Neutral Citation No. [2009] NICC 71 | *Ref:* **McCL7649**

Judgment: approved by the Court for handing down | *Delivered:* **19/10/09**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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LONDONDERRY DIVISION,
sitting in Coleraine

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THE QUEEN –v- SEAN CRUICKSHANK and EDWARD McELENEY

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RULING NO. 7: NO CASE TO ANSWER

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McCLOSKEY J

Reporting Restrictions

[1] Pursuant to Section 4 of the Contempt of Court Act 1981, and in common with all other interlocutory rulings made in the course of this trial and all matters ventilated in the absence of the jury, I order that (a) any report of this ruling and (b) any report of the proceedings relating to this ruling be postponed until the trial has concluded or until further order.

The Prosecution Case

[2] Following some six weeks of evidence, the prosecution case having closed, the Defendants invite the court to direct the jury to enter a verdict of not guilty on the ground that they have no case to answer. Both Defendants have pleaded not guilty to the charge of murdering Liam Anthony Devlin on 4th August 2007. [In this ruling, I shall describe the deceased as "*the injured party*"]. The background to this ruling and the substance of the prosecution case are set out in sufficient detail in paragraphs [3] – [9] of Ruling No. 3 [Bad Character Evidence, No. 1]. In summary, it is the prosecution case that the injured party died as a result of serious head injuries inflicted during an attack perpetrated by both Defendants and, specifically, caused by kicking and stamping on his head. In the opening outline, it was represented to the jury that the evidence would establish that both Defendants kicked the injured party repeatedly on the head and that, in thus doing, they were acting with a common purpose, intending to support each other and intending, as a minimum, to cause serious bodily harm.

The Evidence in Summary

[3] The following is a digest of the salient aspects of the evidence which has been adduced on behalf of the prosecution. Stephen Hutton, a companion of the injured party, described an incident which effectively had three phases. During the first phase, the injured party went to the ground, though this witness could not describe precisely how this occurred. Then the Defendant Cruickshank was booting the injured party in the head, as he lay on the ground, roughly ten to twelve times. The Defendant McEleney then joined in, kicking him in the head more than once. The injured party was defenceless. During the second phase, there was a physical engagement involving Neil Gillespie and Cruickshank (on the one hand) and an engagement of sorts involving Stephen Hutton and the Defendant McEleney (on the other). The Defendant Cruickshank then "*got back at*" the injured party, kicking and kicking him on his head and the Defendant McEleney then did likewise, having first exhorted Cruickshank to jump on their victim's head. The injured party was defenceless and did not throw a single punch throughout.

[4] According to the second prosecution witness, Declan Gillespie, the Defendant Cruickshank and the injured party squared up to each other. The Defendant McEleney then pushed (or pulled) Cruickshank out of the way and attacked the injured party by head butting him. Then Cruickshank jumped in and Neil Gillespie tried to pull him away. Both Defendants were "*hitting*" the injured party, with Cruickshank throwing punches at him, whereupon the injured party went to the ground. This was the first phase described by this witness. This was followed by two separate fights or confrontations – McEleney/Hutton and Cruickshank/Neil Gillespie. By this stage, the injured party was back on his feet. Next, the two groups separated, the impression created by this witness being that the incident was finished. Next, however, the two Defendants came back down towards the larger group, whereupon this witness exhorted that any further fight take place on a "*one on one*" basis. The injured party stated that he did not want to fight. This witness then described a second phase, beginning with Cruickshank striking the injured party, who fell backwards to the ground (for a second time). Then both Defendants were kicking the injured party in the head, repeatedly. The witness thought that he heard the Defendant McEleney say "*Jump on his face*", adding that he knew that McEleney told Cruickshank to jump on the injured party's head. They desisted from their attack, then recommenced it. As the Defendants stopped attacking the injured party, a taxi approached and the Defendants jogged away from the scene. The injured party was defenceless throughout and was unconscious at the end.

[5] The evidence of Neil Gillespie (brother of Declan Gillespie), in common with the first two witnesses, also divided the incident into two basic stages. According to him, the first of these stages involved an attempt by the Defendants to attack the injured party, apparently with limited success on account of the intervention of Stephen Hutton and this witness. This precipitated two confrontations or attacks involving Cruickshank/this witness (on the one hand) and McEleney/Hutton (on

the other). The second phase was initiated by a "one to one fight" statement by Cruickshank, which elicited a negative response from the injured party. Cruickshank then ran and punched or head butted the injured party, who went to the ground, where Cruickshank held him down and was kicking him. Cruickshank was kicking the injured party in the head and was stamping on him, while holding him down "by the scruff". This "one to one" engagement continued until McEleney joined in, kicking the injured party more than once.

