Witness C

[83] Witness C gave evidence with the benefit of special measures. By order of the court of 7 March 2008 she gave evidence behind a screen, shielded from the public and from the accused but not from all the legal representatives and the judge.

[84] Her evidence was that on the evening of 30 January 2005 she had left her home in her car, a four door Skoda, a few minutes past 10.30 pm with the intention of travelling along the Albertbridge Road, into St George's Market via East Bridge Street and on the City Hall. She was alone in the car.

[85] When she reached St George's Market in East Bridge Street it was dry. Visibility and street lighting were good.

[86] As she came level with the front of the market she was in the lane beside the small traffic island depicted in Exhibit 5 at photographs 9 and 10. She recognised in those photographs the traffic lights where she had stopped.

[87] She saw four men running out from Market Street. She marked on a map the position where she was when she saw them coming out of Market Street. At that stage the lights were red for her at Cromac Square.

[88] One man ran behind the back of her car and onto the traffic island. He was wearing a dark tee-shirt, was fairly tall, and had wavy thick hair. A second man ran in front of the car. He was fairly tall, in his late twenties/early thirties wearing a white sweatshirt with long sleeves which were wide and baggy.

[89] The third man she described was well dressed, with pressed slacks, beige in colour, with a zip up corduroy beige jacket. His hair was white, grey. He had skin colour which was quite red and swarthy.

[90] The fourth man she only obtained a glimpse of and could not describe him again. She did not see him after this stage at all.

[91] In relation to the relative positions of the men as they came out of Market Street, the man with the navy tee-shirt was first. Possibly one yard behind him was the man in the white sweatshirt and then there was a gap of 3-4 yards or thereabouts until the third and fourth men ran out.

[92] At this stage she was on the inside lane closest to the road sign depicted in Exhibit 5 photograph 9. There was a dark coloured car on the outside lane.

[93] She stated that she had a very clear view of men 1, 2 and 3.

[94] Witness C described the man in the dark tee-shirt running across the island away from her car to the area of Hamilton Street. He was positioned between the lights and Hamilton Street and was not carrying anything.

[95] The second person, the man in the white tee-shirt, cut across her car towards the island. He was running but not getting anywhere. In cross-examination she described this as looking as if he was treading water or on a treadmill machine. Something was preventing him running at normal speed in her view. She accepted that he might well have been injured or drunk.

[96] She described the third man, the grey haired man, running up and grabbing the second man by the arm. The second man was in fact Robert McCartney. The man with the white hair put his left hand on McCartney and grabbed him by the upper right arm. At first she thought he was attempting to take him off the road but in fact he pulled him across to the Markets area in front of the car in the outside lane. McCartney was trying to pull away from him. At that stage both had their back to her.

[97] The witness observed that whilst the white haired man had been swinging him round by the right arm, he took a number of swipes at him. She described an in-swing movement which was not like a punch. It was with the fist closed and the hand gripped in. She did see his hand as it was brought back. At this stage he was about five feet in front of her. She declared that the only part of the hand that she could see was the back and not the front. She did not see anything in his hand.

[98] Two days after the incident had occurred she demonstrated the swiping movement to a police officer. That demonstration was put on video

and I had the benefit of seeing it. She said that it definitely happened twice although she had the impression it happened more than that. She observed Mr McCartney stooping forward and pulling back. She described him as "sort of flinching". At this stage the witness said the lighting as very good. It was street lighting but was really well illuminated.

[99] Describing the swipes, she asserted that the white haired man took 2 to 3 swipes, the second being at an angle going downwards. The palm of his hand was downwards. Mr McCartney went down onto the ground. He was facing her at that stage. She pointed to No. 4 on Exhibit 15 as being where he fell.

[100] She then related that the white haired man was behind McCartney and was kicking him in the lower back at least a half a dozen times. These were vicious kicks using full force.

[101] Witness C then saw the first man in the dark tee-shirt come across to the white haired man. He was going to position 5 depicted on Exhibit 15. As the first man came over, it looked as if he was saying "that's enough, stop". He had his hands out and upwards as if saying "come on stop". He bent over and put his hand out to McCartney. McCartney was on the ground at that point. It looked as if he was trying to reach to help him up off the ground.

[102] At this stage the white haired man took a swipe at man one. He flinched and went back to position five. The swipe was in the form of the man bringing his right arm round and aiming at this rib cage ie. the upper part of his chest. She thought that happened once. He flinched, jumped up and backed off to where position No. 5 was.

[103] Mr McCartney was attempting to raise himself off the ground. The white haired man walked to where he was, lifted his left foot back, held it, and kicked Mr McCartney in the head. She saw it connect with his head. It was a very deliberate act. He had lashed out with as much power as he could according to the witness. She thought that Mr McCartney would be brain damaged because he had hit him so hard.

[104] At that point the traffic lights changed and the car started to move forward. Later unchallenged evidence was that the time between the lights turning from red to green was something in the region of 80 seconds. The white haired man backed off. Mr McCartney got onto his feet and was walking across the cars in a dazed condition. The white haired man, who was in no rush, backed off onto the footpath. He was calm and calculated in the way he was moving.

[105] She described Mr McCartney at that stage as being totally disorientated. He walked to the island. His whole left side was covered in

blood. At the point Mr McCartney reached the traffic island, the first man was trying to help him. The two of them were then on the island.

[106] Witness C then drove on through the lights, down Cromac Street and into May Street. She looked in her rear view mirror and saw both men at this stage at the point number 5 depicted on Exhibit 15. Witness C described the fact that there was no blood on Mr McCartney when she first saw him but when the incident was over there was blood on him.

[107] Witness C then picked up some people at the City Hall. She was concerned that she had seen the assault. She had no mobile and decided to go back to the scene. She made her way back into Hamilton Street. At this point she looked up to the Ormeau Road but did not see the two men. She then moved towards the Albertbridge Road. C saw Mr McCartney on the ground and the other man sitting with his back to the railing shown in photograph album Exhibit 5 No. 1. Three to four other people were there looking as if they were helping. The grey haired man was not there. The witness then drove on home. She returned later that evening and drove down to Hamilton Street within about an hour.

[108] When the witness returned, she spoke to a police officer and told him that she had seen what had happened.

[109] Describing the white haired man she said that his hair was straight, and came just below his ears. He had a round face with a red tint, swarthy, well dressed and smart. He did not look as if he was someone who would be brawling. He wore a beige corduroy bomber jacket with a zip and a collar. She was not sure if the collar was cord or not. He wore well pressed slacks. She was not sure if he had boots or shoes and he was 5 feet 9 inches/5 feet 10 inches. He was fairly well built and not fat. He did not wear glasses, did not have a moustache or beard and was clean shaven.

[110] Although she said that it felt as if she was watching the scene forever, it was only a few minutes long between lights.

[111] Witness C indicated that on 1 June 2005 she was asked to attend an identification parade at Donegal Pass Police Station. She was told that she would not meet anyone from the investigating team and there would be other people there but she was not to talk about the case. Two other people were in the waiting room, one of them she recognised as Mr Devine, but she did not discuss the case at all with them.

[112] She was taken into an identification suite and asked to identify anyone she could. There was a senior police officer and also a solicitor there. A number of men were asked to walk round. She was looking at them through a glass panel, and she saw the white haired man. She said that his hair was

shaved, which was in contrast to him on the night in question, and he was wearing different clothes. She told police that that was the person she was identifying.

[113] With reference to C's evidence it is appropriate to record at this stage that Dr Bentley the Deputy State Pathologist gave evidence that having seen the video of C's description of the sweeping movement the stab wound to the left side of the abdomen to Mr McCartney could have been sustained by this type of action. The defence subsequently read a statement from a witness J about her view of the scene in Cromac street when she saw only Devine and McCartney there .I was satisfied it had occurred after the attack described by C was over and the minor contrasts with C's evidence did not influence me.

INTERVIEWS

[114] When interviewed by the police, Mr Fitzpatrick on the advice of his solicitor made no response to police questions, Mr McCormick, again on the advice of his solicitor, initially made no response to police questions but subsequently through his solicitor, gave a statement. The statement in brief was that he had been in the Bar and was outside during the rancorous exchanges. However other than to say he may have been at the May Street/Market Street junction he denied any involvement. Mr Davison in the course of a number of police interviews admitted engaging in a verbal exchange with Mr McCartney in the Bar and outside in the street concerning what he alleged were rude gestures by him to his wife. However he did not admit attacking Mr McCartney or being in Market Street or Cromac Square at any material time.

[115] The accused men having been given the appropriate warning by the court under Article 4 of the Criminal Evidence (N.I.) 1988 (see paragraph 211 below) did not give evidence.

[116] I now turn to consider the charges on the indictment.

Count 1

[117] On Count 1 Davison is charged with murder. The prosecution case against him has been put forward on two alternative grounds. The first is that he was a principal actor in inflicting a stab wound on the deceased in Cromac Square. This approach is based almost entirely on the inferences drawn from the evidence of Witness C and her description of the swiping movement. I have outlined her description of these movements at paragraphs [97] and [98] of this judgment which she asserts were carried out by a man she identified as Davison.

[118] Before stating my determination on this first assertion by the prosecution I observe that as I watched Witness C give her evidence before me I was convinced that this was a transparently honest and extremely courageous woman. She had come forward as an independent witness to perform her public duty without fear or favour when others may have chosen to look the other way. She bore the pressure of the trial and the strain of lengthy and searching cross examination with great dignity and fortitude. That I have found flaws in her evidence, occasioned entirely I believe by the enormous stress of the events unfolding before her eyes on that night, does not diminish by one iota the admiration which the court has for this woman.

[119] However I am not satisfied beyond reasonable doubt that Mr McCartney was stabbed in Cromac Square for the following reasons.

[120] First on the *objective* evidence I am not convinced to the requisite standard that even if the swinging/sweeping/swiping motion has been correctly described, it depicts a stabbing action with a bladed instrument in this instance. The witness observed this unfolding incident at a distance of about 5 feet with an unimpeded view through her windscreen in good visibility at a well illuminated area of the road. Yet she never observed a knife or indeed any instrument in the hands of the attacker. She said that she could not see the front part of his hand but she did see him front on as soon as Mr McCartney fell and he commenced to kick him. Still she saw no knife or weapon.

[121] This issue of the absence of any identification by her of a weapon had been dealt with in some detail by Mr O'Rourke on behalf of Davison when the witness made a deposition at the preliminary enquiry in this case in 2007. Part of the exchange with counsel at that hearing repays rehearsal.

“Q. And do you remember what you said in response to that?

A. At that point, the first swipes, I wouldn't have been able to see his hand. It was whenever they had turned round towards me I was able to see his hands.

Q. Right. And you were able to see his hands clearly at that stage; were you?

A. Yes.

Q. Both hands?

A. Yes, I could.

Q. And could you see them clearly?

A. Yes, I could.

Q. And how far away was the white haired man from your car at that point?

A. About five feet.

- Q. In the headlights of the car?
- A. Yes.
- Q. Did he have anything in his hand?
- A. I didn't see anything in the hand.
- Q. Well were you able to see the front of his hand?
When I mean ... when I say the front I mean the thumb and the first finger, in the manner that you described to the police. Were you able to see the hand clearly? [COUNSEL INDICATES]
- A. I think ... no, it was more this part of the hand that I could see. [WITNESS INDICATES]
- Q. You could see that part of the hand. Was that the only part of the hand you saw?
- A. Yes it would have been, by that point they were facing me and he was swiping round like that.
- Q. Who was facing you at that point?
- A. Both Mr McCartney and the white haired man.
- Q. Were facing you?
- A. Initially when he had first got him they both had their backs to me and they were pulling and pushing and they had turned round so that they were facing me.
- Q. Right. So they are in the centre of the road?
- A. Yes.
- Q. And they are facing directly on to your car?
- A. Yes.
- Q. Is the white haired man facing on to Mr McCartney at that point, are they facing each other?
- A. At that point he was still holding, he was still holding Mr McCartney's right arm with his left one and swiping with the other one so all I was seeing was this part here of the hand.
- Q. Sorry, I am not quite clear, as you faced the two men was Mr McCartney on the left or the right as you saw them?
- A. At that point Mr McCartney would have been on the right and the white haired man would have been on the left because they had swung sort of round.
- Q. So the white haired man's right arm, which is the one which is doing the swiping, was in fact closest to you?
- A. Yes, yes.

- Q. And he is facing onto you, is that right?
- A. Yes.
- Q. Just describe if you would the swipe that you said he made?
- A. Again the hand was coming sort of round level with the body, not going up or down but just level.
- Q. So if he is facing on to you like I am here, he was taking his right arm hand back?
- A. Yes.
- Q. Well did you not therefore see what you could see of my hand?
- A. The only part I can remember is the back part of the hand.
- Q. Was the swiping motion?
- A. No, the hand was the other way.
- Q. it was an over arm swipe?
- A. Yes.
- Q. Well?
- A. I only remember seeing sort of the back part of the hand as it came in front of me.
- Q. Would it not be, if the motion was as you describe would it not be the part of my hand as you see my hand?
- A. I might well have seen that bit but I don't remember seeing that part, I only remember seeing it in front of me and connecting with Mr McCartney."

[122] I considered that it is not without significance that the witness admits in her deposition facing the miscreant from only five feet – his right arm was closest to her – and yet still no weapon is observed .

[123] My concern about the absence of identification of any weapon does not end there. She also alleges she saw the man make a similar motion to Mr Devine in the aftermath of the vicious kicking to the back of the deceased. She described how Brendan Devine came across to Mr McCartney to reach down and help him up off the ground. The witness said Mr Devine flinched "and sort of jumped back and then started backing off". Again she saw no weapon. What is equally troubling is that Mr Devine has no recollection of this incident or of any weapon at this stage. Whilst as I will subsequently relate I have difficulty accepting much of Mr Devine's recollection on this night, I do find it curious that he would have no recollection of this man trying to stab him at such close range with a knife or bladed instrument. Whilst it is possible that the front of the man's hand was concealed from both

C and Devine throughout the whole incident the failure to identify the weapon has created a doubt in my mind about its presence.

[124] C stated that the blows with the sweeping movement "all appeared to land" albeit she seemed more sure of the first than the others. She described at one stage the first blow landing in the area of the breast pocket. I must bear in mind that if her description is correct the deceased was gripped by the left hand of the miscreant on his right upper arm at this time i.e they were at very close range indeed. It is therefore difficult to see why the blows would not have landed as she felt they did. But if there was a bladed instrument in his hand why then is there only one stab wound to the abdomen of the deceased? Why were there no other tears to his clothing other than the one in the area of the abdomen? Once again it is not impossible to imagine a scenario where either the witness in the heat of the moment is wrong about the number of swipes or for some reason the miscreant missed with some of the blows. Nonetheless it is yet another troubling absence which adds to the gathering unease I harbour about this evidence.

