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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:*
	Delivered: **06/12/2024**

IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT LAGANSIDE COURTHOUSE, BELFAST

THE KING

v

SOLDIER F

Mr Louis Mabley KC, Mr Sam Magee KC and Mr David McNeill (instructed by the Public Prosecution Service) for the Crown
Mr Mark Mulholland KC, Mr Ian Turkington KC and Ms Leila Gaafar (instructed by MTB Law Solicitors) for Soldier F

RULING ON NO BILL APPLICATION

FOWLER J

Introduction

[1] The defendant before the court is known for the purposes of these proceedings as Soldier F. He applies for an Order of 'No Bill' in respect of all counts on the bill of indictment preferred against him. He was returned for trial in January 2024 and is indicted on two counts of murder (Counts 1 and 2) and five counts of attempted murder (Counts 3–7). The charges against him arise out of events which occurred on 30 January 1972 in Derry when 13 civilians were killed during what has become known as 'Bloody Sunday.'

[2] The specific counts on the bill of indictment are as follows:

Count 1 On 30 January 1972, Soldier F murdered James Wray, contrary to common law.

Count 2 On 30 January 1972, Soldier F murdered William McKinney, contrary to common law.

Count 3 On 30 January 1972, Soldier F attempted to murder Joseph Friel, contrary to common law.

Count 4 On 30 January 1972, Soldier F attempted to murder Joseph Mahon, contrary to common law.

Count 5 On 30 January 1972, Soldier F attempted to murder Michael Quinn, contrary to common law.

Count 6 On 30 January 1972, Soldier F attempted to murder Patrick O'Donnell, contrary to common law.

Count 7 On 30 January 1972, Soldier F attempted to murder a person or persons unknown, contrary to common law.

[3] I have been invited by the defence to order an entry of 'No Bill' under section 2(3) of the Grand Jury (Abolition) Act Northern Ireland 1969 (the 1969 Act) on the basis that the prosecution evidence, as contained in the depositions and statements within the committal papers, taken at its highest, is so tenuous that the court, properly directing itself, could not convict upon it. The prosecution submit to the contrary that the evidence before the court discloses a case sufficient to justify putting the defendant on trial.

No Bill applications – test and principles to be applied

[4] Section 2(3) of the 1969 Act provides that:

> "The judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of "No Bill" in the Crown book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that the depositions or, as the case may be, the statements mentioned in subsection (2)(i), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented."

The statutory language of this section gives the court the power, if it concludes that the committal papers do not disclose a sufficient case, to make an order of 'No Bill'.

[5] There is no dispute as to the appropriate legal test and the principles to be applied in considering a 'No Bill'. These are to be derived from *R v Adams* and *Re Macklin's Application* [1999] NI 106 which were summarised by Hart J in *R v McCartan and Skinner* [2005] NICC in the following way:

> "(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.
>
> (ii) The evidence for the Crown must be taken at its best at this stage.
>
> (iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty, and in doing so should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in Practice Note [1962] 1 All ER 448." (Emphasis added)

[6] The test to which Hart J referred is the well-established one that if there is no, or insufficient, evidence on which a reasonable jury properly directed could return a verdict of guilty then the case must be withdrawn from the jury.

[7] This test was recently revisited by the Northern Ireland Court of Appeal in the case of *R v Valliday [2020] NICA* where the central issue was: –

> "… whether the judge, having determined that the statutory test of insufficiency of evidence was satisfied, erred in law in exercising his statutory discretion to nonetheless reject the 'No Bill' application…"

[8] The court went on to analyse at para 21 section 2(3) of the 1969 Act and observed:

> "Section 2(3) of the 1969 Act prescribes a two-stage exercise. At the first stage the judge determines whether the committal papers disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented. At this stage the court is confined to considering the committal papers only … the test to be applied is the *Galbraith* test. If the court determines that the committal papers do disclose a "case sufficient" in the terms of section 2(3) the exercise is completed. The application to order an entry of "No Bill" must be refused and the second stage does not arise. In contrast, if the court determines that the first stage that the committal papers do not disclose a "case sufficient" in the terms of section 2(3) the second stage is reached, and the exercise must continue. It is at this stage that the exercise of the court's discretion arises. The existence of