[6] The fourth prosecution witness who was present at the scene of these attacks was Conor Porter. He too described two separate stages of the incident. During the first, McEleney was the sole aggressor, initially. He head butted the injured party and was then fighting with him. This stimulated a second fight involving Cruickshank and Neil Gillespie. These fights lasted one or two minutes. As a result, the injured party was dizzy, stumbling and could barely stand, was holding his head and was expressing himself to be unwell. There followed a "*one on one fight*" suggestion by McEleney to Cruickshank, which was duly implemented by the latter, notwithstanding the protestations of the injured party that he was too sick to fight. At this stage, according to this witness, the Defendant McEleney shouted that the injured party was "*faking it*" and exhorted Cruickshank with the words "*Go down and slap him*". Cruickshank thereupon attacked the injured party, got him to the ground and was then kicking him three to five times in the head. After the first or second of these kicks, McEleney joined in and kicked the injured party in the head two or three times. The kicking lasted a minute or two. The injured party was defenceless throughout.

[7] Evidence has also been adduced from three persons who were friends with either or both of the Defendants. This evidence was to the effect that they were all in the house of Blathnaid Dobbins, McEleney's girlfriend. She testified that McEleney received a call on his mobile phone, following which, visibly shaken, he stated that a boy with whom he was fighting earlier was dead and he would be going to hand himself in. Matthew Colby also described McEleney's reaction to this telephone communication. He testified that McEleney stated "*The boy I kicked died*" and, elaborating, claimed to have "*swung a boot*". According to this witness, McEleney also stated that the Defendant Cruickshank "*… got him on the ground and was dancing on his head*" (per his statement to the police). By the use of the plural "*we*", McEleney appeared to implicate both Defendants in the attack on the deceased. Evidence was also given by Ryan Fahy, who testified that some time after the incident, Cruickshank stated that he had kicked the injured party twice. Further, Constable Reilly, who arrested McEleney, testified that, following caution, McEleney repeatedly stated "*I only booted Devlin once on the head*".

[8] There has been much evidence also about the consumption of alcohol by both the aforementioned prosecution witnesses and also the Defendants. The types of alcohol consumed were mainly beer, cider (or something similar) and vodka. The quantities may be described uncontroversially as quite substantial and these varied from one person to another. In addition, there has been evidence about the

consumption of drugs. Neil Gillespie testified that, at an earlier stage of the evening in question, he took two Ecstasy tablets. Detective Constable McLaughlin, who began an interview of Neil Gillespie at 6.30am on 4th August 2007 (i.e. within three to four hours of the incident), has given evidence of his contemporaneous record, which attributes to Neil Gillespie the statement "*I had taken E tabs (5) about 9.00pm …*". Then he added that there were five Ecstasy tablets altogether, divided between the injured party and him.

[9] The evidence of Conor Porter was that Neil Gillespie told him that the injured party and Neil Gillespie had consumed two Ecstasy tablets each. This witness initially denied that he had consumed any Ecstasy tablets. He was then questioned extensively about an entry in the notebook of a police officer (Detective Constable Henry) recording this witness having said "*I had one tab of Ecstasy*". He agreed that he must have said this and that it must be correct, while asserting that he could not now remember taking the tablet. Nor could he remember whether he had taken more than one Ecstasy tablet. He also admitted that he had consumed virtually a half bottle of vodka and a large bottle of "Boost". He conceded that he could have been drinking other alcohol in the Gillespies' house. He agreed that his recollection of certain events was impaired and that this could be explained by his consumption of alcohol and Ecstasy.

[10] Dr. Ingram, Assistant State Pathologist for Northern Ireland, testified that the consumption of Ecstasy can give rise to an appearance of intoxication, comparable to the effects of alcohol consumption. It can cause increased heart rate, increased blood pressure and a sense of elation. It is also capable of causing paranoia and hallucinations, including distorted auditory perception. In addition, it may alter a person's awareness and perception of situation. In the witness's experience, it does not give rise to unsteadiness on one's feet. Generally, it can have effects comparable to those caused by the consumption of alcohol.

