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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 08/03/2019

IN THE CROWN COURT FOR THE DIVISION OF BELFAST

THE QUEEN

-v-

SHANNON McILWAINE

THE QUEEN

-v-

DANIEL McMANUS

COLTON J

[1] The defendants McIlwaine and McManus are two of eight persons who face various counts on the indictment arising from the alleged murder of Christopher Meli and alleged assaults on Ryan Morris and Steven Woods on 12 December 2015.

[2] Each of them is charged with an affray contrary to common law with the particulars of the offence being that on 12 December 2015 they unlawfully displayed force and made an affray.

[3] I have been invited to consider the entry of a “no bill” in respect of both these counts pursuant to section 2(3) of the Grand Jury (Abolition) Act (NI) 1969.

[4] Both counts raise similar issues and I therefore propose to deal with them in the same ruling.

[5] I am indebted to all counsel who appeared in this matter for their detailed written and oral submissions which were extremely helpful. Mr Ciaran Murphy QC appeared with Mr David Russell on behalf of the prosecution. Mr Charles McCreanor QC appeared with Mr Sean O’Hare on behalf of the defendant McIlwaine. Mr Rick Weir QC appeared with Mr John Paul O’Connor on behalf of the defendant McManus.

[6] 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 (my underlining) 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.”*

[7] 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evidence on which a reasonable jury properly directed could return a verdict of guilty then the case must be withdrawn from the jury.

Factual background

[8] On 12 December 2015 Christopher Meli was killed in an area known as “Doc’s Path” which is an open grass area adjacent to the Stewartstown Road. He is believed to have been subject to an assault by multiple persons. Two friends of the deceased, Ryan Morris and Steven Woods were also assaulted in the same vicinity.

[9] In very broad terms the prosecution case is that there was an altercation between the deceased and other youths in the vicinity of a takeaway restaurant on the Stewartstown Road. He was in the company of Ryan Morris, Sarah Morris and Steven Woods. The deceased and the others moved away from the location and travelled along Doc’s Path.

[10] At this stage two of the defendants Caolan Laverty and Daniel McGrath tell a number of other people in the vicinity that they were “jumped” by Meli and others. At this stage a group of between 15 to 20 persons assemble and makes their way to Doc’s Path where a fight and attack occurs.

[11] Christopher Meli was allegedly punched and kicked to the ground and was repeatedly punched and kicked to the head in the course of the attack that occurred in Doc’s Path.

[12] Ryan Morris and Steven Woods managed to run off from the scene of this assault where they were subsequently caught by members of the other group and assaulted.

[13] The prosecution say that each of the eight defendants was part of the group which followed Meli, Morris and Woods to Doc's Path and face various charges including murder and attempted grievous bodily harm arising from the incidents.

[14] Both McIlwaine and McManus are charged with affray, contrary to common law. In each count the allegation made against the defendant is that "*on 12 December 2015 he/she unlawfully displayed force and made an affray*".

The evidence relied on by the prosecution

[15] Before considering the evidence concerning the individual role of each of the two defendants it is necessary to consider some of the evidence in the case relating to the alleged conduct of "the group" which made its way to Doc's Path and which was allegedly involved in the assault on Mr Meli and the subsequent alleged assaults on Morris and Woods.

[16] The following extracts in particular are relied upon by the prosecution.

[17] Ryan Morris, one of the alleged victims of the assaults says in his deposition when he describes the first assault in the Doc's Path area:

"Those ones they just came running down and it was just bottles flinging over the top of our heads and they just came out to do damage basically. They came from across the main road. There is a place Woodside and it is a big field with a big grass bank. Crowds of younger people stay on that big bank because it is like out of the way of the main road and away from the houses and they have a fire usually and they sit there drinking to all hours of the morning and taking drugs to all hours of the morning. So by the time we got down to the bottom of that path they had come from the direction of Woodside fery and were all running across the main road to the top of the path. We were at the bottom of the path they were at the top running towards us."