[125] There was no blood found by the scenes of crime officer of 23 years experience John Davey at the areas where C described the attack having taken place. He had attended the scene on 30 January 2005 about 11.20pm. As depicted on a map before me exhibit 6E he found blood on the pavement next to a lamppost at the junction of Cromac Street and East Bridge Street. Despite what he described as a careful search he found no other blood between there and the pavement at the junction of Market Street and East Bridge Street although he found 21 other areas of blood staining elsewhere. In particular he saw no blood on the small island or the central reservation in East Bridge Street. He checked these areas the next day but again found nothing further in this area albeit he found some more blood marks at the May Street end of Market Street.

[126] On this issue Constable Legge, a uniformed officer but not a SOCO officer, who was at the scene that night gave evidence that he had noticed blood in the middle of the junction of Cromac Street and East Bridge Street. On 21 November 2005 he attended the scene with an officer from the mapping section Mr Honan and allegedly indicated the area to him. I had before me map Exhibit 6C which had recorded on it the area marked by Honan. However in evidence before me Cons Legge claimed this was the wrong area and in fact it should have been closer to the small island in E. Bridge Street. I found this an unsatisfactory piece of evidence. The location he was relying on for the first time in his evidence had not been recorded in the incident log, pointed out to Mr Davey or the photographer and had not been tested to see if it was blood or if so was it relevant to this case. It did not surprise me that the prosecution did not invite me in the course of their submissions to rely on Constable Legge's evidence.

[127] Of course as Mr Davey admitted it is possible this experienced officer missed out on the bloodstains. It is also possible that Mr McCartney did not bleed from his abdominal wound or his facial injuries other than onto his clothing in Cromac Street. Dr Bentley the Deputy State Pathologist deposed that there may have been no spillage of blood from he stab wound unless he had been lying on his front or his left side. Otherwise any bleeding would have come from the cut on the skin. However C did describe his whole left side covered in blood although she was not sure if his face was bleeding. She saw no blood on him when he first emerged from Market Street.

[128] This does have to be reconciled with the presence of his blood both in Market Street and at the junction of Market Street /East Bridge Street. If the stabbing or other violent attack took place in Cromac Street why was none of his blood found at that scene. Witness C described him having been pulled to the ground and lying there when being kicked by the miscreant. Why was blood from him found in Market Street? According to Mr Devine he, Devine, had been stabbed in Market Street. Could the presence of Mr McCartney's blood in Market Street which is otherwise unexplained in this case suggest that he too had been stabbed there as was clearly a possibility entertained by one or two police officers who conducted interviews with the accused?

[129] On the other hand Dr Bentley described a constellation or grouping of injuries to the right eye of Mr McCartney typical of what is colloquially known as a glassing or bottling injury although he could put this theory no further than a suggestion. This may have been the source of his blood in Market Street. But if so how did witness C assert that he had no blood on him when emerging from Market Street? Why did these injuries not leave some tell tale blood marks at the scene where C says he was lying on the ground in Cromac Square especially when now, inferentially accompanied by a stab wound and vicious kicking to the head? I also note at this stage that the car in which Davison had travelled to the RVH very shortly after the incident revealed no blood of Mr McCartney on forensic testing which on one view was a little curious as I would have thought Davison's shoes might have shed some blood which could have been forensically picked up. The silent testimony of this absent blood both at the scene and elsewhere was a matter of concern to me.

[130] The evidence of Dr Bentley was that someone who had been stabbed can continue to move purposefully and voluntarily for a few minutes. He said in cross examination that the effect would be gradual. He accepted that the description by C of the deceased emerging from Market Street trying to run but getting nowhere fast, "in slow motion", "others catching up with him", "like he was drunk and trying to run but not but not quite making it", "there was some obvious difficulty with Mr McCartney running" all could be because he had received what turned out to be a fatal stab wound before emerging in to East Bridge Street ie in Market Street. Given the presence of

his blood in Market Street did this raise the possibility at least that he had been stabbed in Market Street before he even reached Cromac Street.

[131] On the other hand the deceased was very heavily built and had consumed quite a substantial amount of alcohol and, as Dr Bentley indicated in his evidence in chief, he “would not like to draw any conclusions from the fact he was running slowly.”

[132] I am left however in the position where the reason for his relative immobility remains unexplained and could be consistent with him having been stabbed in Market Street where blood was found and where Devine was adamant he was stabbed.

[133] It is not these objective aspects alone however that have created a reasonable doubt in my mind as to the prosecution assertion that the deceased was stabbed in Cromac Square. I must turn now to an analysis of C’s reliability reminding myself that even the most honest, courageous and convincing of witnesses can be mistaken.

[134] I am satisfied on the evidence of two police officers who spoke to C shortly after the incident that she not only failed to describe the swiping movement but, on the contrary, she asserted that she had seen the miscreant punching the deceased instead.

[135] I heard evidence from Detective Constable Gary Bush. He had been a police officer on duty at 0115 on 31 January 2005 at a cordon drawn up around the scene of the crime in Cromac Square. A note which he made shortly after witness C had approached him records as follows:

“Above (*witness C*) approached the cordon and informed me she had observed an assault take place in the middle of the road on East Bridge Street. She described a male in white tee-shirt being kicked in the head and punched repeatedly whilst on the ground by a man with greying hair and a greyish (dark) jacket. The man with the white tee-shirt was then helped up by a man in a black tee-shirt and brought to a place where they were found by the police, both were heavily covered in blood.”

[136] When this was put to witness C, she had no recollection of ever using the word “punch”, insisting that she was adamant that it did not look like a punch. Moreover she said that it was definitely not correct to say that she had described the miscreant as a man “with greying hair and greyish dark jacket”. She also asserted that she definitely did not say “the man with the white tee-shirt was then helped up by a man in a black tee-shirt and brought

to the place where they were found by the police. Both were heavily covered in blood”.

[137] I could readily have countenanced the possibility of this police officer making a mistake in his recollection when writing this note down especially in light of witness C’s convincing assertion in the witness box that she had never described it as a punch to the police officer at the cordon. Indeed Constable Bush gave evidence before me that he did not write down immediately what she had said to him but did make a note as soon as practicable. That may have been the next day. He could not remember if she had described a sweeping motion but he said that he would have it written down if she had so described it. However later that day, there was evidence that she spoke to a different police officer namely Constable Towell. He had spoken to witness C at 1.15 pm on 31 January 2005 and made notes at the time. His purpose in taking notes was to see if she was suitable for a significant witness programme. Inter alia, he recorded her descriptions of three of the four men who had run out of the side street to the left of witness C as follows:

“Lad in white sweatshirt ran onto road and was grabbed by grey haired man and spun around. Grey haired man then directed a punch with his right hand at the stomach of male with white sweatshirt. Pulled him to the ground then man with grey hair started to kick him on the back with both feet when he was lying on the ground.

Incident occurred approx. 15 feet away from her on road in front but slightly to her left.

No obstructions, street lights good. Car lights directed towards incident.

Blood on front of white sweatshirt.

Fella in black tee-shirt back across road – man with grey hair directed punch towards stomach of fella with black tee-shirt (right hand). Blow connected and fella with black tee-shirt staggered back.”

[138] That witness accepted that he did not recall her ever hinting at a swinging movement.

[139] When this was put to witness C in cross-examination, she asserted she did not remember using the word “punch” and said that she would have said “a swipe”. She said she did not believe that she had described the swinging

motion as a punch on two occasions because “each time I was describing it I was saying it wasn’t like a normal punch”. She also denied asserting that the second man had been punched.

[140] Having heard both police witnesses, and having had the advantage of reading their notes, I have come to the conclusion that witness C is wrong about this and that she did tell them both on separate occasions in the hours after this incident had occurred not only that she had seen both men being punched, but failed to make any reference to the swiping movement upon which the prosecution now rely. I have to ask myself what was it that changed her recollection of what she had clearly pictured as a punch into the swiping movement? I could have more readily understood the witness saying either that in the stressful circumstances she had simply forgotten the swiping motion or that at the time she did not see much difference between a swinging arm movement and a punch. However it is the fact that she is now so adamant that she could never have described the action as a punch and that she insists on discerning a major distinction between the two actions that causes me concern. If she is certain that she did not see a punch, why did she describe it as such to two separate witnesses? If she is convinced it was manifestly a swiping motion why did she not mention this to the two police officers-or even one of them - so shortly after the event? What has caused her to change her perception?

[141] This is not the only instance in C’s evidence where the passage of time arguably seems to have fundamentally altered her recollection from her initial impressions. When she spoke to Constable Towell, she described the miscreant who had attacked Mr McCartney as follows:

“Late 40’s - early 50’s short straight grey hair, well built, fawn coloured zip up jacket, fawn trousers, 5 feet 9 inches - 5 feet 10 inches tall.”

[142] When the witness gave evidence before me she was adamant the man who had engaged in the attack on Mr McCartney had hair which was “probably a little longer than my hair now”. As counsel put to her in cross-examination her hairstyle could be described as a bob. She had substantial hair covering her ears. It was her case that when she picked out Davison at the identification parade on 1 June 2005, he was wearing different clothes and had had his hair cut.

[143] The following exchange occurred between Mr Pownall QC on behalf of Davison and the witness in the course of cross-examination:

“Would you agree that the hair of the man that you saw and picked out in June was significantly different?”

- A. Yes, his head, his hair was shaved like a short crew cut.
- Q. Shaved. If his hair had been like that on 30 January, do you agree it couldn't have been that man?
- A. Yes."

[144] Counsel then showed to witness C still photographs taken of Davison shortly after 11.00 pm at the Royal Victoria Hospital on the night when the incident occurred (Defence Exhibits 7 and 10). They quite clearly showed Davison with short white hair, hair well above his ears, balding at the front and with no parting.

[145] When these photographs were put to witness C on 4 June 2008, the following exchange between Mr Pownall QC and the witness appears in the transcript:

- "Mr Pownall: Those photographs have shocked you, haven't they?
- A. They have. I don't believe it is I know the person I picked out was the correct man.
- Q. Do you believe that that person that you have been shown a picture of is not a picture of the person you picked out?
- A. No.
- Mr Justice Gillen: Sorry?
- The witness: I don't believe the pictures just.
- Mr Pownall: You don't believe the pictures?
- A. I can't see how he could have been attacking Mr McCartney, me and been there, one of those pictures have been made up whether I don't know where the pictures are from or how they were got."

[146] The pictures are authentic because it was the prosecution who provided them. They are still images from the CCTV at the Royal Victoria Hospital. Given the timing which clearly appears in the photographs, it seems implausible that the accused could have either changed his clothes or had his haircut during the intervening period between the incident occurring his attendance at the hospital. Indeed the prosecution did not ever attempt to argue this. Hence I have no doubt that witness C is wrong about the length of his hair.

[147] In the context of the issue of whether or not she saw a swiping movement, what concerns me is that witness C has clearly fixed in her mind an image of his hair which is quite wrong. This is not an example of where, three years after the event, that image has changed with the passage of time. When she was interviewed by the police on 1 February 2005 in depth, she

clearly had a similar image about the hair. I recognise that witnesses can make mistakes about inconsequential aspects of description whilst being correct about the fundamentals. However I find it troubling that this witness gave such a high profile to the recollection of the hair as part of her description. The following exchanges emerged from that interview in the context of discussing his hair:

“The thing I remember most about him is the shocking grey hair. Just very grey, very white grey hair.”

The police then addressed the question of the hair again in the course of the interview and the following exchange occurred:

“Lets talk a bit about the length and the style of it, what can you remember.

Very straight hair. Again probably about the ears just.

How much of it was there.

Quite a, he had quite a lot of hair.

It looked like very thick.

Thick hair. Sort of combed over to one side.

.....

Now it would have been combed from his, yes, from his right side over to ...”

[148] When she met with prosecution counsel on 16 February 2006, she again described the hair as follows:

“She said that he had ‘very shocking white hair’. She said that it looked natural, not blond and that it came down to under his ear and it was very straight.”

[149] When she attended in 2007 at the Magistrates’ Court for the taking of depositions, she again insisted that the hair of the man she saw would have been as long as her own hair which she described as a short bob cut. The hair was down around his ears, combed over in a parting and looked quite thick. “He had quite a lot of hair”.

[150] There can be no doubt but that these descriptions are completely different from the hair of the accused on the night of the incident.

[151] Given the absolute certainty that she has expressed about the image of his hair, which is clearly incorrect, could she be similarly mistaken about the image of the swiping movement particularly in circumstances where if her initial description of the punching is correct, she has changed her recollection of this image over a comparatively short time also ?

[152] Her image of the clothing that the miscreant was wearing may also be mistaken. Her recollection of the man who attacked Mr McCartney was that he was dressed smartly. She described that as another distinctive image. She has variously described him as "he looked totally out of place because he looked well dressed, smart, and he didn't look like somebody that should be brawling in the middle of the street, he had on a beige corduroy like bomber type jacket with a zip up the front, it had a collar on it, I'm not sure whether there was fur on the collar or whether it was just corduroy. He had slacks on, again beige slacks very well pressed."

[153] The photographs taken at the hospital reveal a man wearing a not dissimilar jacket, but he clearly not wearing pressed slacks and instead is wearing blue jeans. When the photograph was put to the witness by Mr Pownall on 5 June the following exchange occurred:

"You wouldn't suggest that that was an image of somebody who was dressed smartly, would you?

A. No, that what's annoying me about the photographs.

Q. Yes?

A. Because at any time when I have seen this gentleman, the night he attacked Mr McCartney, at the ID parade, and when I have seen him on television leaving the court here, he's always been dressed very smartly but in that picture he looks quite dishevelled.

Q. So that's another layer of distinctive feature that is absent 25 minutes later, in an image?

A. Yes, well if he has changed his clothes in a hurry that could well be the case."

[154] Subsequently, in the course of cross-examination counsel again revisited the question of hair and clothing and the following exchange occurred:

"So just so that we're clear, is it your evidence that for this man to be the man something must have happened to his hair?

- A. Yes.
Q. Right. You're definite that his hair didn't look anything like that at all?
A. No it didn't.
Q. Nor did his clothing?
A. No."