> this discretion flows from the statutory language "… shall…have power to order an entry of 'No Bill'…"

[9] The "Galbraith test" referred to in *Valliday* is the test articulated by Lord Lane CJ in *R v Galbraith* [1981] 2 All ER 1060, which is itself a two limb test. The first limb being:

> "if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case…"

This test presents little conceptual difficulty, with Lord Parker CJ in his *Practice Direction (Submission of no case*) [1962] 1 WLR 227 conveying the same message when he told magistrates that submissions of no case to answer at summary trial should be upheld, *inter alia,* if "there has been no evidence to prove an essential element in the alleged offence.".

[10] The second limb of the test in *Galbraith* is much less straightforward and will result in the case being stopped where there is some evidence, but only if:

> "… it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence."

[11] The court went on to state, in relation to the second limb, that where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried.

[12] However, this approach leaves a residual role to the court in considering the quality and reliability of the evidence in terms of assessing whether the prosecution evidence is too inherently weak, vague, inconsistent or otherwise manifestly contrary to reason that no reasonable jury properly directed could rely on it. The case of *Shippey* [1988] Crim LR 767 is illustrative. In this case there was some evidence to support the prosecution allegations and on a literal view of the second limb of Galbraith should have been left to the jury to assess. However, the court held that *'taking the prosecution case at its highest'* did not mean the acceptance of evidence that was so inconsistent, self-contradictory, and out of reason and all common sense. In such circumstances a judge can properly withdraw a case from the jury.

[13] However, the subsequent case of *R v Christou* [2012] EWCA Crim 450 cautioned against elevating the decision of *Shippey* beyond that of a fact specific decision rather than one illustrative of the need for courts on application for a

direction to consider the evidence holistically balancing the respective strengths and weaknesses in the evidence. The decision reaffirmed that the proper test to be applied remains that set out in *Galbraith*. Where under the second limb, a case will only be stopped where the prosecution evidence is of a tenuous character, such that, taken at its highest, no jury properly directed could properly convict on it.

[14] Blackstone's Criminal Practice 2025 edition at D16.58 usefully summarises the general principles to be considered and approach to be taken when determining a submission of no case to answer. These are as follows:

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

(b) If there is some evidence which, taken at face value, establishes each essential element, the case should normally be left to the jury.

(c) If, however, the evidence is so weak that no reasonable jury properly directed could convict on it, a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, internal inconsistencies or from its being of the type which the accumulated experience of the courts is shown to be of doubtful value.

(d) The question of whether a witness is lying is nearly always one for the jury, save where the inconsistencies are so great that any reasonable tribunal would be forced to the conclusion that it would not be proper for the case to proceed on the evidence of that witness alone.

The defendant's application for a 'No Bill' is being advanced under the second limb of *Galbraith.* They submit that the body of prosecution evidence, taken as a whole, is so tenuous and inconsistent no judge (sitting as the notional jury), properly directing themself, could properly convict upon it.

Prosecution case

[15] The charges against the defendant arise out of his alleged conduct during events in and around Glenfada Park North (GPN) on Bloody Sunday, 30 January 1972. At this time the defendant was deployed as a Lance Corporal in the Bogside as part of anti-tank platoon (ATP), Support Company, 1st Battalion, Parachute Regiment (1 Para).

[16] The prosecution case is that a large group of civilians were taking shelter behind the gable wall of a house to the south-eastern corner of GPN, adjacent to Rossville Street. Close to this gable wall was a rubble barricade which stretched across the road and soldiers deployed to the north of the barricade fired shots in the direction of it. Michael Kelly was shot and fatally wounded while standing behind this barricade on Rossville Street and carried from there past the gable wall of the

house into GPN. As this was happening a number of the people sheltering in this area and others who were in GPN began to run across the southern end of the courtyard, away from Rossville Street, towards a gap in the southwest corner of GPN leading to Abbey Park.

