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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MARTIN BRIAN JAMES BERNARD MAUGHAN

Before: Kerr LCJ, Nicholson LJ and Campbell LJ

NICHOLSON LJ

Introduction

[1] Martin Brian James Bernard Maughan was convicted at the Crown Court sitting at Craigavon on three counts. On the first count which charged him with attempted murder contrary to Article 3 (1) of the Criminal Attempts and Conspiracy (NI) Order 1983 and Common Law the jury convicted him by a majority verdict of 10 to 2. On the second count which charged him with causing grievous bodily harm contrary to Section 18 of the Offences Against the Persons Act 1861 the jury convicted him unanimously. On the third count he was convicted of possession of a firearm with intent to endanger life contrary to Article 17 of the Firearms (NI) Order 1981 by a majority verdict of 10 to 2. The presiding Judge, Coghlin J, sentenced him to 16 years' imprisonment on count 1 and 14 years' imprisonment concurrently on count 3. He was sentenced on 23 June 2003. No sentence was imposed on the second count. It was left on the books not to be proceeded with without the leave of the Court or the Court of Appeal.

Application for Leave to Appeal

[2] He applied for leave to appeal to the Court of Appeal on five grounds. He was represented on the application, as at the trial, by Mr Gallagher QC and Mr Magee SC. Mr Creaney QC and Mr Fowler appeared for the Crown. The Court is indebted to both sets of counsel for their helpful and constructive

submissions in writing and orally. Gillen J, as the single judge, refused leave to appeal against conviction. Counsel for the applicant applied at the outset of the hearing before this Court to add a sixth ground of appeal that the judge misdirected the jury as to the significance of the evidence and as to the law.

The First Ground

[3] At the close of the Crown case Mr Gallagher QC on behalf of the applicant submitted to the trial judge that he should withdraw the case from the jury on the basis that the defendant had no case to answer. There is no dispute as to the principles to be applied and no criticism has been made of the judge in respect of his statement of those principles in the course of his ruling which are so well known that they scarcely need to be re-stated by this Court.

[4] The basic principle is adequately set out in Archbold: Criminal Pleading, Evidence and Practice 2004 at 4-293 that a submission of no case should be allowed when there is no evidence upon which, if the evidence adduced were accepted, a reasonable jury properly directed could convict. *R v Galbraith* 73 Cr App R 124 is cited in support of this principle. Guidance is given as to the proper approach by Lord Lane LCJ at page 127:-

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case.
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> (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.
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> (a) Where the judge concludes that the prosecution 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.
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> (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the 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."

The Lord Chief Justice then observed that border-line cases could be left to the discretion of the judge. At 4-295 reference is made to observations of Turner J in R v Shippey (1998) Crim LR 767. He stated that the judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness. He went on to say that he did not interpret *Galbraith* as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses although those matters may play a subordinate role. The judge was referred to these passages by Mr Gallagher QC for the applicant. Mr Creaney QC for the Crown referred the judge to Blackstone's Criminal Practice. The relevant passages are to be found at D14.26 and 14.27 of the 2004 edition. After citing the same passage from *Galbraith* the learned authors of Blackstone go on to say at D14.27:-

> "It is clear from Lord Lane's judgment that it is no longer appropriate to argue on a submission of no case that it would be unsafe for the jury to convict, if only because that tempts the judge to impose his own views of the witness's veracity … But it is submitted that the second limb of the *Galbraith* test still leaves a residual role for the judge as assessor of the reliability of the evidence. If that is so, the judge is not obliged to accept everything a prosecution witness has said, however implausible, but may at least ask whether it is too inherently weak or vague for any sensible person to rely on it. In other words, he should give the witness's evidence the greatest weight that any reasonable jury could give to it but need not pretend to believe arrant nonsense. Thus, if the witnesses undermines his own testimony by conceding that he is uncertain about vital points, or if what he says is manifestly contrary to reason, the judge may be entitled to hold that no reasonable jury properly directed could rely on the witness's evidence and therefore (in the absence of any other evidence), there is no case to answer."

They too referred to Turner J's judgment in *Shippey* and advanced the following propositions:

(a) if there is no evidence to prove an essential element of the offence a submission must obviously succeed,

(b) if there is some evidence which – taken at face value – establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury, properly directed, could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, which are considered in the following paragraph).

(c) the question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as *Shippey*) where the inconsistencies (whether in the witness's evidence viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge should withdraw the case from the jury.

At D14.28 they deal with cases involving identification and state:-

> "The correct approach to a submission of `no case to answer' in prosecutions turning on identification evidence was laid down by the Court of Appeal in *R v Turnbull* [1977] QB 224."

