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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **24/5/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

STEPHEN LESLIE BROWN (ALSO KNOWN AS STEPHEN LESLIE REVELS)

Before: Morgan LCJ, Higgins LJ and McCloskey J

MORGAN LCJ

[1] The appellant was convicted on 3 March 2009 by Gillen J, sitting without a jury, of the murders of David McIlwaine and Andrew Robb on 19 February 2000. He was sentenced by the trial judge to a minimum period of thirty five years imprisonment on each count. The appellant appeals against conviction and sentence.

The prosecution case

[2] On the morning of 19 February 2000 the bodies of 19 year old Andrew Robb and 18 year old David McIlwaine were discovered by a passer-by on the road at Druminure Road. The bodies were 100m apart and both bore horrific injuries. Post mortems revealed Andrew Robb had sustained a severe cut throat injury to the neck and a penetrating wound to the abdomen with three further penetrating wounds. There were no defence injuries. David McIlwaine had sustained a severe cut throat injury, 7 penetrating wounds to the chest and penetrating wounds to the face and to the left eye. Both had been intoxicated at the time of death.

[3] The prosecution relied on three strands of evidence in order to prove the case against the appellant. Mark Burcombe said that he was present at the scene where the murder of David McIlwaine had taken place and was a short distance away from the scene where Andrew Robb was murdered shortly beforehand. The circumstances in which he came to give evidence will be set out in some detail below. The prosecution also relied on forensic material consisting of a finding of the appellant's DNA on the jacket of McIlwaine, the

presence of tyre treads corresponding to those on the appellant's car close to the scene of the murders and the presence of fragments of plastic at the scene of McIlwaine's murder corresponding to matching pieces found during a search of the appellant's home on 23 February 2000. The third strand was the hearsay evidence of F, a lady who had been the girlfriend of the appellant during 2004, who claimed that he had made admissions of his involvement in the murder of David McIlwaine to her.

The evidence of Mark Burcombe

[4] On the night of 18/19 February 2000 Burcombe said that he met the appellant and Noel Dillon outside the Paddock Bar and at the invitation of the appellant then accompanied them over the short distance to the appellant's house at 15 Sinton Park, Tandragee. There, he, the appellant and Dillon consumed drink and listened to music during the early hours of 19 February. Burcombe recalled that the appellant received a call on his mobile from his girlfriend. They heard a knock on the door which was answered by the appellant. The appellant returned with the two deceased who had been looking for a party. All sat talking. During the conversation the memory of a recently deceased UVF leader Richard Jameson had been insulted by Andrew Robb. This had changed the atmosphere. Burcombe asked McIlwaine to go outside with him for a smoke and they did so for about 10 minutes. Shortly thereafter Burcombe, while absent from the living room in which the deceased were, had signalled his agreement to an intention asserted by the appellant to "punch" the head of Andrew Robb.

[5] Thereafter Dillon and the appellant left, returning to invite all present to go elsewhere for drink and drugs. They all walked to the appellant's Peugeot car near the Paddock Bar. From there they travelled, driven by the appellant, to a telephone box on Church Street where Dillon got out and then returned. All five then travelled in the Peugeot down through Tandragee and out into the countryside.

[6] The appellant stopped the car on a country road, reversing it into a gateway leading to field. Following a shout by either Dillon or the appellant for everybody to get out of the car Burcombe went downhill from the car with David McIlwaine. Burcombe believed that Robb was going to receive a beating and told McIlwaine about this reassuring him that he need not worry. After some time Burcombe saw the appellant and Dillon come swaggering down the hill with a 'hard man's walk' and on reaching them the appellant launched a sudden attack on McIlwaine. He made off, running, pursued by the appellant and followed at walking pace by Dillon and Burcombe. McIlwaine fell or was brought down by the appellant. Burcombe claimed he said 'fuck sake wise up'. He saw the appellant rain kicks and blows on McIlwaine.

[7] When Dillon reached McIlwaine he crouched down over his body and produced a concealed knife with which he proceeded to cut McIlwaine's throat in a sawing motion, being exhorted to cut his throat by the appellant. Burcombe distanced himself from this scene to the parked car up the hill where he sat in the back seat. The appellant and Dillon then joined him in the car and the appellant drove off in the direction of McIlwaine who was still breathing. The appellant shouted that he was going to run over McIlwaine's head but was told by Dillon not to. The appellant got out of the car having taken the knife from Dillon and proceeded to rain a succession of knife blows on the body. All sounds of breathing stopped.

[8] The appellant drove the car away. As he did so he rejoiced at what he had done. Fifteen minutes later the car stopped near a derelict house. The appellant held the knife and threatened Burcombe that he would cut his throat if he opened his mouth about this. He left the car with the knife, returning without it. Dillon also warned Burcombe to keep his mouth shut after the appellant had refused to shake Dillon's proffered bloodied hand. The journey resumed, passing a white house which the appellant said was his foster home. They travelled in the direction of Poyntzpass and then back to Tandragee and 15 Sinton Park where all three entered the appellant's home.