[18] Describing the same incident Steven Woods says in his deposition:

"Me, Ryan, 'Cricky' and Sarah had walked about a quarter way down the Doctor's path which took about 2 minutes from leaving the Indian. I heard shouting. I looked about to see where the shouting was come from. I looked behind me I could see loads of people coming running at us from

the direction of the Stewartstown Road. I believe there was 15-20 people coming for us. I thought Jesus Christ. I was nervous. I said 'Don't be running'. The crowd came for us. There were at least 5 people around me at any time. I recognised some people's faces from the local area but don't know their names. I recognised Lavo Laverty."

[19] He goes on to identify other people allegedly involved in the assault, neither of whom was McIlwaine or McManus.

[20] The depositions include a statement from Finton Hitchen who is an independent witness and who came upon the scene. He describes what he saw in the following way:

"I walked along the path for about 100 yards where it joins another path which runs from the side of Glasvey Court and leads in the Glasvey Close. As I left Gerard's house I could see a crowd of teenagers running after another crowd of teenagers. They were running down a steep path that comes from the Stewartstown Road to what is called 'Doc's Path'. I could tell that both groups contained males and females and that the group being chased was the smaller group of people. I think the smaller group had about 6 or 7 people in it and the larger group had 10 to 12 people in it. There were more males than females in each group but I can't give exact numbers. At this stage I was 80-100 feet away. I didn't want to get involved and continued walking towards home along the path. I noticed as I started walking along the path that the crowd that was being chased had stopped and turned round and the groups had started fighting. This was at the bottom of the slope of the bank where the new path meets with Doc's Path. I could see that the groups were punching and kicking each other, males fighting with males and females fighting with females. I could also hear lots of screaming from female voices and the noise of the thumps as they hit and kicked each other."

[21] A Mr Gary Hughes has made a statement of what he was able to see from his bedroom window on the night in question. He says as follows:

"And I see a crowd move through the street and down past the houses. When I first see it, they are down at the bottom of my street when it turns there at that turn. I'm not too sure how far it would be. I could see straight down. I could see figures. I then seen them all running about. First thing was I pat my head, right there wasn't a fight because I didn't see no punches or kicks then I just thought

they were all drinking. When I first seen this I think nothing of it. I'm just looking down but I'm still watching. I look down the other side because they all headed down past the houses that I can't see behind. I see all the crowd just moving and when they move into a place I was blind, down a wee pathway. They went down some sort of like a row at both sides but at the bottom where I can see that's when I see a commotion. And I they looked out and I heard right there must be a fight or something. Once I looked on down I seen a wee lad get thrown into the corner onto the ground. I can't describe what he looks like or what he was wearing. It was just like a figure going in towards the ground. I didn't see him. I only seen him once he was thrown onto the ground and then I seen the crowd round him, I could see punches come across and sort of like punches moving and kicks moving towards that point, towards the person on the ground. The crowd were swinging their arms and their kicks and punches were only going one way, towards the person on the ground. I just literally seen him hit the ground sort of like a sideways way. The crowd were focusing on that point where he fell. It was a bit like a crowd fighting but only going one way one direction."

[22] A Mr Henry McConville who lives in the vicinity heard a disturbance outside in the street on the night in question. He describes going to his front door to see what was happening. His statement records:

"I could see a large crowd shouting and brawling. I'm not sure of the distance they would have been but they were about 7 houses and a street away from my own house. The crowd was made up of both males and females. I couldn't describe anyone but they all would have been between 16 and 25 years of age. I have lived all my life in around upper Glasvevy which takes in Galsvevy Gardens, the drive, the park and the walk and I didn't recognise anyone in the crowd. They weren't wearing anything unusual that stood out. It seemed as if the crowd consisted of two groups of people, a main group and a smaller group. In the main group there would have been about 30 people and the smaller group had less than 5 individuals. The main group seems that they were picking on the smaller group and because this smaller group was backing off the main group were following them. Visually it appeared like the main group were accusing the smaller group of something and they were responding to what the smaller group had done. The general gist of the crowd seemed as if the larger group

