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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM BELFAST CROWN COURT

R

v

HUGH McCORMICK

and

JAMES McCORMICK

Gillen LJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] The applicants apply for leave to appeal against conviction. On 23 September 2015 at Belfast Crown Court a jury convicted the applicants of the attempted murder of Joseph Henry on 2 July 2011. Colton J sentenced the first applicant to a determinate custodial sentence of 15 years, comprising 7½ years in custody and 7½ years on licence and sentenced the second applicant to a determinate custodial sentence of 14½ years, comprising 7 years 3 months custody and 7 years 3 months licence. Ms McDermott QC and Ms Smith appear for the first applicant, Mr Mallon QC and Mr Fox for the second applicant and Ms McKay for the prosecution.

[2] On 29 July 2016, Deeny J, as Single Judge, refused the applicants leave to appeal against conviction and sentence.

[3] The issue at trial concerned the identification of the applicants as the perpetrators of an attack upon Joseph Henry. The evidence of Joseph Henry was

that on Saturday 2 July 2011 shortly after 9am he was at the front of his house at Eliza Street, Belfast. He was there confronted by two males whom he identified as the applicants. He had known both applicants most of his life. He saw that the first applicant, whom he called "Apple Goat", was wearing a red Berghaus jacket zipped up to the chest with a bar protruding from the jacket. The first applicant struck him on the top of the head with a crowbar and he was hit several times. The second applicant, whom Joseph Henry called "Jim Dim", was wearing a blue jacket, grey collar, grey down the side, light bleached jeans and white trainers. The second applicant was the father of his sister Sarah's four children, although they had been separated for 15 years. The applicants were asking about the whereabouts of Emmanuel Henry who was Joseph Henry's nephew. Joseph Henry described the slashing of the back of his neck with a knife by the first applicant and the cutting of the side of his neck and his leg by the second applicant. The applicants then went through the house and out the back door. Joseph Henry's account was that throughout this assault he remained conscious and on his feet. Present upstairs in the house at this time of the incident were Joseph Henry's mother, Dinah Henry, his sister Patricia Henry and his nephew Deaglan Henry, the son of his sister Roisin.

[4] The defence case was that Joseph Henry had made a false identification of the applicants as the perpetrators of the assault.

[5] The following events were relevant to the identification issue -

(i) On 2 July 2011, immediately after the incident, Patricia Henry was on the telephone to ambulance control for 7 minutes and reported that she had seen the two attackers walking down the street but she did not identify them by name.

(ii) A Police Service Command and Control entry at 9:37 am stated that Emmanuel Henry had opened the door and been stabbed in the throat.

(iii) Joseph Henry had been taken to the Royal Victoria Hospital by ambulance accompanied by his sister Sarah. He had spoken to the paramedics and at the hospital he was recorded as having completely normal consciousness. He did not mention the applicants' as being the assailants.

(iv) At 10:30 am a constable spoke to Dinah Henry and Patricia Henry at the house. They reported that they had been present in the house when the incident had occurred but had not witnessed the incident or who had carried it out. No information was given to the constable as to the identity of the assailants.

(v) At 10:49 am a constable spoke to Sarah Henry at the hospital and recorded her account that two persons had been involved and that a crowbar and something sharp had been used. The record stated that Joseph's son Deaglan [he was actually Joseph's nephew] and mother Dinah should be at

the scene, Deaglan had witnessed the attack and Dinah was upstairs at the time.

(vi) At 2pm a detective spoke to Henry family members at a neighbour's house. Dinah named the attackers as the applicants but would not answer how she knew that. Roisin stated that her son Deaglan had witnessed the incident but as he was traumatised she would not allow the detective to speak to him. However, Deaglan was present and on being asked by the detective if he had witnessed the stabbing and if the applicants had done it he stated yes.

(vii) At 4:31 pm the detective spoke to Ryan McMahon, a passer-by who had come to the assistance of Joseph Henry. He refused to make a written statement. He gave a description of the events he had observed that differed in some respects from that of Joseph Henry and a description of the assailants that was not an accurate description of the applicants.

