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Judgment: approved by the Court for handing down | *Delivered:* **19/6/08**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

TERENCE MALACHY DAVISON
JAMES McCORMICK
JOSEPH GERARD FITZPATRICK

_____

GILLEN J

[1] At the end of the prosecution case, counsel on behalf of each of the defendants made an application that there was no case to answer on each of the counts in this indictment i.e. count 1 of murder against Davison, count 2 of affray against all three accused and count 3 of assault against Fitzpatrick.

Legal principles governing the applications

[2] In instances where a judge sits with a jury the principles governing submissions of no case to answer are to be found in R v Galbraith 73 Cr. App. R. 124 ("Galbraith") and R v Shippey (1998) Crim. LR. 767 ("Shippey"). In the case of Galbraith Lord Lane CJ described the principles in determining whether a direction of no case to answer should be made as follows:

> "How then should the judge approach a submission of 'no case'? -
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence –

(a) where the judge comes to the conclusion that the Crown's evidence taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case;

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

[3] In R v William Courtney (unreported KERF5734) the Court of Appeal in Northern Ireland expressly adopted the approach followed in The Chief Constable of the PSNI v LO (2005) NICA 3 ("LO") when adapting these principles to the context of a non-jury trial. The following passages from LO were approved:

> "(13) In our judgment the exercise on which a magistrate or judge sitting without a jury must embark in order to decide that the case should not be allowed to proceed involves precisely the same type of approach as that suggested by Lord Lane in the second limb of Galbraith but with the modification that the judge is not required to assess whether a properly directed jury could not properly convict on the evidence as it stood at the time that an application for a direction was made to him because, being in effect the jury, the judge can address that issue in terms of whether he could ever be convinced of the accused's guilt. Where there is evidence against the accused, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was do discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in Hassan, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

> (14) The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb of Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is a tribunal of fact. It is important to note that a judge should not ask himself the question at the close of the prosecution case, 'Do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

[4] I cited that summation in R v White (unreported GILC5867) and I intend to follow the same approach in this instance subject to the principles I outline in the succeeding paragraphs which obtain in cases depending on identification.

[5] Counsel properly reminded me of Turner J's well known admonition in Shippey's case that "taking the prosecution case at its highest" did not mean "taking out the plums and leaving the duff behind".

[6] The correct approach to submissions of no case to answer in prosecutions turning upon identification evidence was laid down by the Court of Appeal in R v Turnbull (1977) QB 224 ("Turnbull"): see paragraph 6 later in this judgment. In Turnbull's case, the guidelines require the trial judge to direct the jury to acquit if the quality of the identification evidence on which the prosecution case depends is poor and there is no other evidence to support it. However, supporting evidence capable of justifying leaving a case to the jury, even where the identifying evidence is poor, need not be corroboration in the strict sense. This does not involve any conflict with the principles laid down by the Court of Appeal in Galbraith's case because, in stopping the trial, the judge does not purport to determine whether prosecution witnesses are telling the truth. He merely decides that there is insufficient evidence on which a jury could properly convict (see Daley v The Queen (1994) 1 AC 177 and MacMath (1997) Crim. LR 586). See also Blackstone's Criminal Practice 2008 ("Blackstone") at paragraph D15.58

[7] In response to widespread concern over the problems posed by cases of mistaken identification, the Court of Appeal in Turnbull laid down important guidelines for judges in trials that involved disputed identification

evidence. 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."

[8] 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.

[9] 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).

[10] I pause to observe in this context that 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.

Care Warning

[11] 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. In R v Makanjuola (1995) 1 WLR 1348 ("Makanjuola"), the circumstances in which it may be appropriate for a judge to a 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 it 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."

[12] 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 and accordingly I have decided to exercise caution and to look for some supporting material before acting on the evidence of either even at this stage. 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 by that unlawful group.

[13] 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. 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.

Affray

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

> "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."

[15] 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."

[16] 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."

[17] 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."

[18] 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."

[19] 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)

[20] 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.

Mens rea of murder

[21] 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 blamable 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. In *DPP v Smith* [1961] AC 290 the House of Lords expressed disapproval of paraphrases which had previously been common currency in directing juries and returned to the ordinary and natural meaning, regarding it as undesirable to attempt any further

> definition. That direction was adopted by the House of Lords in *R v Hyam* [1975] AC 55 and again in *R v Cunningham* [1982] AC 566; and see also *R v Janjua and Choudury* [1999] 1 Cr App R 91 on the significance of the omission from a direction of the word 'really'."

[22] The prosecution case against Davison has been put in the alternative. First that he was a principal actor in inflicting the stab wound in Cromac Square from which the deceased died based on the evidence of witness C. Alternatively, if this was not sufficiently established, that as a member of a group of men armed with a stick and bottles bent on a joint enterprise to inflict really serious bodily harm on the deceased he was an accessory to the person who was the principle actor in stabbing the deceased.