[11] Dr. Ingram testified that the injuries causing death were a traumatic axonal injury, bruising to the brain and oedema of the brain. The injuries described by Dr. Ingram included a bruising and abrasion injury to the back of the injured party's head, overlying the prominence of the occiput. Dr. Ingram was asked whether, in the absence of other injuries, there was a reasonable possibility that this injury could have caused all of the injuries within the brain, thereby giving rise to the death. He replied affirmatively, without any qualification. The jury has also heard expert forensic evidence, which is to the effect that there is "*weak*" supporting evidence for the proposition that the Defendant Cruickshank's footwear caused the bruising marks and impressions found beneath the right eye of the injured party. Similarly, there is "weak" supporting evidence for the proposition that the Defendant McEleney's footwear caused certain specific impressions located above the left ear. The hierarchy of grades has five levels, ranging from no supporting evidence (the lowest) to conclusive supporting evidence (the highest). Weak supporting evidence constitutes the second lowest grade.

[12] Evidence has also been adduced of the interviews under caution of the Defendants by the police. The Defendant Cruickshank asserted that the initial combatants were the Defendant McEleney and the injured party (compare with the evidence of Declan Gillespie and Conor Porter). This Defendant suggested that he was initially fighting with one of the Gillespies. This was followed by a "one to one" fight between this Defendant and the injured party. This Defendant described punching the injured party, who fell backwards to the ground. He denied kicking him. He acknowledged that the injured party did not strike him. Overall, he purported to describe a relatively uneventful, routine physical street fight which did not entail excessive force.

[13] Evidence has also been given of the interviews of the Defendant McEleney. A major feature of these interviews was the emphasis which this Defendant sought to place on the aggressive conduct of the co-Defendant, Cruickshank, vis-à-vis the injured party. According to McEleney, describing the initial phase of the events, Cruickshank "*battered*" the injured party. [I shall deal with his description of the intervening events in the following paragraph]. At a later stage, the Defendant Cruickshank was involved in attacking the injured party again. According to McEleney, Cruickshank "*… was kicking him and punching him … was throwing boots and all … in the chest and all …*" [second interview, pp. 16 and 18]. Cruickshank was "*…kicking him … hitting him hard …* " [third interview, p. 3]. Following McEleney's engagement with him, the injured party "*… got up after I hit him …* [then Cruickshank] *battered him again … he never even got up … he tried to get up*" [fourth interview, pp. 17 and 25-26]. The injured party was defenceless throughout, "*… he was getting a hiding …*" [fourth interview, p. 10]. McEleney admitted saying to one of his peers (Matthew Colby) that the Defendant Cruickshank had been "*dancing on his head*", offering the explanation that "*I meant standing on his head and all like … hitting him boots in the face you know …*" [fifth interview, pp. 12-13].

[14] McEleney was questioned in detail about his own physical interaction with the injured party. He stated that after Cruickshank's initial "battering" of the injured party, Declan Gillespie attempted to intervene, stimulating a reactive intervention by this Defendant, who attempted to head butt Declan Gillespie, struck him around his neck and lost his balance, falling in the process. At this stage, the injured party was on the ground. The essence of this Defendant's account was that the injured party "*… was getting up and I threw a boot*" [see first interview, p. 12]. This Defendant repeated this account throughout his interviews. He suggested that the boot which he admittedly administered was "*… up round the chest or the head … it was a good boot … in the upper body or head*" [first interview, pp. 20 and 22]. The injured party was effectively on the ground when this Defendant booted him, with the laced part of his shoe or the instep, "*on the chest, the chest around the head*" [third interview, pp. 11-12]. When this Defendant swung his boot at the injured party, the latter "*went down again*" [fourth interview, p. 17]. The injured party was in a defensive posture, trying to protect himself, when this Defendant swung a boot at him [fourth interview, p. 28]. This Defendant denied the specific suggestion that he had booted the injured party in the head. He also denied the verbal statements attributed to him by the

prosecution witnesses. This Defendant acknowledged that he had meant to hurt the injured party, while denying any intention to kill him.

The Arguments

[15] On behalf of Mr. Cruickshank, Mr. McCartney QC (appearing with Mr. McAteer) submitted that the evidence established that the injured party was not placed in the recovery position during approximately the first twenty minutes. Dr. Ingram accepted that this could have caused a lack of oxygen. Mr. McCartney further suggested a failure to implement the correct procedures following admission to hospital and highlighted Dr. Ingram's acknowledgement of the "*reasonable possibility*" theory [see paragraph [11], *supra*]. The submission, in summary, was that the evidence about the cause of death is obscure. Mr. McCartney also invoked the second limb of the ***Galbraith*** test, contending that there are inherent weaknesses and inconsistencies in the evidence of the principal prosecution witnesses. Thirdly and finally, Mr. McCartney highlighted the self-designation of the forensic evidence as "*weak*".