(viii) At the hospital Sarah Henry stated to the detective that the assailants were two brothers connected to a stated address and gave their initials as J and H. Dinah Henry then arrived at the hospital and shouted at the detective to go and arrest the applicants.

(ix) On 3 July at 11:33 am the detective spoke to Dinah who stated that she had witnessed the incident and the applicants running off.

(x) At 2:30 pm that day the detective spoke to Roisin by telephone. She refused to allow her son Deaglan to be interviewed.

(xi) On 6 July Dinah Henry made a written statement that she had seen the two men walk along her hallway and into her kitchen and out the back door and she named them as the applicants, whom she had known for 30 years. In her evidence Dinah stated that Joseph Henry was in the kitchen before the applicants went in although the evidence of Joseph Henry was that he remained at the front of the house until the assailants had left.

(xii) On 11 July Patricia Henry was interviewed by a journalist in the presence of Roisin and Dinah. The notes of the interview recorded that Patricia had said that there was a knock on the door, that the attackers were hiding on either side of the door, that Joseph could not see them, that Joseph was stabbed numerous times as he lay on the ground and that her mother had seen the assailants standing over Joseph after having stabbed him. In her evidence Patricia denied having given this account to the journalist.

(xiii) Joseph Henry was in intensive care and sedated until 19 July. He was moved to ENT on 21 July and discharged on 27 July. On 28 July he reported to a constable that his attackers were the applicants. On 1 August 2011

Joseph Henry made a written statement naming the applicants as his attackers.

[6] Deaglan Henry was not interviewed by police or by the applicants' solicitors and was not a witness at the trial. At the date of trial he was 17 years old and receiving in-patient treatment at a mental health institution.

[7] The defence case that there was a false identification of the applicants by Joseph Henry and Dinah Henry was said to have its genesis in the purported identification of the applicants by Deaglan Henry. Thus the defence then contended that, by the absence of Deaglan, they were being denied the opportunity to challenge the source of the identification, namely Deaglan Henry.

Application to exclude evidence of identification of the assailants.

[8] At the trial the applicants applied under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 to exclude the evidence of Joseph Henry and Dinah Henry as to the identification of the applicants.

[8] Article 76 deals with the exclusion of unfair evidence and provides that:

> "76.—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[9] Colton J referred to the sequence of events outlined above in relation to the reports of the incident. He stated that in essence the application relied on an inability to make a proper challenge to the identification evidence and this was said to affect the fairness of the proceedings such that the identification evidence should be excluded. Colton J noted that, in general, proceedings may become unfair if one side is allowed to adduce relevant evidence which for one reason or another the other side cannot properly challenge or meet.

[10] Colton J considered first the evidence of Joseph Henry and found that his evidence was obviously relevant. However he did not accept that it could be said that Deaglan Henry was the genesis of Joseph Henry's identification. He stated that Joseph Henry was in the best position to identify his attackers and concluded that if the defence of false identification was correct any weaknesses in Joseph Henry's identification evidence could be challenged by cross-examination. The applicants had placed reliance on the delay by Joseph Henry in naming his attackers and in a

different description of the attackers provided by Ryan McMahon, both of which were stated to be matters that could be raised in cross-examination.

[11] Colton J rejected the contention that the applicants were unfairly hampered because they could not test the supposed identification by Deaglan Henry. He was not a prosecution witness and the cogency or quality of his evidence was not relevant to the evidence of Joseph Henry. Accordingly, it was concluded that there was no unfairness that could justify the exclusion of Joseph Henry's evidence as to the identity of the assailants.

[12] As to Dinah Henry, Colton J noted that there were matters arising from her reports of the incident that called into question her credibility. He expressed concern that she was present when Deaglan Henry purported to identify the applicants and stated that it would be very difficult in the circumstances for Counsel for the applicants to challenge Dinah's evidence without introducing the identification made by Deaglan. Colton J concluded that this connection between Deaglan and the evidence of Dinah would in turn have an adverse effect on the fairness of the proceedings. For that reason the evidence of Dinah Henry as to the identification of the applicants was excluded.

The evidence at the trial.

