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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DAVID JOHN THOMPSON

CARSWELL LCJ

Introduction

The appellant David John Thompson and Simon Doole were jointly charged with the murder of Ryan Robert James Neill in Antrim on 10 May 2000. They came to trial at Ballymena Crown Court in April 2001, when Doole pleaded guilty to wounding Neill with intent to cause him grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861, which was accepted by the Crown and the court. The presiding judge Kerr J imposed a custody probation order consisting of four years' imprisonment, followed by one year's probation. The appellant's trial on the charge of murder proceeded and on 7 April 2001 he was convicted by the jury and sentenced to imprisonment for life. He appealed to this court against his conviction on a number of grounds to which we shall refer later. The single judge gave leave to appeal on certain of these grounds.

The Factual Background

One of the main themes of the appeal was that the trial judge should have directed the jury at the close of the prosecution evidence that there was no case to answer. It is accordingly necessary for us to examine the evidence given in some detail. At 12.23 am approximately on 17 March 2000 Ryan Neill, a man aged 27 years, was found by a police patrol lying unconscious and bleeding at the edge of a cobbled area at the junction of High Street and Bridge Street, Antrim. The evidence established that he had been set upon by two men, one of whom was Simon Doole, punched, thrown violently to the ground and kicked. During this first assault the two men had stamped on his head. Then after breaking off the encounter, leaving him lying on the ground, the men turned back and returned to him, whereupon one of them stamped on his head again.

Mr Neill was taken to Antrim Area Hospital, where he was found to be deeply unconscious, with gross swelling and bruising to the left side of his face and left ear and an abrasion to the left side of his scalp. He was transferred for treatment at the Royal Victoria Hospital and back again to Antrim Area Hospital, but remained in a coma. On 9 and 10 May 2000 he suffered episodes of collapse and died on the latter date. He had contracted pneumonia, which precipitated his death, but Dr Curtis, the forensic pathologist who carried out a post mortem examination, expressed the conclusion, which was not disputed, that the cause of his death was a blow to

the head received in the course of the assault on 17 March 2000. His diminished level of consciousness left him vulnerable to the development of bronchopneumonia and to its effects, from which his death eventually resulted. Dr Curtis stated in his evidence that Neill had sustained a severe form of head injury known as a diffuse axonal injury. This type of brain injury is the result of forces of acceleration or deceleration acting on the brain. It can be caused when a person is knocked down with force and strikes his head on a hard, unyielding surface. Dr Curtis expressed the opinion that kicking or stamping on the head alone would not have been likely to generate sufficient acceleration force to cause this type of injury, nor would it exacerbate a diffuse axonal injury if it had already been sustained.

The evidence against the appellant comes from a variety of sources, direct eye-witness testimony, the appellant's account in his police interviews and the images seen on a video film recorded by two cameras mounted on the frontage of Madden's Bar, and the sequence of events has to be pieced together from these sources.

The appellant told the police that he had been at a party, but maintained that he had not drunk any alcohol. He decided to go to Madden's Bar in High Street. He met Doole, whom he had known from schooldays but had not seen for some time, and they tried to obtain access to the bar. They were refused entry, then Doole persuaded the doorman to allow him in on the pretext of going to the lavatory. This encounter at the door was recorded by the video cameras, which marked the time of each frame on the tape (the time

recorded on each tape was about 20 minutes later than real time, but for the purpose of following the sequence of events that difference is not relevant). The tape from Camera 1 shows Doole entering the bar at 00:30:26, and the subsequent frames show the appellant waiting outside the bar for him to emerge. While Doole was inside Ryan Neill came out of the bar at frame 00:34:36 and entered into conversation with the appellant, which appears from the film to have been peaceable.

