**Neutral Citation No. [2014] NICC 16**

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

*Delivered:* **11/04/2014**

**IN THE CROWN COURT IN NORTHERN IRELAND**

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**BELFAST CROWN COURT**

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**THE QUEEN**

**-v-**

**FRANK SIMPSON DALY**

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**HEARSAY RULING**

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**MAGUIRE J**

**Introduction**

[1] The defendant in the above proceedings is jointly charged with a large number of others in respect of events which occurred in Coleraine on 24 May 2009. The offences alleged against this defendant are those of manslaughter, attempted murder, assault with intent to cause grievous bodily harm, assault causing actual bodily harm and affray.

[2] The circumstances giving rise to the charges have been helpfully set out in the prosecution's skeleton argument prepared in respect of the application here under consideration. Necessarily the circumstances have been described only in general terms. The circumstances were these: on the above date two football matches were being played to decide the fate of the Scottish Premier League. One involved Glasgow Rangers and one involved Glasgow Celtic. Some of the supporters of the former in Coleraine watched their team's match in Scott's Bar in the town area while some of the supporters of the latter watched their team at home in the Heights area of Coleraine. Part of this area is in the nature of a Catholic or Nationalist enclave within Coleraine which encompasses, *inter alia*, Somerset Drive and Pates Lane, both of which feature as within the principal scene of later disturbances.

[3] It seems likely that at least some of the supporters of both teams had been drinking during the day.

[4] At some point that afternoon at the entrance to the Heights area a number of nationalist/Celtic FC flags were erected, it is suspected, by local residents. The police learnt of these but so also did those who were in Scott's Bar. It appears that after the football was over a number of those who had been in the Bar (who might loosely be described as Rangers supporters) made their way over to the Heights area. This did not involve more than a few minutes travel time. When they arrived in the area they proceeded to remove the flags and attack the local residents.

[5] It is the prosecution's case that what they describe as "a mob" entered the Heights area and inflicted violence on local residents there. Those in the mob, the prosecution say, were acting together and were involved in a criminal joint enterprise. Their purpose, it is alleged, was to engage in serious disorder and violence. The prosecution say that the defendant was one of the mob and took an active role in its activities. These activities resulted in the death of one man (Kevin McDaid), serious injury to another (Damien Fleming) and generalised disorder. The manslaughter charge and the assault occasioning actual bodily harm charge against the defendant relate to Kevin McDaid; the attempted murder charge and the assault with intent to cause grievous bodily harm charge relate to Damien Fleming and the affray charge covers the defendant's alleged involvement in the general disorder.

[6] A feature of the incident overall is that it appears to have lasted only for a relatively short period of time – around 10-15 minutes. During that period the mob attacked those local residents who were in its path. The main scene of the disorder appears to have been a cul de sac off Pates Lane. A number of houses fronted on to the cul de sac, including No 32, which was the house of Christina Kennedy (hereinafter referred to as "Mrs Kennedy").

[7] The prosecution case against the defendant involves evidence of the general scene but, in particular, relies on eye witness evidence identifying him as being present and being involved in what was going on. Ryan McDaid identifies the defendant as one of those who assaulted Damien Fleming. He alleges that the defendant kicked him while he was on the ground. Evelyn McDaid makes a similar allegation. She describes him kicking Damien Fleming. This witness also alleges that the defendant assaulted her. Leona Whittaker is another witness who says that she saw the defendant assault Damien Fleming. She says he kicked him to the side of his face. She also identifies the defendant as one of those who attacked Kevin McDaid and as a person who attacked Evelyn McDaid. This witness also says that she herself was assaulted by the defendant. Other witnesses place the defendant at the scene as part of the mob. Daniel Kennedy has alleged that the defendant was acting aggressively to three women, throwing punches at them. Of importance to the present application none of the witnesses above make an allegation that they saw the defendant use a weapon at any stage, though there is forensic evidence which appears to link the defendant to a pick axe handle which was recovered from the cul de sac. A smear of blood on it matched that of the defendant. A swab taken from a

shed door within the cul de sac gave a DNA profile said to be a match to the defendant.