[13] Joseph Henry gave evidence identifying the applicants as the assailants. Dinah Henry gave evidence only as to the aftermath of the incident, her evidence as to the identification of the applicants having been excluded.

[14] The defence case was that there was a family conspiracy to advance a false identification of the applicants. To aid that case the defence decided that the evidence of Dinah Henry as to the identification of the assailants should be introduced by the defence. Accordingly, in cross-examination of Dinah, she was questioned about her identification of the applicants as having been present in her house at the time of the incident.

[15] The medical evidence outlined the extent of the injuries sustained by Joseph Henry. That medical evidence indicated that a CT scan of the head and brain showed no abnormality, despite the evidence of Joseph that he had been struck over the head with an iron bar. Further the medical evidence indicated no wound to the back of Joseph's neck, despite the evidence of Joseph that a knife had been drawn across the back of his neck.

[16] Joseph Henry's sisters gave evidence and were cross-examined about inconsistencies in their evidence.

The application to withdraw the case from the jury.

[17] At the conclusion of the case for the prosecution, Counsel for the applicants applied to the trial Judge for the case to be withdrawn from the jury. Reliance was placed on the absence of medical evidence to support Joseph Henry's evidence that he had been struck over the head with a crowbar and that a knife had been drawn across the back of his neck, that he had not named his assailants when being taken to or at the hospital, that the Police Service log contained the report that the stabbing occurred on the opening of the front door, being the account given to the journalist by Patricia Henry and that there was nothing to support Joseph Henry's evidence.

[18] Colton J drew attention to Dinah Henry's evidence to the effect that the applicants were in the house after the attack which, although not evidence relied on by the prosecution, was evidence before the jury.

[19] Colton J rejected the application to withdraw the case from the jury, stating that the matters raised on behalf of the applicants were essentially matters to be considered by the jury.

[20] The applicants did not give evidence.

[21] Ryan McMahon, the passer-by, could not be traced prior to the trial and the constable's record of his verbal statement to police was read to the jury. The evidence was not adduced by the prosecution but by the applicants as agreed hearsay. This record was at odds with the evidence of Joseph Henry as to the events that occurred during the incident and the description of the assailants. The record of his verbal statement to police stated that while there were two males only one was involved in the attack, a tyre iron was used with one blow to the neck and the further blows to the body, the injured party fell down, the clothing was described and differed from that described by Joseph Henry and the description of the assailants differed from an accurate description of the applicants.

[22] The jury convicted both applicants of attempted murder.

The grounds of appeal.

[23] The grounds of appeal are as follows:

(1) The verdict of the jury is unsafe for the following reasons:

(a) It is apparent from an analysis of the evidence that there is at least a real possibility that the injured party, whose evidence was the only evidence relied on by the Crown, did not see his assailants and entered into a conspiracy with members of his family, in particular his

mother, to concoct an account in which he falsely claimed to have recognised the applicants as his attackers.

(b) The learned trial Judge should have acceded to the defence application to exclude the evidence of identification of Joseph Henry under Article 76 of the Police and Criminal Evidence (NI) Order 1989.

(c) The learned trial Judge, being satisfied that it was proper to exclude under Article 76 the proposed identification evidence of the injured party's mother, was not justified on the evidence in drawing a distinction between the two witnesses and declining to exclude the identification evidence of the injured party.

(2) The learned trial judge should have acceded to the defence application made at the close of the prosecution case to direct a verdict of not guilty in respect of attempted murder for the following reasons:

(a) A jury properly directed could not properly convict on the evidence because:

(i) Access to the apparent genesis of the identification (the injured party's then 13 year old nephew) was refused to the prosecution and the defence.

(ii) There was no evidence to support the correctness of the injured party's identification.

(iii) The evidence which had been gathered pointed away from the correctness of the injury party's identification.

(iv) The evidence of the injured party's mother was not relied on by the Crown and was irreconcilable with other evidence and out of reason and common sense.

(3) The weight that the jury should properly have attached to the notes taken from Ryan McMahon, giving his description of the attack and the attackers, was significantly undermined by their being told by Crown Counsel, wrongly, in her closing, that this account was not evidence. This error, although the learned trial Judge sought in his charge to correct it, contributed to the unsafeness of the conviction as the injured party's purported recognition was entirely unsupported and contradicted by other evidence.