Turnbull was discussed at greater length by the authors at sections F18.2 and F18.26. At D14.28 they say:-

> "As one of several safeguard against erroneous convictions based on witnesses mistakenly identifying the accused the Court of Appeal stated that if the quality of the identification evidence on which the prosecution case depends is poor and there is no other evidence to support it, then the judge should direct the jury to acquit."

The judge in his ruling rightly, in our opinion, stated that there was no distinction of any consequence between Blackstone and Archbold on the principles to be applied and the issues to be taken into account in cases of

identification and cited the passage from Lord Lane's judgment in *Galbraith* which we have set out above. Thus there is no basis on which any one could criticise the approach of the judge to the principles and issues which were involved.

[5] He rightly drew a distinction between evidence of identification on the one hand, where issues such as the ability of the identifier to make a proper identification in the prevailing circumstances arise and on the other hand where a malicious claim to identify is alleged to have been made, as was claimed on behalf of the applicant. In the former the credibility of the identifier may not be in issue. In the latter inevitably it is in issue.

[6] Detailed criticisms of the judge's approach were made and we deal with them below:

> 1. "In considering the defence submission of "no case to answer" the learned trial judge erred in confining his assessment to the injured party's opportunity to identify/recognise the defendant" and failed also to take account of six matters set out at (iii)(a) to (f) of the Notice of Appeal.
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> It was contended that the judge failed to take adequate account of the injured party's extreme state of drunkenness at the material time. There was plain evidence that he drank heavily on the Sunday night and drank heavily in the Oak Bar on the Monday morning before moving to the Colin Mill Lodge public house where he drank heavily for the rest of the day, apart from a short respite in the early part of the evening while he had something to eat at a café round the corner from the public house. According to his direct evidence he was away from the public house for 15 to 20 minutes (p 30 of the transcript). In cross-examination he said that he was not drinking constantly through the day. He did have a break, going out of the public house to a chip shop just round the corner for a fish supper which he ate on the street. It took him about 5, 10 minutes (pp 67, 68 of the transcript). He said that he was drinking in the public house on the Sunday evening, possibly from 6.30pm to closing time and was intoxicated when he left (p 65). He said that he had four pints in the Oak Bar on Monday morning "because I needed a cure" or "because I wanted a cure" (p 66) starting at 10.00am, and then went to the Colin Mill Lodge Bar where he remained drinking apart from the period when he had his fish supper, until he left at about 11.45pm (pp 68, 69). He agreed that he could have had 20 pints of beer on the Monday and was intoxicated, but was able to walk and make a telephone call to his son as he was leaving the bar (p 91). He said that he made a call to his son to collect him and then, as he started to walk to the taxi-rank, told him "don't collect me, I will get a taxi" (p 92). He said that he then saw a car pull up beside

him and that the driver, whom he claimed to identify as the applicant, shot him (pp 92-100).

We have read the whole transcript of the injured party's evidence, of the evidence of Michael Mongan, Michael Joseph Mongan and Martin Joseph Mongan Junior and the preliminary inquiry statements of Colin Dickson, a part-time barman at Colin Mill Lodge, Mark Hughes, the assistant manager of the public house, Patrick James Maughan who was in the public house during the course of 17 June, Terence Patrick Maughan who was in the public house that evening, Bernadette Maughan who was also there, Martin Gerard Maughan who left before the shooting incident, Patrick Joseph Cawley who was with Mr Mongan on Sunday 16 June and Monday 17 June but left the public house before the shooting and Brian Gerard Mongan who was outside the public house at relevant times. We have looked at the preliminary inquiry statements only in so far as they assist the submissions made on behalf of the applicant. We are confident that if the evidence of these witnesses had assisted the applicant's case beyond what is contained in their statements of evidence, transcripts of their evidence would have been sought and obtained and placed before this Court.

The judge, in the course of his ruling (p 197) referred to "the high alcohol" but said that this evidence on its own or combined with other points did not seem to him to be sufficiently poor to apply the principles set out in *Turnbull* because, whether right or wrong, Mr Martin Joseph Mongan Senior, the injured party, purported to recognise a man whom he had known, on his estimate, for 20 years. The judge stated that there were alternative estimates, but all of them involved knowing the applicant for a number of years. The two men were also known to each other as part of a group of people generally known as travellers. They were also known to each other from a very close physical proximity because it appeared to be common case that within a year and a half there was a physical confrontation between the two of them as a result of which it seemed likely that the injured party, Mr Mongan, delivered a beating to the accused. So there was, in his view, a strong recognition aspect that removed the case from the category of being a poor identification case (p 197). In our opinion there can be no valid criticism of the judge on these aspects of the case, based on the evidence.