[16] On behalf of the second Defendant, Mr. McEleney, Miss McDermott (appearing with Mr. Mallon) highlighted, firstly, the admitted consumption of both Ecstasy and substantial quantities of alcohol by two of the prosecution witnesses, Conor Porter and Neil Gillespie. The former admitted that he had consumed one Ecstasy tablet, while the latter admitted that he had consumed two. Taking the prosecution case at its zenith, these were the minimum levels of drug ingestion by both witnesses. It is appropriate to interpose at this juncture the evidence of two police officers. Firstly, Detective Constable McLaughlin, who interviewed Neil Gillespie initially, approximately three to four hours after the incident, testified that the interviewee was tired, exhausted and reeking of alcohol. When asked whether he was coherent, he replied that what he was saying was "*understandable*". To this one must juxtapose the reasonably detailed account which, based on this officer's contemporaneous record, the witness proceeded to supply. Secondly, Detective Constable Henry, who interviewed Conor Porter at the same time, described him as very agitated initially. However, it is evident that, thereafter, she was able to elicit a fairly extensive and, apparently, comprehensible account of events from him.

[17] Developing her argument, Miss McDermott then highlighted the evidence of Dr. Ingram about the general effects of consuming Ecstasy (which I have summarised in paragraph [10] above). She contrasted the effects of Ecstasy with the effects of alcohol, submitting that the former lie outwith the experience of any jury. Additional factors included the combination of Ecstasy and alcohol and the comparative youth of the two witnesses concerned. It was submitted that the appropriate analogy is with a witness suffering from a transient mental disorder, referring to Phipson on Evidence (15th Edition), paragraphs 8-08/8-10 and ***The Queen –v- Barrett*** [1996] CLR 405, in support. She acknowledged that the crucial consideration is the capacity of the witness to recall the relevant events. She

submitted that, in these circumstances, the court and jury are bound to accept the evidence of Dr. Ingram and are precluded from substituting their own view [see Archbold, paragraph 4-327]. Thus, it was submitted, the court should act on the evidence of Dr. Ingram in this respect, rather than the inexpert assessments of the two witnesses by the aforementioned police officers. It was further submitted that this is not an attack of the veracity of the witnesses – rather, it is objectively demonstrable that both are unreliable. In the particular case of Conor Porter, only two possibilities exist: either he is a perjurious witness or his evidence is contaminated by a fundamentally flawed recollection. Based on these submissions, Miss McDermott invited the court to rule at this stage that it will be appropriate to direct the jury to disregard completely the evidence of Neil Gillespie and Conor Porter.

[18] The second submission of Miss McDermott focussed on the issue of causation. The offence of murder is committed only where the accused person performs an act which is "*a substantial cause of death*": see Archbold, paragraph 19-4. This aspect of Miss McDermott's submissions concentrated on Dr. Ingram's acknowledgement of the "*reasonable possibility*" theory (summarised in paragraph [11] above) and a contention that the burden of the evidence was to the effect that the injured party had fallen backwards and struck his head on the ground, thereby as a matter of probability suffering the injury described in paragraph [11] above, *before* any physical contact between this Defendant and the injured party had materialised. In short, it was submitted, the evidence clearly established that this head injury was perpetrated by the Defendant Cruickshank's initial attack on the injured party. As a result, it was submitted:

(a) Insofar as the prosecution case is that this Defendant is a principal, the fatal injury had been sustained prior to any physical engagement between him and the injured party.

(b) Insofar as the prosecution make the case, in the alternative, that this Defendant aided or abetted or counselled the Defendant Cruickshank as principal, this would depend substantially on the verbal utterances attributed to this Defendant by various witnesses, particularly Conor Porter – and these have been expressed in evidence in such disparate and conflicting terms that no jury, properly directed, could convict this Defendant of murder on this basis.

(c) There is no evidential basis for convicting this Defendant as a party to a joint enterprise.

Finally, it was conceded that this Defendant has a case to answer in manslaughter.

[19] Replying, Mr. Mateer QC (appearing with Mr. Connell) relied particularly on the following passage in Blackstone, paragraph A1.27:

> "*D will not be regarded as having caused the consequence for which it is sought to make him liable if there was a* ***novus actus interveniens*** *(or new intervening act) sufficient to break the chain of causation between his original action and the consequences in question …*
>
> ***One general point may be made at the outset: no intervening act can break the chain of causation if it merely complements or aggravates the effects of D's initial conduct ...***
>
> ***The chain of causation is broken only where the effect of the intervening act is so overwhelming that any initial injuries are relegated to the status of mere background***."