[155] I recognise that if Davison had been involved in a violent altercation with the deceased his clothes may well have become somewhat dishevelled. Moreover the lighting at the scene was artificial and may therefore have made identification of colour more difficult. By itself the disparity in the clothing would not have troubled me, but when coupled with the unanswerable mistake about the length of his hair and the mistaken reference to a punch the cumulative effect served to cause me to doubt whether this witness could be relied on to give accurate recall of detailed acts and features.

[156] Another concerning matter in this witness's recollection of detail was her description of the kick to the head of Mr McCartney. She described the act as follows:

"He lifted it up, he sort of held his foot in mid-air and then lashed out with as much as he could. At that point I thought Mr McCartney would have been brain damaged he had hit him that hard."

The witness later said in cross-examination that the connection had been to the side of his head in the area of the eye or cheekbone on the left hand side. At that point she saw no blood coming from his right eye either above it or below it. She did not remember seeing blood on his face.

[157] When Dr Bentley gave evidence, he initially said that the injuries he found could have been caused by a kick although there was nothing specific to indicate that was the case. Later however, when cross-examined about the allegation of the full forced kick to the left side of the head, Dr Bentley said:

"If it was put to me that the face was kicked with a foot shod in a boot by a healthy adult with as much power as they could muster I'd say the injury was not consistent with that.

....

The injuries noted on the facial dissection were mainly bruising to the right side and broken nose."

He later said:

“If it was the kick that caused the broken nose It is highly highly unlikely that it was a full blooded kick from a grown man wearing shoes or boots.”

[158] When I asked Dr Bentley if there was anything about the injuries to the face which excluded him being kicked in the face by a grown man with a shoe forcefully, he replied:

“If we are talking about full force, a man kicking as hard as he can, I think that is unlikely. I would have expected to see more fractures of the facial bones.”

Thus whilst Dr Bentley did not say that it was impossible to rule out kick with full force as having caused the injuries, he felt it was unlikely. Moreover why was there an absence of material injury to the left side? Thus this is an instance where there is potentially a troubling inconsistency between what witness C has described in terms of the actions of the miscreant and what is the objective medical evidence. Is her image of what happened again simply wrong?

[159] Similarly, witness C did not observe any bleeding to the face of Mr McCartney prior to the attack by the miscreant. However he had undoubtedly shed blood in Market Street and at the junction of Market Street/East Bridge Street which occurred before she ever saw him. Dr Bentley said that the injuries to the face would have bled briskly. The group of injuries around the right eye, typical of injuries caused by a glassing or bottling, were clearly not caused by the actions of the miscreant described by witness C and would have been expected to be bleeding. Why then did witness C not observe the blood to his face? Again, in the heat of the moment over a fairly short period of 80 seconds or thereabouts, a mistake like this can easily be made by an honest witness. However it serves to add yet a further measure of uncertainty about the strength of her own evidence on matters of detail.

[160] Accordingly when I stand back and consider the overall impact of the frailties in witness C's evidence, I was unable to be convinced beyond reasonable doubt that the swiping movements occurred as she described or that, if they did exist, that one of them necessarily amounted to the stabbing of Mr McCartney.

[161] I will deal later in this judgment with the impact of Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 (“the 1988 Order”) and the adverse inferences that I may draw from the applicant's failure to give evidence. However I feel that the weight of the evidence in this instance falls so far short of the necessary standard of proof that Article 4, even if invoked,

cannot assist the Crown case sufficiently to convince me beyond reasonable doubt that witness C saw a stabbing incident in Cromac Square.

[162] I hasten to add that this conclusion is arrived at by me without the need to make any determination as to whether C has correctly identified Davison as the miscreant in Market Street.

[163] I now turn to the alternative basis upon which the prosecution have set their case on Count 1 against Davison. It is to the effect that if he was not a principal actor in stabbing Mr McCartney in Cromac Square, then as a member of a group of men armed with a stick and bottles, at least one of whom must have had a knife, bent on a joint enterprise to inflict really serious bodily harm on the deceased he was an accessory to the person who was the principal actor in stabbing the deceased. For the purposes of this aspect of the case and for consideration of the issues that I have outlined above, I have assumed that Gowdy, Devine and witness C were all correct in their identification of Davison.

Mens Rea of Murder

[164] I have already dealt with the legal principles governing this matter in the course of the judgment I gave when refusing the application by the accused that there was no case to answer at the end of the prosecution case. For ease of reference I shall therefore simply set out again the principles and authorities to which I adverted in that judgment.

[165] I respectfully adopt the relevant definition of murder in circumstances such as the present set out by Carswell LCJ in R v Henry and Others (unreported CARE2732 21 December 1998) where he said at page 15 et seq:

“In order to prove any of the defendants guilty of the murder of the deceased it is incumbent upon the Crown to establish that the intention of his attackers was to cause grievous bodily harm to him. Malice aforethought, which is express where there is a proved intention to kill, can be implied where the accused intended by a voluntary act to cause grievous bodily harm to the victim: see *R v Vickers* [1957] 2 QB 664 at 670, per Lord Goddard CJ. The policy reason for supporting that rule is set out succinctly in Lord Edmund-Davies' speech in *R v Cunningham* [1982] AC 566 at 583A, where he stated that –

‘the outcome of intentionally inflicting serious harm can be so unpredictable that anyone prepared to act so wickedly has

little ground for complaint if, where death results, he is convicted and punished as severely as one who intended to kill.'

As Professor Glanville Williams expressed it in his *Textbook of Criminal Law*, 2nd ed, p 251:

'The human body is fragile, and a person who shows himself willing to inflict really serious injury to another, thus causing his death, is so little less blameable than the intentional killer that the law is right in not making a distinction.'

The term 'grievous bodily harm' should be given its ordinary and natural meaning of really serious bodily harm."

[166] The principles governing the liability of an accessory/aider and abettor are conveniently referred to by Carswell LCJ in *R v Henry and Others* when he quotes from Smith and Hogan, *Criminal Law*, 8th ed, pages 134-5 at page 17 of the judgment as follows:

"The abettor must either (i) be present in pursuance of an agreement that the crime be committed or (ii) give assistance or encouragement in its commission. Both assistance or encouragement in fact and an intention to assist or encourage must be proved. When this is proved, it is immaterial that D joined in the offence without any prior arrangement ... if some positive act of assistance or encouragement is voluntarily done, with knowledge of the circumstances constituting the offence, it is irrelevant that it is not done with the motive or purpose of encouraging the crime."

[167] In the present instance, to convict any member of the group in Market Street allegedly bearing bottles and a stick, it would have to be established that the common purpose extended to the infliction of grievous bodily harm rather than a lesser degree of violence. In the event the evidence from Gowdy is that he was confronted by two of these men namely Fitzpatrick and McCormick. He contends he was struck by Fitzpatrick with a stick or sewer rod. Brendan Devine believes that he was stabbed by one of these men who he believed to be McCormick. Something happened to Mr McCartney in Market Street because his blood was found there. In order to establish that Davison was guilty of

being an accessory to the murder of the deceased and part of the joint enterprise on this basis, the prosecution would have to prove that some person in that group inflicted injuries which caused the death of McCartney with intent to inflict grievous bodily harm upon him and that the defendant, as part of the joint enterprise, gave him assistance or encouragement in doing so with knowledge of the facts from which the intentions of the principal to inflict grievous bodily harm could be inferred.

[168] I am satisfied beyond all reasonable doubt that if there was present in Market Street a group of men as described by Mr Gowdy and Mr Devine (and I shall return to this issue later in my judgment) armed with a stick and bottles, one of whom attacked Mr Gowdy as described by him and another of whom attacked Mr McCartney as described by Mr Devine, then those men were engaged in a joint enterprise to inflict grievous bodily harm upon Mr Devine and Mr McCartney.

[169] However a wholly separate issue arises in light of the fact that the deceased died as a result of a stab wound and not a wound due to the use of a punch, stick or a bottle. If Davison was a member of that joint enterprise to attack Mr McCartney with a bottle or a stick, in order to convict him of murder as an alleged accessory to the death of Mr McCartney, I have to be satisfied beyond reasonable doubt that he knew or contemplated that whoever committed this murder possessed and might use a bladed weapon and that this weapon was not unknown and unforeseen by him. I have to be satisfied beyond reasonable doubt that the bladed weapon was not fundamentally different in nature from the weapon which Davison contemplated might be used. Outside the evidence of witness C, which I have concluded does not amount to evidence that a knife was used at that stage, there is no evidence that Davison was the man who stabbed Mr McCartney. Hence for me to convict him of murder on the alternative basis relied on by the Crown, I have to be satisfied beyond reasonable doubt on the questions I have raised in this paragraph.

[170] The House of Lords in R v English (1997) 3 WLR 959 (“English”) was a case where the accessory contemplated the intentional infliction of grievous bodily harm with a wooden post but the principal used a knife which on the evidence the jury could have found was unknown and unforeseen by the accessory.

[171] In English’s case, Lord Hutton made it clear that a difference in the weapon used would not always exempt the accessory: “If the weapon used by the principal is different to, but as dangerous as, the weapon which the secondary party contemplated he might use ... for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa”.

[172] In R v Gamble [1989] NI 268, where an accused knew that a victim was to be kneecapped with a firearm but did not contemplate he would be killed (in the event he was killed by having his throat cut) Carswell J said:

“Although the rule remains well entrenched that an intention to inflict grievous bodily harm qualifies as the mens rea of murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation”.

[173] The authors of Blackstone at paragraph A5.7 say of this principle:

“The more difficult case is where the accessory contemplates merely an act done with intent to cause grievous bodily harm where the type of weapon may be highly material in determining the type of grievous bodily harm contemplated and in particular its propensity to cause death. It is clear now that in this situation the test is whether the act done by the principle (including the weapon used) is of a ‘fundamentally different nature’ to that contemplated by the accessory.”

[174] In R v Rahman (2007) 3 All ER at 396 (“Rahman”) C was killed during an attack by a group of people using blunt instruments and kicks. None of the defendants could be shown to have caused the death of C which resulted from a stab wound (one of three stab wounds) to his back.

[175] In Rahman’s case, Hooper LJ suggested the following manner of putting the issues to the jury at paragraph 69:

“(1) Are you sure that D intended that one of the attackers would kill V intending to kill him or that D realised that one of the attackers might kill V with intent to kill him? If yes, guilty of murder, if no, go to 2.

(2) Are you sure that either:

(a) D realised that one of the attackers might kill V with intent to cause him really serious bodily harm; or

- (b) D intended that really serious bodily harm would be caused to V; or
- (c) D realised that one of the attackers might cause serious bodily harm to V intending to cause him such harm.

If no, not guilty of murder, if yes, go to question 3.

(3) What was P's act which caused the death of V (eg. stabbing, shooting, kicking, or beating)? Go to question 4.

(4) Did D realise that one of the attackers might do this act. If yes, guilty of murder, if no, go to question 5.

(5) What act or acts are you sure D realised that one of the attackers might do to cause V really serious harm? Go to question 6.

(6) Are you sure that this act or these acts (which D realised one of the attackers might do) is/are not of a fundamentally different nature to P's act which caused the death of V? If yes, guilty of murder. If no, not guilty of murder.

(70) Mr Smith submitted that the expression 'fundamentally different' would normally need no further clarification, albeit that the judge would summarise the competing arguments as the judge did in the present case. We agree."

[176] Blackstone at paragraph A5.9 aptly summarises the approach to be taken by a court when considering whether or not the actions of the principal were within the scope of the joint enterprise contemplated by the accessory:

"It is submitted that the best approach would be to ask the jury to consider whether the principal's act (causing death) and the manner of its doing was within the contemplation of the accessory and thus within the scope of the joint venture (cf. the reference to the 'manner in which a particular weapon is used' at the end of Lord Hutton's speech in English)."

[177] I am not satisfied beyond reasonable doubt that the action of the person who stabbed Mr McCartney was within the scope of the joint enterprise

contemplated by Davison. I am not satisfied beyond reasonable doubt that the manner of causing the death ie. a stab wound was within his contemplation and was not of a fundamentally different nature to that action which he realised one of the attackers might do. I am of this view for the following reasons:

[178] First, there is no evidence before me that Davison knew or contemplated that a bladed instrument was either on the person of any one of the members of the joint enterprise or would be used. The only evidence before me, emanating from Mr Gowdy if I accept what he says, is that the group were bearing bottles and a stick. Mr Devine made it clear that he could not say that he had actually seen a knife prior to him being stabbed. When Mr Devine was stabbed he does not allege that Davison was there at the time or that Davison was aware what had happened. The height of Mr Devine's allegations against Mr Davison is that he was involved in gouging and punching Mr McCartney. He did not see any weapon. Mr Devine is to say the least uncertain as to seeing any such bladed weapon prior to him being stabbed. Where then is the evidence that Davison tacitly agreed to or contemplated the use of a knife or bladed weapon? I find no such evidence.

[179] It is clear law of course that if Davison had intended that one of those men in Market Street would kill Mr McCartney or even that he realised that one of the attackers might kill him with intent to kill him then he would be guilty of murder irrespective of what was the method used to kill him. I am not satisfied beyond reasonable doubt that on the evidence before me that Davison had such an intention or realisation. I have no evidence of any plan or agreement that this was to be the case and there are no utterances provided to this court by Mr Gowdy or Mr Devine which would lead me to that conclusion. The use of a stick or an unbroken bottle does not inevitably lead to that conclusion.

[180] In looking at this matter I can draw inferences from the circumstances preceding the attack and arising out of the attack itself. In the bar I am satisfied that a broken bottle was used to cut Devine's neck. Subsequently both Devine and Mr McCartney were stabbed. McCormick, through his solicitor, when interviewed by the police made a statement which included the following:

"I also left the bar with a large number of other people. There were several aggressive people wanting to continue the fight and threatening to kill people. They were being told by a large number of people to go home. This seemed to go on for a long time, during this time I was at the front of Magennis's bar moving around. Part of the crowd went beyond Market Street towards Victoria Street."

[181] However Mr McCormick's statement does not in law constitute evidence against Davison and McCormick has not been charged with murder.

[182] I am bound to confine myself to the admissible evidence before me. I therefore have to ask myself whether the manner in which the participants went into Market Street, the weapons they were seen to carry, and the background facts of the incident in Magennis's bar and outside justify a conclusion that each would have known a lethal weapon such as a knife was being carried. Likelihood is not enough. I have to be satisfied of such facts beyond reasonable doubt. I am not satisfied that there exists beyond reasonable doubt the necessary minimum evidence upon which I could be sure that Davison contemplated the possible use of a knife. Hence if I was applying my mind to the fourth question in the Rahman case at paragraph 69 ie. "did D realise that one of the attackers might do *this* act? If yes, guilty of murder, if no, go to question 5." I would have to answer No.