[9] Dillon went off to the bathroom. The appellant was boasting about what he had done. He said 'such a buzz. Forgot what it was like to kill. The two bastards deserved it'. He then announced that he was going back up to cut one of them open and left, warning Burcombe not to leave. Burcombe remained alone until the appellant returned. When he returned the blood had been washed from his hands and he had changed his clothing and footwear. Burcombe and the appellant then got into a Rover car and the appellant drove Burcombe home. As they drove to Woodview where Burcombe lived the appellant again boasted about the killing adding that Robb would not be 'slabbering or telling wee stories' that 'the two bastards deserved it' and that he 'had done the stomachs and Dillon had done the throats.'

[10] As he left him off the appellant told Burcombe that if he kept his mouth shut he would be alright. The appellant said that he would contact him the following day as he needed him to do something. Later that morning Burcombe viewed a teletext report which stated that two bodies had been found. He later phoned the appellant asking to meet up. The appellant arrived by car. Dillon was driving the car which was a burgundy coloured Rover. Burcombe got into the car intending to tell them that he had had nothing to do with what had happened. They travelled to the Ballymore Inn in Tandragee. On the way an elderly man had been crossing the road and Dillon had said, 'if he doesn't hurry up, I'm going to cut his throat'.

[11] On the return journey the appellant told Burcombe that if anyone asked he, Burcombe, was to give them an alibi by saying that he had been

drinking with the appellant and Dillon at the appellant's house on the previous night. Burcombe had protested that it had nothing to do with him, that nobody had said anything about murder or about a knife and that the appellant had said that he had been going to "punch" the head of Andrew Robb but had not mentioned murder. On stopping at Woodview the appellant reiterated the two bastards had deserved it and again threatened to cut Burcombe's throat if he talked, adding that if he couldn't get him he would get someone in his family.

The forensic evidence

[12] McIlwaine had been wearing a cream jacket. Collette Quinn, Senior Scientific Officer, FSNI, swabbed ten stains on the jacket that appeared to be bloodstains. She looked for very small bloodstains that could have been projected blood. In the left chest area she looked at five stains which she lettered 'A', 'B', 'D' 'E' and 'F'. 'B', 'E' and 'D' were found to have a profile unique to the deceased. The major DNA contributor to the samples 'A' and 'F' was the appellant. 'A' was a mixed profile with a minor contribution from the deceased and a full profile of the appellant. The only contributor to 'F' was the appellant. In respect of the DNA samples found matching the appellant on the upper front of the deceased's jacket the likelihood that an unrelated man from NI would have one of these genetic combinations is less than one in a billion.

[13] The case advanced by the appellant in his evidence was that the appellant had spoken to both deceased on the night of the murder when they had called at his house attempting to locate a party which the appellant said was taking place at the adjoining house, 14 Sinton Park, the home of Debbie Maxwell. Ms Quinn was cross examined on the basis that it was possible that it was the appellant's saliva or another DNA source that had produced his DNA at points 'A' and 'F'. She indicated that to detect saliva there is a presumptive test which was not carried out because she understood the deceased had been in the presence of the accused prior to his death. Such a test would not, therefore, have provided assistance in this instance. Ms Quinn could not exclude the scientific possibility that the appellant's DNA at points 'A' and 'F' were saliva but considered it highly unlikely. In view of the size of the bloodstain she had anticipated that it would be sufficient to produce a DNA profile and she considered it highly likely that the DNA profile of the appellant at 'F' in particular was from the bloodstain at that location.

[14] The learned trial judge concluded that he was fully satisfied that it was highly likely that sample 'F' of the DNA of the appellant found on the clothing of McIlwaine was a blood DNA sample of the appellant. He also considered it was probable that the DNA sample in specimen 'A' was from the blood of the appellant. The judge indicated that the blood on its own was insufficient to convict the accused but it was strong supportive evidence of

the presence of the accused at the scene of the murder of McIlwaine and of the allegations made against him by Burcombe. That conclusion cannot be faulted.

[15] Tyre marks were found in the area of a gate into a field on the north side of the Druminure Road, not far from where the bodies of the deceased were discovered. Walter James McCorkell, Chartered Chemist and Principal Scientific Officer at FSNI stated that he received 2 casts of tyre prints from Druminure Road. He later received a red Peugeot which had been found at the appellant's home. That car was fitted with Hankook and GT tread radial tyres. Examination revealed that the tyres which had left the tracks were Hankook and GT tread radial tyres or facsimiles and that they were of the same width as the tyres on the Peugeot. Mr McCorkell conceded that there was a possibility that different tyres from a different vehicle could have made the marks. The expert did not provide a statistical probability that the Peugeot had made the tyre marks in the field. He added that he took into account that there were two different tyres found on the Peugeot and on the casts.