were holding the smaller group responsible for something. The larger group seemed to be attacking the smaller group and the smaller group seemed to be retreating from them. I remember pitying the individuals that were being chased. Everyone threw punches and were all pushing each other. They were scuffling all the way up the road. I can't recall what they were saying but they were shouting and screaming at each other. They all seemed angry and there was lots of swearing and profanities being used like fuckers and bastards. I think the small group were all young men by the tone of their voices but I'm not sure if there were any females with them. The whole thing was a bit of a melee. I can't describe anyone specifically it was all a general blur. The crowd then splits into two and part of it goes round into the rear of Glasvey Walk which is behind Glasvey Drive at the other side of the road. The other part of the crowd comes on up Glasvey Drive and is directly outside my house. At this point they would have been about 30 feet away. It all happened very fast and only lasted a few minutes in total. The groups were constantly moving, they were running up the road then stopping then running again then stopping. The larger group were running after the smaller group. The whole crowd then merges together on the road at the rear of Glasvey Walk. The fight makes it way towards St Luke's Chapel. I could only hear the commotion I couldn't see anything because there is no lighting around the chapel. As soon as the crowd were out of my view some of the people seemed to peel off and get lifts in cars."

[23] It is the prosecution case that taking the evidence at its height it can be established that both Daniel McManus and Shannon McIlwaine were members of the larger group which was involved in the chasing and attacking of initially Christopher Meli and subsequently Morris and Woods. Essentially this evidence arises from statements made by each of them to the police.

Shannon McIlwaine

[24] She was interviewed on a number of occasions. I have read the transcripts of the interviews. In particular Mr McCreanor was anxious that the answers given by her are seen in context and in their entirety. Specifically he suggests that the prosecution have misinterpreted the answer she gave in the interviews in relation to her potential role in the group engaged in the subsequent assault on Morris and Woods.

[25] I do not propose to set out the detail of the answers she gave in the interview. For the purposes of this application I am satisfied that taking the prosecution case at

its height her admissions are sufficient to establish that she was a member of the group which followed the smaller group to the point of the initial assault. I agree with Mr McCreanor that the interview does not suggest she was a member of the group involved in the second assault but rather that she separated herself from that group.

[26] In her interviews she accepts that she was drinking with her co-accused Laverty, Smith and McManus when another co-accused Daniel McGrath ran up to them alleging that he had been “jumped”.

[27] She accepts that she was in the group that made its way to Doc’s Path. It is right to say that she seeks to underplay her role in that group in terms of any fighting and also is reluctant to accept that the group ran but says that the group merely walked.

[28] She admits to being in the presence of her two accused Gary Lewis and Aaron Stilges throughout the night. She accepts that at one stage she confronted one of the other group (Woods) when he took out a knife.

[29] When she was pressed as to why everyone went down the path she says she went “*obviously to like to try it stop it or something*”. There then follows:

“Q. And how would you have tried that?”

A. Break it up.

Q. Deepsie has come back, he’s got help and he’s taking a crowd down across to Doc’s Path and he wants revenge because he was quite beaten up hasn’t he?”

No response.

Q. Isn’t that right?”

A. Yeah.”

[30] At one stage in the interview she accepts it was obvious there was going to be a fight. She said that she herself was not going down to fight but she would expect her friends were. She accepts she knew the crowd were going down to fight and seek revenge. She further accepts going down with the others and being involved in a confrontation with a person with a knife (Woods). She witnessed the fighting.

[31] In addition to these interviews forensic evidence links her to the blood of Steven Woods and Christopher Meli. At the very least it suggests that she was close to the source of a transfer source of the blood of these alleged victims. As Mr McCreanor points out it may well be that this blood was transferred at a later

stage when she came into contact with one of the co-accused who is charged with the murder of Christopher Meli and the attempted grievous bodily harm of Steven Woods.

Daniel McManus

[32] Mr McManus originally gave an account to the police when he attended at Musgrave Street Police Station on 12 December 2015. At that stage he was treated as a witness and gave an account to Detective Constable Howard and Detective Constable Collins. He was accompanied by his father and a solicitor. An Article 3 PACE caution was not given. In the course of that interview he gave an account explaining that he is Ryan Morris's cousin. He said that he had been with Gary Lewis and that he was standing at the Costcutter at Twinbrook when McGrath told him he had been "jumped". They went to Doc's Path and saw three wee lads and a girl. One of the lads had a knife and another had a baseball bat. As soon as he saw the knife he stopped. He told the police that he knew both these persons but could not name them. There were a good few people with him. He describes one person swinging a knife and putting it through someone's hand. He describes a fight between a number of others and chasing the person with the knife who ran off.