Doole is seen coming out at frame 00:35:50, along with the two doormen, and he then joined the appellant and Neill. According to the appellant Doole had "a bit of an attitude" at that point. Between then and 00:37:13 the three men talked in the vicinity of the front of the bar. It is difficult to interpret what was taking place with any degree of certainty, but it appears as if Doole and Neill were arguing. They then moved off together towards the cobbled area and are seen standing on the road at frame 00:37:31. At 00:37:33 the lights of a vehicle may be seen as it approaches the three men standing in the road and goes round them. From the evidence of Mr David Alexander it is apparent that that vehicle was a large taxi or people carrier driven by him. A woman got out of his taxi and went into Madden's, which appears on the video at 00:37:45; the taxi remained outside the bar, and she is seen returning to it at 00:42:22. At 00:40:31 the doorman Aaron Adair may be seen coming out of the door of the bar and walking towards the roundabout. At 00:40:40 he is standing on the footpath looking towards the roundabout, then he turns back towards the bar, which he enters at 00:40:49.

Evidence was given by Paul Rainey that he had been sitting for about five minutes in his taxi, also a people carrier in type, at a layby in High Street a little to the east of the cobbled area, facing away from the direction of Madden's Bar. He was hoping to get a fare and was watching for people approaching. He saw in his "quite big" wing mirror three men walking towards him from the rear and watched them in the hope that they would want to engage him. He had them in view for about ten or twenty seconds when he saw one of them turn towards the man in the middle of the group, whereupon the man in the middle punched him, then grabbed him by the shoulders with both hands and threw him to the ground. Both the first assailant and the other man commenced to kick the man who had fallen in the chest and stomach. The first assailant jumped four or five times with both feet on his head as he lay on the ground. The two attackers then started to walk towards the witness, but turned back to their victim and jumped on his head once more. The two men ran off towards the "bottom of the town", that is, in the direction of the old courthouse. Mr Rainey estimated the distance between himself and the men as the attack took place as half a football pitch, but counsel informed us that evidence had been given that it was in fact approximately 27 yards.

In his evidence in chief Mr Rainey described the man in the middle as being about 5 feet 8 or 9 inches, with black hair and wearing a black and white kind of top. He said that the other man was "a wee bit smaller", probably about 5 feet 6 inches, and he had fair hair. In cross-examination he

accepted that he had told the police that the "middle man" was wearing dark trousers and a white shell type jacket that had dark coloured vertical stripes, and that he was about 5 feet 8 inches, whereas the other assailant was slightly smaller, about 5 feet 6 inches, and was wearing dark clothing. He was shown the video and agreed that the appellant was not wearing dark trousers and a black and white striped top. He was then asked a question which we consider was a conclusion for the jury to draw rather than the witness, "That person is obviously not the person that you saw subsequently, is that right?" No objection was taken and the question was not disallowed, and the witness answered it "That's correct." A short time later the appellant's counsel returned to the point when viewing another sequence on the video and the following exchange took place:

> "Q. Yes. Just play that on just for a few seconds (Same shown). There, just pause for a moment. You could see that person's back shown, the person I have been dealing with in the light coloured clothes?
>
> A. Yes.
>
> Q. You have now seen him more or less all round. He doesn't have any kind of stripes on his jacket or dark trousers or anything of that kind?
>
> A. No, he hasn't, no.
>
> Q. We can be sure we can rule out that person as a person involved in this attack?
>
> A. Yeah, could be.
>
> Q. Well, I think we have already agreed that that's not the person on the basis of the clothing; it couldn't be, could it?

> A.	No.
>
> Q.	No. We can be sure about that?
>
> MR JUSTICE KERR: Well I think you might say you can be sure of it rather than we can be sure about it, Mr MacDonald.
>
> MR MACDONALD: Sorry My Lord.
>
> MR JUSTICE KERR: Normally it is perfectly acceptable but I think in this precise scenario it is better to be precise.
>
> MR MACDONALD: On the basis of the clothing, in fact, that particular individual on the right of this screen now, as we look at 36:57, on the basis of that, that he has got a plain jacket with no stripes and light coloured trousers, not dark coloured trousers. You can be sure that's not the person we are talking about as the middle man?
>
> A.	Yes."

Mr Rainey also stated that the first assailant, when punching Neill, did so with his left hand. Defence counsel suggested that this indicated that he was left-handed (whereas the appellant is right-handed), but we do not think that that conclusion follows.