[17] At this time the prosecution allege that Soldier F was one of four members from ATP who entered the northern end of the courtyard at Glenfada Park North. The other soldiers were Soldier G, Soldier H and Soldier E. Soldiers F and G appear to have entered GPN as a pair followed by Soldiers H and E also acting as a pair. It is the prosecution case that on entering GPN the soldiers opened fire on the group of civilians making their way across the courtyard towards the southwest exit. The soldiers were armed with self-loading rifles (SLRs) and shot six of the civilians within the group.

(i) Joseph Reid was shot to the front of his chest. The bullet passing from right to left exiting his chest. While he required surgery, no vital organs were damaged. He managed to keep running and exit the courtyard through the Abbey Park exit.

(ii) Michael Quinn was shot in the right cheek but managed to keep running and leave the courtyard through the Abbey Park exit.

(iii) Joe Mahon was shot just above the right pelvic bone with the bullet lodging in his abdomen. After being shot he fell to the ground at the southern end of the courtyard.

(iv) William McKinney was shot in the back, under the right shoulder blade. At the time of being shot he was close to Mr Mahon and fell to the ground close beside him. The internal injuries caused were catastrophic and fatal.

(v) Jim Wray was shot close to where Mr McKinney and Mr Mahon had fallen, but further towards the Abbey Park exit. He had been with the party carrying Michael Kelly across the courtyard, he appears to have been out in the open as he made his way across the courtyard and much closer to the Abbey Park exit than the others. He was shot in the back twice, from the right side, with both bullets passing through the trunk, exiting on the left side. The internal damage caused by the bullets was fatal.

(vi) Patrick O'Donnell was on the Rossville Street side of the courtyard and was taking shelter. He heard shots and dived to the ground but was shot in the shoulder. Fortunately, his injury was not serious.

[18] The prosecution accept that the statements of Soldier G and Soldier H, together, constitute the sole and decisive evidential basis by which they seek to established that Soldier F was present in GPN at the time of the shooting and that he discharged his self-loading rifle at that location. Significantly, neither witness can be

called to give live evidence. Soldier G is deceased, and soldier H is unwilling to give evidence, and if called to give oral evidence would rely on his privilege against self-incrimination. In these circumstances, the prosecution have made hearsay applications in respect of both witnesses under the hearsay provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). In relation to Soldier G this application is made under Article 20 (deceased witnesses provision) and Article 18(1)(d) (interests of justice provision). Concerning Soldier H an application is made under Article 18(1)(d) (interests of justice).

[19] While these hearsay applications are to be contested at the start of any trial of Soldier F, for present purposes of a 'No Bill' application it is accepted that the content of the hearsay statements can be relied upon by the prosecution.

[20] The main sources of the hearsay evidence of Soldier G and Soldier H, in the present application, are statements taken by the Royal Military Police (RMP) in 1972, written witness statements to the Widgery Inquiry, and oral evidence on oath to the Widgery Inquiry. A summary of the evidence of Soldiers G and H follows:

Statements of Soldier G

[21] The first hearsay statement of Soldier G which the prosecution rely on for the purposes of this 'No Bill' application is a written statement to the RMP, dated 31 January 1972. In this statement Soldier G describes running from Rossville Street, up an alleyway with Soldier F and into GPN, followed by two other soldiers. Once inside GPN courtyard he saw two men standing 25 metres away, both holding what he described as small rifles. He states he fired three aimed shots at one of the men and he fell to the ground. That Soldier F fired at the same time and the other man fell. People near the gunmen picked up the rifles and ran off down an alleyway in a northeasterly direction. He and Soldier F split up and chased after them, but the crowd disappeared. The two bodies of the men they shot were left where they fell.

[22] In a second written statement to the RMP, dated 31 January 1972, Soldier G purported to identify a photograph of a person he shot in GPN.

[23] In a third written statement to the RMP, dated 14 February 1972, Soldier G stated that the two gunmen in GPN were accompanied by a third man, who was not carrying a rifle. He then described how he fired at one of the gunmen and heard Soldier F fire at the same time and because both men fell to the ground, he assumed that Soldier F had fired at the second gunman. However, as Soldier G fired three shots, he said it was possible that he hit both of them. He concluded by saying that he later saw a third man on the ground not moving and, therefore, concluded that it is likely this third man was shot by Soldier F.