[My emphasis].

Mr. Mateer submitted, secondly, that at least one aspect of each Defendant's application for a direction rests on the quality of the evidence of the principal Crown witnesses, thereby engaging a particularly elevated threshold to be overcome. In short, the second limb of the ***Galbraith*** test is to be invoked only in a rare or extreme case. Thirdly, Mr. Mateer emphasized that the context of the evidence of Mr. Harvey, the forensic scientist, must be carefully appreciated, given the significant differences in the function which he was performing and the function of the jury. It was further submitted that Dr. Ingram's evidence about the effects of consuming Ecstasy was general in nature, not purporting to focus on the two individuals concerned. The evidence of the two interviewing police officers was also highlighted in this context. It was argued that the content of the witnesses' evidence clearly contradicts the hallucination theory. Finally, it was submitted that Dr. Ingram's evidence about the "*reasonable possibility*" theory cannot be divorced from the factual assumptions on which it must be premised if the Defendants are to invoke it to their advantage.

[20] Miss McDermott, in reply, argued that it would be perverse if the jury were to reject Dr. Ingram's "*reasonable possibility*" acknowledgement. It was further submitted, in terms, that the failure of the prosecution to adduce favourable expert evidence about the ability of Neil Gillespie and Conor Porter to give reliable testimony (given their admitted consumption of Ecstasy) amounts to an incurable flaw.

Governing Principles

[21] The principles which govern the determination of this application are well established and uncontroversial. In ***The Queen –v- Galbraith*** [1981] 73 Cr. App. R 124 and [1981] 2 All ER 1060, Lord Lane CJ stated (at 1602e/g):

> *"How then should the judge approach a submission of 'no case'? -*
>
> *(1) 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.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.–*
>
> *(a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case;*
>
> *(b) Where however the Crown's 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 a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

Significantly, the Lord Chief Justice added:

> "*There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.*"

The ***Galbraith*** approach has been adopted and applied consistently in Northern Ireland: see, for example, ***Chief Constable of PSNI –v- Lo*** [2006] NI 261 and [2005] NICA 3, paragraphs [10] – [16] especially and ***The Queen –v- Courtney*** [2007] NICA 6, paragraphs [18] and [19].

[22] A notable contribution to this subject was provided by Lord Lowry LCJ in ***The Queen –v- Hassan and Others*** [1981] 9 NIJB where, after considering ***Galbraith***, the Lord Chief Justice stated [pp. 2-3]:

> "*I entirely accept the principles as stated by Lord Lane, always remembering that 'no evidence' does not mean literally* ***no evidence*** *but rather no evidence on which a reasonable jury properly directed* ***could*** *(I emphasize that word) return a verdict of guilty. This test does not depend on the unacceptable practice of assessing the credibility of a* ***witness*** *…*
>
> *But it is still open to the trial judge to say that the evidence reveals inconsistencies and absurdities so gross that, as a rational person, he could not* ***allow*** *a jury to say that it satisfied them of the prisoner's guilt beyond reasonable doubt. If that is his clear view, he should direct a verdict of not guilty.*"

It is noteworthy that, in formulating the test in this way, Lord Lowry CJ cited with approval the statement of Lord Widgery CJ in ***The Queen –v- Barker*** [1977] 65 Cr. App. R 287, at p. 288:

> "*… even if the judge had taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned* ***primarily*** *with those cases where the necessary minimum evidence to establish the facts of the crime has not been called.* ***It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury ...***".

[My emphasis].

Notably, Lord Lowry CJ observed that in ***Galbraith***, Lord Lane CJ had, by citing the same passage, "*redressed the balance*", stating:

> "*Delivering the judgment of the court, Lord Lane CJ, having noted the practice, which had arisen since the amendment introduced by the Criminal Appeal Act 1966, of asking the judge to withdraw the case from the jury if he thought that it would be unsafe or unsatisfactory to convict on the evidence offered by the Crown, redressed the balance*

> *(quite rightly, in my respectful opinion) by citing what Lord Widgery CJ had said in* ***The Queen –v- Barker*** *…".*

It might be said that there is some tension between the respective formulations of Lord Lowry CJ and Lord Widgery CJ with regard to the issue of assessing the credibility and veracity of prosecution witnesses. Subject to that observation, it seems to me that where an application of this kind is brought, two of the main principles in play are as follows. Firstly, it is the function of the jury, rather than the presiding judge, to evaluate the veracity and reliability of the evidence of individual witnesses. Secondly, *pace* the first-mentioned principle, the judge is not relieved of his obligation to make an assessment of the overall credibility and reliability of the prosecution witnesses and retains a discretion to withdraw the case from the jury at the halfway stage, in circumstances where, by definition, the frailties and deficiencies in the prosecution case are extreme and fundamental. The defects in question are also, of course, properly characterised incurable, or irredeemable, since the prosecution case has closed and there is no onus of proof on the defence.