[24] The second applicant added the following to the grounds of appeal -

(a) The original and only suggested identification witness, Deaglan Henry, was not prepared to co-operate with police.

(b) The parent/guardian of Deaglan Henry was not prepared to accept service of a witness summons or permit of his being interviewed or being spoken to by the applicants' legal advisors.

(c) It was not until the date of trial, some 4 years and 3 months post the assault, that the investigating officer first became aware that Deaglan Henry had not in fact witnessed the assault, as previously claimed by him and other prosecution witnesses, to include Dinah Henry and Patricia Henry.

(d) The unavailability of an independent passer-by, Ryan McMahon, who had witnessed the assault and provided the police detailed descriptions of the two assailants, which did not support the purported identification by Joseph Henry of the applicants as the assailants.

The learned trial Judge, at the close of the prosecution case, failed, adequately, to take into account whether a fair trial was possible and whether there was extreme prejudice to the applicants in permitting the case to proceed with the unavailability of such witnesses, which could not be addressed properly in the trial process.

The application to receive evidence not adduced at the trial.

[25] By the time of the appeal Ryan McMahon had been traced. An application was made under section 25(1)(c) of the Criminal Appeal (Northern Ireland) Act 1980 for the Court to receive the evidence of Ryan McMahon. Section 25(1)(c) provides as follows:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—
>
> …
>
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

[26] D/Constable McKeown made notes of his conversation with Ryan McMahon on 2 July 2011. The notes read as follows:

"09:20 Mr McMahon was walking citywards on Cromac Street on the far side of the road from the Markets area. He is alerted by shouting coming from the front of a house on Eliza Street and sees three males at the front of this house. As he approaches the house he sees a man in long mid-thigh dark trench coat strike a man with an item he describes as a "tyre iron". This is a silver bar 2-3 feet long with a semi-circle hook at the end. He further describes the man with the "tyre iron" as early 40s, 6' to 6' 1" tall, heavy build, short brown hair going grey, unmasked. The man who is struck falls to the ground and is hit a further two times with the tyre iron whilst on the ground. The second man does not take part in the assault and is desc. as early 40s, stocky build, 5' 10"-5' 11", short brown hair wearing a dark track suit top unmasked. Mr McMahon shouts at the males as he approaches the house both males go through the IPs house to make good their escape. He hears the man who delivered the blows with the tyre iron say towards the IP words like "you know what this is about". Both attackers did not turn to face Mr McMahon at any time. He then gives first aid to the IP."

[27] By affidavit Mr McMahon confirms that the constable's notes are an accurate account of all that he witnessed on 2 July 2011 with one exception, namely that he

came upon the assault as he walked along Eliza Street on the left hand side as one approaches Cromac Street and he was not walking citywards on Cromac Street as the notes state.

[28] The prosecution oppose the receipt of the oral evidence of Ryan McMahon on the basis that it is not "fresh" evidence but rather a repetition of the evidence of Ryan McMahon admitted at the trial in the form of the notes of the constable recording Ryan McMahon's description of events.

[29] In R v Walsh [2007] NICA 4 at paragraph 25 this Court stated that the power to admit fresh evidence was fettered only by what was necessary or expedient in the interests of justice and the factors listed in section 25(2) are merely factors that are to be taken particularly into account. It is clear however that not only must the Court consider these factors but it must also address the question of what the interests of justice require in relation to possible fresh evidence.

[30] Assuming for present purposes that the oral evidence of Ryan McMahon qualifies for receipt as evidence under section 25(2), the first factor to which regard must be had in particular is whether the evidence appears to be capable of belief. The prosecution do not dispute that Ryan McMahon was a chance passer-by who was an independent witness and who gave an honest description of events to the best of his ability. Accordingly the evidence appears to be capable of belief.

[31] As to the third factor to which regard must be had in particular, namely whether the oral evidence would have been admissible in the trial, that was clearly the case.