[16] Burcombe gave evidence that on the night of the murders, he had travelled with the appellant, Dillon and the two deceased in a Peugeot 205 from the Paddock Bar to a telephone box and finally stopped at a farm gateway at which location the murders occurred. He said that after the murders he returned to Sinton Park with the appellant and Dillon in the same vehicle. The appellant drove on both occasions. The tyre track evidence is at least consistent with Burcombe's account that the appellant drove a Peugeot to the location of the murder and returned from it. The learned trial judge was also entitled to take into account that Burcombe could not know that his account would be supported by these findings at the scene.

[17] Constable Beattie gave evidence that he was part of the search team that went to the appellant's house on 23 February 2000. He noticed a piece of green coloured plastic close to the gate post at the back of the house. SOCO Kyle attended 15 Sinton Park on the same date and found a small piece of green coloured plastic on the front door step of the house. He also observed the piece of green plastic at the back of the house beside a gate at the top of the path. SOCO Johnston found small pieces of green plastic close to the right hand side of the body of McIlwaine, close to the foot of the body and underneath the body. The plastic from the front step and the plastic found in the garden beside the gate were forensically compared to plastic pieces found at the murder scene and were found to have likely originated from the same source. Collette Quinn examined five pieces of plastic found at the scene of the murder and the two pieces of plastic found at the house of the appellant. She found that the dimensions, texture, appearance and colour matched those of an aerosol can top similar to that found at the appellant's house albeit she could not say definitively that they came from one particular piece or from the same aerosol can.

[18] Mr Marshall, Senior Scientific Officer FSNI, examined three pieces of plastic from the murder scene and the two pieces from the appellant's front step and garden. He gave evidence that the plastic from the garden fitted with the piece from the front step and a piece from the murder scene fitted with the piece from the garden. He concluded they were originally one piece of plastic. Mr Marshall also examined a tin of aerosol graffiti remover with a green plastic cap which had been found in the appellant's house. The cap was of the same dimensions and colour visually as the plastic pieces when tested by a technique which measures the way a coloured object reacts with light.

[19] The appellant argued that the evidence of Mr Marshall is consistent with the pieces of plastic having been transported from the appellant's home to the murder scene by the two deceased who had been present at the appellant's door. In addition, the plastic found within the perimeter of the deceased's address had been found beside another address to which the appellant said both deceased had been directed. Finally, the pieces of plastic were mobile and there was evidence of disruption by police in the area where one of the pieces had been found.

[20] The forensic evidence with regard to the plastic pieces is consistent with the evidence of Burcombe to the extent that material may have been transferred to the murder scene from the appellant's home by the appellant, Burcombe, Dillon or the two deceased who had been present in the appellant's home before the murder. The presence of green plastic under the body of the deceased McIlwaine negates any suggestion that the plastic somehow transferred to the murder scene after the murders occurred. If the deceased had only been present for a short time at the appellant's front door before the murders, it would seem improbable that they alone could have transported so many pieces of plastic from the area of the premises to the murder scene.

[21] The learned trial judge concluded that despite a failure to find consensus as to the number of pieces of plastic found at Druminure Road, the fact was that one piece of plastic from the murder scene fitted with a piece of plastic found in a wholly separate venue at the appellant's home and that the two pieces of plastic found at the house fitted together. He remarked that this evidence was insufficient to convict the accused but when added to the other forensic evidence constituted compelling supporting evidence for Burcombe's account. We agree.

The evidence of F

[22] F started to give oral evidence but shortly into her examination in chief she was unable to continue. The learned trial judge was satisfied that she was medically unfit to give evidence. He ruled her written statement admissible

under article 20(2)(b) of the Criminal Justice (Evidence)(NI) Order 2004. He considered the general discretion to exclude under Article 30 of the 2004 Order and the power to exclude under Article 76 of the Police and Criminal Evidence (NI) Order 1989. He decided not to exclude the evidence in the interests of justice. He also had regard to the appellant's rights under Article 6 ECHR in admitting the evidence. He reached this decision as he did not consider the prosecution case (having heard the entirety of the Crown evidence) was founded solely or to a decisive extent upon the statement of F. The other evidence implicating the appellant was the evidence of Burcombe and the supporting forensic evidence.

[23] The learned trial judge referred to the principles which apply to cases where a witness may be tainted by improper motive. He recognised the obligation to proceed with caution where there is material to suggest that a witness' evidence may be tainted by an improper motive. He correctly concluded that the warning should extend to a motive such as jealousy or spite. In this case he noted that such emotions may have induced the witness to fabricate her statement as the appellant had left her with a young child and had behaved badly towards her during the relationship. He indicated that he considered the evidence of F required a Makanjuola warning (see below) and that it was wise to look for supporting evidence before relying on it.