[23] These principles were considered quite recently by the Northern Ireland Court of Appeal in ***The Queen –v- Courtney*** [2007] NI 178 and [2006] NICA 6: see in particular paragraphs [18] – [20], where the Lord Chief Justice described the judgment in ***Galbraith*** as "*the locus classicus for the exposition of the principles to be applied in determining whether a direction of no case to answer should be made*". One of the main themes emerging from ***Courtney*** is the obligation of the trial judge to evaluate *all* of the evidence in order to determine its potential to raise a prima facie case against the Defendant:

> "*[25] … it was necessary for him to consider all the evidence against the Defendant in order to address the ultimate question whether there was any possibility of him finding the Defendant guilty on that evidence*".

Ultimately, the criticism of the trial judge rested on a conclusion that he had failed to discharge this obligation: see paragraphs [29] – [31] especially.

<u>Conclusions</u>

[24] It is beyond argument that the Gillespie brothers, Stephen Hutton and Conor Porter are key prosecution witnesses. It is equally undeniable that they have all given conflicting accounts of the events at the time of the attack on the injured party. Furthermore, individually, each has provided inconsistent accounts of what happened: firstly, during an initial interview conducted by a police officer some few hours after the event; secondly, in a subsequent formal police interview and/or in a formal written statement of evidence; and, thirdly, in sworn evidence. These conflicts and inconsistencies relate to matters such as the timing of various events throughout the night in question; the sequence in which certain events occurred; who was present at certain times; who was not present at certain times; words

spoken amongst themselves or by others; the quantities in which alcohol had been consumed; whether drugs had been consumed and, if so, at what times and in what amounts; who the real aggressors were; the precise sequence of events during the crucial phase of the *inter-partes* aggressions; where exactly in the street the various phases of the incident unfolded; what brought the incident to a conclusion; the timing of the arrival at the scene of the taxi driver; and the significance of his arrival. As a result, the overall picture which the evidence has depicted for the consideration of the jury is undoubtedly a mixed and fragmented one.

[25] On the other hand, all of the aforementioned four prosecution witnesses are basically agreed about the following matters:

(a) Both Defendants attacked the injured party.

(b) The attack by the Defendant Cruickshank involved both punches and kicks.

(c) The kicking of the injured party by Cruickshank included kicking him in the head.

(d) The Defendant McEleney kicked the injured party, more than once.

(e) The injured party was defenceless throughout.

(f) The injured party did not land a single blow on either of the Defendants.

(g) In the middle of the exchanges, there was a separate fight involving the Defendant Cruickshank and Neil Gillespie.

Furthermore, at least three of these four witnesses are agreed about the following matters:

(h) The Defendant McEleney was involved in the attack on the injured party during the initial phase.

(i) The Defendant McEleney kicked the injured party in the head.

(j) The kicking of the injured party in the head by the Defendant McEleney occurred during the second phase of the attack.

(k) In the middle of these events, there was a separate engagement of sorts between McEleney and Stephen Hutton.

(l) Just before the beginning of the second phase of the attack, the injured party expressed himself to be unwell and, in terms, incapable of fighting.

I would also highlight that at least two of the aforementioned four witnesses have attributed to the Defendant McEleney the words "*Jump on his* [head/face]" – *and,* significantly, these witnesses are Stephen Hutton and Declan Gillespie, rather than the two witnesses [Neil Gillespie and Conor Porter] who are the particular focus of Miss McDermott's attempted dismantling of the prosecution case.

[26] It is also appropriate to highlight, based on the Defence Statements, and the cross-examination of the prosecution witnesses and the evidence of the Defendants' interviews under caution, following arrest, that the Defendants do not dispute that a physical confrontation with the injured party occurred. Furthermore, the Defendants do not assert that any blow was struck, or even attempted, by the injured party. Cruickshank admits punching the injured party, while denying kicking him. McEleney's interviews were to the effect that Cruickshank was repeatedly "*battering*" the injured party, giving him "*a wild hiding*", using both fists and feet. McEleney admits swinging a boot at the injured party while on the ground and making contact with the area of the upper chest and head. Having regard to all of the foregoing, I consider that even if one were to withdraw the evidence of Neil Gillespie and Conor Porter from the equation, by instructing the jury to disregard it completely, a substantial quantity of evidence against the Defendants, supportive of the prosecution case, would remain.