2. <u>"His clear motive to falsely accuse the defendant"</u>

There is no doubt that there was bad blood between Mr Mongan Senior and the applicant. According to the former, in earlier years they had been very good friends. But then they ceased to be on speaking terms. There was an incident when Mr Mongan was living in

Colinglen Park. The applicant allegedly made threatening phone calls to his house, saying: "I'm going to burn you out of it". Mr Mongan phoned the police at 3.30am. The applicant and his brother John then came at about 5.00am the same morning. The applicant and his brother were beaten up by him, his son and his brother-in-law (pp 40-43). In cross-examination he agreed that there had been bad feeling between him and the applicant for about three to four years and accepted that about a year before the shooting he had given the applicant a bad beating. He was told that the applicant had to be admitted to hospital, that he had a fractured bone in his neck. It was put to him that, because of the bad blood between him and the applicant and their families, he took the opportunity to allege that the attacker was the applicant when, in fact, he was not. He replied: "That is not correct, I seen that man shoot me." (p 60). In his ruling the judge said: "The issue then arises as to whether or not this man (Mr Mongan) is maliciously lying about identifying Mr Maughan. That, in my view, simply is a matter really for the jury to determine since it is essentially a question of credibility unless, in accordance with the *Galbraith* approach, it is so tenuous and so inherently weak or irrational that no judge could properly leave it to the jury and no conviction based on such evidence could properly be sustained." He then cited the relevant passage from *Galbraith* which is set out above. We entirely agree with the judge's reasoning on this issue.

3(i) "His knowledge prior to making his police statement that the defendant was a suspect having been implicated by the injured party's son and arrested";

(ii) "his knowledge that the defendant had to be released after his initial arrest in the absence of a statement from the injured party implicating the defendant";

(iii) "the fact that the injured party had delayed for a number of days after regaining consciousness before implicating the defendant";

(iv) "the fact that the injured party had deliberately lied to the police regarding the extent of his drinking prior to the attack upon him".

Mr Mongan was cross-examined about the fact that, although he was shot on 17 June, he did not make a statement to the police that the applicant had shot him until 2 July. He replied that he was unconscious for two weeks after the shooting. He was coming in and out of consciousness. He told some of the family that the applicant shot him. He was not capable of thinking clearly or of having a conversation. His son, Martin, told him in the Craigavon Hospital or in the Royal Victoria Hospital that he got a phone call from the

applicant, saying: "Don't mess with Cally." He told Martin in hospital that the applicant had shot him, before he made his statement to the police. He learnt that the police had arrested the applicant but had to release him because he, Mr Mongan, had not made a statement to the police (until 2 July). It was suggested to him that he deliberately lied to the police when he made his statement of 2 July in order to minimise the extent of his drinking on 17 June. He said that he had confused his account by describing events which had in fact occurred on the evening of Sunday 16 June, when making his first statement to the police. He was heavily sedated. He corrected this error in a second statement made in October.

Mr Colin Russell, the surgeon who was responsible for the treatment of Mr Mongan after he was shot, gave evidence of the life threatening injuries which Mr Mongan sustained. In the first 10/14 days while he was in the intensive care unit in Craigavon Hospital (to which he had been transferred from the Royal Victoria Hospital) he would have been initially fully anaesthetized and thereafter heavily sedated until the day or two before he was re-transferred to the Royal Victoria Hospital on 2 July. He would have had an endotracheal tube which when inflated meant that he could not have spoken. Depending upon his level of consciousness he may have been able to write messages. Other evidence indicated that he could read with difficulty but not write.

Although the judge did not deal expressly with the four points listed above in his ruling, they were made to him and, of course, he heard the evidence on which they were based. We are satisfied that he took them into account as he referred to them in his summing-up. We ourselves have considered them and regard them as matters for the jury to consider. The first three points are significantly weakened by the evidence of the surgeon and the fourth point goes to the credibility of Mr Mongan which was properly within the province of the jury.

4. It was further contended that the identification was carried out in darkness but, as appears from the summing-up of the judge, there was a significant conflict of evidence on this point (see p 27 of his charge to the jury) and this was plainly a matter for them to resolve.

We have considered all the submissions so ably made by Mr Gallagher QC and are satisfied that this case was properly left to the jury.

The Second Ground

[7] "The jury ought to have been advised or directed not to draw any adverse inference against the applicant in respect of his failure to give

evidence as there was a serious risk that the jury would not appreciate the reason for his decision not to testify and may well have concluded that he was guilty if he was not prepared to deny the offences in Court".

