

1 MR ORR: May it please your Lordship, my Lord, at this stage I
2 would make an application for a direction based on
3 effectively two aspects; first of all the second limb of
4 [REDACTED] and the second matter, the refinement of the
5 Turnbull principle in relation to identification. If I
6 could refer your Lordship initially to page 406 of Archbold.
7 Paragraph 4-294 dealing with the [REDACTED] decision and the
8 first limb.

9 "If there is no evidence that the crime alleged has been
10 committed by the defendant, there is no
11 difficulty".

12 But the second limb:

13 "The difficulty arises where there is some
14 evidence but it is of a tenuous character,
15 for example, because of inherent weakness or
16 vagueness or because it is inconsistent with
17 other evidence

18 (a) where the judge concludes that the
19 prosecution evidence, taken at its highest,
20 is such that a jury properly directed could
21 not properly convict on it, it is his duty,
22 on a submission being made, to stop the case.

23 (b) where, however, the prosecution evidence
24 is such that its strength or weakness depends
25 on the view to be taken of a witness's
26 reliability, or other matters which are
27 generally speaking within the province of the
28 jury and where on one possible view of the
29 facts there is evidence on which the jury
30 could properly come to the conclusion that

1 the defendant is guilty, then the judge
2 should allow the matter to be tried by the
3 jury".

4 And over the page, page 407, reference to the Shippey
5 decision and "...the requirement to take the prosecution
6 evidence at its highest did not mean picking out all the
7 plums and leaving the duff behind".

8 The second aspect of it, if your Lordship pleases, is
9 the Turnbull case and I refer your Lordship to page 1247 of
10 Archbold.

11 [REDACTED]: Yes.

12 MR ORR: I am dealing with identification. It indicates the
13 following guidelines to be observed by trial judges when
14 identity is an issue were laid down by the Court of Appeal
15 in R.v.Turnbull. First:

16 "Whenever the case against the accused
17 depends wholly or substantially on the
18 correctness of one or more identifications of
19 the accused which the defence alleges to be
20 mistaken the judge should warn the jury of
21 the special need for caution before
22 convicting in reliance on the correctness of
23 the identification".

24 Secondly, then moving on, my Lord, to the bottom of the
25 page:

26 "Secondly the judge should direct the jury to
27 examine closely the circumstances in which
28 the identification by each witness came to be
29 made"

30 and deals with a number of matters. And then moving onwards

1 to page 1249 under the heading:

2 "Withdrawing the case from the jury".

3 "When the quality of the identifying evidence is poor and
4 unsupported the trial judge should withdraw
5 the case from the jury. Turnbull protects
6 the jury from acting upon the type of
7 evidence which, even if believed, experience
8 has shown to be a possible source of
9 injustice. Where the judge forms the view
10 that the identification evidence is poor and
11 unsupported he is under a duty in the absence
12 of submissions from the defence to invite
13 submissions and, if appropriate, to withdraw
14 the case from the jury".

15 And we respectfully say applying both the Galbraith second
16 limb and the Turnbull principle that your Lordship should
17 not allow the case against this accused to proceed further.
18 In terms of the opening of the Crown case if your Lordship
19 pleases, the Crown opened the case on the basis that this
20 was a joint enterprise, that the accused joined in a joint
21 enterprise with others and in the circumstances in which he
22 was observed he was clearly involved as one of those who
23 contributed to the death, either as a principle or as a
24 secondary party.

25 Now, if I might refer your Lordship to the judgment of
26 the learned Lord Chief Justice in the case of the R.v.Henry
27 & Others which has been referred to as the Ballymoney case.
28 And that was a case, my Lord, in which an off-duty police
29 officer was attacked by a number of male persons in the Main
30 Street in Ballymoney and suffered injuries which resulted in

1 his death. And in relation to that judgment the heading of
2 mens rea of murder the learned Chief Justice deals with the
3 evidence.

4 [REDACTED]: I don't think I have a judgment.

5 MR ORR: Sorry, does your Lordship -- (speech interrupted).

6 [REDACTED]: If you might have a spare copy. Thank
7 you very much.