[33] Ryan Morris in his statement places McManus in the vicinity of the second attack at St Luke's. He is placed at the alleyway close to the church but not as far up as the church itself. Just prior to the attack McManus allegedly shouted "Don't touch the fucking ginger one that's my cousin don't touch him and they didn't listen at all". When he describes the person pulling the knife he says that he was at the front. He agrees there were a significant number of people involved and estimates this at about 20.

[34] He describes the fight happening very quickly. He explains that he actually pulled people off and away from the fight. Mr McManus was born on 21 August 1999 and therefore was approximately 16 years and 4 months at the time of the incident.

[35] Mr Weir submits that it is arguable that the contents of the interview are not admissible in evidence but for the purposes of this application the evidence is prima facie reliable and I take the prosecution case at its height. After this interview Mr McManus was subsequently interviewed as a suspect on 24 occasions throughout December 2015. With the exception of confirming his name and a few short comments, the questions were met with a no comment answer or no response at all.

[36] At no stage in the course of his interview does he admit to engaging in any violence or that anyone else with him acted violently other than the person who used the knife, who is an alleged victim in this case. In fact he describes himself acting as a peacemaker and attempting to stop his cousin being attacked.

[37] The prosecution say that the evidence establishes that he was part of the group described in the statements to which I have referred earlier. The evidence establishes that he was part of the initial group which followed the smaller group to Doc's Path and also of the second group which engaged in the alleged assault on Morris and Woods. It is submitted that on his own evidence he is at the centre of events.

[38] The prosecution say that taking the case at its height, as I must do at this stage, the conduct of those involved in this group must be seen in the context of what the other witnesses have described.

The offence of affray

[39] Affray is a common law offence. It was abolished in England and Wales with the introduction of the Public Order Act 1986 ("the 1986 Act"). The elements of the offence are:

- "(i) Unlawful fighting or unlawful violence used by one or more persons against another or others; an unlawful display of force by one or more persons without actual violence;*
- (ii) In a public place or, if on private premises, in the presence of at least one innocent person who was terrified;*
- (iii) In such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified."*

[40] In this case it is not alleged that the defendants were engaged in unlawful fighting or unlawful violence. There is no evidence which points to either of them being engaged in any act of assault or violence. The count is specifically founded on their alleged "*unlawful display of force*".

[41] In my view the case against each of the defendants turns on whether or not at this stage taking the evidence at its height it can be demonstrated that a jury could convict them of being engaged in an unlawful display of force by one or more persons without actual violence.

[42] Put simply both defendants argue that there is no evidence that they have done so. Mr McCreanor and Mr Weir ask the question – where is the evidence of "*the display of force*" alleged against the defendants?

[43] In terms of what is meant by an unlawful display of force there is a dearth of authority on this particular point. The cases which I have considered in this

jurisdiction deal with unlawful fighting or on the appropriate sentencing ranges for the offence.

[44] In general terms Treacy J, as he then was, described affray as typically involving “*a group of people shouting, struggling, threatening, waving weapons, throwing objects, exchanging threatening blows etc.*” – **R v Murphy and Others** [2011] NICC 18. In the Court of Appeal review of the same case reported at [2015] NICA 54 the court alludes to a display of force (for example brandishing an offensive weapon without actual violence).

[45] Clearly in this case there has been no brandishing of an offensive weapon.

[46] In terms of authorities therefore one has to look at some of the older cases in England and Wales prior to the 1986 Act.

[47] Mr Murphy referred to the well-known case of **R v Sharp** [1957] 2 WLR 472. That case focused on whether or not it was necessary for the prosecution to call evidence to the effect that any person had actually been put in terror as a result of the alleged conduct of the accused. That case involved two men who were fighting in the street so the issue of the meaning of a display of force did not arise. The case is authority for the proposition that it is not necessary to demonstrate any actual violence under this limb of the offence but the example given again relates to a man who “*arms himself with dangerous and unusual weapons in such a manner as will naturally cause terror to the people*”. The judgment points out that the essence of the offence is that it imports “*terror and disturbance*”.