[24] F stated that she met the appellant in April 2004 and soon began to live with him. She then discovered the appellant was known by a different name. She found a newspaper cutting from years ago in his wallet. The cutting concerned his having been charged with murder and that those charges had been dropped. A cutting to this effect was found by police in the appellant's wallet during a search at his address in November 2005.

[25] F said that the cuttings prompted a conversation during which the appellant claimed two boys had arrived at his flat one night and came in to have a drink. They talked about Richard Jameson who had been killed ten days before. She said Steven said this man who had been killed was a friend and the boys had slagged him off. They said he had deserved to die and he was 'an oul bastard and deserved it'. The appellant said that he had driven the boys away with Dillon and that he was going to do them in. Steven said one of the boys tried to get away after he saw the other one die and that he nearly got away but Steven got him and he cut his throat and stabbed him. F stated that Steven said that this boy was begging for his life but Steven said he stabbed him and stabbed and stabbed him until he was dead. She said the appellant was drunk when he told her this and there was a further occasion when Steven again talked about cutting this boy's throat. F referred to a further incident which occurred when the accused was drinking. He said something could come out about it and then Dillon killed himself. It was after this that he told F that he was going to be all right now because Dillon was dead.

[26] The appellant relied on the evidence of Constable Cairns to highlight an inconsistency in F's evidence. She had met F at a court house in October 2005 when F was instituting matrimonial proceedings against the appellant. Constable Cairns had a conversation with F during which the officer had asked the witness if she knew whether the appellant had convictions. F said that apart from points on his licence she did not know except that he had murdered someone. She told Constable Cairns that bits of paper had fallen out of his wallet and when she looked at them they were about a court case. The officer understood it to be small articles out of a newspaper. As they were in a public place at the time F said' Don't tell anyone I told you that'.

[27] The learned trial judge did not attribute any significance to whether the cutting was found by F or fell out of the appellant's wallet. That was undoubtedly correct as both F and the appellant agreed that the cutting was the subject of conversation between them. The appellant contended that he explained to F that he had been arrested in connection with the murders of the deceased. He said that he recounted to her the details of matters put to him by the police. It was that account which she was now attributing to him. He further said that F had given this information to police shortly after he and she had separated and he had taken up with G. He said that F had threatened both him and G and he relied on a written statement in draft prepared on behalf of G in connection with alleged harassment by F which the learned trial judge had admitted as hearsay evidence even though G herself was unwilling to give evidence.

[28] The learned trial judge noted that this was not the case of a jealous woman who had gone into a police station to make this allegation. On the contrary this had emerged in a casual conversation and F had immediately asked Constable Cairns not to tell anyone. He carefully satisfied himself on the medical evidence that she was unable to continue giving oral evidence. He rejected as implausible the suggestion by the appellant that he had explained the gruesome nature of the police case in respect of the killings to help her understand that he had nothing to do with it. He also satisfied himself that F was not spitefully manufacturing these allegations and pointed to the fact that she did not implicate the appellant in the murder of Robb. The judge noted that she added detail to the account which was not in the police material. She did not refer to Burcombe but the learned trial judge did not find this surprising as the appellant had been at pains to conceal his association with Burcombe, not telling police that the had met Burcombe the day following the murders even on his own account.

[29] The learned trial judge made it clear that in light of the fact that she was not cross examined and that she was undoubtedly very upset by the appellant's behaviour towards her he could not have relied on her evidence if it had been the sole and decisive evidence against the appellant. He

considered, however, that it was a strand of supporting evidence which generally supported Burcombe's account and we consider that this is a conclusion which it was open to him to reach. In any event the learned trial judge indicated that he would have been satisfied beyond reasonable doubt by the other evidence in the case. We have already dealt with the forensic evidence and we now turn to the evidence of Burcombe.

The appellant's case

[30] The core contentious issue in the appeal was the reliance which the learned trial judge placed on the evidence of Burcombe. He was aged 19 in February 2000. He said that at that time he did not know Dillon but he did know the appellant. He also knew both of the deceased. Burcombe left Tandragee in the immediate aftermath of the murders in February 2000 and resided with his sister at Inniskeen. He left to work in England around March 2000 and travelled back and forth between England and Northern Ireland. He was back in Northern Ireland in November 2000 and in 2001. In November 2000 Paul McIlwaine, the father of David McIlwaine, encountered Burcombe and asked him if he had murdered his son. Burcombe denied involvement.

[31] In 2001 Burcombe was asked by a police investigator about his movements on 18/19 February 2000. This was in the course of routine investigations and evidence gathering. He stated that he had been with the Lunt brothers on both days. He was not under arrest during this exchange. He later said this was not a truthful account. In April 2001 Burcombe was arrested under the Terrorism Act and was alleged by interviewing police to have been a member of the UVF, to have been involved in a murder conspiracy involving the purchase of a car and to have been involved in the attempted murder of a Mr Greenaway. The Lunt brothers, Wayne and Philip, were also arrested at around the same time and questioned about the same matters. At some point the appellant was also alleged by police to have been involved in a robbery of premises called 'Planet Bingo'. He was not charged in respect of these matters.