On perusal of the cross-examination of Mr Mongan Senior it is apparent that the questions were framed in such a way that there would be no obligation to call the applicant to give evidence and, if he did not testify, there could be no criticism by way of comment that he had failed to give evidence other than in accordance with the legislation governing failure of an accused to give evidence. The bad characters of witnesses for the Crown were exposed and, of course, if the applicant had given evidence, Crown counsel would have been entitled to seek the leave of the judge to cross-examine about his bad character. If he had intended to give evidence, cross-examination as to the bad character of Crown witnesses could have been omitted, or his own criminal record, bad as it was, could have been exposed to the jury because there was no conviction for any crime of violence.

If the judge had invited the jury to consider that the applicant might not have given evidence because he had criminal convictions, the applicant would have had a good ground of appeal. As it was, the judge made plain that he was "quite entitled not to give evidence" and expressly told the jury that they should not find him guilty only or mainly because he did not give evidence. The manner in which the judge dealt with this issue is to be found at pp 33-35 of his summing-up and in our view was very fair to the applicant.

This ground of appeal was considered by the Court of Appeal in The Queen v Anthony Martin Hagans (unreported: 05.03.04). At paragraphs 57 and 58 of the judgment the Lord Chief Justice stated:-

> **"[57]** A similar argument to that advanced by Mr Gallagher for the applicant in this case was considered by the Court of Appeal in England in *R v Cowan & others* [1996] 1 Cr.App.R. 2. In that case in the course of cross-examining the victim, the appellant's counsel referred to his previous convictions. Before he began his charge to the jury, the judge was urged not to direct them as to their right to draw inferences from the appellant's silence because that silence was necessary to prevent his previous record being put to him. The judge rejected that submission. The Court of Appeal considered that he was right to do so. We agree with this approach.
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> **[58]** It could not be right that every defendant who has elected to challenge a witness as to their criminal convictions could avoid the effect of article 4 of the

> 1988 Order. There may be cases where it would be appropriate for the judge, on application by the defence, to direct the jury not to draw an inference. It would be imprudent to attempt to describe the type of case where such a course would be suitable, save to say that it would clearly be exceptional. We are content that such a direction was not required in the present case, nor, indeed, was one sought. We do not consider that there is any reason to conclude that the jury's verdict, if it was influenced by the failure of the applicant to give evidence, was unsafe on that account."

[8] Defence counsel did not requisition the judge on his charge to the jury. But there was one error in it. The judge told the jury that Mr Mongan informed the police that his assailant was wearing a beige baseball cap. The applicant, when arrested, was wearing a beige baseball cap. It is correct that Mr Mongan did say to the police that his assailant was wearing a beige baseball cap but his written statement containing that information was not put before the jury. Mr Mongan gave evidence to the jury that his assailant was wearing a beige baseball cap, and in the course of police interviews with the applicant, the details of Mr Mongan's statement to the police were put to the applicant and the portion of it in which he alleged that the applicant was wearing a beige baseball cap was read out or put to the applicant, without objection, so that the jury would have been aware that Mr Mongan had initially described the gunman as wearing a beige baseball cap. We consider that the judge made the error because much of Mr Mongan's statement to the police was put to him in cross-examination; apart from the reference to wearing the beige baseball cap. In all the circumstances we do not consider that this slip makes the convictions unsafe. Mr Mongan's evidence that his assailant was wearing a beige baseball cap was relied upon by the defence as showing that he had a limited view of his assailant's face.

The Third Ground

[9] "The jury's verdict was against the weight of the evidence which almost conclusively established that the defendant could not have committed the offences alleged".

Apart from the issue of identification with which we have dealt, this appears to rest on the evidence of Mrs Faloon which was read to the jury with the consent of the defence and is to be found in the preliminary inquiry papers at pp 28 to 31. She was the proprietor of Oakfield Guest House, Lower Ballinderry, and stated that there was one main entrance to the guest area at the front of the house although there was a fire exit through the disabled room. She described the arrival between 8.00 pm and 8.30 pm on

17 June of four persons, one of whom was the applicant. About an hour later it is highly likely that one of them left with the applicant and returned about 9.45 pm. About an hour later she heard a male voice in Room 4. Two of the persons were female; one was a male child and the other was the applicant. About midnight she locked the front doors but, she stated, "the door can be easily opened from the inside. It is locked with the turn of a knob". She did not hear any sounds of movement during the night but she indicated that the guesthouse had "my own side and a guest side" and also stated that "the property is double glazed and one would not hear noises from outside". Moreover she said that when the party left the next morning about 10.30 am she discovered a fault in the lock to the door to the disabled room which gives access to the fire-exit. She could not open the door. The lock did not work. She had to get a joiner to open it. Prior to the arrival of the four persons "it worked fine". In a second statement she stated that on arrival "the two girls paid me in cash at the door". The male (ie the applicant) and one of the females went into Room 2, the other female and the male child went into Room 4. At 10.45 pm she heard no sound from Room 2. The male voice was heard in Room 4. In interviews with the police the applicant said that with the door closed it would not be possible to tell whether a male voice was his or the boy's voice.