[8] The defendant was interviewed by the police following arrest. Initially he denied being present at the scene but he later stated that he had been in a fight with a man called Peter Neill, a local resident on the nationalist side. This, the defendant said, occurred at the bottom of Pates Lane and explained why he had injuries on him.

**The Application before the Court**

[9] The application before the court relates to the evidence of Mrs Kennedy. Unfortunately she died not long after the incident on 19 July 2009. Her death was unrelated to the matters with which the prosecution of the Defendant is concerned. She had been informally interviewed by police on 26 May 2009 and on 27 May 2009 an extensive video and audio recorded interview took place with her. There is, therefore, a DVD of the interview. At the date of interview Mrs Kennedy was 71 years of age. The transcript of the interview is available. It runs to some 167 pages and the court has read it carefully. The court has also viewed the DVD referred to above. In its skeleton argument for this application, the prosecution has summarised the evidence contained in the statement of the deceased witness against the defendant in bullet point form. By way of context it is clear that the deceased lived at 32 Pates Lane and that the front of her house looks out on the principal scene of the disturbances that day, the cul de sac at Pates Lane. The bullet points are:

- The witness said she was in the kitchen making a cup of tea when she saw 5 persons coming up Pates Lane. These persons pull down flags. A crowd then came up Pates Lane.
- The witness described Damien Fleming being hit with a stick and having his head jumped on by a person in a blue shirt.
- The witness described the actions of 5 males, in particular.
- The witness described them as having sticks, like bats and one as having an iron bar. Initially she said that she didn't know the names but later said that she knew "a couple of names right enough". She said she saw the men hitting Damien.
- The witness described Damien getting hit on the head with the bar and being kicked to the head or having his head "tramped on".
- The witness named the person in the blue shirt as Frankie Daly.
- The witness described how she knew Frankie Daly and described his face.
- The witness said that she left her house and went outside her front door when she saw the person she recognises as Frankie Daly with the iron bar. She said he hit Damien Fleming over the head with it and then stamped on his head.

[10] The interview conducted by the police on the 27 May 2009 also contains a useful summary towards the end of it when the interviewing officer seeks to pull the

threads of Mrs Kennedy's evidence together. He does so by saying that she is talking about events around 9.30 or 9.40 pm on 24 May 2009. It was still daylight. She was in the kitchen. She saw 4 guys wearing Rangers shirts. They had gone to the lamp posts where the flags were. They climbed up and were taking them down. One put a flag he has taken down in his rear pocket. These men were joined by more people who had come from the direction of Killowen Street. She saw a taxi stop and 4 men get out. The crowd walked towards the car park area in the cul de sac – to the front of her kitchen. She was looking straight at them. They were engaging in sectarian language. She saw Damien Fleming who was a relative of hers. He was just outside her house. She then left her house and went out. She saw the defendant whom she recognised. He had an iron bar in his hand and he hit Damien Fleming over the head with it. Damien Fleming dropped to the ground. The defendant then stamped on him with his foot. Others included persons with sticks or chair legs for use as weapons. She also saw Kevin McDaid being assaulted. He was beside the garages. Those who had been involved in the assault on Damien Fleming joined others who attacked Kevin McDaid. She couldn't see who was doing the punching and kicking. She sought to help Damien Fleming. She saw Kevin McDaid's wife going to help him. She got hit as well but Mrs Kennedy did not herself see this. The police intervened at this stage.

[11] In its application to the court the prosecution seek to have the DVD of Mrs Kennedy's statement of 27 May 2009 adduced at the trial of the Defendant notwithstanding that it constitutes hearsay evidence.

[12] It is common case as between the prosecution and the defence that the former's application meets the tests found in Article 20(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). The evidence would be admissible if Mrs Kennedy was available to give it; Mrs Kennedy's identity as the author of the evidence is clearly ascertainable; and the reason why she is unable to testify is that she is now dead.

[13] In these circumstances the statement, it is agreed between the parties, is automatically admissible, but this is not the end of the matter as it is contended on behalf of the Defendant that the court should exclude the statement by reason of either the terms of Article 30 of the 2004 Order or Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order").