[32] As to the fourth factor, namely a reasonable explanation for the failure to adduce the evidence at trial, efforts were made to locate Ryan McMahon in London but they did not prove successful. A London address had been obtained. A Witness Summons was issued by the Crown Court and sent to the London address by post. The appropriate procedure under the Judicature Act (NI) 1978 to secure the attendance of a witness out of the jurisdiction was not adopted. Section 47(4) provides that the Crown Court shall, in relation to the attendance of witnesses, have the like powers as the High Court. Section 67 (1) provides that a Judge of the High Court may, if satisfied that it is proper to compel the personal attendance of a witness not within the jurisdiction, order that a writ of subpoena shall issue commanding the witness, wherever he may be in the United Kingdom, to attend the proceedings. In the absence of an explanation for the failure to secure an appropriate writ of subpoena we have not been satisfied that there is a reasonable explanation for the failure to adduce the oral evidence of Ryan McMahon at the trial.

[33] As to the second factor, namely whether it appears to the Court that the evidence may afford any ground for allowing the appeal, it is proposed to consider the grounds of appeal.

The trial Judge's refusal to exclude the identification evidence of Joseph Henry.

[34] The first issue concerns Colton J's refusal to exclude the identification evidence of Joseph Henry. The defence was based on a Henry family conspiracy to make a false identification of the applicants based on the purported identification of the assailants by Deaglan Henry. Colton J had excluded the identification evidence of Dinah Henry on the basis that it would have been difficult to challenge her evidence without introducing the identification evidence of Deaglan Henry. The applicant's submission was that Colton J had failed to recognise similar difficulties that applied to the cross-examination of Joseph Henry. Thus it was the applicants contention that, if the jury were to hear the identification evidence of Joseph Henry, there was no alternative but to adduce the patently unreliable identification evidence of Dinah Henry.

[35] An additional matter relating to the identification evidence of Joseph Henry was that he, unlike Dinah Henry, had not been present when Deaglan Henry had identified the applicants to the detective as being the assailants. The applicants' submission was that Colton J failed to recognise that the same risk of contamination affecting the evidence of Joseph Henry could have occurred at a later date before Joseph Henry was released from hospital. Joseph Henry had been tendered as a witness on this issue and had denied any possible contamination by discussion with others about the identity of the assailants while he was in hospital.

[36] Joseph Henry as the victim of the assault purported to recognise his assailants. This was not an identification case but a recognition case. The defence was not one of mistaken identification but of false identification. There was no evidence of contamination of Joseph Henry's identification evidence in that other members of the Henry family had prompted Joseph Henry to make that identification. There were issues about delay in making the identification and the reliability of the identification when made and the consistency of the identification with other evidence, all of which were matters for cross-examination of Joseph Henry.

[37] Colton J acceded to the application to exclude the identification evidence of Dinah Henry and rejected the application to exclude the identification evidence of Joseph Henry. It is well settled that this Court should be slow to interfere with the exercise of a trial Judge's discretion under Article 76, as stated, in relation to evidence of a confession, by Kerr LCJ in R v McKeown [2006] NICA 42 and Coghlin LJ in R v Mawhinney [2012] NICA 27. The Court cited *Blackstone's Criminal Practice* and the 2017 edition at paragraph F18.33 states that the Court of Appeal will not interfere with the exercise of a trial judge's discretion to admit evidence under [Article 76] unless satisfied that the decision was perverse and that it follows that cases in which the discretion can be said to have been wrongly exercised are comparatively rare.

[38] Dinah Henry had been present at a purported identification of the applicants by Deaglan Henry, a concern that did not apply to Joseph Henry. The other concerns raised about Joseph's evidence could be raised in cross examination. The essential defence of false identification could be made. It was not necessary to introduce the purported identification by Deaglan in order to advance that defence, indeed it is apparent that the first applicant intended to make no reference to any identification by Deaglan Henry.

[39] Leaving aside for the moment the issue of the oral evidence of Ryan McMahon and looking at matters as they stood during the trial, there are no grounds for interfering with the trial Judge's decision not to exclude the identification evidence of Joseph Henry and in so doing drawing a distinction between Dinah Henry and Joseph Henry.