8 MR ORR: I apologise, my Lord.

9 [REDACTED]: What page are you on?

10 MR ORR: I refer your Lordship to page 15 of the judgment.

11 [REDACTED]: Yes.

12 MR ORR: "In order to prove any of the defendants guilty of the
13 murder of the deceased it is incumbent upon
14 the Crown to establish that the intention of
15 his attackers was to cause grievous bodily
16 harm to him. Malice aforethought, which is
17 express where there is a proved intention to
18 kill can be implied where the accused
19 intended by a voluntary act to cause grievous
20 bodily harm to the victim".

21 Refers to R.v.Vickers and Lord Goddard. And then deals with
22 the policy reason for supporting the rule. And if I move
23 forward, my Lord, to page 17. At the top of the page:

24 "The Crown case against Henry and Stevenson
25 was put in the alternative.

26 (a) Each was, on the evidence, shown to have
27 been a principle actor in inflicting the
28 injuries from which the deceased died...

29 [Read]...

30 ...If some positive act of assistance or

1 encouragement is voluntarily done".

2 And then:

3 "With knowledge of the circumstances
4 constituting the offence it is irrelevant
5 that it is not done with the motive or
6 purpose of encouraging the crime".

7 And it would be our respectful submission to your
8 Lordship that there is no evidence before the court on which
9 the Crown can establish or show or demonstrate that this
10 activity by the accused, accepting the Crown case at its
11 height, was in pursuance of any agreement. There is no
12 evidence that his conduct was done with knowledge of the
13 circumstances constituting the offence. If your Lordship
14 pleases, the matter is taken further in Archbold, but I
15 don't propose to just simply to read it, but I refer your
16 Lordship to page 1545 of Archbold, chapter 18 and also page
17 1566. And we say, if your Lordship pleases, three things:
18 We say that there is no evidence of any common purpose, we
19 say there are no words to suggest any common purpose and
20 then taking it a stage further, we say that there is no
21 reliable evidence of any intention to cause really serious
22 harm.

23 And, secondly, the Crown case at its highest, one is
24 still dealing with a situation where the accused is
25 accepting Constable Neill came on the scene after the attack
26 had been carried out on the unfortunate Mr Hamill. If one
27 looks at the totality -- (speech interrupted).

28 [REDACTED]: When you talk about common purpose and so
29 on, what you are saying, relative to the accused?

30 MR ORR: Yes, indeed.

1 [REDACTED]: I mean other people may have had a common
2 purpose, you're not really interested in that, you say?

3 MR ORR: No. Clearly on the evidence that your Lordship has
4 heard there was a group, a Loyalist group, who had the
5 common purpose of attacking and injuring the small group
6 coming from St Patrick's Hall, there is no question of doubt
7 about that. But there's no evidence of the involvement in
8 any shape or form of this accused at that time.

9 [REDACTED]: Yes.

10 MR ORR: And indeed accepting the evidence of Constable Neill the
11 first sighting of the accused is at a time when Mr Hamill is
12 lying prone on the ground. If one accepts Constable
13 Neill's evidence someone was running towards Mr Hamill with
14 a bottle, he doesn't suggest that was the accused. If one
15 accepts the evidence at its height of Constable Atkinson
16 that there were three people stamping on Mr Hamill's head he
17 doesn't make the case that the accused was any of that
18 group. But one has to look, if your Lordship pleases, at
19 the Crown case in its totality and referring it to the
20 Galbraith principle the evidence of Constable Neill is
21 inconsistent with every other witness in this case. And
22 indeed his evidence is inconsistent within itself where he
23 changes his evidence from time to time. If one takes
24 account, if your Lordship pleases, of the E & F,
25 E and F, D I disallow because
26 he really can't assist or help in any shape or form, but
27 E sees the Land Rover sitting when they get
28 close to the junction. She has herself in a group of four,
29 two of whom are girls, and she describes the incident as
30 'the attack' being over in a matter of seconds. Now, it's

1 difficult, my Lord, to accept that it was over that quickly.
2 But the situation is that quite clearly this was an
3 unprovoked attack on a small group of people who were moving
4 from St Patrick's Hall back to their home area near to the
5 tunnel. The position is that E said that at the
6 time of the attack there were no police out of the Land
7 Rover. She said that she saw no confrontations at or near
8 the Land Rover and her evidence was that by the stage the
9 attack was over and by the attack being over, the attack on
10 Mr Hamill, the police hadn't got out. She was obviously
11 more concerned about D and what she said was that
12 no one attacked D after the initial attack. And
13 she describes no ongoing attack by the crowd that she could
14 see.