The second eye-witness of the assault was David Thomas Alexander, a taxi driver, who drove two passengers to Madden's Bar. He also was driving a large taxi-bus type of vehicle. He came along High Street and went on through the mini-roundabout and across the cobbled area on to the pedestrian precinct until he came to the door of Madden's, facing towards the old courthouse. As he drove there he saw three young fellows standing in the middle of the cobbled area, and he had to go round them to get past on the

right hand side. The female passenger got out and went into the bar, and Mr Alexander waited there for her to return. He heard some shouting from behind him, then on looking into his rear view mirror he saw two of the three young fellows standing either side of the third, who was lying on the ground. The two on either side were stomping on the head of the one on the ground, jumping on his head with the flat of their feet three or four times. He was sure that it was the same three men whom he had passed, because it was only a couple of minutes or so. The witness thought that the two attackers were both wearing trainers and that one had dark trousers, though he could not remember which. They moved away and then Mr Alexander saw them returning to the victim. He saw one of them take something from his back pocket and one of them kicked him again around the body or the head. They then walked off briskly past the witness in the courthouse direction. He thought that one was about six feet in height and the other slightly smaller, 5 feet 6 inches or 5 feet 8 inches. He had seen their faces, but professed not to be very good at descriptions. They were, he said, young fellows, with short crew cut hair as far as he could remember. The witness continued to express the positive opinion that the three men in the fracas were the same ones as those whom he had passed, although pressed hard in cross-examination. He did accept, however, that there was no single feature of their appearance that stuck in his head by which he identified them as the same men.

Evidence was also given by John Ivan Stewart, who was making deliveries of pizza and Chinese take-away food. He drove along High Street

to the mini-roundabout, then rounded it and double parked alongside another vehicle near the place which had been pointed out by Mr Rainey as his parking place. As he approached he saw a body lying on the ground at the edge of the cobbled area, which he thought was just a drunk man. Two persons were standing slightly to his left, then as the witness approached the roundabout they started walking towards him. After he had parked he saw in his mirror these two persons who appeared to be stomping two or three times on the head of the body on the ground. They then set off at a half-trot in the direction of the courthouse. Another car pulled up at the cobbled area and a young girl got out and went to give assistance to the man on the ground. Mr Stewart noticed that one of the two assailants was about six inches taller than the other and that both were wearing light coloured jackets. They were of medium build and he pictured them as "squaddy types", clean and tidy.

The young girl referred to by Mr Stewart was Rebecca Joanne McCaul, who was one of four passengers in a car driven by Leanne Mayne. The party was heading for Madden's Bar, travelling down High Street at about 12.15 or 12.20 am. As they approached the mini-roundabout the witness saw a body lying on the cobbled area. She told the driver to stop and alighted to give assistance. The car was driven on and parked in the vicinity of Madden's. When she saw Mr Neill's condition Ms McNaul shouted to her driver to call for an ambulance. She said that the "bouncers" came out after they had telephoned for an ambulance.

One of the important planks of the Crown case was the timing of the arrival of Ms Mayne's car and Ms McCaul's sighting of the body lying on its own in the road. Crown counsel submitted that the lights of that car may be first seen on the video at frame 00:42:06. A car is seen to pull up at Madden's Bar at 00:42:24 and at least three persons are seen to get out in the next minute. One doorman emerges at 00:42:26 and the other at 00:43:21. These sightings, together with Mr Stewart's evidence, do in our view confirm the Crown contention that the car in which Ms McNaul was travelling was approaching at 00:42:06 and that she must have seen Neill's body at or very shortly after that time.

The appellant was interviewed in two sessions on the evening of 20 March 2000, between 5.53 and 8.13 pm. He maintained a complete denial of any assault in a somewhat abrasive and argumentative series of exchanges. He claimed that he had taken no drink that evening, although he had been at a party. He had headed for Madden's but was refused admission, by his account because he was wearing trainers. Doole, whom he had met shortly before, was allowed in to go to the toilet, then emerged a few minutes later with "a bit of an attitude". Meanwhile Neill, who according to the appellant was very drunk, tried to engage him in conversation, but the appellant said that because he was talking gibberish he did not want anything to do with him. The burden of the appellant's case was that he left Doole's company before any incident took place and that a fourth person must have joined Doole and Neill after his departure and carried out the assault. They stood

for a while at the road -- he later said that it was of the order of 30 seconds -- and then he headed off and left them because they were drunk and he was sober. He himself measures 6 feet 1 inch in height, has dark hair and was wearing light coloured clothing on that evening.