The trial Judge's refusal to withdraw the case from the jury.

[40] There is an issue concerning the refusal of Colton J to withdraw the case from the jury at the conclusion of the prosecution evidence.

[41] The approach to an application of no case to answer was set out in R v Galbraith:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge should stop the case. (2)The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence taken at its height is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made to stop the case.
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken about witnesses reliability or other matter 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."

[42] The applicants relied on the second limb of Galbraith. This requires an assessment of the reliability of the prosecution evidence. Reliability requires an assessment of the prosecution evidence as a whole, taking account of both the strengths and the weaknesses. As stated by Turner J in Shippey [1988] Crim LR 767

assessment of reliability does not mean "taking out the plums and leaving the duff behind". Where the prosecution evidence as a whole contains really significant inherent inconsistencies so that the evidence was self-contradictory and out of reason and all common sense, the trial Judge could properly conclude that it was inherently weak and tenuous within the meaning of the second limb of Galbraith.

[43] The applicants had relied on the absence of medical evidence in support of Joseph Henry's account involving the blow to the head with a crowbar and the drawing of a knife across the back of his neck, the delay by Joseph in naming his assailants, the entry in the control log and the report by Patricia Henry to the journalist that the incident had occurred on the opening of the front door of the house and the absence of any supporting evidence for Joseph purported recognition of the assailants. All of these matters were, as Colton J stated in rejecting the application, matters for the jury.

[44] A further issue concerned the identification evidence of Dinah Henry. Colton J had excluded Dinah's identification evidence under Article 76 of the 1989 Order. However, the applicants elected to introduce Dinah's identification evidence in advancing the defence case of a conspiracy among members of the Henry family to promote a false identification of the applicants as the assailants. The identification of the assailants by Dinah was then in evidence, although not relied on by the prosecution in the case against the applicants.

[45] The purported identification of the applicants by Deaglan Henry was also introduced by the second applicant. It seems that trial Counsel for the applicants were not of the same mind as to how to handle the position as to Deaglan.

[46] The introduction of the identification of the applicants by those other than Joseph Henry was a tactical decision on the part of the defence. In so doing the defence sought to advance their case. The first applicant did not seek to have the jury discharged when this happened. Had the introduction of that evidence raised a reasonable doubt in the minds of the jury as to the identification of the assailants then the applicants would have been acquitted and the tactical decision would have been judged a success. However, clearly, the jury were not so persuaded. The defence cannot then complain that the matters that were introduced to the jury did not achieve the purpose they hoped to achieve.

[47] A further issue concerned the absence of Deaglan Henry. His family had not permitted his engagement with the police or the prosecution or the defence. He was not a witness at the trial. The prosecution did not rely on Deaglan. His purported identification was introduced to the knowledge of the applicants that he would not be a witness and could not be challenged about his purported identification. His absence did not prevent the applicants making the case of a conspiracy by members of the Henry family to advance a false identification of the applicants as the assailants.

[48] The *Turnbull Guidelines* concern identification evidence (R v Turnbull [1977] QB 224). On an application for a direction in a case of disputed identification there may arise a combination of the issues that arise under Galbraith and under Turnbull. The *Guidelines* state –

> "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 identification 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."

[49] The trial Judge clearly concluded that the evidence was not inherently weak or tenuous within the meaning of the second limb of Galbraith. Again, leaving aside the issue of the oral evidence of Ryan McMahon and looking at matters as they stood during the trial, there are no grounds for interfering with the decision of the trial Judge to allow the case to proceed to the jury.

The evidence of Ryan McMahon.

[50] This brings us back to Ryan McMahon. The applicants seek the reception of his oral evidence on the basis that he is able to give evidence that contradicts that of Joseph Henry in all material respects, namely -

(i) the physical description of the attackers;

(ii) their clothing;

(iii) the mechanics and order of the assault;

(iv) that only one person attacked Joseph Henry; and

(v) that Joseph Henry fell to the ground after being struck.