15 Now, allowing for the fact that her main concern and
16 interest was D, who was lying unconscious on the
17 roadway, she also was related to Robert Hamill, so she was
18 concerned about both of them. And looking at her evidence,
19 if one stops there and comparing and contrasting that with
20 the account that your Lordship has heard from Constable
21 Neill, the two just do not stand together. One is
22 completely at odds with the other.

23 If one takes the evidence of F, the
24 relevance and significance, my Lord, of her evidence is
25 added to, unlike any of the other civilians in the case
26 because F was sober, she had no drink taken.
27 And she describes coming along Thomas Street, she describes
28 the attack taking place and she describes seeing Robert
29 Hamill lying on the ground after the attack. Her evidence
30 was that after the attack which forced Robert Hamill to the

1 ground she said that the crowd, that is the Loyalist crowd,
2 were no longer attacking Robert when she put her coat, took
3 her coat off, and put it under Mr Hamill's head.

4 **EW to GM at 12.00**

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GM from EW at 12:00.

Submissions (Cont'd) by MR. ORR.

MR. ORR: She confirms that at no stage did she see any police officer out of the Land Rover during the attack on the two men who ended up unconscious. She confirms that she was with Robert, and as best she can she thinks she was with Robert Hamill for five to ten minutes before she ran to the Land Rover. She said she couldn't be sure about the times. During that time she saw no one attack Robert Hamill. The position is that she said that she banged on the door of the police Jeep, as she called it, shouting to them to get out and help him. She said no-one said anything. Her evidence was that she never saw any police trying to stop the trouble, and her evidence was that she didn't hear the two groups taunting each other and catcalling.

If one takes her evidence, my Lord, and compares it with the evidence of Constable Neill, who is essentially the key Crown witness in the case, the two don't lie together.

Indeed, it would seem that F [redacted] may well have been the woman or girl who was complaining to Constable Neill about them sitting in the vehicle watching it happen.

Colin Prunty was the other civilian witness who was called. He is walking along and he also confirms that the first attack was on Robert Hamill. He describes the group involved as it being 20 to 30, that Mr. Hamill was dragged to the ground and kicked and beaten and was kicked everywhere, and that he heard comments such as "kill the Fenian bastard". He also confirms that D [redacted] was hit and he went straight to the ground. His evidence is

that he went to help, and when asked he said there were no police around at that time.

His evidence differs or varies from the two girls in that his evidence in recollection was of an incident which lasted about 10 minutes. That would be closer to the estimate which is given by the police. But if your Lordship takes account of the fact that the evidence is that the function in St. Patrick's Hall ended at 1:30, the evidence of the E & F was that they didn't leave until after the end, although they left reasonably quickly because of concern about a babysitter. So that the likelihood would be that their arrival at this flashpoint junction would have been more likely to have been around 1:40am, perhaps a minute or two either side; and that the attack, whilst it wasn't over in a flash, the attack on the two men was over within a relatively short period of time; that after the initial attack others who were on the fringes were involved in shouting at each other and indeed in running forward and attacking each other, but that that was all after Mr. Hamill and D had been put to the ground.

One then has a situation where the police, when they did get out, should have seen those two people on the ground and that is the only conceivable explanation for the man and the woman. Again one would suggest that the man who was complaining about the police conduct could well have been Mr. Prunty but without going into who it was, they clearly were complaining about the police sitting in the police vehicle watching it happen and doing nothing.

The evidence about the original confrontation between the man who gave the police the warning that there was a group coming from St. Patrick's Hall and his confrontation with the two people, one of whom was Stacey Bridges who ended up chatting to the police at the open door of the Land Rover, it was something that could not have been seen because of the existence of the Land Rover. The evidence given was that that couldn't have been the case; Constable Neill said that.