In the course of discussing the appellant's movements, which they were viewing on the video, the interviewer read to him part of a statement made on 19 March 2000 by Aaron Adair, one of the doormen at Madden's. The following exchange took place:

	"OK I'll read you his statement out, from that point. As he goes out to check for his girlfriend, right, as I went out I looked up the town and saw Ryan Neill, Doole and Monster they were standing on the far side of the road about 30 yards on up the town –
SOLICITOR	Yes.
	- Ryan was standing with his hands out gesturing with them and talking to Monster and Doole. I formed the opinion at this point that there was going to be a bit of trouble and walked towards them. I'd only gone a few yards when Monster looked over at me and held up his had as if to say OK everything alright.
THOMPSON	Exactly.
	I stopped and returned back inside the bar.

THOMPSON	Does that not agree what I said.
	Agrees with what we're saying, you were there standing with the injured party and Doole –
THOMPSON	And I left not long after, like I told you from the start."

Adair did not give evidence at the appellant's trial and one of the important issues, both there and on appeal, was whether the appellant had in this exchange adopted the part of his statement read out to him. We might mention at this point that when the detective gave his evidence of the interview and read out the passage the name "Thompson" was by the judge's direction substituted for the appellant's nickname "Monster".

At the conclusion of the Crown evidence the appellant's counsel applied for a direction that the appellant be acquitted on the ground that there was no case to answer. The judge refused this application and the trial proceeded. The appellant did not give evidence, although he had been warned that an adverse inference might be drawn under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988. The jury retired at 3.03 pm on Friday 7 April 2001, then the judge sent them home at 4.34 pm. They returned the following morning at 10.30 and resumed their deliberations. They brought in a unanimous verdict of guilty at 12.42 pm.

The Grounds of Appeal

Twelve grounds of appeal were set out in the amended grounds, some of them voluminous, but as presented by Mr Barry Macdonald QC at the hearing they can be summarised under the following heads:

1. The judge should have acceded to the submission that there was no case to answer at the close of the prosecution. In particular he should have so ruled in the light of Rainey's evidence about the assailant whom he saw on the video transmission.
2. The judge was in error in (a) allowing the jury to consider the passage of the interview in which part of Aaron Adair's statement was read to him and it was claimed by the Crown that he adopted that (b) failing to direct them that they must disregard that completely if they did not find that he did adopt it (c) substituting the appellant's name for his nickname.
3. The judge wrongly directed the jury or failed to direct them properly on a number of matters:
   - (a) the sequence of events as seen on video and appearing from the evidence of the witnesses;
   - (b) Alexander's evidence that the men whom he saw during the assault were the same as those whom he had passed in the road shortly before;
   - (c) Ms McNaul's evidence;
   - (d) the possible presence of other persons on the scene;
   - (e) the issue of the appellant's intent.

4. The judge's summing-up did not sufficiently put the defence case and was unbalanced in favour of the prosecution.
5. The judge should not have allowed the jury to commence its deliberations after 3.03 pm on the Friday afternoon.
6. The jury should have had the opportunity which they requested to see the video evidence before reaching their conclusion.

These submissions overlap at some points, but we shall deal with each.

The Sufficiency of the Prima Facie Case

Mr Macdonald's main theme was that the evidence against the appellant was circumstantial and contained too many areas of doubt to be sufficiently reliable, and that when it was set against Rainey's evidence a reasonable jury could not have found the case proved. The Crown Counsel's riposte was that that circumstantial evidence, properly understood, was very compelling and that the jury were entitled to regard Rainey's evidence about the assailant's clothing as mistaken. The judge was accordingly right to allow them to decide the matter, for a reasonable jury was entitled to reach the conclusion that it had been proved beyond reasonable doubt that the appellant must have been the assailant.

The Crown case depended to a considerable extent upon the timings of the last sighting of the appellant and the occurrence of the assault upon Mr Neill. It was their contention that the interval between the time when the appellant was last seen with the deceased and the conclusion of the assault was very short, no more than a minute and a half. The prosecution case was

that it was not reasonably possible that in that space of time the appellant could have left the scene and then another unidentified man joined Doole and the deceased and took part with Doole in a savage attack upon Neill. The man who attacked Neill along with Doole can therefore only have been the appellant. It was contended on behalf of the appellant, on the other hand, that he was not identified on the video or in reliable evidence after 00:37:33 or thereabouts, which gave sufficient time for such a sequence of events to take place.