[32] Burcombe said that from the time of the incident to his arrest in 2005, he had attempted to block out the memory of what had happened with drugs and drink. He married and his wife had a child in June 2005 at which time he stopped drinking and taking drugs. He gave evidence that he came to the realisation at this time in his life that he had to tell what had happened. He became aware that a Crimewatch programme was being made in respect of the murders, having heard a trailer for the programme on the radio. He wanted to talk to someone about what he should do.

[33] He said that he approached a Christopher Hodgins who was a Christian with strong past loyalist connections. Mr Hodgins introduced him to a Mr Alan Oliver, another Christian, who worked with loyalist

paramilitaries. Mr Oliver was suspected by police to be heavily involved with the UVF. He told Burcombe that a top UVF man, Bunter Graham, was conducting a UVF internal investigation into the killings. Both the appellant and Dillon had been 'arrested' and released in connection with this investigation.

[34] Burcombe wanted to know from Oliver whether, if he gave information to the police, his family would be attacked. Oliver proposed a meeting with David McIlwaine's father, Paul, Andrew Robb's mother Ann Robb, a Christian CID man and a member of the UVF. The meeting did not take place. Oliver told Burcombe that he understood from Paul McIlwaine that a senior RUC officer called Kincaid had said that if Burcombe came into the police everything would be alright. Burcombe consulted with a solicitor and discussed the matter with Oliver. He instructed his solicitor to contact the police maintaining anonymity under the pseudonym Sam. Supt. Hanley told Burcombe that on coming in he would be arrested, there would be no guarantees or inducements and that his evidence would be tested. Burcombe presented himself to police outside Hillsborough Castle and was interviewed over 4 days. Burcombe told the court that during these interviews he had not admitted knowing an assault was about to take place on Robb, nor did he speak of the boasting of the appellant. He was charged with the murder along with the appellant who had also been arrested.

[35] In January 2008 Burcombe instructed his solicitor to approach police shortly before his trial for the double murders was due to start. He was then interviewed by police and on 26 February 2008 signed a written agreement with the PPS pursuant to s 73 of the Serious Organised Crime and Police Act 2005 wherein he formally agreed to admit to and give a truthful account of his own involvement in the murders and other crimes he had been involved in, to plead guilty to such offences and to give evidence against the appellant. He was then interviewed on various dates in February, March and April 2008, signing a written statement relating to the above referred-to matters. The murder charges against Burcombe were withdrawn and he pleaded guilty to the offence of conspiracy to cause grievous bodily harm to Andrew Robb. He was sentenced to 28 months imprisonment together with 2 months consecutive for an unrelated suspended sentence.

[36] The appellant takes no issue with the general expression of legal principles set out by the learned trial judge. The judge was satisfied that Burcombe was a sympathiser and supporter of the UVF. He had not given a full and honest account during his interview in 2005. In particular he had not disclosed that he knew that Robb was going to be attacked and he also omitted damaging statements allegedly made by the appellant at the time. He admitted that he lied to the police when interviewed in 2001 about his movements on the night of the murders. The learned trial judge treated Burcombe as an accomplice.

[37] Against that background the judge first considered whether the evidence of Burcombe was so utterly lacking in credibility that it should be rejected. He applied the conventional principles set out in R v Galbraith (1981) 73 Cr App R 124 and determined that it was not such that no court or jury properly directed could ever properly convict on it. Having so concluded he then recognised that he should exercise caution in accepting Burcombe's evidence and that it was wise to look for supporting evidence before acting on it on the basis of the principles in Rv Makanjoula (1995) 1 WLR 1348 set out at paragraphs 102 and 103 of the judgment.

> "(1) Section 32(1) (*of the Criminal Justice and Public Order Act 1994*) abrogated the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
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> (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and on what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
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> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor would it necessarily be so because the witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.
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> (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of a jury before final speeches.
>
> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence

> and his comments as to how the jury should evaluate it rather than as a set piece legal direction.
>
> (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
>
> (7) It follows that we emphatically disagree with the tentative submission that if a judge does give a warning, he should give a full warning and should tell the jury what corroboration is in a technical sense and identify the evidence capable of being corroborative. Attempts to re-impose the straightjacket of the corroboration rules are strongly to be deprecated.
>
> (8) Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where the exercise is unreasonable in the Wednesbury sense."

As to the circumstances in which it may be appropriate for the judge to give a warning, in Makanjuola Lord Taylor said:

> "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 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."