[27] In my view, Mr. McCartney's first submission does not find a sufficient foundation in the evidence of Dr. Ingram. The latter was asked specifically whether any failure to place the deceased quickly in the recovery position could be significant. Dr. Ingram answered promptly, and without qualification, that this was not assessed as being a factor in the death. Then he was asked about the hospital records. His answer was that there was no indication that the usual protocol of securing the airway was not duly observed. He attributed no particular significance to the absence of either hyperventilation or the administration of the drug Mallitol. He specifically declined to criticise the treatment of the deceased at the hospital. He was also asked about the entry in the hospital records "*Blood in his mouth and airway*". He suggested that this might have been noted when the injured party was intubated. He added that one would expect blood to be present in the mouth, due to the lacerations of the lip. If the airway were *seriously* compromised by blood, this *could* cause swelling of the brain. He did not testify that the airway *was* seriously compromised by blood or that this factor *did* cause swelling of the brain. Furthermore, Dr. Tipping, in his description of the procedures carried out at the hospital – which included intubation of the injured party, an intravenous infusion and CPR – testified, effectively unchallenged, that the appropriate measures of advanced life support were performed, in accordance with the relevant guidelines, and that conventional treatment was administered. I conclude, accordingly, that it will be open to the jury to find that the actions alleged against the Defendant

Cruickshank were a substantial cause of the death. Thus I reject Mr. McCartney's main submission.

[28] The second submission on behalf of the first Defendant, Mr. Cruickshank, was based on the second limb of ***Galbraith***, focussing on suggested fundamental frailties and deficiencies in the evidence of the four main prosecution witnesses. In my view, this is not one of those extreme cases where the conflicts and inconsistencies which I have acknowledged in paragraph [24] above are of such gravity and proportions that the jury could not reasonably make findings based on the key elements of their testimony, which related to the attacks perpetrated against the deceased by the Defendants. I would also highlight the analysis in paragraph [25] above. This demonstrates that, in certain unquestionably important respects, there are threads in this evidence which would enable the jury to form the view that it has a reasonably clear and consistent *central core*. Thus I reject this submission.

[29] The third and final submission on behalf of the first Defendant highlighted the limited strength of the forensic evidence, summarised in paragraph [11] above. There was no suggestion, however, that the jury could not act on this evidence, in tandem with other evidence which they have heard, and make findings accordingly. It suffices to say that the forensic evidence bolsters the prosecution case to some extent. The ultimate evaluation of its strengths or otherwise will be a matter for the tribunal of fact viz. the jury.

[30] As regards the second Defendant, McEleney, I consider that the primary submission of Miss McDermott QC rests on an interpretation of the evidence of Dr. Ingram which it does not reasonably bear. In his testimony, Dr. Ingram *aligned* the typical effects of Ecstasy consumption with those of alcohol consumption. He did not make any distinction between the two. Nor did he purport to testify that, in the particular cases of Neil Gillespie and Conor Porter, the consumption of Ecstasy (in whatever measure) actually, or even probably, had specified effects on their senses, perceptions and recollections. Furthermore, belonging to this equation is the evidence of the two interviewing police officers, to which I have adverted in paragraph [16] above. Significantly, neither of the officers, whose recollections appeared reasonably impressive, described Neil Gillespie or Conor Porter as rambling, incoherent or even vague in the accounts which they provided. In my view, the foundation for the suggestion that these two witnesses should be treated in the same way as witnesses with a transient mental disorder is absent. I would add that the evidence of what both Defendants said in interview does not support this aspect of the argument in any way. Finally, there is conflicting evidence about this topic – how much Ecstasy was consumed by each of the witnesses, at what stages, combined with how much alcohol and with what effects. Based on what I consider to be the correct interpretation of Dr. Ingram's evidence, I conclude that the impact of Ecstasy consumption on these two witnesses *is* a matter lying within the experience of the jury and the other factual issues bearing on this matter are, *par excellence*, to be considered and determined by the jury also. In my view, it will be

open to the jury to evaluate and interpret Dr. Ingram's evidence in the way suggested above.