The starting point for the sequence was defined on the Crown case by the episode in which the doorman Adair is seen on the video to come out of the bar at 00:40:31, stand looking in the direction of the roundabout and then return into the bar at 00:40:49. If, as the Crown claim, the appellant accepted the part of Adair's statement put to him in interview which we earlier set out, then the appellant was still with Doole and Neill at that point.

The end point of the sequence is the time at which the car in which Ms McNaul was a passenger approached the scene, for on her evidence the incident was then over and the deceased was lying on his own in the road. Crown counsel submitted that the loom of its lights could be seen at 00:42:06, and that the matters visible on the video over the next minute or so establish that this was Leanne Mayne's car.

The first challenge to this scenario was based on an objection to the admission in evidence of the portion of the interview of the appellant in which part of Adair's statement is read out to him. An application was made

to the judge at trial to exclude that evidence on the ground that it was hearsay, since Adair did not give evidence, and had not been adopted by the appellant. The judge acceded to this application in respect of certain parts of the interview, but admitted those parts which we have quoted. He then left it to the jury to determine whether the appellant had accepted the truth of the material parts of Adair's statement. The principle governing the admissibility of such evidence was set out by Lord Atkinson in *R v Christie* [1914] AC 545 at 554:

> "… the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part."

We consider that the judge was correct in leaving this issue to the jury.

It was then submitted before us that he failed to make it clear to them that if they did not consider that the appellant had accepted that part of Adair's statement they must disregard it as being inadmissible in evidence. We have to agree that such an instruction does not appear in the passage at pages 58 to 60 of the judge's charge in which he deals with the issue and that it would have been preferable that he should have given it. We are of

opinion, however, that the passage which we have quoted from the interview shows very clearly that the appellant did accept the correctness of the material portion of Adair's statement. The omission of an instruction to disregard it if the jury did not so find had in our judgment no significant effect on the safety of the conviction.

Thirdly, it was argued that by substituting the appellant's name "Thompson" in the quotations from Adair's statement instead of his nickname "Monster" the judge prejudiced the appellant. We do not consider that there is any substance in this point. The judge substituted the name for the nickname because of the obvious possibility that the nickname might give rise to a prejudicial inference against the appellant. Mr Macdonald claimed that this constituted an identification which Adair had not made, which wrongly strengthened the evidence against the appellant. We do not consider, however, that he was put at any disadvantage by the substitution of his name. It is quite clear from examination of the interview transcript that the appellant accepted that it was he who had been standing with Doole and Neill when Adair came out and walked towards them and that he was the one who answered to the name of Monster.

The issue then was whether the evidence appearing from the video sequences, taken together with the evidence from Adair's statement, was sufficiently compelling to constitute a prima facie case on which a jury could properly find that the interval was too short for Doole's co-assailant to be anyone but the appellant. It was submitted that in the light of Rainey's

evidence accepting that the man in the light trousers appearing on the video was not the man whom he saw attacking Neill it should not have been left to the jury. We have already indicated that we consider that Rainey should not have been asked the questions in the form in which they were posed, for the conclusion which counsel asked him to draw was properly for the jury. What was established was that the clothing described by Rainey as that worn by the assailant differed markedly from that worn by the man in the video. The judge left it to the jury to determine whether Rainey's description given to the police may have been mistaken. If the jury took that view, then they might conclude that the circumstantial evidence that the appellant carried out the assault on Neill was sufficiently conclusive to prevail over Rainey's misdescription of the assailant. That circumstantial evidence, as the Crown contended, was that the interval between Adair's last sighting of the appellant along with Doole and Neill at 00:40:49 and the arrival on the scene of Ms McNaul at or shortly after 00:42:06 was so short that it was impossible for any person other than the appellant to have been the assailant. As Mr Lynch QC cogently argued, within that time the appellant must have left the scene, then the unknown assailant would have arrived on the scene, joined up with Doole and Neill and for some reason become involved with Doole in a ferocious attack on Neill. He submitted that it was incredible that this could all have occurred within a period of less than a minute and a half. He pointed out that the facts other than Rainey's description of the assailant's clothing supported the Crown case, for all witnesses correctly described the assailant as some

inches taller than Doole. We are of opinion that the judge was correct to leave the case to the jury and that it was very much a matter on which the jury could decide.