[38] None of those principles was in dispute in the appeal but it was contended by Mr McCrudden that the learned trial judge erred in the application of the principles by not rejecting the evidence of Burcombe in light of its inconsistencies and falsehoods thereby leading to the dismissal of

the case at the direction stage or alternatively at the end of the trial. In order to deal with that submission it is necessary to set out some of the discrepancies upon which the appellant relied and examine how these were approached by the judge.

[39] The appellant's case at first instance was that it had been Burcombe who, with others, had carried out the double murder and had then made up a false story at the behest of the UVF. It was suggested that he was aided perhaps by extracts from Brown's interviews, the committal papers, the 2005 Crimewatch programme about the crime and general talk around the environs of Tandragee. The judge noted Burcombe's background and was satisfied that he was a sympathiser and supporter of the UVF.

[40] He records Burcombe's concession in examination-in-chief that he had not given a full and honest account to the police in the 2005 interviews. He further notes that Burcombe, in the course of his evidence at trial, sought to account for this by reference to a combination of loss of memory, pressure, nerves and distaste about going through the details of the incident, shame, the fact that he had gone to the police only intending to relate to the police his involvement in the murder, that he did not consider many other details relevant and his desire to conceal from the police his knowledge that Robb was to receive a beating. There were also occasions in his evidence when Burcombe indicated that he could not give a reason for what he said in 2005 as compared to his evidence at trial.

[41] Addressing the appellant's criticisms of Burcombe's evidence the learned trial judge firstly deals with certain assertions made in evidence which the appellant described as implausible. Burcombe had been cross-examined about his arrest in 2001 along with Philip and Wayne Lunt as part of an investigation into the attempted murder of a Mr Greenaway during which the police alleged a car purchased by them had been used. Burcombe explained how he had become involved in the purchase of the car and the judge dismissed this evidence as peripheral. The appellant submitted, however, that the implausibility related to the fact that Burcombe said that he had never subsequently discussed the police interviews with the Lunts who were detained at the same time despite the fact that Philip Lunt was his best friend with whom he had gone to England to seek work. It is common case that the learned trial judge did not deal with this discrete point but it seems to us that this was entirely removed from the circumstances of this case. Even if Burcombe was wrong about this detail in 2001 it properly was peripheral and therefore of little assistance to the appellant.

[42] The judge then dealt with the fact that at the trial Burcombe had a clear recollection of the quantity and type of alcohol which the appellant had with him when he exited the Paddock Bar (two bottles of Buckfast wine and six tins of Tennents). In the 2005 interviews he did not remember that detail. He

notes Burcombe's assertion that the detail was not relevant at the time of the interview. He was cross examined on the basis that he subsequently picked up the detail from the appellant's interview notes which were part of the committal papers available to him at that time. Burcombe denied that he had read the appellant's interviews. He said that he only read the main papers and those matters directly relevant to him. There was evidence that Burcombe had returned the photographs to his solicitor as he did not wish to look at them.

[43] The learned trial judge concluded that this was a classic example of the kind of minute detail that the witness would never have anticipated he was to be questioned about when he went to see the police in 2005. Although he was questioned by police for 4 days he was subsequently questioned in depth over weeks in connection with his witness statement and this is the sort of detail which may have come back to him later in the wake of being closely questioned about the matter and having had months to reflect on it. He further questioned the value to Burcombe of borrowing this evidence from the appellant's notes and noted that if Burcombe had wanted to lift evidence from this source there were other more beneficial things to choose.

[44] The judge noted that among other alleged implausible assertions Burcombe had been questioned as to why it took him 5 years to come forward. Initially he said that he feared for his life and that of his family. The twin fear of having seen what these men could do and the threat that they would do it to him in the judge's view were, if true, some basis for his concern about coming forward. The judge also had no doubt that his involvement may also have been a factor. The judge found nothing inherently implausible in a man now enjoying the responsibility of marriage and fatherhood choosing to face up to his past. Indeed at a later part of his consideration the learned trial judge noted that a fundamental difficulty that the defence faced from the start of this trial and which they never overcame was to give a plausible explanation based on human experience why Burcombe came forward to implicate the accused in circumstances where he had nothing to gain by so doing and where he ran the risk of implicating himself.

[45] Mr McCrudden submitted that this latter assertion had the effect of reversing the onus of proof and placed a burden on the appellant to prove his innocence. We do not agree. As Mr Kerr QC for the prosecution submitted the judge's task was to assess the credibility of the witnesses before him. That included an assessment of why this witness had chosen to come forward. The learned judge's remarks simply indicated that despite the searching cross examination of the witness the judge's assessment was that Burcombe was a witness of truth on the material issues and not the cunning, manipulative figure suggested by the appellant.

[46] There were contradictions between the 2005 and 2008 statements. The appellant asserted that in 2008 Burcombe had been unequivocal in stating that Dillon had exited through the double doors at the front of the Paddock Bar whereas his account of how he met Dillon was vague and uncertain when asked about it at the 2005 interviews. However the judge observed that he was convinced that Burcombe had not been prepared for this level of detailed questioning in 2005 and he saw no reason why, with time to reflect, his recollection would not become clearer.