[183] Moving then to the fifth question in the Rahman criteria I must ask "What act or acts am I sure Davison realised that one of the attackers might do to cause McCartney really serious harm." I am not in a position to be satisfied beyond reasonable doubt that he was sure that one of the attackers might do more than use a stick or a bottle.

[184] Finally then I must turn to question number 6 in the Rahman criteria. "Are you sure that this act or these acts (which Davison realised one of the attackers might do) is/are not of a fundamentally different nature to the killer's act which caused the death of McCartney." I am not satisfied that the use of a knife is not fundamentally different from the use of a stick or a punch/gouge for example as allegedly used against Gowdy. In my view this is self explanatory even in the circumstances depicted in this instance. So far as the bottle is concerned, there is no evidence that any of the bottles were broken or smashed. No evidence of broken glass was found in Market Street in the aftermath of this incident. Undoubtedly Mr McCartney did receive some injuries in Market Street. One of them, to the right side of his face, may have occurred there and was consistent with a glassing or bottling injury according to Dr Bentley although he could not put this any higher than a suggestion. In the absence of any evidence of what happened to Mr McCartney in Market Street which caused him to have shed blood there, I cannot be satisfied beyond reasonable doubt as to precisely when or where or with what these injuries were caused. The height of Mr Devine's evidence of events in Market Street involving Mr McCartney was punching and gouging. I am therefore left in the situation where there is no evidence about the presence of bottles in Market Street other than that of Mr Gowdy which, if I accept it, amounts to some persons carrying a bottle without any evidence of whether those bottles were broken or were used as weapons at all.

[185] I have considered whether in this context the inference that may be drawn under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 Order by virtue of Davison's failure to give evidence could lead to the conclusion, after a consideration of all the evidence in the case, that the accused was guilty of murder. It must be remembered that the refusal of accused to give evidence on his own behalf does not in itself indicate guilt. Under Article 4 it would be improper for the court to draw the bare inference that because he refused to give evidence in his own defence that he either was aware that the attackers intended to kill Mr McCartney or might kill him or that one of the attackers might use a knife. In R v McLernon (1992) NI 168 Hutton LCJ borrowed the words of a distinguished Australian judge at page 175 as follows:

"It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorise the court to substitute suspicion for inference or reverse the burden of proof or to use intuition instead of ratiocination."

[186] I am satisfied that the facts upon which I have relied in this consideration do not depend upon any of the identifications in this case but rather upon an analysis of the factual situation, accepting for these purposes the outline of the evidence of Devine and Gowdy. His absence from the witness box does no more than raise the suspicion as to Davison's knowledge of the nature of the joint enterprise and the weapons involved. Consequently invoking Article 4 is not sufficient in these circumstances to enable me to be satisfied beyond reasonable doubt that the second leg of the prosecution case on this count is proven.

[187] Consequently, I acquit Davison on the first count of murder.

Counts 2 and 3

Affray

[188] Before considering the evidence against the three accused on this count of affray I shall for ease of reference set out the ingredients of the offence in the same terms as I have already done in my earlier ruling.

[189] Affray is a common law misdemeanour, whose elements were encapsulated by Edmund Davies LJ in Reg v Summers (1972) Crim. L.R. 635 ("Summers"):

“The question therefore arises as to what exactly is meant by an ‘affray’. We respectfully approve of and adopt a passage which appears in *Smith and Hogan Criminal Law*, 2nd ed. (1969), p. 539:

‘Affray is a common law misdemeanour which, after a long period of desuetude, has not only been brought back into regular use, but greatly expanded in scope by judicial decision.’

- and then follows the definition proper - ‘its elements are
- (i) fighting by one or more persons: or a display of force by one or more persons without actual violence;
- (ii) in such a manner that reasonable people might be frightened or intimidated.”

[190] The definition in Summers case was approved in R v Taylor (1973) AC 964 at 975 (“Taylor”) save for the following comment by O’Connor J at 975h:

“So we have an approval of that passage from Smith and Hogan *Criminal Law*, 2nd ed. P. 539 in Reg v Summers in this court. In the passage quoted there is an oversight in the definition probably because Professors Smith and Hogan thought it too obvious to need stating: fighting by one or more persons has to be qualified - ‘unlawful’ fighting by one or more persons.”

[191] In Taylor ‘s case Lord Hailsham said:

“It is essential to stress that the degree of violence required to constitute the offence of affray must be calculated to terrify a person of reasonably firm character. This should not be watered down. Thus it is arguable that the phrase ... ‘might be frightened or intimidated’ may be too weak. The violence must be such as to be calculated to terrify, that is might reasonably be expected to terrify.”

[192] In Taylor’s case Lord Reid said:

“Undoubtedly if people are present it is not necessary to prove by the evidence that they were terrified .It is enough if the circumstances were such that ordinary people like them would ... have been terrified.”

[193] Although referable to the Public Order Act 1986 s. 7, the words of Lord Bingham CJ in R v Smith (1997) 1 Cr. App. R. 14 at p. 16 are also instructive in the context of the common law offence of affray:

“It typically involves a group of people who may well be shouting, struggling, threatening, waving weapons, throwing objects, exchanging threatening blows and so on. Again, typically, it involves a continuous course of conduct, the criminal character of which depends on the general nature and effect of the conduct as a whole and not on particular incidents and events which take place in the course of it. Where reliance is placed on such a continuous course of conduct, it is not necessary for the Crown to identify and prove particular incidents.”

[194] Mere presence at an affray is not enough to constitute aiding and abetting. There must be evidence that the defendant at least encouraged the participants by some means or other: see R v Rice and others (unreported Girvan J 15 April 1997).

[195] Where one person is acting as part of the crowd, the acts of the others in the crowd are part and parcel of the same activity: see R v Hobson (1999) 7 BNIL 13.

[196] If I was satisfied beyond reasonable doubt as to the identification of these three accused by the three main witnesses in this case, namely Mr Gowdy, Mr Devine and Witness C and if I was satisfied as to the account of the facts given by Gowdy and Devine as to the behaviour of this group of men in Market Street, such facts would amount to the offence of affray as alleged.

[197] In short I am satisfied beyond reasonable doubt that if a group of men - variously described as between 5-10 entered Market Street armed with a stick and bottles (and at least one has a knife which may be unknown to the others) bent on pursuing two other men ,that two of them confront a man who approaches them asking for an explanation and one of them strikes him with a stick or sewer rod whilst the others proceed on after the two being pursued and that one of them then gouges or punches Mr McCartney this undoubtedly involves all the elements of fighting, calculation to terrify,

threatening behaviour and blows which I have set out in paragraphs 169 et seq above. In my view such facts are a paradigm case of affray.

[198] In so concluding I consider I am entitled to take into account as background material the violence that clearly had erupted a short time before in Magennis's bar and the rancorous expletive laden scenes outside the bar which had set the scene for the events in Market Street and beyond. That Mr Gowdy asserted that this scene did not terrify him does not deflect me in the slightest from concluding that these events were calculated to terrify a person of reasonably firm character.

[199] The key issues in deciding whether I am convinced beyond reasonable doubt as to the guilt of the accused in this count lies in the matter of whether I can rely on the identification evidence of the witnesses and their description of the behaviour of the impugned group to implicate the accused.

Principles Governing Identification

[200] For ease of reference I repeat the comments I made on this matter when refusing a direction to the accused at the end of the prosecution case. I remind myself that the visual identification of suspects or defendants by witnesses has for many years been recognised as problematic and potentially unreliable. It is easy for an honest witness to make a confident but false identification of a suspect even in some cases where the suspect is well known to him or her. Several reasons for such errors are well known. Some persons may have difficulty in distinguishing between different subjects of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly often in stressful circumstances. Such problems may then be compounded by the understandable, but often misguided eagerness of many witnesses to help the police by making a positive identification.

[201] In this context I was helpfully provided with extracts from the Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases 26 April 1976 highlighting the dangers inherent in identification. It included reference to the case of Virag where 6 witnesses had mistakenly picked a man out of an identification parade.

[202] The principles that govern cases of alleged mistaken or disputed identification are those set down by the Court of Appeal in *R v Turnbull* (1977) QC 224. Although this is now a much cited authority it is important to record that this case emerged in response to widespread concern over the problems posed by cases of mistaken identification. These guidelines are reproduced (with slight abridgement) in Blackstone at paragraph F18.19 as follows:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct him as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long

period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a work mate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. ...

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. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification ...

The trial judge should identify to the jury the evidence which he adjudges as capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so."

[203] Evidence capable of supporting a disputed identification may take any admissible form, including self-incrimination by the accused and other evidence of identification. In a jury trial the judge must identify evidence that is capable of providing such support and warn the jury against reliance on anything that might appear supportive without really having that capability.

[204] It is permissible in appropriate cases for two or more disputed identifications of the accused to be treated as mutually supportive but only if the identifications are "of a quality that a jury can be safely be left to assess"(see *R v Weeder* (1980) 71 Cr App R 228).

[205] Recognition evidence will often be more reliable than identification of a stranger but this may still be erroneous: see Lord Lane CJ in *R v Bentley* (1991) Crim LR 620:

"Many people have experienced seeing someone in the street whom they knew, only to discover that they were wrong. The expression, 'I could had sworn it

was you' indicated the sort of warning which a judge should give, because that was exactly what a testifying witness did - he swore that it was a person he thought it was. But he may have been mistaken ..."

[206] Identification by one witness can support the identification by another, but the judge must be mindful that any number of honest witnesses can be mistaken (Russell (1982) 6 NIJB).

[207] A judge needs to warn himself that witnesses, genuinely mistaken about a purported identification, may appear convincing. A close examination is required of the opportunity available to identifying witnesses to make a reliable identification. These warnings are necessary because of the tendency of some witnesses to feel certain that they have correctly registered the features of the individual that they believe they can identify and because of the similarity in appearance of different people: see R v Hagens (2004) NICA 9 at paragraph 48.

[208] I am particularly conscious that paying lip service to the Turnbull guidelines is not enough and I must confront in a detailed way any particular circumstances that may have affected the accuracy of the witness's observation. Any supporting evidence upon which I rely must be identified.

[209] I hasten to add that a mistaken identification does not necessarily prove that the accused is innocent or that the witness is untrustworthy in other respects especially if his view of the crime was imperfect (see Trew (1996) Crim LR 441) or in my view if the witness was suffering under other disabilities.

Care Warning

[210] Once more for the purpose of completeness and the removal of doubt I shall rehearse again the care warning that I must invoke in considering the evidence of Mr Devine and Mr Gowdy and which I have already set out in my earlier judgment at the end of the prosecution case .

[211] In appropriate circumstances it is necessary for a judge to warn himself to exercise caution before acting on the evidence of certain types of witnesses if unsupported. Whether it is necessary to remind himself of such a warning together with the strength of the warning to be given is a matter of judicial discretion dependent on the particular circumstances of the case.

[212] In R v Makanjuola (1995) 1 WLR 1348 ("Makanjuola"), the circumstance in which it may be appropriate for a judge to give a warning to a jury were described by Lord Taylor CJ as follows:

“The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material for acting on the impugned witnesses’ evidence. We stress that these observations are merely illustrative of some, not all, of the factors which the judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury.”

[213] In this matter the prosecution, in the case of both witnesses Gowdy and Devine, invited the court to invoke the principles in *Makanjuola* when considering their evidence. I am certain counsel was correct to make those concessions. Accordingly I have decided to exercise caution and to look for some supporting material in each case before acting on the evidence of either. In the case of Gowdy, I have come to this conclusion because of the influence of alcohol on him on the evening in question, his own admission that he has told many lies to the police before allegedly telling the truth after speaking to the IRA, certain inconsistencies in his various accounts of the events and the fact that the candour of his account may also be tainted by a desire to deflect any blame attaching to him for not helping Mr McCartney and Mr Devine prior to the attack upon them. Additionally he has admitted lengthy meetings with the IRA before gaining their “approval” to speak to the police. I must be wary therefore lest he is merely repeating a version of events which he has been instructed to relate or has been influenced by that unlawful group.

[214] In the case of Devine, I am satisfied that he also had consumed considerable amounts of alcohol on the night in question which may have had an influence on his perception of what was going on. He too has spoken to the IRA and so I harbour similar concerns to those in the case of Gowdy. Counsel have drawn my attention to certain inconsistencies in his versions of what had occurred. At the time events were unfolding in Market Street or Cromac Square he was necessarily labouring under the effects of injuries to his neck and a stab wound to his abdomen which may have impaired his powers of perception and subsequent recollection.

Adverse Inference from Failure to Testify

Article 4 of the Criminal Evidence (Northern Ireland) Order 1988

[215] In this case each of the accused declined to give evidence on his own behalf after being informed by the court that it might draw inferences as appeared proper in accordance with Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 (“the 1988 Order”). I issued the appropriate warning to each of them and counsel on behalf of the accused each confirmed to the court that their respective client had received the appropriate advice on the matter.

[216] In R v Cowan (1996) QB 373 the Court of Appeal laid down a number of principles which have governed my approach to Article 4:

- (i) The right to silence is still preserved.
- (ii) The burden still remains on the prosecution to prove the case beyond all reasonable doubt.
- (iii) A court is prohibited from convicting solely because of an inference drawn from the defendant’s silence. I must not assume that any of the accused is guilty simply because he has not given evidence.
- (iv) I might regard the inference from a defendant’s failure to testify, in effect, as a further evidential factor in support of the prosecution’s case.
- (v) I should not hold against the defendant his silence at trial unless the only sensible explanation was that he had no answer to the case against him which could have stood up to cross-examination.
- (vi) It will be open to court to decline to draw an adverse inference from silence at trial and for a judge to direct or advise a jury against drawing such inference if the circumstances of the case justifies such a course. But there would need either to be some evidential basis for doing so or some exceptional factors in the case making that a fair course to take. The inferences permitted by the article are only such as appear proper.

[217] In R v McLernon (1992) NI 168 Lord Hutton borrowed the words of a distinguished Australian Judge, Dixon J who said:

“It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorise the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination.”

The identification evidence of Ed Gowdy

[218] I commence by recognising that Mr Gowdy has undergone a stressful and exacting experience in coming forward to give evidence in this case in circumstances where others who were possibly equally well placed to assist have chosen to remain silent.