[24] In a written statement to the Widgery Inquiry, dated 1972, Soldier G described how he usually operated with Soldier F. He saw Soldier F moving forward, he followed him, and they went down an alleyway into GPN. Once in the

entrance of the courtyard he went to the right-hand side of a parked car, with Soldier F close beside him. It was then he saw two men with short rifles possibly M1 carbines and immediately dropped to one knee and fired three aimed shots at one of the men. He describes Soldier F firing beside him and saw both men fall. A small crowd gathered round the men, but he could not actually see anyone pick up the rifles as there were too many people in front and the crowd then ran up an alleyway. At this point he says Soldier F moved down the eastern side of the courtyard towards the gable wall near the rubble barricade on Rossville Street, while Soldier G went to the exit at the opposite corner, by the time he got there the crowd had vanished. In the courtyard, he saw saw the two bodies, and a third body further down the courtyard.

[25] In oral evidence to the Widgery Inquiry, dated 1972, Soldier G recalled that he went to GPN with Soldier F, and Soldier E. Once inside GPN, he saw two gunmen standing at the southwest corner holding short rifles. He immediately went down on one knee and fired three aimed shots. While Soldier F was beside him, he could tell Soldier F fired but does not know how many shots. At the time he did not know what Soldier F was firing at, but thought he was firing at one of the gunmen. He recalls both gunmen fell to the ground, and he definitely hit one of them conceding that based on where they were standing, he could quite easily have hit both. A crowd of about 15 people ran past the men, and by the time they had done so the two rifles had gone. He gave evidence that at the time of the shooting there were two other soldiers in GPN. He agreed that he had opened fire without shouting a warning.

Statements of Soldier H

[26] The first written statement of Soldier H was to the RMP, dated 31 January 1972 (2.10am), he stated that on arrival at Rossville Street there was a crowd behind the rubble barricade which he claimed included four gunmen. Subsequently, he and other soldiers chased youths through the gap between the flats into GPN. He stated youths began to throw bricks at them and saw three youths at 70 metres, hiding behind a wall, in possession of nail bombs. He fired two shots at the youth in the middle of the group aiming at the centre of his stomach. He recalled that Soldier F and Soldier G were with him, and they fired shots at the other two youths. He stated all three youths on being shot fell to the ground. At this point a further youth appeared from the northwest block of flats and picked up an object from one of the youths that had been shot. As a result, Soldier H describes how he fired an aimed shot at this youth hitting him on the shoulder, thereafter he disappeared in to the crowd.

[27] Later that same morning Soldier H made a further written statement to the RMP, dated 31 January 1972 (2.30am), in which he records that he followed Soldiers F and G, into GPN and saw Soldiers F and G behind a parked car. He then says that he witnessed Soldier F fire at a man near an opening in the southwest corner of the courtyard. At this point he alleges he saw a youth about 50 yards away, about to

throw what looked like a nail bomb. On seeing this he fired two aimed shots at this youth who fell to the ground. He is recorded saying another youth came into the courtyard and picked up the nail bomb, whereupon he fired one aimed shot at this youth as he ran away and was seen by Soldier H to stagger into the gap at the corner of the courtyard. His platoon commander later discovered that the youth that Soldier H had first shot was dead.

[28] In a third written statement to the RMP, which appears to have been made on 5 February 1972, Soldier H recounts his location and actions in GPN. In this statement he records that he was positioned behind a parked car in the northeast corner of GPN with Soldiers F, E and G. To the southwest a group of five to seven youths, aged between 18-22; were congregated. He asserts positively that two of the youths were carrying nail bombs but cannot say anything about whether or not the others had weapons as explained in his previous statement. He repeats his earlier evidence that he fired at one of the youths about to throw a nail bomb and saw him fall to the ground. He suggests this was followed by more shots from the members of his platoon, and four youths were shot dead. He claims not to have actually seen who shot the other youths. He claims his concentration was to another youth who appeared from the west side of the courtyard, ran towards where the bodies lay and picked up a nail bomb and turned. On seeing this happen Soldier H says he fired one shot at this youth and hit him in the upper right arm or shoulder. However, the youth carried on and left the area. While Soldier H says he knew that Soldiers E and G fired, he did not actually see what they were aiming at.