[23] 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."

[24] In the present instance, to convict any member of the group in Market Street who were bearing bottles and a stick, provided I believe that to be the case, 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. He alleges they were Fitzpatrick and McCormick. He contends he was struck by Fitzpatrick with a stick or sewer rod. Brendan Devine asserts 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 Crown would have to prove that some person in that group inflicted injuries which caused the death 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 can be inferred.

[25] On the basis of the contentions of fact set out in paragraph 21 I am satisfied that it is not inconceivable that I could draw an inference that the object of the joint enterprise of those men in Market Street, who included Davison, was at least to inflict grievous bodily harm upon Devine and McCartney.

[26] A separate question however arises in this case in light of the fact that the deceased died as a result of a stab wound and that Devine was also stabbed. Whilst there may be evidence that Davison as an alleged accessory to the death of Mr McCartney contemplated the intentional infliction of grievous bodily harm with a stick or a bottle, is there evidence that he knew whoever committed this murder possessed and might use a bladed weapon or was this unknown and unforeseen by him? Was the bladed weapon fundamentally different in nature from the weapon which Davison contemplated might be used?

[27] 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.

[28] 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".

[29] 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".

[30] 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."

[31] 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.

[32] 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."

[33] At this stage I must consider whether I am convinced that there are no circumstances in which I could properly conclude that the stabbing of Mr McCartney did not amount to a fundamentally different act from what had been contemplated by a person such as Davison should I determine that he was a member of the group bearing a stick and bottles in Market Street. Is there evidence that what was done by the principal is within the scope of the joint enterprise contemplated by the accessory (See R v Stewart (1995) 3 All ER 159)? When applying that test, the submission made by the author of Blackstone's Criminal Practice 2008 at paragraph A5.9 is the correct approach. The author states:

> "… 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)."

Conclusions

[34] Since as a judge sitting alone, I will ultimately have to determine the outcome of this case both on fact and law, it is inappropriate at this stage that I should go into detail particularly on issues of credibility. I am satisfied that the approach to be adopted in non-jury cases is for the judge to give only a brief summary of reasons where he is refusing an application.

[35] Dealing with the counts of affray in Count 2 and of assault in Count 3, I have asked myself whether I am satisfied that there are no circumstances in which I could properly convict. I have come to the conclusion that the evidence

is not so weak or so discredited that it could not conceivably support a guilty verdict and the identification evidence not so poor and unsupported that I could not conceivably convict on the strength of it.

[36] In brief my reasons are as follows: First I am satisfied that there is evidence before me of the presence of a number of men (variously described between 5 and 10) in Market Street armed with bottles and a stick (according to Mr Gowdy in his evidence before me albeit he varied from this somewhat in earlier versions) bent on pursuing Mr McCartney and Mr Devine. There is evidence two of them confronted Gowdy, one struck Gowdy with a stick and Mr Devine was later stabbed. The background to their presence in Market Street was a violent and rancorous situation in Mageniss's bar and the street outside shortly before. This evidence provides circumstances where I could conceivably properly conclude that there was unlawful fighting and an affray within the terms of the definitions I have set out above. That evidence is not so weak or discredited that it could not conceivably support a finding of affray as contained in the indictment at count 2.

[37] I am not satisfied that the evidence of Mr Gowdy is so weak and discredited or his identification of Joseph Fitzpatrick, as the man who struck him on the face with a stick, so poor and unsupported that it could not conceivably support a guilty verdict against him on count 3. In so concluding I am conscious of the need to recall the principles in Makanjoula and of the frailties and inconsistencies in Mr Gowdy's evidence which have been drawn to my attention by all counsel. I have as in all the other identification issues applied the test in Turnbull's case. This includes the length of time he alleges he was confronted by Fitzpatrick, how close he was to him, the nature of the lighting in Market Street according to Constable Legge and Alan Michlethwaite, the lack of any impediment to his view, his claim to have seen the accused before on a number of occasions, the assertion that he was hit by Fitzpatrick and whether this provided a special reason for remembering him, the lapse until he identified him to the police and the discrepancies in his accounts of the incident. I emphasise in this instance, as in all the other matters with which I will now deal, that I am not at this stage asking myself "Do I have a reasonable doubt?". Whilst all the issues so cogently argued by counsel will have to be revisited by me when I come to determine whether I do have a reasonable doubt, at this stage I must only ask myself is the evidence so weak or so discredited or the identification so poor and unsupported that it could not conceivably support a guilty verdict. I am not convinced that Gowdy's identification of Davison and McCormick, against whom there is other evidence of presence in Market Street does not constitute material from which I could not conceivably conclude there was supporting material for his identification of Fitzpatrick.