Independent evidence established that it would take ten to fifteen minutes to drive from Mrs Faloon's guesthouse to the scene of the crime. Undoubtedly, if the applicant was the gunman, he changed cars because the four persons arrived and left in a red Audi whereas the evidence was that Mr Mongan was shot by the driver of a red Renault.

All of this evidence was dealt with fairly and properly by the judge. We can find nothing in it which provides the applicant with an alibi. On the contrary it places him ten to fifteen minutes from the scene of the crime on the evening of 17 June.

In the course of interviews with the police the applicant referred to the fact that he stayed in a guesthouse on 17 June and, undoubtedly, this was Mrs Faloon's guesthouse. He was able to name it and he had given his solicitor a card from it, it would appear (interviews, p 7). He said that he paid in cash for staying in the guesthouse but he was not too sure how much he paid. The unchallenged evidence of Mrs Faloon was that the girls paid when they arrived. He told the police that he left the guesthouse that evening twice or maybe three times, but that he went to bed not later than 11.15 pm. At another stage of the interviews he said that he had owned a red Renault 19 but got the red Audi in its place.

We are satisfied that this ground of appeal must fail, having regard to the evidence.

[10] By agreement a statement of evidence of a lady who was the proprietor of a bed and breakfast establishment was put in as "fresh evidence". This had been in the possession of the applicant's solicitor and was known to the applicant but had not been disclosed to counsel for the applicant in this case and counsel indicated that, if he had been aware of it, the lady would have been called as a witness for the defence. On the night of 18 June it would appear that the applicant and the other three persons stayed at her establishment and left the next day without paying.

One of the females had signed the applicant in at Mrs Faloon's guesthouse under a false name for which he gave an explanation to the police. Counsel indicated that the lady at whose establishment the group had stayed on 18 June would have been called by the Defence because the same false name was given there and the jury might not have attached any significance to the giving of a false name on 17 June since the group might have hoped to leave without paying after staying at Mrs Faloon's guesthouse, if given the chance. But, as has been pointed out, Mrs Faloon's unchallenged evidence was that the girls paid in cash when they arrived on the evening of 17 June.

We are satisfied that if such evidence had been called, it would certainly not have assisted the applicant and could have harmed him, as inviting the comment that the prompt payment on 17 June was to set up an alibi, as contrasted with the behaviour at the next establishment where they stayed.

The Fourth Ground

[11] "The verdict of the jury on Count 2 was inconsistent with the verdict of the jury on Count 3 in that two members of the Jury were not satisfied beyond reasonable doubt that the defendant was in possession of the firearm at the relevant time".

This argument does not bear scrutiny. The solution is, we believe, to be found in the form of the indictment. On the charge of Attempted Murder two members of the jury were, it is apparent, not satisfied beyond reasonable doubt that the applicant intended to murder Mr Mongan. On the charge of possession of a firearm with intent to endanger life, the same two members of the jury must not have been satisfied beyond reasonable doubt that the applicant intended to endanger the life of Mr Mongan.

On the second count which charged the applicant with causing grievous bodily harm, contrary to Section 18 of the Offences Against the Person Act 1861 the jury unanimously convicted him. They were all sure that he caused

grievously bodily harm. It may be that they did not look at the particulars of the offence or it may be that the same two jurors drew a distinction between an intent to cause grievous bodily harm and an intent to endanger life. They would have been entitled to do so. There is no logical inconsistency between the verdicts.

The Fifth Ground

[12] "The manner in which the Crown conducted the swearing of the jury, standing by a large number of potential jurors for no ascertainable reason, was unfair and oppressive to the defendant and may have resulted in an unbalanced jury".

Eighteen members of jury panel were stood by. The Crown has the right to do so. No improper motive was suggested. No objection was taken at the time. There is no reason to believe that the applicant was prejudiced in any way or that the jury was unbalanced. The applicant had the right to challenge twelve jurors without cause.

[13] The sixth ground that the judge misdirected the jury as to the significance of the evidence and as to the law has been dealt with in the course of this judgment. Apart from the one slip we can find no fault in his summing-up.

[14] Accordingly, this application for leave to appeal against conviction on the three counts in the indictment is dismissed.