Misdirection of the Jury

The Sequence of Events

Counsel for the appellant argued that the judge misdirected the jury in his reference to the length of time between Adair's last sighting of the appellant and the arrival of Leanne Mayne's car. He referred to a period between 72 and 80 seconds, whereas the minimum lapse of time between 00:40:49 and 00:42:06 was 77 seconds (the judge used the times of 00:40:48 and 00:42:07 in his charge, two seconds longer). It was possible to suppose that it might be extended at each end by a few seconds, if Adair had his back to the three men as he turned back into the bar and Ms McCaul did not spot the body immediately. Crown counsel's working gap of 90 seconds was a fairer estimate, and the difference between 72 and 90 seconds was material. It is right to say, however, that at page 62 the judge said "let us say 80 seconds", which is in our view not unfair. Moreover, he had the material parts of the video played over to the jury during this part of his charge and invited them to form their own judgment on times. We accordingly do not consider that he misdirected them over the timings.

Counsel also took exception to the fact that the judge's charge was the first place in which the suggestion was made that the lights of Ms Mayne's car could be seen on the video at 00:42:07 or thereabouts. This had not been

propounded in the course of evidence, so when the judge raised it at that stage counsel had had no opportunity to deal with it in their speeches to the jury. He ought to have given notice to them, in the interests of fairness: *R v Christini* [1987] Crim LR 504 at 506, *per* Watkins LJ. In general it is desirable that a judge take this course if he is raising a new issue, but it will depend on the facts and circumstances of the case whether failure to do so has given rise to any unfairness. In the present case the judge was not so much introducing a suggestion which changed the course of the case as amplifying the matters visible on the video which had already been well canvassed during the trial. We do not consider that it gave rise to any unfairness.

David Alexander's Evidence

Mr Macdonald submitted that when he came to deal with David Alexander's evidence the judge ought to have given a full *Turnbull* warning of the dangers of relying on identification evidence. Mr Alexander did not, however, purport to rely on any identifying features when he expressed the conclusion that the three men whom he saw engaged in the fracas were the same ones as those whom he had passed in his taxi. He accepted that he could not identify them by any single feature of their appearance. His reason for assuming that they were the same men was because of the brevity of the time which had elapsed since he passed them. We do not consider that a *Turnbull* direction in the usual form would have been necessary or even appropriate. The task of the judge in these circumstances was to give a direction tailored to the particular facts of the case. He had to point out to the

jury that the witness's conclusion was based not on identifying features but on a particular assumption, the validity of which they could judge for themselves, and remind them that a witness giving such evidence may be completely honest but nevertheless mistaken. The judge performed this task with care and skill at pages 44-46 of his charge and we do not think that he can be faulted.

Ms McNaul's Evidence

When the judge retailed the content of Ms McNaul's evidence to the jury at pages 55-56 of his charge, he told them that she had stated (as she did in examination in chief) that she had arrived on the scene five to ten minutes before the arrival of the police, whose arrival was timed at 12.23 am. He omitted to remind them that she agreed in cross-examination that she really was not able to say how long elapsed before the police arrived and had been prepared to agree with counsel that it might have been only a few seconds. The judge did, however, remedy this omission when he gave the jury further directions after requisitions had been made. In our opinion the jury had the whole of the evidence sufficiently before them and the content of the video and we do not consider that they were misled over Ms McNaul's evidence.

The Possible Presence of Other Persons

At pages 66-67 of his charge the judge dealt with the possibility that other people may have been on the scene. At page 67 he said that the jury might want to ask themselves if it was not remarkable that none of the people who observed what took place appeared to have seen any third person

coming on to the scene. Mr Macdonald submitted that this was misleading, because Mr Rainey accepted in cross-examination that there could have been other persons whom he did not notice. We see no substance whatever in this point: the material fact pointed out by the judge is that Mr Rainey did not observe any other persons, nor did any of the other witnesses, and this fact is unaffected by his agreement that it was possible that he may have failed to notice them.