[38] So far as Count 2 is concerned, I again do not consider that the evidence of Mr Gowdy, who identifies Fitzpatrick as one of a number of men who

entered Market Street armed with a stick and bottles, to be so discredited or his identification so poor and unsupported that I could not conceivably convict Fitzpatrick of the offence of affray for the same reasons as I have set to in paragraph [35] above.

[39] I add that at this point I do not accept the submissions of Mr Lyttle QC on behalf of Fitzpatrick that the proceedings against Fitzpatrick should be stayed as an abuse of process (see Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 AC 42), that he has been prevented from properly challenging Mr Gowdy's evidence or that I should exercise my discretion not to admit his evidence in accordance with Article 76 of PACE (NI) Order 1989 ("article 76"). Whilst his exchanges with the IRA are clearly matters which must be taken into account in relation to his credibility and the reliance I can ultimately place on his evidence, the fact that these meetings have occurred per se is not sufficient to persuade me at this stage that his identification or other evidence is so weak or discredited that it could not conceivably support a finding of guilt or that they have fatally flawed the fairness of his trial. Counsel on behalf of all of the accused have been afforded a full opportunity to cross examine him and the police at length on the nature and extent of these meetings and the manner in which they may have influenced his evidence. His evidence was that he could not remember the full details of what had been discussed with the IRA although he would have told the court if he could. I find no basis for argument that the accused has been prejudiced in the preparation or conduct of his defence.

[40] If visits by paramilitary organisations to potential witnesses were to be regarded as so tainting future evidence from such witnesses that their evidence was to be unacceptable to the courts as a matter of course it would provide a valuable weapon to such groups against the rule of law enabling them to effectively sideline witnesses. Each case must be determined on its own facts and whilst there may be circumstances where such an event might impugn the fairness of a trial I do not believe that to be so in this instance. Accordingly I find no breach of the article 6 rights to a fair trial of Fitzpatrick or the other accused. Finally I am not persuaded that I should exercise my discretion to exclude Mr Gowdy's evidence under article 76 on the grounds of unreliability.

[41] In relation to McCormick on count 2, I am similarly not satisfied at this stage that the evidence of Gowdy (who claimed to have seen him previously in the area) placing him as one of the men at the front of the group who entered Market Street with bottles and a stick and who confronted him is so discredited or the identification so poor and unsupported as to render it inconceivable that it could support a guilty verdict. Once again applying the Turnbull criteria, there is evidence he had a similar opportunity to view this accused as he had of Fitzpatrick. He picked him out of an identification parade on 1 June 2005. Supporting material is conceivably found in the presence of McCormick's blood at the top end of Market Street, his admission he may have been in Market

Street and his identification in Market Street by Devine. I refuse the application on count 2 in relation to McCormick.

[42] As in the case of Gowdy I am conscious of the inconsistencies and frailties of Mr Devine as pointed out by all counsel and of the need to be aware of the Makanjoula principles. However at this stage I am not satisfied that the evidence of Brendan Devine who identifies McCormick (and has picked him out of an identification parade) as being in Market Street at this time and at least close to Devine when he was stabbed, is so discredited or the identification so poor and unsupported that it could not conceivably support a conviction of him being part of the group in Market Street who were committing an affray. I have applied the Turnbull criteria including how long he observed, the distance, the light, the absence of impediment, his identification of him at an identification parade, the reason for observing him in light of Devines's belief he had stabbed him, the gap until he identified him to police, and the uncertainties in his identification drawn to my attention by Ms McDermott QC.

[43] Support for the identification is conceivably found in the case of McCormick in that the accused has admitted he may have been in Market Street, the evidence of his blood on a wall in that street and the identification of him by Gowdy. I therefore refuse the application on count 2 in relation to McCormick

[44] So far as Terence Malachy Davison is concerned, on count 2 of affray, I am satisfied that despite the frailties in the evidence of Mr Gowdy and Mr Devine pointed out by Mr Pownall on his behalf there are circumstances in which I could properly convict on this count. The evidence against him of affray is not so weak or discredited and the identification evidence is not so poor or unsupported that it could not conceivably support a guilty verdict.

[45] He has been identified by Mr Gowdy as being in Market Street with the group of men armed with bottles and a stick. The witness purports to have known him for some years and depicts him in this instance in a somewhat exculpatory role. As with the other identifications by Gowdy I have applied the Turnbull criteria. His opportunity for observation was not dissimilar to that of Fitzpatrick and McCormick albeit he may have paid less attention to Davison than to the other two. Supporting evidence of his presence in Market Street may conceivably be found in the matters set out in the ensuing next two paragraphs of this judgment.