[219] However I have come to the conclusion that this witness's evidence is so seared with inconsistency, contradiction and implausibility in crucial areas that I could not place sufficient reliance on him to be satisfied beyond reasonable doubt as to his account. No adverse inference to be drawn from the absence of any of the accused from the witness box or what supporting evidence there is suffices to repair those fundamental flaws in his credibility which prevent me relying upon him to the requisite standard. My reasons for so concluding are as follows.

[220] First I am absolutely satisfied he is not telling the truth about the extent of his knowledge of the events both in the bar at Magennis's and more importantly in Market Street that night.

[221] So far as the events inside the bar are concerned he has given completely different versions to the police both before and after he spoke to the IRA (and which he accepts were fabrication at least prior to speaking to the IRA), to a national newspaper (which again he admits were lies) and to the family members at the hospital on the night of the stabbing. He told this court that other than to remember "a commotion, people shouting, fighting, blood" he remembers nothing of the events in the Whiskey bar in Magennis's until he was outside." I do not believe that he does not have a recollection of at least some of those who were involved in the fracas in the bar. By agreement between prosecution and defence I had before me a written statement from a sister of the deceased who had spoken to Gowdy at the hospital on the night in question. She has no reason to tell lies about what he had said to her. She records "Ed confirmed it was Magennis's bar and there was an argument with Brendan Devine, Joe Fitz, Bobby Fitzsimons, Jim McCormick, Paul Brennan and about 20 others ". The witness admitted that he has lived in the Short Strand and knows most of the people in that area and the nearby Markets. I was left with the impression from an early stage that he was being deliberately selective with the information he was prepared to impart to the court even at this stage.

[222] His account of events in Market Street were similarly unreliable. He has persisted in asserting that he saw nothing happen to Mr McCartney or Mr Devine in that location and that when he last saw them they were leaving Market Street. I do not believe him. The bloodstains from Mr McCartney in Market Street reveal that something did happen to him there and Mr Devine is adamant he was stabbed in Market Street. It is inconceivable that Mr Gowdy did not see something of these events despite his protestations of

drunkenness or swift departure. If, as he asserts, he saw them leaving Market Street he could not have failed to see them being pursued as described by witness C.

[223] That he did see something of these crucial events in Market Street is well evidenced by the accounts of the family members to whom he spoke at the hospital that very night. Claire McCartney, Paula Arnold and Donna McCartney all recalled him asserting in crude terms that he knew “who had done this to Mr McCartney”. Since he had not gone further than Market Street, how could he have known who did this to the deceased unless he had witnessed a great deal more than he is prepared to reveal to this court where his sworn testimony was that he saw nothing happen to him?

[224] His reaction on this being put to him was to assert that Donna McCartney was a liar and by implication that the others were also. I am satisfied that he did say this at the hospital to them. The family members have no reason to lie whereas he clearly does because of his desire to remove any suggestion that he failed to help his friend.

[225] Mr Gowdy’s transparent selective relationship with the truth troubled me from an early stage and throughout his evidence. Instances relevant to the individual accused proliferated as his evidence progressed and include the following.

Fitzpatrick

[226] Before me he asserted that Fitzpatrick struck him with a stick. The statements of the family members at the hospital on that night record him embellishing that assertion to a worrying extent. Claire McCartney, Paula Arnold and Jim Arnold recall him saying that Fitzpatrick, as well as striking him, put a gun to his chest. In the witness box his account of this was that Terry McKay told him there was a gun put to his chest but that his view was “it was a load of crap”. Why then did he tell the family that night it had happened? He must have known it was untrue if, as he said, he was confronted by Fitzpatrick. If he was prepared to recklessly exaggerate Fitzpatrick’s role on that occasion can I believe his other evidence about him beyond reasonable doubt?

[227] The whole unsatisfactory nature of this question of the gun being put into his chest is well captured in the following extract from the transcript of his interview with the police on 10 March 2005 when he was discussing with them the people he had seen in Market Street:

“Police – How many well how many would have been in that street. I appreciate it’s a difficult one but.

Witness - I mean I, see to be honest I'd only be guessing if I says.

Police - ... But you've, you can't remember anyone else walking up past you or, you didn't recognise.

Witness - I can't remember, I know there was people there but I can't remember any specific faces.

Police - Right. So there was other people in Market Street other, over and above the crowd that was already past you involving.

Witness - No these might have been.

Police - Including Davison, McCormick, or -

Witness - See these might have been some of the crowd that originally started to walk up and they'd stopped. But see I'm saying this here and it's.

Police - Right you can't remember that bit anyway. So you get down there and you see your friend Terry McKay. What was he saying to you.

Witness - First of all, see I never mentioned a thing, I think, I think he said that was a gun put to your chest, I think it was Terry McKay said it.

Police - Terry said that.

Witness - Yeah. And I says you're balls was it and he says aye but I didn't, I didn't believe it like. But I just said, I just took it on board anyway.

Witness - And I think he says to me did you get a dig in the face there and I says it sure was a dig I got hit with something. And he says Bobby says its luck, its lucky that's all you got."

[228] Subsequently in the interview the police asked him how Terry McKay could have seen this if Fitzpatrick was standing directly in front of him and McKay was standing down at the bottom of the street. Mr Gowdy replied:

"Terry definitely says to me in that street at some point, now Terry says to me he was at the bottom of

the street when he said it, when I confronted him about it. He says to me he was at the bottom of the street but he could very well have been on up the street.

Police - So Terry says to you he was at the bottom of the street. Where did you see him?

Witness - See I can't remember him.

Police - So you didn't see Terry standing?

Witness - I could have been standing talking to Terry but I forget now, you know cos it wasn't till the next day that I started hearing wee bits and pieces. And here's me f... Terry was there, cos he says to me this and says to me that. You know but I couldn't actually remember him unless, unless someone says to him it was a gun put to your chest, he never seen it. Unless he just made it up."

[229] Sadly his embellishment to the family of what he now says Fitzpatrick did on that night does not end with the suggestion to the family that there was a gun put to his chest by Fitzpatrick. When he spoke to the police on 10 March 2005 he indicated that Fitzpatrick had put the tip of the sewer rod against his chest. When he spoke to prosecution counsel on 16 February 2006 he now added a further detail that Fitzpatrick had slapped him in the face. However when giving evidence in chief before me he made no mention of this. When it was drawn to his attention by counsel in cross-examination he said he had no recollection of Fitzpatrick slapping him in the face and he had no idea why he had mentioned that to prosecution counsel in February 2006 other than, "It maybe came back to my mind and then it went out".

[230] Yet a further potential variation emerged in the course of his interview with Detective Superintendent Nicholson on 24 February 2005. A note of that interview records as follows:

"Ask Gowdy if he was hit on the night in question, whilst in the entry. He said he was, he was drunk, he was drunk, he had been drinking for two days, he was hit in the face with either a stick or a punch. It was right side, ear to chin ..."

When pressed about this in cross-examination, and asked why he had introduced the possibility of being punched he replied that he simply had no idea. He claimed that he knew that he had been hit with but he was unable to

account as to why he had told the police it could have been a stick or a punch. I found some difficulty understanding why he would have said that. Even if he had wanted at that stage to keep the identity of the assailant secret, that should not have prevented him telling the police the truth, namely that someone had hit him with a stick. Why did he introduce the possibility of a punch if he genuinely knows what did happen to him and if he was telling the truth about the stick?

[231] A further version emerged in the early part of his interview on 10 March 2006 when, describing the action of Fitzpatrick, he said:

“He struck me with something on the face, on the right hand side here, a stick or something. I didn’t really see what it was.”

[232] Consequently, at various times Gowdy has alleged that Fitzpatrick put a gun in his chest – which he now denies happened –, that he had slapped his face – which he now has no recollection of happening–, that he may have hit him with a punch – which he now denies happening and that he didn’t really see what it was with which Fitzpatrick hit him whereas now he says he saw a stick or sewer rod.

[233] There has been a not dissimilar variation in his description of the group of men of which he alleges Davison, McCormick and Fitzpatrick were at the front and what they were carrying.

[234] According to the recollection of Bridgeen Hagan at the hospital, when the family had met Gowdy there, he had made no mention of bottles but said that some of the men had rods and sticks.

[235] When Mr Gowdy first spoke to the police on 31 January 2005, he made no mention of any group of men whatsoever in Market Street. Indeed on that occasion the only commotion he described was outside the bar.

[236] When he spoke to the police at 11.35 am on 1 February 2005, he described Brendan Devine and Robert McCartney heading off towards East Bridge Street after the commotion outside the bar, but again made no reference to any group of men armed with sticks or bottles in Market Street. Unsurprisingly on 1 February 2005, police had observed the discrepancies between what he was telling the family and what he was telling the police, and considered the option of treating him as a suspect for withholding information.

[237] Mr Gowdy then made a signed statement on 1 February 2005 and for the first time he then identified a group of 8 or 9 males standing at the

junction of May Street/Market Street. However, as was pointed out by Ms McDermott QC on behalf of McCormick there is no suggestion of a group actually walking up Market Street or of him being struck.

[238] On 24 February 2005 he again spoke to police about discrepancies which he had told the police compared to what he had told other people. He agreed to make an ABE interview but once more seemed to make no reference to the number of men or identity of them of in Market Street other than the fact that he was hit in the face with either a stick or a punch.

[239] Having spoken to the IRA, to which I will shortly return, he gave an interview to the police on 10 March 2005 and now identified a number of men coming after himself, Devine and Mr McCartney in Market Street. He said "The only three I can positively remember is Terry Davison, Jim McCormick and Joe Fitz. They seemed to be all carrying weapons, sticks or bottles or whatever." He then mentioned Bobby Fitzsimmons as having been there as well.

[240] However later when he was speaking to the police on 10 March 2006 he recorded:

"You see I'm not sure what, what they had in their hand but they had some form of things on them, maybe sticks or bottles that I can remember. But I can't specifically remember which, who had what. ... I think I recall somebody with a bottle, a Budweiser bottle in their hand and somebody with a stick in their hand."

As he admitted in cross-examination, in that portion of his interview he seemed to be saying that he could make out there were two sticks, one bottle distributed between Fitzpatrick, McCormick and Davison but that the rest of the crowd did not have any sticks or implements that he could see.

[241] How could he reconcile this with his earlier suggestion that everybody in the group had weapons? Moreover there appears to be no mention in any of his interviews with the police until 10 March 2005 that bottles formed part of the weapons in the group.

[242] During the course of his evidence he variously described the group in terms that "They all had sticks", "A lot of them had weapons", "A couple of the crowd walking down the street had bottles and that", "Bottles, and I don't what they were carrying, some sorts of weapons".

[243] By itself the confusion over who had sticks or bottles or other weapons might be explicable by the general confusion and terror of the occasion.

However this uncertainty further contributes to my general unease about the accuracy and truth of his account.

[244] I found it curious that Mr Devine, although clearly seeing five men walking towards him which presumably much coincide with the 8-12 men described by Gowdy, saw not a single stick or bottle at that time although he later saw a stick raised . I can find no obvious explanation for this disparity other than perhaps the poor lighting.

[245] My uncertainty about Gowdy's account of what happened that night and who was there is further fuelled by his interview with police on 10 March 2005 in the context of Bobby Fitzsimmons being there. He had told the police that he had known Bobby Fitzsimmons for 20 years and that on the night in question it was Fitzsimmons who had taken him by the arm after he had been struck by Fitzpatrick, back to Magennis's bar. However when the police on that occasion asked him who else had been in the group apart from Terry Davison, Jim McCormick, Joe Fitzpatrick and Bobby Fitzsimmons he gave the following answer:

"I don't know. My mind's is totally blank and it has been from it. They're from the top they're the only faces I can remember. I couldn't even remember Bobby's face, Bobby Fitz's face the next day until something jogged my memory the next week, the next week."

When he was asked about this in cross-examination he said he had no idea why he had said that. He agreed that it could not be right. Unhappily it struck me as yet another example of an instance where this witness was prepared to say something which was devoid of truth or accuracy when it suited him. It further served to undermine my ability to place reliance beyond a reasonable doubt on what he was saying.

[246] Mr Gowdy described how he had seen Fitzpatrick on previous occasions in the month before as a doorman at the bar. He had never spoken to him but although he had only seen him on one or two occasions, he had observed him walking about Magennis's and people would have said his name. In other words it was not just as he walked through the door but he saw him in the pub itself. However when he was asked to describe him, his description included the fact that he had red hair. In his statement of 16 May 2006 to the police he had said "I know Joe Fitzpatrick only a month or two since he started doing the door at Magennis's. He would be small and stocky, maybe 5 foot 7-8 inches, red hair, a skinhead." Clearly Fitzpatrick does not have red hair. I can readily understand someone making a simple mistake about the colour of hair particularly if that person is not particularly well known to you and artificial lighting is the means of identification. But given

the general tenor of inaccuracy and unreliability of his evidence it added yet another uncertainty to his evidence.

[247] Within a few seconds of being struck, he said that Bob Fitzsimmons had grabbed him by the arm and taken him away up Market Street back to Magennis's. The observation of Fitzpatrick therefore must have been relatively short albeit if Gowdy's account is correct he would have been facing him front on. Could I rely on such a brief encounter with a witness so unreliable in other respects?

[248] Even that opportunity to view him, has to be seen in the context of the lighting. Mr Micheltwaite, a lighting engineer employed by the Department of Regional Development Service indicated that on the date in question lighting in Market Street had been removed to facilitate redevelopment works. There was some private lighting outside 16-18 Market Street upon which he was unable to comment. Constable Legge had described the lighting in Market Street in the upper half as being exceptionally bad and the lighting for the other halfway up he described as poor, albeit it varied throughout the various sections. He described the first half of the street being better lighting than the second half. Moreover having been shown photograph 15 in Exhibit 5 there clearly was the presence of some artificial lamps in part of the street. Nonetheless I formed the impression that probably Constable Legge was correct in describing the lighting as poor. Even Gowdy himself admitted that, at least at a distance, the lighting and visibility did affect his perception of what was going on. Moreover he accepted that the lighting in the area obscured the view of the people that passed him albeit he said not the people that were directly in front of him. Similarly Mr Devine commented on the darkness in the street.

[249] When Gowdy was discussing with the police the events on 10 March 2005, and was being asked the names of other people who were there, he said this:

"But I was talking to Bobby Fitzsimmons, I wasn't ever talking directly to the crowd or addressed the crowd, I was either looking back at Bert or talking to Bobby Fitzsimmons or else Joe Fitzsimmons or else Joe Fitzsimmons who hit me, I was talking to him, I wasn't really looking much further. Unless, as you say, it might have been dark and I couldn't, the ones behind weren't visible or as visible as ones in the front."