[51] In considering whether it is necessary or expedient in the interests of justice to receive the oral evidence of Ryan McMahon the Court must have regard in particular to whether it appears to the Court that the evidence may afford any ground for allowing the appeal. The applicants rely on that evidence to challenge the identification evidence of Joseph Henry.

[52] This Court has not found it necessary or appropriate to hear the oral evidence of Ryan McMahon in considering the issue. The content of that evidence has been confirmed as contained in the notes. This Court does not consider that the

prosecution challenge to the reliability of that evidence by cross examination is a matter for this Court but rather would be a part of a consideration of all the evidence in a retrial, should that be the outcome ordered by this Court.

[53] At the heart of the defence case is the following scenario. A mistaken identification of the applicants was made by Deaglan Henry. For reasons related to his status as a vulnerable child, the family did not want Deaglan to be involved with the police or the court. Thus Deaglan has been beyond challenge, to the disadvantage of the applicants. This has also been seen by the Henry family as a disadvantage to the prosecution of the applicants. As a result, some members of the Henry family have conspired together to provide evidence as to the identification of the applicants that Deaglan has been unable to provide. Dinah did not see the assailants and at first did not identify the applicants as the assailants but after being present when Deaglan named the applicants she later provided a false identification. Joseph did not see the assailants and at first did not identify the applicants as the assailants but after visits by family members to the hospital he too later provided a false identification.

[54] The applicants emphasise the value of oral evidence as opposed to the disadvantages of hearsay evidence. In the absence of the witness there can be no challenge to that evidence and no assessment of the witness in person. However, in the present case the veracity of Ryan McMahon has not been an issue. The applicants and the prosecution agree that he gave an honest and independent account. The applicants seek to rely on his evidence. Any challenge would come from the prosecution who would assert the inaccuracy of his evidence.

[55] The differences between Joseph Henry and Ryan McMahon were before the jury. In his summing up Colton J stated that it was clear that what Ryan McMahon said did not tally with the account given by Joseph Henry. Colton J noted what he described as the obvious points. First of all the assailants' clothing, which in one case Ryan McMahon described a long mid-thigh dark trench coat and not a Berghaus jacket of the type described by Joseph Henry. The other person was described by Ryan McMahon as wearing a dark track suit top which contradicted the jacket described by Joseph Henry. Further, Ryan McMahon described one person as 6' to 6' 1" whereas the first applicant is 5' 6" or 5' 7" and the other person was described as 5' 11" and as not taking part in the attack contrary to what Joseph Henry said. In addition, one person was said to be early 40s, which was compatible, and with heavy build, short brown hair going grey and the other person had short brown hair. Colton J also stated to the jury that Ryan McMahon had not seen a knife and did not see Joseph Henry being stabbed, a matter which Colton J described as an example of how a perfectly truthful honest convincing witness could make a mistake about what happened.

[56] The Ryan McMahon evidence and the issues raised by that evidence were assessed by the jury. Clearly the jury were satisfied by the evidence of Joseph Henry in the knowledge that it did not correspond with the evidence of Ryan McMahon.

There is no additional information to be offered to the jury. It does not appear to the Court that the oral evidence of Ryan McMahon might afford any ground for allowing the appeal.

[57] As well as having regard to the particular factors the Court must determine if it is the interests of justice to receive the oral evidence of Ryan McMahon. There are further matters to be taken into account.

[58] In relation to Ryan McMahon, Crown Counsel, in closing the case to the jury, referred to him as a person "who is not a witness in the case". Later it was stated to the jury that they were dealing with "the evidence you have heard". The applicants contend that these references to the evidence of Ryan McMahon served to undermine the value of his evidence as contained in the notes made by the constable. In summing up Colton J re-read the evidence of Ryan McMahon in the form of the notes made by the constable and stated that the notes were evidence in the case. While referring to them as hearsay evidence Colton J stated:

> "That means you have not actually heard Mr McMahon say them, but nonetheless, the note of what he said is evidence in this case and it is for you to place whatever weight you think is appropriate to that evidence."

[59] Although prosecuting Counsel stated that Ryan McMahon was not a witness and that the jury should deal with the evidence they had heard, it is apparent that Colton J, in summing up to the jury, made it perfectly clear to the jury that the notes of interview with Ryan McMahon constituted evidence in the case for the jury to take into account.