[29] He again repeats his version of events in a further statement, this time in a written statement furnished to the Widgery Inquiry, dated 2 March 1972. He is recorded as stating, while positioned on Rossville Street, facing the rubble barricade he followed Soldiers F and G, to an alleyway where they chased youths into GPN. That Soldiers F and G were about two seconds ahead of him. They stopped at a car where Soldier H stayed at one end of the vehicle and Soldiers F and G at the other. Soldier H describes leaning on the bonnet of the car in a firing position. When he was in this position he saw Soldier F fire his rifle. Soldier H then recalls seeing a youth about to throw an object in his hand and he fired two shots at the youth who fell to the ground. A further youth ran out from the alleyway at the opposite side of the courtyard, picked up the bomb and was about to throw it when Soldier H fired one round at him, hitting him in the right shoulder or upper arm causing the youth to stagger away.

[30] Soldier H in his oral evidence in the Widgery Inquiry, dated 1972, stated: He was behind Soldiers F and G, and pursued youths into GPN. That he took up a firing position on the bonnet of a parked car, Soldiers F and G had run to the boot area of the car and one of them fired. He knew which one but could not specify which by reference to the ciphers and believed that the other soldier could quite possibly have been firing as well. After this Soldier H says he saw a youth in a throwing position, about 70 metres away from his position and fired two shots at him, hitting with the second shot. At this point in time another youth ran out of the

corner of the courtyard to the body, picked up the nail bomb and was about to throw it when Soldier H says he fired one shot at him, hitting him in either the arm or shoulder.

[31] The prosecution argue that the cumulative evidence of Soldiers H and G contains straightforward and relatively consistent statements that Soldier F was present in GPN and discharged his weapon towards a civilian or civilians. Taking this evidence at its highest, there is nothing tenuous or unreliable about these aspects of their evidence, such that no tribunal of fact could rely on them to reach a conclusion adverse to the defendant. In terms of evident untruthful aspects of their statements this will be a matter for the tribunal of fact to examine in detail in the context of the evidence as a whole and come to an assessment as to why they may have felt it necessary to have been untruthful with regard to some aspects of their account of material facts and yet wholly truthful on others. But at this stage, clear and unambiguous statements that Soldier F was present in GPN and fired his weapon is, the prosecution say, sufficient to put the defendant on trial for the counts on the bill of indictment.

Defence No Bill application

[32] The defence argue that the prosecution evidence, taken as a whole and at its highest, is so tenuous or unreliable, as set out in the second limb of *Galbraith,* that no judge sitting as a notional jury, properly directing himself, could properly convicted upon it. They identify five core deficiencies in the prosecution case as follows:

(i) The fundamental unreliability of the out-of-court statements of Soldiers G and H, which is the decisive evidence in the case;

(ii) Issues with the civilian evidence, in particular, the suggestion from a number of civilians that only one soldier fired his weapon in GPN;

(iii) A complete absence of scientific or forensic evidence;

(iv) An issue in Count 6 in that Patrick O'Donnell's injury was caused by a ricochet and in such circumstances, there is insufficient evidence to establish an intention to kill, and secondary party liability.

(v) Lack of particularisation in respect of Count 7.

Unreliability of hearsay statements of Soldiers G and H

[33] The defence complain of the inherent unreliability of the statements taken from Soldiers G and H by the RMP and evidence gathered from them in the Widgery Tribunal of Inquiry. That the statements and evidence obtained from them in circumstances of compulsion and absent appropriate legal safeguards are so unreliable as to be inadmissible against the makers. They place some reliance on the

decision in *R v Soldiers A and C* [2021] NICC 3 where O'Hara J concluded that it was "inevitable" that statements obtained by RMP in 1972 would be inadmissible against their maker, since they were obtained by oppression, and circumstances that would be likely to render those statements unreliable.