I am therefore satisfied that the lighting in this area can only be described as poor. This is clearly a further factor I must take into account in following the Turnbull criteria.

[250] To add to the concerns that I have about Mr Gowdy's ability to identify these accused, irrespective of the whole issue of his credibility, I must recognise the unchallenged fact that he was very drunk on this occasion. He had consumed up to 35 pints or bottles of beer in the previous 36 hours ("about 20 pints on the Saturday and between 12 and 14 pints on the Sunday"). He variously described himself as "I was drunk enough", "I can remember parts of it, not everything" and "Very drunk". He accepted that his drunkenness would have affected his ability to estimate distances and sequences, and he said that he could not remember "90% of the events of that night". In cross-examination he said that the remaining 10% of recollection had the three men in the dock but "I could have had more men in the dock if I wasn't drunk". Moreover he told the police on 10 March 2005 that he did not know that he had telephoned Robert McCartney or Bobby Fitzsimmons until he checked his telephone bill. He knew he had telephoned Terry McKay only because he told him the next day that he had phoned him. As I have already indicated, he also told police that he did not remember Bobby Fitzsimmons being there until the following week. Such drunkenness clearly therefore must diminish his ability to make a reliable identification.

[251] Frankly, I have grave doubts as to whether his memory was so defective as he alleges and I harbour a grave suspicion that he hid behind the mask of memory loss in order to be selective about those that he chose to name. However whether it was alcohol that genuinely made him forget 90% of the events of the evening or whether it was him being selective about the material that he was prepared to reveal, it all serves to fundamentally undermine the reliability that I can place upon his description of the names and the facts of that night.

[252] The problem with his evidence is further compounded by the open admission by him of his ready facility for lying to the police and the press and his wholly implausible assertions that members of the family have been lying in recalling what he said to them at the hospital on the night on which Mr McCartney died. In the course of his cross-examination concerning the early police statement that he had made he said:

"These statements you keep reading to me, I admit that they are mostly lies, the only statement you can go by is my last statement, I am not saying I didn't lie, I lied a lot at the start."

[253] I might have found it somewhat plausible if his lies to the police had been to protect himself from the wrath of the IRA by identifying persons. However his lies went much further than this. He deliberately lied to the police about identifying events which would not have revealed names eg. the presence of a number of men in Market Street with weapons, the fact that that

group had not simply been standing at the junction of Market Street but had moved along Market Street and the violence in the public house at Magennis's to name but some. As I have already indicated, I am satisfied that he lied to this court about his knowledge of the events in Market Street, the accounts he gave to the relatives of Mr McCartney in hospital, the events that occurred in Magennis's bar prior to the incidents in Market Street etc together with seemingly gratuitous lies about his route to Magennis's bar and his route after leaving.

[254] His conversations with the IRA when they visited him between 4 and 6 times are further causes for the gathering momentum of doubt that I felt about his evidence. The first visit was in the week after the incident occurred when apparently he received no assurances. The second was a week or two weeks after that. He believed it was then that he received clearance to tell the truthful version of what had occurred. Mr Gowdy considered that it would have been a couple of days before he spoke to the police on 10 March 2005. Thereafter he was visited on a further 2 or 3 occasions. He declared that he could not remember what had happened at those meetings. I doubt very much whether he was telling the truth to the court when he said that he could not remember what had happened at those meetings and it is more likely that he was afraid to reveal what had been said. The danger is however that in the absence of having any information whatsoever as to what happened during the hours of discussion with the IRA, there exists the possibility that his evidence, including identification of the people he has named, may have been influenced or indeed even directed by the IRA. At the very least there must be a real possibility that his evidence has been through a sieve orchestrated by this unlawful organisation. That in itself creates a danger about his evidence the reliability of what he has said.

[255] I have already indicated the various reasons why it is necessary that I should apply the principles in Makanjola in this matter and exercise caution in looking at this statements. I consider it wise to look for supporting material before acting on his evidence.

[256] The only supporting material that I can find in the case of Fitzpatrick is an inference which I could draw from his failure to testify pursuant to Article 4 of the 1988 Act. I do not believe the adverse inference which I have drawn is sufficient to satisfy me overall to the requisite standard that Mr Gowdy can be relied on. As I will shortly indicate, I do not consider that his purported identifications of Davison and McCormick are sufficiently strong to merit recognition as supporting material particularly since it would amount to self-corroboration.

[257] Gowdy's account is essentially the sole source of the evidence against Fitzpatrick on these counts. I have come to the conclusion that I could not be convinced beyond a reasonable doubt that Fitzpatrick had acted in the

manner alleged by Gowdy and I must therefore acquit him on Counts 2 and 3.

Davison

[258] Turning to Gowdy's evidence against Davison, the same background frailties as I have identified in Fitzpatrick's case, surface with his case. Mr Gowdy's admitted facility for telling lies, the disparity in the various accounts he has given, his discussions with the IRA, his desire to deflect any blame from himself, his drunkenness at a time when he was purporting to recognise Davison and his basic unreliability all present once again.

[259] I do not understand why he failed to introduce Davison into the equation in any shape or form until after he had spoken to the IRA and gave his account to the police on 10 March 2005. Whilst the desire to keep Davison out of the frame until he had received clearance from the IRA might have been explicable in terms of his failure to inform the police of his presence, it cannot explain why he failed to mention Davison's name to the family. He did make mention on the night of the incident in the hospital, according to Paula Arnold of the names of Jock Davison (to the effect that he had nothing to do with it although the evidence of Mr Devine is that he most certainly did have something to do with events inside Magennis's bar and on the street outside where Gowdy was present), Joe Fitzpatrick, Bob Fitzsimmons, Jim McCormick and Pearce Breen. Why then did he not mention the name of Terence Davison? He certainly knew him and one would have thought that mention of his nephew Gerard would have brought him to mind.

[260] The explanation of Mr Gowdy in cross-examination was that he did not mention Mr Davison because "Bobby Fitzsimmons, McCormick and Fitzpatrick were in confrontation with me, Mr Davison wasn't. I told them what happened to me. So I had no reason to mention Mr Davison." That seems to me wholly implausible because he was quite prepared to mention Bobby Fitzsimmons, who he has indicated helped him, Terence McKay and Pearce Breen, none of whom had confronted him. Why then did he not mention Terence Davison since he clearly was not confining such mentions to people who had confronted him?

[261] Tellingly, the role he has given to Terence Davison has grown with the passage of time. At the hospital he told Paula Arnold and Jim Arnold that upon being struck by Fitzpatrick, Bobby Fitzsimmons had said words to the effect that he was not to be touched. When he spoke to the police on 10 March 2005 he said of this matter "Bobby Fitzsimmons or somebody shouted from the crowd not him he's trying to break it up."

[262] It was during the course of the questioning on 10 March 2005 with the police, after he had met the IRA and after he had purported to identify Terry

Davison as being near the front of the group, that Mr Gowdy first said that the person who shouted he was trying to break it up was Terry Davison although he added "I'm not sure but I think it came from". He again told this court that he thought it was Davison who said this. I must therefore step back and ask why it is that Terry Davison's name did not surface from Mr Gowdy until 10 March 2005 and why did he not in the early days volunteer his thoughts that Davison had spoken these protective words. I could not dismiss the possibility that having for some reason belatedly introduced Davison he was deliberately giving him a diminutive role. Was this to protect him or was it a clever contrivance to protect someone else? Was it a coincidence that not having mentioned his name to the family he now introduced his name to the police having spoken to the IRA shortly before? Such was my uncertainty about this man's capacity to tell the truth that I was unable to dismiss these doubts from my mind.

[263] I must also bear in mind in the context of Davison that although Mr Devine did see five men "walking, quick marching, like a quick jog or a quick walk" behind him and Robert McCartney in Market Street, he did not recognise any of them. He did not notice any bottles apart from what he thought was a blade at the start and about which he now thinks with the benefit of hindsight he may be wrong. He saw only one stick and no bottles. Indeed he cannot even say that it was a stick because his knowledge of that assertion emerged from what he had been told Ed Gowdy had said on 4 February. He had told the police that it was an iron bar, a shiny one that doormen carry which, in cross-examination he accepted was different from a sewer rod. Devine agreed that his change of description could well have been possible because of what Ed Gowdy was saying. Devine said that he did not see Terry Davison in that group of five although he added he would not have known if he was there or not. Certainly he did not recall seeing a man with grey hair wearing a white tee-shirt. Albeit perhaps a straw in the wind, it further caused me to reflect on the truth of Gowdy's identification.

[264] Applying the Turnbull principles to his purported identification of Davison, Mr Gowdy had said that he did not know Davison that well. He told police "To be honest with you I probably see him once every few months maybe even less." He said to the police that he knew him about a couple of years. Asked what clothing he was wearing he said he may have been in black. As I have indicated, I consider the lighting in that area of Market Street to be poor, he was clearly incorrect in describing his clothing as black and Mr Gowdy laboured under the difficulty of being very drunk. On his own case most of the time that he viewed the men at the front of this group, was focused on the two men who allegedly confronted him. A substantial number of weeks elapsed between him allegedly recognising Davison and purporting to name him. These are all Turnbull factors that cause me to doubt

the strength of his identification even apart from the credibility issues raised above.

[265] Once again, in considering the evidence of Gowdy in relation to Mr Davison I have applied the Makanjuola principles for precisely the same reasons as before. Potentially in the case of Davison there is supporting material for Gowdy's identification by virtue of Davison's failure to testify, together with the identification of Mr Devine and witness C to which I shall shortly turn. However I regard his evidence overall as so flawed that the adverse inference I draw is insufficient to persuade me of Gowdy's reliability to the requisite standard. As I will shortly indicate the identification by Devine is not sufficiently free of imperfection to constitute supportive evidence. Moreover I do not consider C's account of events in Cromac Square is sufficient to support Gowdy's account of Davison's presence or behaviour in Market Street.

McCormick

[266] When considering the evidence of Gowdy in the context of McCormick, I am conscious of the findings I have already made in relation to Fitzpatrick and Davison concerning his lies, his contradictory and implausible accounts, his discussions with the IRA, his drunkenness, and his desire to deflect any blame attaching to him for not helping Mr McCartney or Mr Devine prior to the attack upon them. I therefore once again invoke the Makanjuola principle whereby I must caution myself about his evidence and consider it wise to look for some supporting material for acting on any part of his evidence.

[267] The flaws in his account with reference to Mr McCormick were obvious. In the first place, although his evidence before me was that McCormick had walked down Market Street as part of the group of men with a stick and bottles, I remind myself again that Gowdy had not made any mention of this behaviour when he had spoken to the police on 31 January 2005 or 1 February 2005. At that stage his case was that a crowd had moved to Market Street/May Street junction and he had gone to the end of Market Street with Devine and McCartney. I do not know why he did not reveal to the police, if it was true, that this crowd had followed them up into Market Street without if necessary giving any names in the event he was concerned about the IRA. He failed to tell this to the police in his oral interview and also in his written statement.

[268] I note at this stage that supporting evidence upon which the Crown rely is the presence of blood from McCormick's found at the top of Market Street at the junction with Victoria Street on a wall. Ms MacDermott pointed out that this would be consistent with the hand of the accused McCormick being put there if he was part of a group of people at the top of Market Street

in the area depicted by Gowdy when he first described the group of men at the junction of Market Street/May Street junction. Coincidentally this did fit with his assertion to the police in interview that he might have been at the entrance to Market Street at the junction with May street .How he sustained the laceration at that area is unknown other than in his self serving statement he that he had cut it earlier on in the evening.

[269] When he was interviewed by the police on 10 March 2005 he said “The only three I can positively remember is Terry Davison, Jim McCormick and Joseph Fitz. They seemed to be all carrying weapons, sticks or bottles or whatever.” This would obviously have included McCormick.

[270] However in the course of evidence before me, he said that he could not say specifically whether Mr Davison or Mr McCormick had any weapons. Why did he exaggerate the position on 10 March 2005?

[271] A matter which concerned me greatly arose out of his interview of 10 March 2005 with the police. Describing what happened with a group of men who had reached halfway up Market Street, the following exchange occurred between the police and Gowdy:

“Police - And saying basically what was going on here or words to that effect, did the group stop, did they continue on or what exactly happened.

Witness - Joe Fitz stopped. Joe Fitzpatrick stopped to hit me I know that I don't whether the other ones I think the other ones walked on past so they did they walked on past.

Q. - When you walked on past you know where you shuffled out of the way or did they go round you or did you have to move to allow them to get past.

Witness - No because I was standing over till the right hand side looking down. I think some of them started to walk on up, it was around that at the same time I started talking to Bobby Fitzsimmons.”

[272] This account clearly left McCormick out of the alleged confrontation and confined the confrontation solely to Fitzpatrick. When this was put to him in cross-examination, and he was asked for an explanation as to why he had said this to the police, he informed the court that he had no idea why he had said this. What possible reason could there have been for failing to mention McCormick at this stage?

[273] Turning to the Turnbull criteria with reference to the accused McCormick, Mr Gowdy told the police that he would have known him only casually about the area over a number of years. Other than to purport to identify McCormick, he had no recollection of any other details about him that night including what he was wearing when pressed by counsel or indeed by the police. When asked why that was so in cross-examination his answer was "I don't know because I didn't care and I didn't look". Such a casual observation by a drunk man scarcely lends confidence to an identification in poor light within the Turnbull strictures.

[274] Once again I have come to the conclusion that even the presence of an inference properly drawn against the accused because he has failed to testify and the supporting evidence of Mr Devine on identifying McCormick, with which I shall deal shortly, are not sufficient to satisfy me that I can safely rely upon Gowdy's evidence when considering the case against Mr McCormick.

The identification evidence of Brendan Devine

[275] I commence by commenting that this man has suffered greatly not only as a result of his physical injuries but through the loss of his close friend Robert McCartney. I believe he did everything he could that night in Market Street and beyond to help him. Although I have found his account deeply flawed I do not believe he has in the main wilfully attempted to mislead the court in the manner that I fear Mr Gowdy has.

[276] However I have determined that this witness's evidence is so inexplicably and fundamentally at odds with the evidence of witness C about a number of salient events in Market Street/Cromac Square that, when coupled with other profound inconsistencies in his account, I am unable to place sufficient reliance upon him to the requisite standard of proof required. No adverse inference to be drawn from the absence of any of the accused from the witness box or such supporting evidence as there is suffice to repair these fundamental flaws in his credibility and his identification. My reasons for so concluding are as follows.