[60] Next, the directions to the jury on identification. The applicants contend that a *Makanjuola warning* was required in respect of the evidence of Joseph Henry and Dinah Henry. In R v Makanjuola [1995] 1 WLR 1348 Lord Taylor LCJ stated –

> "Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. 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 before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the

> factors which 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. We also stress that judges are not required to conform to any formula and this Court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content."

[61] Colton J in his summing up cautioned the jury:

> "As I have said, really the trial turns on the correctness of Joseph Henry's identification and I, therefore, warn you of the special need for caution before convicting the defendants in reliance on the evidence of identification. This is because it is quite possible for an honest witness to make a mistake in identification. There have been wrongful convictions in the past as a result of such mistakes. An apparently convincing witness can be mistaken. In fact, sometimes a number of apparently convincing witnesses can be mistaken. So you need to examine carefully the circumstances in which the identification by Joseph Henry was made in this case."

[62] Joseph Henry was described by Colton J as "the pivotal witness" and "the centrepiece" of the prosecution case and his evidence was restated. Then the summing up dealt with the "pieces of evidence that the defendants say support their case". The trial Judge outlined the evidence of Ryan McMahon, the delay of Joseph Henry in identifying the applicants, the record of events relevant to the identification issue and the relevant records that were made at the time, as set out at paragraph [5] above, the statement made by Dinah Henry, the issue about Deaglan Henry, the evidence of other Henry family members, the contacts with Joseph Henry about the assailants while in hospital, the contents of criminal injury applications and the medical evidence.

[63] As to Dinah Henry, it was stated that the prosecution did not rely on her evidence, her different accounts and her explanations were outlined, the rejection of her evidence by the defence was stated, all of which led to the question for the jury as to whether that caused them to doubt the evidence of Joseph Henry. Her identification evidence having been introduced by the applicants and not relied on by the prosecution, the summing up directed attention to its impact on the pivotal witness, Joseph Henry.

[64] As with a trial Judge's decision as to the exclusion of evidence, there is limited scope on appeal for interference with the trial Judge's decision on the nature of the directions to the jury on identification. In Makanjuola it was recognised that the Court will be disinclined to interfere with a trial judge's exercise of his

discretion, save in a case where that exercise is unreasonable in the Wednesbury sense.

[65] We are satisfied that the manner in which the trial Judge dealt with the issue of identification cannot be faulted. He directed the jury as to the special need for caution in relation to Joseph Henry. In dealing with Dinah Henry he focussed the jury on the impact on the evidence of Joseph Henry.

[66] As to Deaglan Henry, it was stated that the jury should not speculate about what he might or might not have said. However the jury were told they could take account of the notes about his exchange with police, leading to the question for the jury as to whether this bore on the defence case that there was an attempt by the Henry family to get somebody to identify the applicants. Again, this was evidence introduced by the applicants and the summing up in that regard was directing attention to the defence case of false identification.

[67] As to Ryan McMahon, the note of his evidence was read again to the jury, it was stated that the notes were evidence in the case, the differences with Joseph Henry were outlined and the matter was left to the jury.

[68] Having considered all the circumstances of the case and the grounds of appeal we are satisfied that the interests of justice do not require the receipt of the oral evidence of Ryan McMahon.

[69] While this case involves applications for leave to appeal, the practice of the Court is to examine the grounds of appeal as in a case where leave has been granted. In the event of leave being granted the ultimate question for the Court would be whether the convictions of the applicants are unsafe. The Court of Appeal in R v Pollock [2004] NICA 34 set out the approach -

> "(1) The Court of Appeal should concentrate on the single and simple question "Does it think that the verdict is unsafe".
>
> (2) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> (3) The court should eschew speculation as to what may have influenced the jury to its verdicts.
>
> (4) The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the

> evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[70] We have had regard to the prospect of Ryan McMahon giving oral evidence in the terms of the written evidence admitted at the trial. We are left with no sense of unease about the correctness of the verdicts of the jury. The applications for leave to appeal against conviction are refused.