The Balance of the Summing Up

The appellant's counsel attacked the content of the charge as a whole, contending that the errors and omissions on which he relied made the verdict unsafe and that the judge did not put the defence case properly to the jury. We have read carefully through the long and detailed charge, which was patently the product of careful preparation on the part of the judge, in order to form our judgment on these issues. On the first, we are of the clear view that any errors or omissions – and it will be seen from the foregoing passages in this judgment that we decline to accept that most of the complaints about the judgment have been made out -- were very minor and fell a long way short of making the verdict unsafe. Mr Macdonald catalogued a number of respects in which he submitted that the judge laid undue emphasis on the Crown case and undermined the defence case. We do not propose to repeat them in this judgment. It is the duty of the judge in a criminal trial with a jury to ensure that the defence case is clearly and fairly put, a duty which must be discharged with particular care when the defendant does not give evidence.

It is equally his duty not to give undue emphasis to the Crown case so that the charge becomes unbalanced. That is not to say, however, that one should count sentences or paragraphs to see that the balance between the cases runs like a euphuistic sentence. The Crown evidence will frequently be substantially more detailed than the defence evidence, and in a case depending on circumstantial evidence it may require detailed exposition and explanation so that its proper effect is clearly understood by the jury. The important thing is that the judge sets out clearly what the answer of the defendant is to the allegations of Crown witnesses and does not gloss over any weaknesses exposed in the prosecution evidence in the course of the trial. The fairness of the charge can usually be assessed only by reading critically through it and considering it as a whole, an exercise which we have performed. Having done so, we are satisfied that the defence case was properly and fairly put before the jury for their consideration.

Intention

The judge directed the jury in very clear terms about the nature of the *mens rea* of murder and the necessity for them to be satisfied beyond reasonable doubt that at the time when the appellant threw Neill to the ground (assuming that they were so satisfied that it was he who did so) he intended to inflict death or grievous bodily harm on him. He pointed out at page 18 of the charge that they could have regard to the intention of the appellant at the subsequent stage of the assault, when he jumped up and down on Neill's head, when seeking to assess his intention at the time when

he threw him to the ground. We consider that this was a correct direction: if the jury concluded that the appellant threw Neill to the ground in order to kick him, they could quite properly take the view that his intention throughout both phases of the assault was to inflict grievous bodily harm.

Mr Macdonald submitted, however, in reliance on *R v Woollin* [1999] 1 AC 82, that the judge should have directed the jury that it was not entitled to infer the necessary intention to inflict death or grievous bodily harm unless they were satisfied that death or grievous bodily harm was a virtually certain result of the appellant's actions. That proposition is in our opinion founded on a misapprehension of the principle enshrined in *R v Woollin* and the earlier case of *R v Nedrick* [1986] 3 All ER 1. In *Woollin's* case the appellant lost his temper and threw his three-month-old son on to a hard surface, in consequence of which the child sustained a fractured skull and died. The distinctive feature of the case was that it was accepted by the Crown that the appellant did not subjectively wish to kill the child or cause him grievous bodily harm. It was contended, however, that the intention on his part to do so should be inferred from the virtual certainty that death or grievous bodily harm would result from his actions.

The trial judge directed the jury in accordance with the direction given by Lord Lane CJ in *R v Nedrick,* in which the appellant had poured paraffin through the front door of a house and set it alight, in consequence of which a child died. At page 3 of his judgment Lord Lane dealt with what he later called the "simple direction":

> "What then do a jury have to decide so far as the mental element in murder is concerned? They simply have to decide whether the defendant intended to kill or do serious bodily harm. In order to reach that decision the jury must pay regard to all the relevant circumstances, including what the defendant himself said and did.
>
> In the great majority of cases a direction to that effect will be enough, particularly where defendant's actions amounted to a direct attack on his victim, because in such cases the evidence relating to the defendant's desire or motive will be clear and his intent will have been the same as his desire or motive. But in some cases, of which this is one, the defendant does an act which is manifestly dangerous and as a result someone dies. The primary desire or motive of the defendant may not have been to harm that person, or indeed anyone. In that situation what further directions should a jury be given as to the mental state which they must find to exist in the defendant if murder is to be proved?"