[277] First, as I have already indicated, whilst I consider witness C is mistaken in certain of the details that she has outlined, I have no doubt whatsoever that she is correct in describing an attack having taken place on Mr McCartney in Cromac Square. Until he heard of the evidence of witness C, Mr Devine had absolutely no recollection of any such incident whatsoever in Cromac Square. He was convinced that the attacks on himself and Mr McCartney had all occurred in Market Street. This in itself has served to undermine the credibility of this witness and any reliance that I can place upon him.

[278] I recognise only too well that Mr Devine laboured under the effects of loss of blood through his throat being cut in Magennis's bar, a stabbing injury to himself and a great deal of alcohol. In such circumstances it is very easy indeed for a witness to be confused as to location. My experience in these courts has revealed to me that perfectly honest witnesses often mistake a venue or location without being dishonest or inaccurate about the events themselves.

[279] However the topographical difference between Market Street and Cromac Square, particularly to a local person such as Mr Devine who must know the area tolerably well, is such that it is virtually impossible to envisage a mistake in location on this scale. One could easily image two small streets being confused but not a major thoroughfare and a small entry. If his account in this respect is so thoroughly misconceived, how could I rely on any part of his evidence to the requisite standard?

[280] It was a matter of great concern to me that three years after the incident, Mr Devine, for the first time in court before me, proffered the suggestion that he might be entirely wrong about the location of the various events surrounding Mr McCartney being on the ground unconscious and being attacked as having. His sole reason for entertaining that doubt was the evidence of witness C. Had it not been for that witness, he freely admitted that he would still be convinced the whole matter occurred in Market Street. His uncertainty, the total contradiction with witness C, and his willingness so late in the day to accept that his whole account may well have been misplaced have served to fundamentally undermine his credibility in my view. His description of the locations including the parking area, the new brick of the buildings in Market Street and the detail of the incidents that he depicted would normally have led me to believe that such detail smacked of accuracy. It is therefore all the more troubling to discover that, once I accept the evidence of witness C which I do, Mr Devine description of the events in Market Street must be bordering on the fantasy.

[281] Even when he indicated that he was prepared to change his version of the location where the gouging etc. had occurred, in light of what C had apparently seen, he attempted to rationalise the situation by declaring that all he recalled was that Bert was 4 feet or roughly 4 feet near the corner of a fence ie. when he had had his hands up he was just beside the corner of a fence. I consider he clearly believed that this was consistent with witness C's evidence perhaps as a result of someone telling him this. In the event this is completely different from where C said the incident happened i.e. at or about the central traffic island. There still remains a clear disparity between the two versions. They are irreconcilable in my view and the belated attempt to shift his ground not only damages his reliability as a witness of accuracy but also his credibility as a witness of truth.

[282] The irreconcilable nature of Mr Devine's account with that of witness C purely cannot be explained on the basis that they differ only as to location. The two accounts are fundamentally different in many other key parts and much of his evidence is inconsistent with any plausible explanation.

[283] Mr Devine's recollection finds no part for the description by witness C of a man making swinging motions towards Mr McCartney or indeed himself and Mr McCartney being viciously kicked. In turn witness C has no recollection of any gouging or punching action relied on by Mr Devine.

[284] The suggestion by Mr Devine that he had witnessed Mr Davison performing a gouging exercise on Mr McCartney finds no independent support from the evidence of Dr Bentley the Assistant State Pathologist. When Dr Bentley was asked in cross-examination whether the injuries to the face of Mr McCartney were consistent with gouging by the use of the hand and fingernail he replied that he thought it was "highly highly unlikely". He would have expected to have seen fingernail marks, which are linear scratches or cuts in the skin if they are deep enough and there may be scratching associated with these to the side. He found nothing consistent with or indicative of digital gouging. This evidence carried a particular resonance in light of the detailed account given by Devine of the gouging and related by the police in the interview of 17 February 2005 in these terms:

"Police - So you see this one person and you're about 10 yards away and you're walking..... and you see him digging his fingers into Bert's face".

[285] Hence, in light of that unchallenged evidence from Dr Bentley, I find it impossible to accept Mr Devine's assertion that he witnessed Mr Davison or anyone gouging at Mr McCartney's face.

[286] For some reason he did not tell the police about the allegation of gouging when he spoke to them on 2 February 2005. Moreover a report from Paula Arnold, a member of Mr McCartney's family, records how she had spoken to Mr Devine in the hospital on 3 February 2005. That note records Mr Devine saying:

"Brendan described two of the males that followed them out of the street as 1. Older male with grey hair.
2. Bald male with bad teeth. There were 4 or 5 mother males on the street. He saw the older male walking away from Robert. Brendan thought older male may be Jock Davison's uncle."

[287] I find it odd and troubling that he gave her no description whatsoever of seeing the older male with grey hair gouging or punching or in anyway

attacking Mr McCartney given the nature of the evidence which he now describes. I appreciate that this man was in hospital at this stage and that he clearly would not have been in the best condition to offer up a truly accurate recollection. However he did give some substantial detail to Ms Arnold and I am bound to note the telling omissions from even the outline account he gave.

[288] He failed again to mention the gouging incident allegedly when he met Bridgeen Hagans, a relative of Mr McCartney, at the Royal Victoria Hospital when she visited him on 4 February 2005. Not only did he fail to make mention of any gouging incident or attack that he witnessed on Mr McCartney, but he described one of the two males he saw in Market Street as bald with funny/bad teeth wearing a thick gold chain “swinging a butcher’s knife”. This again clearly amounts to an embellishment because he now has no such recollection to the extent that he has even described seeing a doorkeepers baton on another occasion instead of knife.

[289] Mr Devine’s evidence was that he saw at first two men, but later one man, leaning over Mr McCartney in what he believed was Market Street. If this is the situation depicted by witness C, it is again fundamentally different because she never saw more than one person attacking Mr McCartney.

[290] The witness asserted that he had seen Mr McCartney with his bottom against the fence with his head down and unconscious in Market Street. He even recalled slapping and pinching his nails into his gums in order to bring him around. He then described walking him 20-40 yards with his arm around his waist. This is simply irreconcilable with C’s account.

[291] He had no recollection of Mr McCartney ever being kicked and insofar as he had told police on 2 February 2005 when he was in the High Dependency Unit in the Royal Victoria Hospital that he saw Mr McCartney wrestling/fighting with someone up the street he told this court had no recollection of ever saying that and had not seen it happen. Had this simply existed in his imagination therefore?

[292] He again fundamentally differs from witness C in that he said he had no recollection of the man who attacked Robert McCartney coming at him with a swinging motion or a knife as is inferred from the evidence of witness C.

[293] On 4 February 2005, when he had been moved to the secure ward in the Royal Victoria Hospital he was again interviewed with the police and rough notes of that interview were before me. The notes contained the following extract:

“Brendan said he saw a baton or a knife. ... Skinny wee fuckers the lot of them, there was only one wee skinny one challenging him with maybe two beside him, one of these ones stabbed him. Brendan didn't know if he was stabbed from behind or not, he doesn't know or not but he thinks he was running round in circles trying to run but having difficulty. He thinks he was stabbed 10-15 yards before the main road. Brendan thinks the same person stabbed him and Bert, when he was stabbed he didn't fall down and Bert wouldn't fall down.”

[294] Whilst again one must appreciate that Mr Devine was labouring under the aftermath of the stabbing to himself, and indeed he said that he was still confused, the fact remains that he never purported to have seen any action which would constitute the stabbing of Mr McCartney. The very fact that he ventured the thought that the same person had stabbed both him and Mr McCartney illustrates that he never saw Davison participating in any action which approximated to a stabbing. Once again, he made it clear that the events he was describing all occurred in Market Street.

[295] Finally in relation to Witness C Mr Devine has never at any time described a scene even vaguely approaching that which I believe witness C has correctly described, namely himself and Mr McCartney running out of Market Street pursued by two others.

[296] There emerged a distinct variation in the accounts that Devine gave as to the weapons or lack of weapons of the men that he alleged were walking behind himself and Robert McCartney in Market Street. In hospital on 2 February 2005, he told the police that “he saw shiny things in the hands of the fellows following them up Market Street ... He thought they all had knives, but definitely saw one with a knife and one with an iron bar. He was asked to describe the iron bar and said it was a shiny one that doormen carry.”

[297] However when he spoke to Bridgeen Hagens on 4 February 2005, his description was of one the males, who was bald with funny bad teeth wearing a thick gold chain, “swinging a butcher's knife”.

[298] Another variation surfaced when he spoke to the police on 4 February 2005. This time he said that he saw a baton or a knife.

On speaking to the police in the course of his first interview on 17 February 2005 he reverted to saying that he thought he saw “a blade with a person closest to the inside wall”.

[299] By the time he gave his fourth interview to the police, he had become riven with doubt said "At the start, the first glance I looked round there seemed to be 4 or 5 people jogging or a quick walk up towards Bert, Ed and Terry, I was in the front, maybe about 10-20 yards ... and then I just, once I seen the first time they walked round the corner and I thought I seen somebody with a blade, my memory is that I can't remember specifically now but I said it at the start, I don't know if that's true or not ... but I thought I seen somebody in the inside with a blade, maybe I'm wrong."

[300] At this point therefore I found it surprising Mr Gowdy had allegedly seen what presumably was the same group bearing bottles but Mr Devine has never at any time suggested that they were carrying bottles. Moreover he said that at the time when he thought Gowdy got hit, Mr McCartney had his hands up and he heard Mr McCartney shouting "No one deserves this or he didn't deserve that". Again this is in stark contrast to Mr Gowdy's account because he makes not the slightest mention of Mr McCartney being anywhere near him at this stage. On the contrary he had Mr Gowdy and Mr Devine up at the end of Market Street/East Bridge Street junction at or about this time.

[301] When he cross-examined on these matters, yet more disparities emerged. He expressly denied ever having said to Bridgen Hagens on 4 February that the bald man with the funny bad teeth was wearing a thick gold chain and he had no idea where the suggestion that he was swinging a butcher's knife came from. He asserted that it certainly did not come from him. Was the butchers knife therefore another figment of his fertile imagination?

Davison

[302] Turning specifically to his identification of Davison, disparities in the account are also to be found in great number. When he was interviewed by the police on 17 February 2005 the following exchange occurred between himself and a police officer interviewing him:

"Police - So you see this one person and you're about 10 yards away and you're walking and you say him and you see him digging his fingers into Bert's face and you say to him, oh not you, now you're telling me that that's the same guy that, the very first argument you had inside or that's -

Devine - That's the only person I remember out of the lot, that's the only person that's sort of clear even though I can't remember what his face looks like, driving me crazy and all this and it'll come and hopefully I do remember what he looks like ... but I

can't picture, I just picture the rough, what he looks like you know. I wasn't as if I was staring, looking at his face and I can picture his face."

[303] It is obviously therefore a matter of concern to me that within 17 days of the incident occurring, he cannot remember what the face of this man looks like. I must bear in mind that he did not have the opportunity to pick this man out of the identification parade until June 2005 i.e. very nearly four months after the incident had occurred.

[304] He was asked to describe at the interview on 17 February what this man had been wearing. He said he thought he had a white tee-shirt on and jeans. In his interview of May 2005 with the police he again give a description of the man in these terms "He had a pair of jeans and a white tee-shirt on with a design on the front of it."

[305] It is also significant that in the course of that interview the following exchange occurred:

"What can you tell me about his face, moustache, beard, glasses.

Witness - I think he had a moustache just sort of thin face."

[306] The fact of the matter of course is that the photographs taken of the accused Davison at the hospital shortly after 11pm revealed that he did not have an moustache and he was not wearing a short sleeved white tee-shirt with a motif on the front. Indeed when Mr Devine was cross-examined about this his response was "is it not possible that he could have went to get changed, any murderers commit murder, they go and change themselves obviously". The difficulty confronting the prosecution in this case is that it is fairly obvious that the timings would not have allowed him to go home to get changed - it is common case that he got into the BMW car and was driven to the hospital from outside Magennis's bar. In any event Mr Devine's description of the clothing he was wearing is in marked contrast to the description which witness C gives of his clothing. It is also common case on all sides that he did not have a moustache.

[307] Of course I bear in mind that clothing, build, and even facial hair can be mistaken in the stress of a traumatic incident such as this. Mr Devine said that whilst he may not have been clear in his recollection at that time what the face looked like, once he saw him in the identity parade he was certain he was the one that demanded the apology in the bar and he was the one that gouging the face. I have to ask myself however whether or not the man he picked out was the person in the bar who argued with Mr McCartney but not

the man who he alleged was doing the gouging? Could this account for the disparity in the description about clothing/moustache especially since he had no independent recollection in his mind of what the person was like at least between 17 February 2005 in his interview by the police and his attendance at the identification parade in June 2005?

[308] My concerns are further fuelled in this purported identification of Davison by the fact that there is clear evidence which Mr Devine freely admitted, that he had been told by others that Terry Davison had been involved. He had contacted the police on 11 February 2005 and the note of his conversation with Detective Superintendent Nicholson records "Brendan Devine heard from a reliable source, whom he didn't name, that 'Dim' McCormick was responsible for the stabbing, also that the uncle of 'Jock' Davison, Terence Davison was also involved. "

[309] He repeated the assertion to the police on 17 February 2005 that someone had said to him afterwards that Terry Davison had been involved. Worryingly, in the course of his second interview on 17 February 2005 when asked by the police to describe the hair of this man he said "Which I heard different, his hair was different than what I remember". In cross-examination he accepted that someone had described his hair to him which apparently was different from what he remembered. Had he been discussing the description of Terry Davison with someone in the aftermath of the incident including the type of hair that he had?

[310] In this context I must bear in mind also that he had been spoken to by the IRA and as I will shortly relate, he told Crown counsel on 4 March 2006 when they saw him in Magilligan Prison, that the IRA had told him that it was "Dim" McCormick who had stabbed him. They may also have told him that Terence Davison was involved. Has this influenced his identification or fuelled his certainty about the presence of Terry Davison.

[311] One final matter has been a further source of doubt about the evidence of Mr Devine. Had witness C not come forward, Mr Devine would have been certain in his own mind that the whole incident which she saw occurring in Cromac Street, and which I accept, occurred in Market Street. Mr Devine would have given that evidence to me with all the certainty that he could muster. Not only does he have absolutely no recollection of being pursued by two men into Cromac Street, one of whom the prosecution asserts is Mr Davison, but on the contrary he claims that the man who gouged the face of Mr McCartney walked back i.e. in completely the opposite direction towards Magennis's bar. In other words the man that witness C describes pursuing Mr Devine and Mr McCartney out into Cromac Street, is allegedly observed by Mr Devine going in entirely the opposite direction back towards Magennis's bar.