[14] Article 30 *supra*, in its material part, reads:

> "(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if –
>
> (a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it taking account of the value of the evidence."

[15] Article 76 of the 1989 Order *supra*, in its material part, reads:

> "In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

**The court's approach to the issue of exclusion**

[16] In approaching the issue of the exclusion of what is otherwise an automatically admissible hearsay statement the court has considered the extensive case law in respect of this subject. The statement of Mrs Kennedy plainly cannot be viewed as being in the category of "sole or decisive" evidence whose admissibility or otherwise would make or break the prosecution of the defendant. Even without her statement, there is other evidence which tends to support the case against the defendant. The case therefore is not one which calls for detailed consideration of the state of the law as it applies in cases where the evidence at issue falls into the "sole or decisive" category. Rather, it appears to the court that in a context such as the present, in considering the issue of exclusion, the court is involved in an exercise in determining where the interests of justice lie as between admission and exclusion of the statement. This was the view of Gillen J in R v Brown [2009] NICC 11 where he states at paragraph [13] that:

> "The interests of justice seem to me to be a relevant test."

In reaching this conclusion, Gillen J placed weight on the view of Lord Phillips CJ in R v Cole and Kerr [2007] 1 WLR 2716 where the "interests of justice" test was linked to an analysis of the factors referred to in Section 114(1)(d) of the Criminal Justice Act 2003, which is the English equivalent of Article 18(1)(d) in the Northern Ireland 2004 Order. While those particular provisions are concerned with the interests of justice in the context of the admissibility (not the exclusion) of certain hearsay evidence, both Lord Phillips and Gillen J regarded them as a useful guide to the issue now under consideration. This court sees no reason to deviate from that approach which was not disputed by either counsel when the application was being

argued. However, the court is of the view that the elements to be considered under Article 18(2) should not be seen as, and were never intended to be, an exhaustive statement of what may be relevant in considering the issue now under discussion.

[17] Article 18(2) reads as follows:

> "(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1) (d) the court must have regard to the following factors (and to any others it considers relevant) –
>
> (a) How much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) What other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) How important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) The circumstances in which the statement was made;
>
> (e) How reliable the maker of the statement appears to be;
>
> (f) How reliable the evidence of the making of the statement appears to be;
>
> (g) Whether oral evidence of the matter stated can be given and, if not, why it cannot;
>
> (h) The amount of difficulty involved in challenging the statement;
>
> (i) The extent to which that difficulty would be likely to prejudice the party facing it".

[18] Other ways of approaching the interests of justice, in the court's view, should also be considered. One of these is the well-known triangulation of interests'

principle. This was explained by Lord Steyn in Attorney General's Reference (No. 3 of 1999) [2001] AC 91 at 118 where he stated:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of justice that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public".

A second principle derived from the Strasbourg jurisprudence is the fair balance principle. At paragraph [39] of his decision in R v Brown (*supra*) Gillen J indicated, in a dictum this court will bear in mind:

> [39] "Finally I bear in mind, as Strasbourg jurisprudence has recognised, that there is a need for a fair balance between the general interest of the community and the personal rights of the individual. I must not only safeguard the rights of the individual to have a fair trial, but the interests of the community and victims of crime must also be respected."

[19] In the court's view, the overriding factor when considering the interests of justice must be whether there can be a fair trial if the hearsay evidence is admitted. This will involve the court, having considered the totality of relevant factors, making an assessment which, *inter alia*, takes account of the disadvantages which flow from the admission of hearsay evidence and balances these against the advantages which flow from the admission of the hearsay evidence. It appears to be well established that in striking the requisite balance the court should take into account what has been described as the "counterbalancing measures" which are available and which limit or are intended to limit the prejudice caused by the admission of hearsay evidence.

**The application of the above approach to the circumstances of this case**

[20] It is convenient to begin with a stocktake in relation to the nine factors within Article 18(2) *supra*.