[47] The next contradiction which the judge noted related to the fact that in the 2008 statement Burcombe referred to a discussion with the appellant in the car about the collection of £30,000 worth of drugs from a drugs house. He neglected to mention this in 2005. He also did not mention that he had referred to this when speaking to McIlwaine in the laneway. The appellant referred to this as the lure which got the deceased out of the house. The oversight did not seem inherently implausible to the judge given the sort of world which these young men were inhabiting, and bearing in mind that the reference by the appellant to the drugs may have been an idle boast. The judge also could not see what such an alleged embellishment would add to the account of the murder.

[48] Burcombe's contradictory evidence about the vehicle movements of the appellant's red Peugeot or Dillon's Rover together with the movements of Dillon and Brown on the night/morning of the murder was potentially more significant. There was clear inconsistency here in that the 2005 version had Burcombe being left home in the appellant's red Peugeot car after Dillon had been dropped off at Sinton Park while the 2008 statement was that they had all gone to Sinton Park for a while before the appellant left him home in Dillon's car. Burcombe told the court that that he had not forgotten that it was a different car but had just wanted to keep the matter simple. However the judge noted that the witness corrected his account during the second day of interviews on 9 November 2005 between 4.00 and 4.30 pm after having had a period of time in the cells. The judge also observed that Burcombe readily admitted that he was attempting to conceal at these interviews in 2005 any involvement on his part with the incident including his belief that Robb was to be beaten. In light of his voluntary change of this detail on the second interview day in 2005 the learned trial judge did not place any weight upon the inconsistency.

[49] The judge went on to deal with further alleged inconsistencies relating to whether or not McIlwaine went out with Burcombe at Sinton Park for a cigarette and Burcombe's description of the appellant's clothing in 2005 and 2008. As regards the former he considered this precisely the kind of relatively unimportant minutia that may fade over a period of time though may return after further reflection. The latter he saw as part of the pattern of oversight or flawed recollection of specific details which characterised the account given in

2005. He observed that Burcombe had been quite unprepared for the detail that would be asked of him regarding events 5 years previously when questioned by police.

[50] There were inconsistencies with other prosecution evidence. The judge noted that Burcombe said that he had no recollection of meeting in the Paddock Bar with Andrew Robb during the evening of 18 February 2000 as described by Kim Topley. The judge concluded that it did not influence his assessment of credibility and observed that there was no benefit to Burcombe in taking issue with Miss Topley.

[51] The judge recognised that the issue of the Crimewatch programme was of potentially greater significance. Burcombe said in evidence that he had not seen the programme in 2005 whereas Superintendent Hanley, the senior investigating officer in November 2005, had given evidence that before his arrest Burcombe had told him that he did watch the Crimewatch programme saying: 'The worst day of my life was when it (the crime) happened. The second worst day was when I watched it on Crimewatch.' The judge also noted that during a bail application on behalf of Burcombe in 2005 his counsel had made specific reference to Burcombe having watched the programme. The judge considered the evidence of Burcombe's father, whom he assessed as a very impressive man and believable and he accepted Mr. Burcombe's assertion that his son had not seen the programme. He also accepted Supt. Hanley's assertion about what Burcombe had said. He noted that the programme had certainly been a pivotal event. Hearing the trailer for it set off the sequence of events which led Burcombe to speak to the police. He noted that no purpose would be served by his denial that he had seen the programme. The judge further observed that, as Burcombe had asserted in the course of his interviews in 2005, there were aspects of this crime that he did not want to revisit. The judge considered that a rerun of the events on Crimewatch was one such example.

[52] Lastly, the judge dealt with allegations of utterances ascribed to the appellant by Burcombe made in 2008 but not in 2005. There were a number of such instances, most of them going to further blacken the picture of the appellant. It had been the defence case that these were manifest embellishments or attempts to beef up the case. Examples included Brown saying 'kill the bastard, cut his fucking throat'; 'I am going to run over that bastard's head' or Brown saying after the deed that he was 'buzzing' and that he had forgotten what it was like to kill. Additionally, Burcombe didn't tell the police in 2005 that Brown had threatened to cut his throat or someone in his family although he had mentioned that Dillon had threatened him. The judge was careful to note each of these instances of additional information which had not been included by Burcombe in 2005.

[53] In his evidence Burcombe said that he had blocked out a number of things about this event and had been taking large quantities of drink and drugs over the years. He did not go into the conversations with police in 2005 and the judge recognised that on his own admission he was deliberately keeping back his connection with the proposed beating of Robb. When he was interviewed in the context of the SOCPA agreement he had a longer period to reflect and the environment was less pressurised than at the time of his initial interview.