Unreliability of Soldier G

[34] The defence draw attention to what they say are inconsistencies between the accounts given in Soldier G's various statements and evidence. That in his first RMP statement he claimed to have fired three aimed shots at two men in GPN and that Soldier F had fired at the second man who Soldier G witnessed fall to the ground. By way of contrast in his statement to the RMP a few weeks later he stated he saw three men, that he may have fired at and hit both of the men, he originally described that it was likely that Soldier F had shot the third man. The defence suggest that shortly thereafter in his statement to the Widgery Inquiry he stated that 'if' Soldier F was firing at the same time as him, it was 'possible' he may have hit the same man but did not know. The defence argue that Soldier G is entirely unreliable and has lied in his accounts to cover up his own actions that day.

Unreliability of Soldier H

[35] Soldier H gave three accounts to the RMP and again the defence consider he has been untruthful and inconsistent. It is suggested that Soldier H in his first account stated he was with Soldiers F and G, and they both fired at a number of youths. However, by his third statement, Soldier H stated: "the members of my platoon beside myself and F were E and G. I know that E and G fired but I did not actually see what they were aiming at"; he made no reference to seeing Soldier F fire at all. In his Widgery evidence, he reverted to an assertion that he saw Soldier F fire. The defence say Soldier H is entirely unreliable, lied and invented accounts to disguise what in fact happed in GPN, and to mitigate his own responsibility.

Civilian evidence

[36] The criticism of the civilian evidence from the defence perspective is that their evidence is inconsistent with the prosecution case and Soldiers G and H hearsay evidence which they purport to rely on. The defence suggest that the weight of the civilian evidence supports the contention that the shooting was carried out by either the first soldier who entered GPN, or by a soldier who was separated from the others. The defence specifically refer to the witnesses Joseph Friel, Denis Mclaughlin and Joseph Mahon, together with a number of other civilians who give the impression that only one person was responsible for the shooting. It is also alleged that some civilian evidence places at least one soldier entering GPN from the north-west corner not the north-east corner as claimed by the prosecution. This the defence say raises as a reasonable possibility that if soldiers entered and were firing from a different direction and they may have been responsible for some, or all of the shots fired, that wounded or killed those on the indictment. This different route,

approach and firing from any of those soldiers would preclude a finding of secondary liability on the part of Soldier F. Similarly, it is argued that the civilian evidence suggests that gunfire was directed from elevated positions into GPN again compromising any suggestion of a joint enterprise.

Lack of forensic evidence

[37] It is agreed there is no forensic, ballistic or other scientific evidence available to the prosecution to establish Soldier F's presence in GPN at the material time.

Issues concerning attempted murder of Patrick O'Donnell

[38] Soldier F is charged with the attempted murder of Patrick O'Donnell on a joint enterprise or secondary liability basis. It is suggested that the medical evidence confirms that only a small fragment of bullet was retrieved from the wound sustained by Mr O'Donnell. This gives the appearance of a ricochet fragment. A point is raised by the defence that the prosecution case is that the shot was fired either by one of Soldier F, E, G, and H, who are alleged to have entered via the north-east corner of GPN. The defence make the case that Mr O'Donnell has the soldiers entered from the north-west corner. The defence appear to be making the case that there is no evidential connection between this ricochet and Soldier F and by virtue of the randomness of a ricochet how could the person who fired the round which ricochets have an intention to kill Patrick O'Donnell.

Issues concerning count 7

[39] It is alleged that Count 7 is a "catch all" alternative to all other charges on the indictment and no detailed explanation has been given for its inclusion nor particularity. It is suggested that this in indicative of the inherent weakness of the prosecution case against Soldier F and no attempt is made to identify when, where, or even generally who it is alleged the victim, or the alleged victims were.

[40] Based on the arguments set out in paras [33]–[41] above, Soldier F invites the court to order an entry of 'No Bill' in respect of all seven counts on the indictment.

Consideration

[41] Applying the provisions of section 2(3) of the 1969 Act and mindful of the applicable case law discussed above, the indictment of Soldier F should proceed to trial unless the court is satisfied that the available evidence taken at its highest does not disclose a case sufficient to put him on trial. Whether the committal papers disclose a sufficient case is determined by applying the two-limb test in *R v Galbraith*. In the present case the 'No Bill' application is advanced under the second limb, that the case should be stopped because the prosecution evidence is of a tenuous character, such that, taken at its highest, no jury properly directed could properly convict on it.