[21] Firstly, on the assumption that Mrs Kennedy's statement is true, the court readily concludes that her statement would have substantial probative value in the proceedings. The statement positions the defendant within the mob and also depicts him as playing an active role in the mob's activities, including identifying him as an

assailant of Damien Fleming. Indeed, the statement describes the defendant as using an iron bar with which to attack Damien Fleming by means of a blow to his head. Whether the defendant had a role at all in what went on and, if he had, what all it consisted of are matters at issue in the proceedings.

[22] Secondly, in the court's view there is other evidence of at least some of the matters dealt with in the statement. There is other evidence placing the defendant at the scene which tends to show his involvement in the mob. There is also other evidence available as to the particular role or part he played in respect of a number of assaults. However, the only witness evidence of the defendant wielding an iron bar to the head of Damien Fleming is that of Mrs Kennedy.

[23] Thirdly, the court inclines to the view that the statement, when referring to the general scene and to the role of named individuals in that context, deals with issues of importance to the case as a whole.

[24] Fourthly, it seems to the court that the circumstances in which Mrs Kennedy made her statement are clear. The court understands from the prosecution that she was interviewed informally as a witness on the 26 May 2009. Notes of that interview have been seen and read by the court. On the following day, as already referred to, the police conducted the interview with which the court is concerned. This was video and audio recorded and, as already noted, there is a DVD of it which will be played to the court should this application be successful. The provenance of the statement and the DVD are therefore not in doubt.

[25] Fifthly, the court assesses that the question of Mrs Kennedy's reliability is a live issue, as the court will discuss further below.

[26] Sixthly, the court is of the view that there is no significant issue about how the statement came to be made. The circumstances of the making of it have been referred to at paragraph [24] above.

[27] Seventhly, it is clear that oral evidence in respect of the matters which the statement covers cannot be given because Mrs Kennedy is dead.

[28] Eighthly, the difficulty or otherwise involved in challenging the statement is a live issue. The defendant can, of course, deny the accuracy of the statement but the court will need to consider the extent to which the witness's account can be tested in the absence of the witness unavoidably being unavailable for cross examination.

[29] Ninthly, the court considers that the issue of the extent to which there would be difficulty in challenging the statement so giving rise to prejudice the defendant is also a live issue.

**The live issues**

[30] Clearly, what the court has described above as the live issues require further discussion in this ruling. Before doing so, however, it is worth referring to a number of helpful passages in recent judgments which the court considers are of assistance in guiding the court's assessment.

In a recent case, R v Rodgers [2013] NICA 71 the Northern Ireland Court of Appeal *per* the Lord Chief Justice stated (at paragraph [19]):

> "Once the hearsay evidence is admissible through one of the gateways the court needs to examine the apparent reliability of the evidence and the practicability of testing and assessing its reliability. This is because such evidence will generally be admissible where it is either demonstrably reliable or capable of being properly tested."

[31] The court, therefore, acknowledges that it should consider the reliability of the statement along with the question of whether it is capable of being properly tested. The two factors must be looked at together. Support for this is found in the decision of the Court of Appeal in England and Wales in R v Riat and Others [2013] 1 Cr App R 2. Hughes LJ put the matter thus at paragraph [5]:

> "The written arguments in several of the cases now before us suggest that this language may be understood to mean that hearsay evidence must be demonstrated to be reliable (i.e. accurate) before it can be admitted. This is plainly not what these passages in Horncastle say … This court was far from laying down any general rule that hearsay evidence has to be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury."

The same judge went on to say at paragraph [6]:

> "The true position is that in working through the statutory framework in a hearsay case, the court is concerned at several stages with both:
>
> (i) The extent of risk of unreliability; and
>
> (ii) The extent to which the reliability of the evidence can safely be tested and assessed …

> The availability of good testing material … concerning the reliability of the witness may show that evidence can be properly tested and assessed. So may independent supporting evidence".

[32] In a later Court of Appeal authority in England and Wales, R v Jabbar [2013] EWCA Crim 801, Treacy LJ stated at paragraph [31]:

> "The essential question for us is whether the judge was right to conclude that the interests of justice test was satisfied. It is clear from Riat that Ibrahim did not require that a judge had to be satisfied that hearsay evidence was demonstrably reliable in order to admit it under the Act. There was no general rule to that effect."