[31] In response to Miss McDermott's second main submission, I consider, firstly, that Dr. Ingram's evidence about the "*reasonable possibility*" theory (paragraph [11] *supra*) does not bear the weight or interpretation advanced and that it will be open to the jury to so conclude. His evidence was that the laceration to the back of the head of the deceased could, as a matter of reasonable possibility, have caused all of the brain injuries giving rise to the death, *in the absence of other injuries*. In other words, the *other* injuries fall to be considered. These must include the two other injuries to the scalp (one reproducing the pattern of footwear, according to Dr. Ingram) and the six injuries to the face (one of which, he testified, is of the same *genre*). I consider the thrust of Dr. Ingram's testimony on this discrete issue to be that *all* of these injuries must be considered. Accordingly, it will be open to the jury to reject the "*reasonable possibility*" theory, in the abstract. I consider, secondly, that it will be open to the jury to find that the head injury in question was *not* caused by the deceased falling backwards on to a hard vehicular or pedestrian surface. Furthermore, Dr. Ingram's evidence did not exclude the thesis that the axonal injury to the brain was caused by a combination of the head striking a hard surface and kicks. Finally, Dr. Ingram did not resile in any way from the overall assessment in his report, couched in these terms:

> "*Death was due to a head injury … the autopsy revealed a number of injuries, principally to the head …*
>
> *There were bruises, abrasions and lacerations on the scalp, face, around the eyes and on the nose as well as fractures of the nasal bones. The lips and their linings were bruised and lacerated. Furthermore there were five bruises on the under surface of the scalp some of which related to injuries seen on its surface. These injuries were consistent with blows to the head possibly by his having been punched, kicked or stamped upon. The presence of patterned bruising on the left side of the scalp and right cheek was consistent with the ribbed pattern of the sole of footwear. As a result of the blows to the head or his having been struck while upright and having fallen to the ground striking his head, or as a combination of both, the underlying brain had been injured. It was bruised in places and small pinhead sized haemorrhages had developed within its substance* [gliding contusions] *… typical of that associated with early traumatic axonal injury, and these injuries were further complicated by the development of a generalised reactive swelling, termed cerebral oedema. It was the effects of these injuries and the secondary brain swelling which were responsible for his death about forty-five minutes after arrival at hospital*".

[32] A further reason for rejecting Miss McDermott's second principal submission is the two factual premises on which it is based. The first is that the injury to the back of the head was inflicted exclusively by the first Defendant, Mr. Cruickshank, in his initial attack on the deceased. The second is that none of the other injuries sustained by the deceased made any contribution to his death. Thus, it is argued, that even if the jury were to find that the Defendant McEleney kicked the deceased's head, there is no evidence that this was a substantial cause of the death. These submissions are sustainable only if no other reasonable view of the evidence is properly open to the jury. I do not accept this. There is a substantial body of evidence, various aspects of which are conflicting, about the physical interaction of both Defendants with the deceased, the details thereof and the sequence. In my view, it will be open to the jury to find that both Defendants kicked the deceased in the face and/or head and/or stamped on his face and/or head *and* that such actions constituted a substantial cause of the brain injuries giving rise to the death. I reject the argument that the only reasonable view of the evidence available to the jury is that the second Defendant engaged with the deceased *after* the fatal injury had been inflicted.

[33] The final argument relating to the second Defendant, Mr. McEleney, is based on an attack of the quality of the evidence of the prosecution witnesses, particularly Mr. Porter, relating to certain aggressive utterances attributed to this Defendant. In my view, it will be open to a properly directed jury to find that this Defendant expressed himself in the terms alleged. Furthermore, the jury could properly find that this Defendant was guilty of murder as an accessory by his physical conduct and the encouragement of and assistance to the principal (Cruickshank alone, on this hypothesis) offered by both his conduct and his presence, in the absence of any of the aggressive utterances attributed to him.

Conclusion

[34] For the reasons elaborated above:

(a) I do not consider it appropriate to rule that the jury should be directed to attribute no weight whatsoever to the evidence of Neil Gillespie and Conor Porter, or either of them.

(b) I consider it inappropriate to withdraw the case from the jury at this stage.

[35] I rule further:

(a) The prosecution case against the first Defendant, Cruickshank, is that he was guilty of murder as a principal only. There is no viable secondary, alternative case.

(b) In contrast, it seems to me that the prosecution case against the second Defendant, McEleney, has two sustainable bases. The primary case is that he was guilty of murder as a principal. The secondary, alternative case is that he was guilty of murder as a secondary party, in the sense that he aided or abetted or counselled the murder by his conduct and/or words.

(c) An alternative verdict of guilty of manslaughter should be left to the jury, as against both Defendants.

The parties will be at liberty to address further argument to the court arising out of these conclusions.