[42] It has to be recognised that the hearsay statements of Soldiers G and H are derived from a number of sources gathered over a period in excess of fifty years and this presents its own unique challenges in this case. The lack of fundamental safeguards and compulsion exerted on the statement makers creates concerns in terms of their reliability, accuracy and truthfulness which makes them inadmissible against the makers of the statements. This is clearly the position, and the decision of O'Hara J in *R v Soldiers A & C* confirms this. This case involved two soldiers charged with murder who made statements to the RMP broadly under the same conditions and in similar circumstances as Soldiers G and H. The statements were ruled inadmissible against the defendants, who were the makers of the statements, due to circumstances of compulsion, absence of legal safeguards and an erosion of their privilege against self-incrimination. While *R v Soldiers A & C* is a relevant decision when considering the reliability of the statements of Soldiers G and H, who are witnesses and third party to the prosecution of Soldier F, their statements are not being used against them as defendants but as witnesses against Soldier F. The case of *R v Soldiers A & C* is clearly distinguishable on this basis, and it is for the court to consider the fact specific circumstances surrounding the evidence of Soldiers G and H and determine whether their evidence is tenuous and unreliable.

[43] The hearsay statements of Soldier G and Soldier H are proposed to be admitted by the prosecution to establish two core factual matters essential to the viability of the prosecution against Soldier F, his presence in GPN and discharge of his weapon at that location. While the admissibility of the statements when contested in any trial will not be without difficulty, however, for present purposes in this application they are deemed admissible by agreement. However, it is important to consider the statements of Soldiers G and H in the context of whether their evidence taken together is of a tenuous character, such that, taken at its highest, this court properly self-directing could properly convict on it.

Unreliability of the hearsay statements of Soldiers G and H

[44] The court accepts that the hearsay statements relied on contain significant untruthful accounts, including claims of seeing weapons in the hands of the civilians in GPN, coming under nail bomb attack at this location and firing shots in self-defence. The defence have sought to elevate these aspects of the evidence to the position where they submit that virtually nothing contained in the hearsay statements from Soldiers G and H can be relied upon. The prosecution, suggest this false evidence was born out of a desire to justify what they knew to be the unjustified discharge of weapons toward unarmed civilians. Both Soldiers G and H in their statements admit to firing their weapons in GPN and were aware that civilians were killed and wounded which may well have given them cause to be untruthful concerning this aspect of their statements in an effort to justify their unlawful actions. However, there is no apparent compelling reason why they would have to lie, adjust their account or be mistaken as to how they came to be in GPN and who was present there with them.

[45] As discussed in paras [21-31] above there is evidence on the committal papers from both Soldiers G and H confirming Soldier F's presence in GPN and firing his SLR. This is worth repeating in brief summary.

[46] Soldier G in his first statement to the RMP has himself and Soldier F running into GPN followed by two other soldiers. That he, Soldier G, fired at an alleged gunman and heard Soldier F fire at the same time. In a second statement to the RMP he repeats hearing Soldier F shoot at the same time as he did. In his statement to the Widgery Inquiry he described Soldier F firing his gun beside him and later saw Soldier F move down the eastern side of GPN. When giving oral evidence at the Widgery Inquiry he described going to GPN with Soldier F and once inside GPN he was beside Soldier F. He said he could tell Soldier F fired shots but did not know how many.

[47] Soldier H in his first statement to the RMP recalled Soldier F being present in GPN with Soldier G and they both fired shots. In a second statement to the RMP he described following Soldiers F and G into GPN and saw them behind a parked car. While in that area he witnessed Soldier F fire at a man near an opening to the southwest corner of GPN. In a third statement he describes being beside Soldiers F and G taking cover behind a parked car. His statement to the Widgery Inquiry he repeated being led by Soldier F and G into GPN and positioned himself at one end of a parked car while Soldier F was at the other end and saw Soldier F discharge his rifle. In oral evidence he repeated he was behind Soldiers F and G when they entered GPN, and he took up a position at the bonnet of a parked car while Soldiers F and G were at the boot. He saw one of the soldiers at the boot of the car fire his weapon, he knew who he was but could not specify by reference to his cipher.