Having quoted part of paragraph [6] in Hughes LJ's judgment in Riat, Treacy LJ went on (still at paragraph [31]):

> "The court stressed the twin alternatives concerning hearsay evidence, which is either demonstrating reliability or is capable of proper testing as referred to in Horncastle. At paragraph [33] the court spoke of a need for the evidence to be shown to be 'potentially' safely reliable before it is admitted. It is not the task of the judge to look for independent complete verification. What the judge must do is to ensure that hearsay evidence can be held to be reliable by a jury. This involves considering its strength and weaknesses, the tools available for testing it, and its importance to the case as a whole."

[33] The notion of the hearsay evidence needing to be at least "potentially safely reliable" as a form of minimum standard if it is to be admitted in contrast to the statement being completely independently verified seems to the court to be a sensible way to proceed.

[34] The issue of the tools for testing the reliability of the hearsay statement, it should not be forgotten, is, in part, dealt with in the statutory scheme of the 2004 Order. In this regard the court draws attention to Article 28. This states:

> "28-(1) This articles applies if in criminal proceedings –

(a) A statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and

(b) The maker of the statement does not give oral evidence in connection with the subject matter of the statement.

(2) In such a case –

(a) Any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;

(b) Evidence may with the court's leave be given of any which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;

(c) Evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself."

**The reliability of Mrs Kennedy generally**

[35] An issue which may arise relates to the general reliability of Mrs Kennedy as a witness, as against the reliability of her account given to police. On this aspect of the matter there is not a great deal to be said. As regards this witness, there is no suggestion that she has a criminal past, is prone to alcohol or drugs or lacks capacity to understand what she is saying. While she clearly can be seen in the DVD to be a woman who was, to a degree, nervous and fearful when giving her account to the police, such apprehensiveness as she displays is hardly surprising in the circumstances, given the sectarian nature of the incident which had taken place as recently as a few days before. Mr Brolly, on behalf of the defendant, suggested that the witness may have an axe to grind and be infected by partisanship on sectarian grounds. The court acknowledges that this may be a possibility but unhappily in the context of urban interfaces, such as the area here at issue in Coleraine, sectarianism is a fact of life and is all too common. The court suspects that many of the witnesses who will give evidence in this case to a greater or lesser degree may evince sectarian

attitudes but this alone would not mean that their evidence should be rejected. The court in carefully considering the DVD of Mrs Kennedy's evidence did not detect anything in this regard which would be out of the ordinary. The tribunal of fact hearing the case should without any great difficulty be able to assess the witness's general reliability.

**The reliability of Mrs Kennedy's account**

[36] Distinct from the issue of the reliability of Mrs Kennedy generally is the issue of the reliability of her account – what her statement says.

[37] Mr Brolly, in his submissions, attacked the veracity and reliability of Mrs Kennedy's account. Firstly, in a general sense, he argued that the quality of the evidence given in the interview was very poor and that the interview transcript reveals a significant level of suggestibility to what the officer conducting the interview said and an alarming number of inconsistencies from page to page. Secondly, he points to what he considered to be specific and glaring changes in the witness's evidence as the interview went on. In this context, he drew the court's attention to the following, in particular:

(i) at the outset of the interview the witness firmly placed herself as inside her house in her kitchen. At one point she spoke of hiding behind a kitchen cabinet to take shelter from objects being thrown from outside at the house and in its direction. She described the assault on Damien Fleming from her perspective inside the house. Yet about the middle of the interview, Mr Brolly argued, the witness suddenly expresses the view that what she saw in the context of the assault by the mob on Damien Fleming and later Kevin McDaid was observed by her from outside the house. She later in the interview explained that she left the house and was outside at the height of the trouble observing events which were going on within feet of her.