So clearly something must have happened which caused two people to complain to Constable Neill about the actions or rather the inactions of the four police officers. He has not put forward or given anything that could have happened which could have led to that conclusion. It would seem that effectively if his evidence is to be believed that what in reality was happening was the two people were complaining about the police allowing two rival groups to catcall one another - one group of about 50 and one group of eight to 10.

So clearly we say that the attack was over before Constable Neill left the police Land Rover. If that was the case then in relation, and accepting his evidence of identification but I'll come to that in due course, my Lord, accepting his evidence one could not form the conclusion that the accused was involved in any joint enterprise. If one takes the matter a stage further one considers the evidence of Constable Atkinson. Constable Atkinson did get

out of the Land Rover. Constable Atkinson ran, on his account, got out and he went to the side of the vehicle; didn't know why Constable Neill had been pulled out; and then he said that the fighting started and that he and Constable Neill ran together to a three-to-one situation out Eastwoods, grabbed the person who was on his own, namely the Nationalist, and ran him together right through into the mouth of Woodhouse Street. Constable Neill says that he did it on his own. Constable Neill says that when he got that youth into Woodhouse Street, that another, a loyalist youth, came and punched him in the face, punched the Nationalist youth in the face. Constable Atkinson didn't see that.

Of course, the other factor is that Constable Atkinson turns from leaving the youth into Woodhouse Street, turns around and sees two bodies on the ground - clearly Mr. Hamill and Mr. D. So if one takes the evidence of Constable Atkinson it doesn't fit in, it doesn't tie in in any shape or form with the evidence of Constable Neill. Of course, Constable Neill goes further because Constable Neill, leaving aside for the moment what he saw of the accused beside Robert Hamill, he also says that the accused was involved in a fight with Constable Atkinson. Constable Atkinson makes no mention of being in any such fight, makes no mention of having to be dragged out of any such fight. In one takes, if it please your Lordship, the ambulance driver who clearly has no axe to grind in this case, Constable Neill says that D was lying outside the Number 7 Bakery and Mr. Hamill was lying outside the

Eastwood shop; the ambulance driver says both men were lying on the church side of the mouth of Thomas Street. So that even in terms of where the two men were lying, and there is nothing to suggest one got up or moved. Bear in mind also, my Lord, the evidence of Constable Atkinson that he is holding this loyalist mob back while he says Constable Neill is checking on the two civilians. So it is not a case that Constable Neill is saying I thought one was outside the bakery from a distance. The evidence is he went over and checked both men.

So when one looks at all of that, of course one takes it, if it please your Lordship, to the additional evidence which was served, namely the A [REDACTED].

The evidence suggests that the vehicle A [REDACTED] was in was at the roundabout at about 1:46. Your Lordship has heard that it would take two to three minutes from there to get to the centre of Portadown and that would suggest, if it please your Lordship, that by 1:50 the main problem, the main fighting was already over. The proof of that is the log which shows a request for an ambulance at 1:48, so the incident involving the attack on Mr. Hamill at that stage was complete. Whilst there may have been catcalling and the occasional fighting going on afterwards, it is not without significance that A [REDACTED] sees none of it. She arrives; her first concentration is on a man with a bottle in his hand and a red, white, and blue scarf over his face. She doesn't get him initially but she gets him at the second attempt and she walks him down. One can time her call seeking his identification at 1:55. So that again, we

suggest, would support the second police vehicle arriving at around 1:50, 1:49, 1:50 by which stage the fighting was over. Again taking the starting point of the function in St. Patrick's finishing at 1:30, the incident was a lot shorter than is being suggested or indicated by Constable Neill.