[46] The accused has also has been identified by Mr Devine as attacking Mr McCartney in Market Street. Whilst there is self evidently conflict between elements of his evidence and that of Witness C, at this stage of the proceedings I must observe that Devine correctly identified Davison as the man who had engaged with the deceased in the bar a short time before the events in Market Street and Cromac Square (this is supported by an admission by Davison of his

exchanges with the deceased) and he picked him out of an identification parade on 1 June 2005. Shortly after the incident in the bar he claims to have seen the same man in Market Street attacking the deceased albeit the location of where he describes this attack may be in direct conflict with witness C. Moreover the nature of the attack – gouging - he describes is a matter to be looked at carefully in light of the evidence of Dr Bentley. I have applied the criteria in Turnbull to which I have already adverted. I am not satisfied that the identification of Davison by Mr Devine in Market Street is so poor and unsupported and the evidence so discredited or weak that I could not properly take it into account when considering whether or not the accused was part of the group of men identified by Mr Gowdy as taking part in the affray.

[47] In this context, I have considered the evidence of witness C. Once again I am conscious of the potential weaknesses in her evidence drawn to my attention by Mr Pownall which included his assertion that she is clearly mistaken in such material matters as the length of hair, the clothing and the actions which she alleges Mr Davison performed including kicking Mr McCartney on the face. Counsel contends that she initially described punching as opposed to swiping by him and points to the absence of blood in the area where she describes the event having occurred etc. These are all matters which I will revisit when I come to decide if I have a reasonable doubt about her evidence. At this stage however, the fact remains that it is accepted by the prosecution and the defence that she is an honest and independent witness. It is also common case that she had a close unimpeded view of the alleged attacker. She picked out Mr Davison some months later from an identification parade not having had any knowledge of him prior to the 80 seconds or thereabouts when she alleges she observed him from a distance of only a few feet.

[48] I have not only looked at Turnbull's case, but also a number of other authorities which I drew to the attention of counsel including R v Bolton (unreported KERC2890), R v Duffy (unreported (1997) 7 BNIL 40) and R v Hagans (2004) NICA 9. I do not consider it appropriate at this stage that I should go into any further detail in issues of credibility in respect of witness C other than to say that her identification of Davison, which gathers some support from the identifications of Gowdy and Devine, is not so poor and unsupported or her evidence so discredited or weak that I cannot take it into account when considering whether or not one of the men she saw running from Market Street in pursuit of Mr Devine and Mr McCartney was the accused Davison. The cumulative effect of the three identifications therefore are sufficient for me to conclude that I am not convinced there are no circumstances in which I could not properly convict the accused on count 2. I refuse the application by Mr Pownall so far as Count 2 is concerned.

[49] That leaves outstanding Count 1. I have come to the conclusion as the evidence stands, the count of murder against Davison is not so weak or discredited and the relevant identifications are not so poor and unsupported

that it could not conceivably support a guilty verdict. I repeat that I am not considering at this stage the concept of the reasonable doubt and it is inappropriate that I should go into detail on issues of credibility as to my reasons for so holding. A brief summary for refusing this application is as follows.

[50] First, the evidence of witness C includes a description of the assailant making swiping movements of the arm together with a description of the position of his hand which according to Dr Bentley, would be consistent with a stabbing movement. It is the evidence of witness C that after this there was blood over the shirt of the deceased and that the deceased had fallen to the ground albeit no blood may have been found at that area. It is clear that at some stage the deceased was stabbed once with a knife. I am satisfied that this description of what might be described as a most unusual set of movements from a person who was clearly given to very violent actions if C is to be believed, taken together with the identification of Davison by C is not so poor or unsupported or the evidence so weak or discredited that it could not conceivably support a guilty verdict against Davison as a principal with the intent to at least cause grievous bodily harm by stabbing Mr McCartney.

[51] Turning to the alternative path to a conviction for murder relied on by the prosecution there is evidence before me that Davison was a member of a group of men at least one of whom was armed with a knife, who were observed to have a stick and bottles pursuing Mr Devine and Mr McCartney along Market Street. Accordingly even if the Davison was not the person who was wielding the knife, there is evidence before me that he was part of a joint enterprise involving men armed with bottles and a stick some of whom struck Gowdy and stabbed Devine. At this stage the submission by the prosecution that an attack involving the use of a bottle (in the knowledge that a broken bottle had been used earlier to attack Devine in the bar) would not constitute an act of a fundamentally different nature from an attack using a bladed instrument such as a knife is not such a weak or discredited point that it could not conceivably support a verdict of guilty of murder in the circumstances.

[52] In all the circumstances therefore I refuse the application of all the defendants at this stage.