[54] The learned trial judge had the advantage of seeing the witness subject to rigorous cross examination over 6 days. He formed the view that he was a person of limited intellectual ability. At one stage it was suggested that in 2005 he had not mentioned that the appellant indicated that he was going to go back up to cut one of them open. In fact he had done so in one of his interviews. Burcombe had not, however, made that point himself in answer to the questions put to him. As the learned trial judge correctly remarked that demonstrated that he did not recollect what he had said in 2005 even when it was advantageous to him.

[55] We consider that the meticulous and careful manner in which the learned trial judge reviewed the detail of Burcombe's evidence and assessed him as a witness demonstrated the rigorous scrutiny which was required in light of the Makanjoula warning. We do not accept that the judge failed to keep in mind that Burcombe was a UVF sympathiser but the judge rightly found that there was no evidence whatsoever to support the contention that Burcombe was part of a UVF plan to wrongly implicate the appellant.

[56] In support of his overall conclusions the learned trial judge also took into account lies told by the appellant for which there was no innocent explanation. In his interviews in 2005 the appellant disclosed that he had gone to the Ballymore Inn on the afternoon after the murders with Dillon but did not disclose that Burcombe who had initiated that meeting was also present. The judge concluded that he had not done so because he did not want Burcombe exposed to questioning on the issue. The appellant then changed his account in light of a deposition at the committal stage which placed him with Dillon and Burcombe that afternoon. The judge had no doubt hat he had tailored his evidence to accommodate that deposition.

[57] Late in the trial Burcombe was recalled and it was put to him that he had admitted to the appellant as he was leaving Newry courthouse after a remand that he had been put up to this by the UVF. If that was right it is a conversation that would have taken place in the hearing and sight of a prison officer. When it became apparent that this was implausible he then changed the location to the prison van, suggesting that this conversation was while they were travelling in the van. The appellant also added that he said that he had been held by UVF. The latter statement was not put to Burcombe. The

learned trial judge noted that his change of venue and substance was an indication that this was a fabrication and that the appellant was incapable of maintaining a consistent line in telling it.

[58] We conclude, therefore, that we do not consider that the reliance by the learned trial judge on the evidence of Burcombe was unsafe, nor did it engender any unease in respect of the conclusions reached.

The murder of Andrew Robb

[59] It was submitted on behalf of the appellant that even if the account of Burcombe was accepted in whole or in part it did not follow that the appellant should have been convicted of the murder of Andrew Robb. There was no eyewitness evidence about this murder. The death of the deceased was caused by knife wounds. There was no direct evidence that the appellant had a knife at the time of the attack. The appellant was convicted on the basis of his participation in a joint enterprise.

[60] The liability of secondary parties has been the subject of recent consideration by the House of Lords in R v Rahman [2008] UKHL 45. In a case of non accidental presence at the scene of a murder by a principal it is necessary to establish the following matters before a person can be convicted as a secondary party:-

(i) It must be shown that the accused assisted or encouraged the actions of the principal;
(ii) The accused must intend to assist or encourage the actions of the principal;
(iii) The accused must know or believe that he is encouraging the actions of the principal;
(iv) The accused must know or foresee the nature of the acts of the principal;
(v) The accused must know or foresee that the principal may act with the intention to kill or cause serious bodily injury.

Joint enterprise is an aspect of the principles of secondary liability and we agree with the analysis set out in R v Mendez and Thompson [2010] EWCA Crim 516 at paragraph 17.

[61] This was a case where there was abundant material to support the conclusion that the appellant was voluntarily present at the scene of the murder. The appellant had driven the car in which the deceased were taken to a remote and isolated spot. Robb was then taken off by the appellant and Dillon to a quiet part of the country road where he was the subject of a vicious and savage attack. The injuries sustained by Robb reveal the ferocity of the

attack. The direct attack was carried out by one or both of the appellant and Dillon. Both came swaggering back towards the car after the attack at which point the appellant launched a vicious attack upon McIlwaine. He then encouraged Dillon to cut his throat. The appellant then himself further attacked McIlwaine with the knife as he lay on the road and thereafter disposed of the knife.

[62] It is clear from the manner in which the learned trial judge has reviewed the evidence at paragraphs 407 and 408 of his judgment that he was satisfied on that evidence alone that the necessary elements had been satisfied. In our view he was perfectly entitled to reach that conclusion. The actions of the appellant in driving the deceased to the scene and separating him from Burcombe and McIlwaine was clearly for the purpose of launching the attack and was intended to do so. The appellant and Dillon knew or believed that they were encouraging each other. It is not possible to attribute to either of them specific actions but their subsequent behaviour is a clear indicator of their approval of the method of attack on Robb and their intention to kill.

[63] The learned trial judge drew further support from the comments which Burcombe said the appellant made subsequently and which the learned trial judge was satisfied he did make.

Conclusion

[64] We can find no error in the approach of the learned trial judge. We do not consider that these convictions are unsafe and for the reasons given we dismiss the appeals.