If one looks then, taking it from that general issue, my Lord, to the issue concerning the identification, and the position is that Constable Neill had the accused in sight for a few seconds. He had accepted that he said one to two seconds at the preliminary investigation. So that is the time factor. At what distance - the distance it would appear to have been halfway, the width of the street. In what light; we have heard that the lighting was not brilliant but it was adequate. Was the observation impeded in any way from passing traffic or oppressive people? Clearly there was oppressive people here. Not only was there oppressive people but Constable Neill performs this identification of someone he had never seen before whilst he was involved in a fight with two or three other people. He manages to see the accused mouthing something at the prone Mr. Hamill; he manages to see him swinging at him but he then goes on to say that he watched and he did not see Mr. Hamill's body move. So that there must be a doubt as to whether there was even a contact between Mr. Hamill and the deceased.

But dealing with all of those factors concerning the identification, those factors alone would be such that it

would be unsafe to allow the case to proceed.

When one adds really the combination of the conflict in the evidence between Constable Neill and all of the other Crown witnesses in relation to the Galbraith point, and when one adds the various criteria that the Court of Appeal has seen fit to adopt in Turnbull, it would quite improper or wrong to allow the Crown case to proceed.

I mention, if it please your Lordship, in passing that on the basis of the medical evidence, and particularly the evidence of Professor Crane and significantly the evidence of Mr. Patel, I would respectfully ask your Lordship to consider the possibility that there was a novus actus interveniens. Taking account of the evidence of Professor Crane that he had never known anyone with this axonal injury to progress and seem to be improving and then suddenly deteriorate as happened with Mr. Hamill; that he would normally expect either the person would be bad and just get worse or alternatively would improve and get better; that that leaves open the possibility that the injection which was given at 3:10 in the afternoon would led to Mr. Hamill's deterioration within 30 minutes, because we have heard from Mr. Patel that at 3:40 he was urgently summoned because of the deterioration in Mr. Hamill's situation.

In relation, my Lord, to the second count concerning the affray, what we say effectively is that it is covered by the learned Lord Chief Justice in the Ballymoney case at page 21 and it says "affray is a common law misdemeanour whose elements present to the case that unlawful fighting is used

by one or more persons against another or others in a public place in such a manner that by a person of reasonably firm character might reasonably be expected to be terrified".

Referring to Lord Hailsham's warning that the requirement of terror rather than mere fright should not be watered down, it is not necessary however to call a witness to say that he was put in terror.

Insofar as that is concerned, if it please your Lordship, the Crown at your Lordship's invitation have indicated that the evidence of causing an affray relates (a) to the conduct of the accused over the prone body of Mr. Hamill; and (b) his fighting with a police officer who didn't know he was fighting with him.

The only evidence in relation to the affray comes from Constable Neill, and we say that his evidence is seriously flawed, indeed we go further and say that Constable Neill's evidence is incapable of believe, because one is dealing with a police officer of 16 year's experience who just cannot logically put together a sequence and series of incidents; who seems to be at variance with absolutely every other witness in this case.

Of course, the other factor which we say is relevant to both counts - there were four police officers in the vehicle, the court has only heard from two of them. The evidence would suggest that Woman Constable Cornett remained at the police vehicle. One witness suggested might be because there was a rifle in it, but it was suggested she was there for radio

communications. As your Lordship has heard, her radio communications were few and far between during the crucial period. There appeared to have been three attempts to contact the police station by the police radio in the car and then an attempt to get an ambulance. That seems to be the extent of her involvement.

But P40, he wasn't protecting any rifle, he wasn't listening to any radio communications. P40

P40 was out and in the middle of this matter and yet for some reason we just don't hear from him, we don't know what he saw or didn't see. We respectfully say that when one takes all of those factors that the only possible conclusion that your Lordship can come to is that it would be unfair to allow the trial to proceed.

There is nothing I can usefully add.

[REDACTED]: Yes, I am much obliged.

MR. KERR: If it please your Lordship, my Lord. My Lord, in terms of most of the legal principles relating to the power of the court at this stage I have no disagreement with my learned Friend, and in fact in relation to some of the factual matters he has raised it would be foolish of the Crown to suggest that this was a case which was not one which contained difficulties in terms of inconsistencies as between witnesses called arising out of the circumstances which persisted on the night. But if I might respectfully reply to my friend's application by dealing with the matters firstly as to the facts that are relevant, the prosecution say, and then secondly dealing with the legal implication of