[312] Apart altogether from the credibility issue, applying the Turnbull criteria creates further problems for the assertion by the Crown that his identification can be relied on. His observation of Mr Davison allegedly in Market Street is for a comparatively short time and the lighting has been acknowledged to be poor especially by Devine himself. Whilst his observation may not have been impeded by any obstruction, Devine was a man who had consumed considerable amounts of drink, had suffered a great loss of blood from having his throat cut, had been stabbed and has a complete blank in terms of recollection of what happened in Cromac Square. He had not seen Mr Davison before that night when he saw him confront Mr McCartney in the bar and that may have given him a special reason for recollecting him when he saw him in the identification parade. However a substantial elapse occurred between the original observation on 30 January 2005 and the identification parade at the beginning of June 2005. There are a number of material discrepancies in his description including clothing, a moustache, the contradictory medical evidence given by Dr Bentley of the allegation of gouging and of course the disparity between the description of events given by witness C and himself.

[313] I have also indicated earlier in this judgment that I consider that the Crown were right to concede that the Makanjula caution should be given when dealing with Mr Devine. That need arises out of the alcohol he had consumed, the fact that he too had spoken to the IRA who may have influenced his account, and the inconsistencies in the version he has given.

[312] There is supporting material in the adverse inference I can draw from Mr Davison's refusal to give evidence but I consider that the weaknesses in his account of what happened and his identification of Mr Davison are so profound, and the support from Gowdy so riven with defects, that I could not be satisfied beyond reasonable doubt that the identification given by Mr Devine of Davison on this night in Market Street is reliable. It is potentially so defective that even if I accepted the evidence of witness C that Davison was in Cromac Square, I still could not be convinced beyond reasonable doubt that the description of the role played by Davison in Market Street by Mr Devine can be relied on.

McCormick

[313] I have come to the conclusion that the evidence of Mr Devine in relation to McCormick is similarly flawed and unreliable to the extent that I could not be satisfied beyond reasonable doubt as to its reliability. My reasons for so concluding are as follows.

[314] As I have earlier related, Mr Devine told the court in his examination-in-chief by Mr Murphy on behalf of the prosecution that the man that he saw gouging at the face of Mr McCartney "was the only one I could be sure of that

night". He conceded that that was true in cross-examination by Ms McDermott. That assertion immediately cast some measure of doubt into my mind as to his certainty in identifying McCormick.

[315] This bore the uncertainty that I discerned as his cross-examination proceeded. He told the court that for two reasons he believed that Dim McCormick was one of the men who was standing outside Magennis's bar pointing and shouting at Mr Devine and calling him a police informer. First because his mannerisms were similar to those the brother of McCormick whom he knew and secondly because it is well known that Jock Davison and Dim McCormick were friends and he was with him. As he said "Them two things made me come to that conclusion at that time". In other words at the time he saw this man outside the bar, he believed he was Dim McCormick.

[316] Mr Devine further asserted that the man that he saw when he turned around immediately after he was stabbed - who had an evil grin and bad teeth - was the same man as the one he had seen outside the bar.

[317] The following important exchange therefore occurred between myself and the witness:

"Mr Justice Gillen: Yes, after you had been stabbed, you thought that man was Dim McCormick?"

Witness: Not at that time, I didn't know who it was, all I remember was an evil grin.

Mr Justice Gillen: That is what I can't understand Mr Devine, ... If you thought the man standing outside the bar was Dim McCormick, why did you not think that the man you saw after you were stabbed was Dim McCormick if they were the same man?

Witness: Because I didn't look, I didn't look at anything else apart from the teeth. I did not, I didn't know who Dim McCormick was, I just thought he was one of the ones that was there who was pointing and shouting because the whole bar was out shouting."

[318] Applying the Turnbull principles this was a case where he did not have the man under observation for that long, the lighting must have been poor as I have described earlier in this judgment, he was suffering from the loss of blood from a cut throat, he had been stabbed, and the only part of the miscreant that he seemed to be concentrating on was the teeth. Such must

have been the transient and partial nature of his observation with his focus entirely in the teeth, that apparently at that time he did not connect him with his earlier identification of allegedly the same man he believed was called Dim McCormick.

[319] The partial nature of that identification was repeated by him earlier in his cross-examination when he said:

“All that time all I remember was crooked, bad teeth, you know has anybody even asked to see his teeth? Has he got a shiny white pair of teeth has he? He didn’t have good teeth, all I remember at that time when I got stabbed was somebody with an evil grin who was like crooked teeth.”

[320] I found that limited feature of recognition to be an inadequate basis for being satisfied beyond reasonable doubt that this was the accused McCormick.

[321] That doubt was reinforced by his comments in the third interview with the police on 17 February 2005. When the police were questioning him about his identification of people outside the bar in the course of the rancorous exchanges prior to the incident in Market Street, he referred to Dim McCormick as being one of the men who was shouting at him. At one stage Mr Devine said “I can’t even remember you know I can’t remember what Dim looks like – I just think, picture him as smaller and a bit plump and I just think it was him.” When the police asked him further about this he added:

“I only know him by this guy, apparently it was Dim, I wasn’t sure if it was him or not but I think I seen him in the bar, I can’t be sure.”

[322] If Mr Devine thought that the person who had stabbed him was Dim McCormick - for whatever reason - I found it very difficult to understand why he did not mention his name to the police on 2 February 2005 on an occasion when he told them that he could not name the person who had stabbed him. I appreciate that at that time he was in the High Dependency Unit of the Royal Victoria Hospital and was in a poor state of health. However he was able to give a detailed account of events that night indicating to the police that “this wee runt ran over and stabbed him”.

[323] I became even more concerned when my attention was drawn to a document recording what Mr McCartney’s sister Paula Arnold had told police about a conversation Mr Devine had with her when she had met him at the Royal Victoria Hospital. On that occasion he had named Jock Davison as the man who was calling him a drug dealer and a police informer and then

described two of the males who followed him out onto the street. The following note appears:

- “1. Older male with grey hair.
2. Bald male with bad teeth.

There was 4 or 5 other males on the street. He saw older male walking away from Robert. Brendan thought older male may be Jock Davison’s uncle. When they were on the street he saw Billy Fitzsimmons pulling Ed Gowdy back towards Magennis’s bar”

[324] Why then did he not indicate that he believed the bald man with the bad teeth - the very man who he believed had stabbed him - was Dim McCormick and that he had seen him earlier in the evening outside the bar berating him?

[325] Moreover on 4 February 2005, when he had been moved to a secure ward in the Royal Victoria Hospital, he again spoke to the police describing what happened to him in the following terms according to a police note :

“Skinny wee fuckers the lot of them, there was one wee skinny one challenging him with maybe two beside him, one of these ones stabbed him. Brendan doesn’t know if he was stabbed from behind or not ... thinks he was stabbed 10-15 yards before the main road. Brendan thinks the same person stabbed him and Bert.”

[326] Mr Devine accepted that Mr McCormick could not be described as skinny and Mr Devine asserting that he never did so describe him as skinny and that was a mistake. I am satisfied that he did so describe the person who he believed had stabbed him and once again did not venture his apparent belief that this man was or may have been Dim McCormick. Whilst I recognise that this description was given by him very shortly after he had received surgery, nonetheless it is another factor which concerns me about his purported recognition. Not only did he not mention the name Dim McCormick to the police, but the description of the man who stabbed him as skinny, clearly did not describe the body shape of McCormick.

[327] A further discrepancy in his description emerged when he spoke to prosecution counsel at Magilligan Prison in March 2006. Describing the behaviour and words of McCormick outside the bar in the street a note records the following extract from Mr Devine’s description:

“He said that Dim was wearing a gold chain and black sweater and was saying ‘you are dead, you are finished’.”

[328] In evidence before me he accepted that was wrong and that McCormick had not been wearing the gold chain and black sweater. Indeed earlier in evidence he described quite a different person – a dark skinned young man 25-30 who was quite good looking wearing a black tee-shirt- as the man wearing the gold chain.

[329] My doubts were further fuelled by the fact that the first time Mr Devine gave the name of Dim McCormick to the police was on 11 February 2005. Detective Superintendent Nicholson’s note records:

“Brendan Devine heard from a reliable source, whom he didn’t name, that ‘Dim’ McCormick was responsible for the stabbing ...”

[330] I do not understand why he had not conveyed his belief, even though it may not have been imbued with certainty, that Dim McCormick had stabbed him prior to this date in light of the evidence that he gave to this court. Mr Devine admitted that he had had a number of meetings with the IRA to discuss the events of this night between 30 January 2005 and the end of June 2005 when he picked out McCormick in an identification parade. He told prosecution counsel in March 2006 that he had been told by the IRA that it was Dim McCormick who stabbed him. Once again I was left with a smouldering concern that Mr Devine may have been steered towards McCormick by the comments of others rather than by his own identification of him.

[331] All of this has to be seen in the context of a man who had admitted to the police that prior to even arriving at Magennis’s that night he had consumed six pints and 2 to 3 vodkas. Whilst in Magennis’s he had consumed something between 5-8 pints of alcohol. The effect on him of alcohol therefore has to be taken into account as a further factor in diminishing his capacity to properly recognise someone.

[332] In the course of his evidence before me Mr Devine expressed his irritation that the initial charge of attempted murder against McCormick had been discontinued by the prosecution long before this trial commenced. In light of the evidence before me I can understand the stance adopted by the prosecution.

[333] Accordingly not only did I find doubt in his identification when applying the Turnbull principles but the caution that I must exercise under

the Makanguola principles caused me to seek supporting material from elsewhere. As I have determined earlier in this judgment the identification by Mr Gowdy is so unreliable that it did not provide me with any support. The presence of McCormick's blood in Market Street was at or about the junction with Victoria Street and did not indicate that he was one of those either further up the street or involved in the stabbing. Mr McCormick had made a statement to the police in which he indicated that he may have been at the mouth of Market Street but this afforded me insufficient support for Mr Devine's suggestion that he had been behind him immediately after he was stabbed.

[334] I did derive some support for Mr Devine's identification from the adverse inference that I am prepared to draw by virtue of the fact that McCormick chose not to testify. However I have come to the conclusion that the identification is so unreliable that the adverse inference is not sufficient to rid me of the reasonable doubt which I entertain about the guilt of McCormick in this matter.

[335] I have come to the conclusion therefore that I must acquit McCormick on the charge of affray under count 2 on the indictment.

Witness C

[336] Subsequent to the completion of the evidence and the submissions in this case but before I handed down my judgment one week later, my attention was drawn to a decision of the House of Lords in R v Davis [2008] UKHL36 concerning the admissibility of evidence given by a witness with the benefit of a special measures order. The special measures in this case were not the subject of any submission before me in this trial and counsel did not advance any argument of prejudice accruing to the accused in this instance. On the contrary Mr Pownall expressly adverted to his acceptance of the honesty of witness C albeit he strongly asserted she was mistaken. In any event the verdict at which I have arrived renders the case of Davis irrelevant in this particular instance. Accordingly it is unnecessary for me to comment further on this decision.

[337] Prosecution counsel conceded that if the evidence of Devine and Gowdy was so flawed that I could not rely upon it to place Davison as part of the affray in Market Street, the evidence of witness C as to his behaviour in Cromac Street created difficulties in bringing him within the ambit of an affray. No charges have been preferred against Davison for the alleged assaults against Mr McCartney which witness C purported to observe. I am satisfied that the attack upon Mr McCartney in Cromac Street, whilst clearly amounting to serious allegations of assault if the charges had been preferred against him, do not amount to the offence of affray within the definition of that offence as I have outlined above. Consequently having dismissed the

charge of murder against Davison and having concluded that the evidence of Devine and Gowdy is so flawed that even a supporting identification by C of Davison's presence in Cromac Street would have been inadequate to satisfy me beyond reasonable doubt as to his guilt of affray in Market street, the purported identification of Davison by C becomes arguably somewhat academic.

[338] So far as witness C is concerned, as I have indicated she was a transparently honest and brave witness. I have also adverted to the imperfections in her evidence. It was a very telling matter indeed that she identified Davison at an identification parade in June 2005. This identification occurred in circumstances where she had no idea who he was, did not know that he had been in the bar that night or that he had confronted Mr McCartney inside the bar and was unaware that on his own admission he had spoken to him outside the bar. On the other hand I had to balance that against the weaknesses in her identification applying the Turnbull principles and in particular her conviction that the man she saw in Cromac Street had different and longer hair than clearly was the case. Her reaction in the witness box when shown the still photographs of Davison taken in the RVH was clearly one of disbelief. Whilst not rejecting her identification I concluded that it would have been necessary to have found some independent supporting evidence for it before I could have been satisfied beyond reasonable doubt as to her accuracy. That supporting evidence might well have come from Mr Devine and Mr Gowdy had their evidence not been so fundamentally flawed that I could not regard it as supporting the evidence of witness C. Equally the discrepancy in witness C's statement, prevented me using her account to shore up or support the flawed evidence of Devine and Gowdy to an appropriate level in order to rid myself of a reasonable doubt. Davison's failure to testify did permit me to draw an adverse inference against him and lend some support to her identification but it was not sufficient to satisfy me beyond reasonable doubt in the circumstances of this case. In any event as I have pointed out in the earlier paragraph his presence in Cromac Square alone would not have been sufficient to prove the necessary constituent parts of the offence of affray in Market Street.

[339] I have therefore come to the conclusion that I must acquit Davison on the second count of affray.

[340] In the circumstances therefore I acquit the accused of all three counts before me.

[341] Before concluding this judgment by I pause to make this observation. I recognise that the family of Mr McCartney and others who held him dear will be frustrated and disappointed that whoever it was who cut this young man down in the prime of his life has or have not yet been brought to justice.

However the memory of Mr McCartney and the rule of law itself would be ill-served by this court failing to observe the high standards of criminal justice and the burden of proof which prevail in courts in Northern Ireland. The law is not a feather for every wind that blows and the need to ensure that defendants are found guilty only if there is proof beyond a reasonable doubt cannot be sacrificed to genuine and justifiable public concern that miscreants should be brought to justice. I have no doubt that the investigation into this crime will continue and if new evidence emerges in connection with this murder no one, including for that matter even the accused in this trial, will be beyond the reach of potential prosecution.