[48] In the case of **Taylor v DPP** [1973] 2 All ER 1108 at 1112, Lord Hailsham stated:

“... The extent to which the ‘display of force ... without actual violence’ constitutes the offence of affray even where the element of terror is present is not wholly clear. It seems that the brandishing of a fearful weapon does constitute the offence, and has always done so, though in most cases where this is done by an individual a charge under the Prevention of Crime Act 1953 would now seem preferable. From the older authorities it seems plain enough that mere words, unaccompanied by the brandishing of a weapon or actual violence, are not enough. But all sorts of things are arguably, a display of force. I am anxious that nothing in this case should be construed as necessarily implying that anything less than an unlawful participation in a violent breach of the peace will be enough to satisfy the requirement.”

We were invited to consider demonstrations of all kinds, whether in the course of an industrial dispute or some politically motivated procession. It seems to me that there is nothing in the instant case, where all the ingredients of the offence save one were plainly present, to compel us to lay down the law in such a fashion as to extend the definition beyond what the strict circumstances of the case require."

[49] What do the strict circumstances of this case require? From the authorities it can be contended that various types of conduct may constitute a display of force. In **Taylor** the House of Lords quoted with approval the definition of affray in Smith and Hogan's Criminal Law – 3rd Edition (1973) where the authors state:

"Affray is a common law misdemeanour which, after a long period of desuetude, has not only been brought back into regular use, but greatly expanded in scope by judicial decision. Experience suggests that it is being increasingly used by the prosecution in relation to offences involving serious public disorder."

[50] The fact that the offence of affray can constitute a wide variety of conduct is confirmed in the sentencing judgment in this jurisdiction of the Court of Appeal in the case of **Attorney General's Reference (No. 1 of 2006)** [2006] NICA 4 when Kerr LCJ quoted with approval the comments of Lord Lane CJ to the effect that:

"The facts constituting affray and the possible degrees of participation are so variable and cover such a wide area of behaviour that it is very difficult to formulate any helpful sentencing framework."

[51] In these cases the defence say that all the prosecution can establish is the presence of each of the defendants when the other alleged offences were committed. They say that presence alone is insufficient to bring home a charge of affray.

[52] However, that presence has to be looked at in context. The presence was not accidental. They were not innocent bystanders in the manner of the witnesses Hitchen and Hughes to whom I have referred earlier.

[53] The question is whether, taking the prosecution case at its height, a jury could come to the conclusion, properly directed, that by being part of the group acting in the manner described by the witnesses each of the defendants had engaged in a display of force sufficient to constitute the offence of an affray.

[54] The witnesses clearly describe the group following the smaller group. They are described as running and in effect chasing the group. There are references to

bottles being thrown. When the chasing group engaged with the retreating group serious violence ensues.

[55] It is not alleged that any of these defendants engaged in this violence. Furthermore, the prosecution does not say that the evidence against them is sufficient to establish encouragement of the attack on the victims of the assaults sufficient to sustain a charge based on a joint enterprise. Whilst the prosecution say the evidence falls short of that they say that the actions of both defendants as part of the group is sufficient evidence to support a case to answer in respect of the allegation of affray.

[56] The question is not by any means straightforward but having considered the matter I have come to the conclusion that their conduct taken at its height is sufficient to put each of the defendants on trial for affray. The conduct and movement of the group in the manner described by the witnesses is in my view sufficient for these purposes to constitute a display of force. In Mr Murphy's words the group was "*moving and acting in a fashion which amounted to a display of force*"

[57] Self-evidentially, depending on the evidence as it materialises in the trial, the jury will need a very careful direction on the issue of affray should the question arise.

[58] Having concluded that the conduct of the group was sufficient prima facie evidence to establish an unlawful display of force I am satisfied that the other limbs required for an affray are present namely that it took place in a public place and in such a manner that a bystander of reasonably firm character might reasonably expect it to be terrifying.

[59] Accordingly, I do not propose to enter a no bill in respect of the affray counts against McIlwaine and McManus.