He went on then to consider the type of case where a defendant may intend to achieve a certain result while at the same time not desiring it to come about. At page 4 he set out the following principles for directing juries in such cases:

> "Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.
>
> Where a man realises that it is for all practical purposes inevitable that his action will result in death or serious harm, the inference may be irresistible that he intended the result, however little he may have desired or wished it to happen."
> The decision is one for the jury to be reached on a consideration of all the evidence.

In *R v Woollin* the trial judge had in some places in his summing up used the phrase "substantial risk" instead of "virtual certainty". The House of Lords approved the *Nedrick* guidance, but held that the use of the phrase "substantial risk" blurred the line between intention and recklessness. The effect of the special direction, as Lord Steyn observed at page 93, is that "a result foreseen as virtually certain is an intended result."

The special direction was not in our opinion in point in the present case, nor was it necessary that the jury should be directed that they should find that grievous bodily harm was a virtual certainty as a result of the appellant's actions before they could infer that he had the intention to inflict such harm. Such a direction is appropriate where the subjective desire of the defendant did not extend to the infliction of grievous bodily harm. In such a case he may nevertheless be taken to have intended such harm where it is a virtually certain result of his actions. As Lord Lane CJ stated in *R v Nedrick,* it is only in rare cases that this direction is required. In cases where the defendant's intention can be inferred in a straightforward manner by considering his words and actions, it is not necessary to resort to it. This was in our opinion such a case. The judge's direction was accordingly quite sufficient.

The Time of the Jury's Retirement

The judge sent the jury out at 3.03 pm to commence consideration of their verdict. He did not, however, require them to remain in deliberation for a long period and released them at 4.34 pm, to return the next morning and

resume their task. Not very long ago criminal courts sat for rather longer hours than today and juries frequently were sent out to consider their verdict at much later hours. It is now generally reckoned undesirable, however, to send out a jury after 3 pm in a complex case or one in which they have to weigh up a good deal of evidence, and we regard this, as we have said before, as sound advice. The mischief against which the practice is designed to guard is that the jury may be fatigued and their concentration may be impaired or that they may feel under undue pressure to reach a verdict in order to finish the case and get home: cf our judgment in *R v McMoran* [1999] NIJB 50 at 52f. The judge was himself fully aware of the importance of this, as appears from page 76 of the transcript. There was no evidence in the present case that the jury had shown signs of tiredness or had been required to sit for a particularly long day before they retired (they had started later than usual, as the judge was in another court). Any such possibility was effectively negated when the judge released them at 4.34 pm. Mr Macdonald argued that by bringing them back on a Saturday, which also happened to be Grand National Day, the judge may have put them under some pressure to finish their deliberations. He submitted that he should not have sent them out on the Friday at all, but should have deferred doing so until the Monday morning. This ingenious submission seems to us to depend entirely on speculation, in which we are not prepared to indulge. We do not consider that there was any basis for criticism of the judge for taking the course which he did.

The Jury's Request to see the Video

As the transcript shows, the jury made a request to see the video again after they retired. Some discussion took place between the judge and counsel as to the proper course to be followed, then the judge told them (page 73) that they could signify to the jurykeeper when they would like to see it and arrangements would be made. The next morning the judge told them that it would have to be viewed in open court, founding no doubt on the views expressed by the English Court of Appeal in *R v Imran and Hussain* [1994] Crim LR 754. The jury did not in the event follow up the matter and returned with their verdict without further viewing. Mr Macdonald submitted that in the absence of a further viewing the verdict was unsafe. We cannot accept that. The jury were informed unequivocally that they could see the video when they wished. If they felt that they had a sufficiently clear view of the case and chose to bring in their verdict without seeing it again, that was a matter for their own judgment.

Conclusion

For the reasons which we have given we therefore conclude that (a) there was a sufficient prima facie case to go to the jury (b) the jury were quite justified on the evidence in reaching the verdict of guilty of murder (c) none of the matters put forward on behalf of the appellant made the verdict unsafe. We therefore dismiss the appeal.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

DAVID JOHN THOMPSON

———

J U D G M E N T O F

CARSWELL LCJ

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