[48] The prosecution maintain the statements of Soldier G and Soldier H are truthful in relation to where they were located and positioned when they opened fire, and in particular where Soldiers F was within the courtyard at GPN, where he was in terms of proximity to Soldiers G and H and that Soldier F fired his weapon at and was intimately involved in the shooting of unarmed civilians. I agree that in the case of both Soldiers G and H, their written and oral statements provide clear statements that Soldier F was present in GPN at the material time and discharged his weapon at a civilian or civilians.

[49] While there are general points that can be made in relation to the way the statements were obtained, inconsistencies as between individual statements and evident untruthful and distorted accounts of a number of the material aspect of the factual circumstances surrounding the shootings. On the narrow but essential facts required to be established by the evidence of Soldiers H and G, specifically that Soldier F was present in GPN at the time of the shootings and that he discharged his weapon, a high velocity SLR, at a civilian or civilians, are prima facie established in their hearsay statements. Their statements taken individually and together provide a sufficiency of evidence on these essential facts and it cannot be said that their

evidence on the presence and conduct attributed to the defendant while in GPN is tenuous in character. It will be for a court at any trial to consider the admissibility of these, the reliability of them and what weight can be attached to them.

Civilian evidence

[50] I do not consider the evidence of Soldiers G and H in relation to the defendant's presence in GPN and the discharge of his weapon to be significantly undermined by the defence suggestion that the weight of the civilian evidence tips the balance in favour of a finding that the shooting in GPN was carried out by either the first soldier who entered GPN or alternatively a single soldier. The events at the material time were fast moving, dynamic and frightening, but despite this the civilian evidence is broadly in keeping with the general evidence of Soldiers G and H, that the soldiers entered the courtyard from the north and the civilians were moving away from Rossville Street towards the southwest exit to Abbey Park when the shooting started in GPN. That it would not be unsurprising that witnesses making their way across the courtyard only see one shooter given the cover position behind a car the soldiers who were firing were positioned in.

Absence of forensic evidence

[51] The absence of forensic evidence does not contradict or diminish the sufficiency of the evidence of Soldiers G and H on the core factual issues relevant to Soldier F's presence and actions in GPN.

Counts 6 and 7

[52] Soldier F is charged with the two murders on the indictments on a joint enterprise or secondary liability basis. The four attempted murder charges are proffered on the same basis. In relation to Count 6 it is suggested as a reasonable possibility that Mr O'Donnell was struck by a ricochet, and it will be difficult to establish that Soldier F or whoever fired the bullet had any intention to kill. The evidence of Soldiers G and H indicate these soldiers and Soldiers E and F were deployed as a team apparently working in pairs covering one another. At least three of them appear to have taken up a position of cover behind a parked car and discharged their weapons from in or about this area of GPN. I accept that the evidence indicates that the soldiers in GPN at the material time were acting unlawfully, in firing at a group of unarmed civilians in a relatively confined courtyard with high velocity SLRs. It follows a proper inference to be drawn, is that if Mr O'Donnell was shot as a result of soldiers acting together, assisting and encouraging each other to unlawfully shoot at civilians in the confines of the courtyard, those persons firing their weapons in such circumstances were intending to kill. In my view the evidence provides a sufficiency of evidence on this count and is not tenuous in character.

[53] Count 7 is a charge of attempted murder of a person or persons unknown and is designed to accommodate the potential for conviction based on Soldier F's own discharge of his rifle, irrespective of his responsibility for the conduct of other soldiers present at the material time. This covers the eventuality where the court is sure that the defendant opened fire at a civilian or civilians and intended to kill but is unsure whether he struck anyone, or, if he did, which of the named casualties it was, and whether by his actions in shooting or otherwise acting in GPN, he was acting together, assisting and encouraging other soldiers to unlawfully shoot at civilians within the confines of the courtyard. Adding an alternative count in these circumstances is unremarkable. I conclude there is a sufficiency of evidence on the committal papers to sustain this count which cannot be regarded as tenuous.

[54] Accordingly, the court determines that the committal papers disclose a case sufficient to put the defendant, Soldier F, on trial in respect of each of the seven counts on the indictment the application to order an entry of 'No Bill, must be refused and the defendant arraigned.