(ii) at the outset of the interview she described what she saw of the assault on Damien Fleming. Three persons she said were involved. She saw them through the kitchen window. When asked if she could identify them she initially provided no names. Later, when asked again about identifying the person who had used the iron bar on Damien Fleming she said that she could not. Yet later still she told the officer conducting the interview that that man was in fact the defendant who she knew from being about the town.

(iii) in terms of the descriptions of the persons she said were present, Mr Brolly drew attention to numerous changes from sentence to sentence and numerous contradictions.

Mr Brolly also made the point that it was only this witness who identified his client as having an iron bar and having used it on Damien Fleming.

Thirdly, Mr Brolly drew attention to the potential damage which might be effected to the defendant's case if Mrs Kennedy's DVD evidence was admitted. The tribunal of fact would not be able to see the witness undergo cross examination. In this case this loss, counsel argued, would be particularly felt as in the presence of so many shortcomings in the quality of the witness's account defence counsel would have had little difficulty exposing the witness's confusion and unreliability. Her account would simply be unable to withstand scrutiny.

In these circumstances Mr Brolly argued that it would be wrong to allow the hearsay evidence to be admitted as it could not meet the minimum standard of even being "potentially safely reliable".

[38] Mr Steer, for the prosecution, urged the court to keep in mind that the incident in question involved a substantial number of people and involved the movements of a mob over a short, intense but crucial period. What occurred was bound to be confusing and witnesses would see and appreciate events from different angles. It would be surprising indeed if every witness's account could be viewed as entirely consistent with every other witness's account. What counted, he argued, were the crucial points at which it could be said that Mrs Kennedy's statement dovetailed with the known evidence of others. Her evidence painted a similar general scene to that of other witnesses. The sequence of events was essentially shared with many of the other accounts. Likewise the witness's account where it identified those involved identified persons who other witnesses had also identified as involved.

**Counterbalancing measures**

[39] At paragraph [19] above, the court referred to the need to strike a balance between the advantages of admitting the hearsay evidence and the disadvantages of doing so. It is noted that in reaching a conclusion the court should take into account "counter-balancing measures".

[40] To an extent, the court has already alluded to such measures when considering issues of reliability. The ability of the defence to put before the tribunal of fact evidence about the character, motivation and habits of the statement maker is one such measure. But there are others. There is the ability of the defence to expose inconsistencies between statements made by the same statement maker. This is possible in a limited way in this case as there is a short written record of what was described earlier as the informal interview with Mrs Kennedy by the police on 26 May 2009. Conflicts between the evidence of Mrs Kennedy and that of other witnesses can also be pointed to for the purpose of testing the hearsay evidence of the former. Article 28 has been referred to which provides machinery by which the tribunal of fact can become appraised of matters which may be used to impugn the witness's evidence. In addition, the court reminds itself of the processes of

disclosure, both that between the prosecution and the defendant and that involving third parties, which can assist in uncovering or seeking to uncover the truth.

[41] "Counter balancing measures" of relevance do not, however, end with the above.

[42] The statutory scheme for the admission of hearsay evidence contains an important provision which it would be remiss for the court not to mention. Article 29 of the 2004 Order is in the nature of an additional safeguard of general application. It states:

> "Stopping the case where evidence is unconvincing
>
> 29-(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that—
>
> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
>
> (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,
>
> the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."

[43] It is plain from this provision that the judge at trial is under a duty to monitor both the issue of the importance of the hearsay evidence to the case and also the issue of how convincing or otherwise that evidence is. If the judge concludes that at any time after the close of the case for the prosecution both limbs (a) and (b) within Article 29(1) are satisfied he/she must act in the way prescribed.

[44] While the decision to admit or exclude the hearsay evidence must be made consistently with the tests and provisions already discussed, the safeguard contained in Article 29 is of value as it caters for the case where, although there were proper reasons for admitting the hearsay statement, the actuality of what occurs at trial sheds a different light on the hearsay evidence and renders it unconvincing.

[45] The presence of Article 29 does not, of course, mean that a judge considering the admission or exclusion of a hearsay statement should lean towards admission just because problems can be picked up and resolved later under Article 29, but it

does offer the reassurance that the statement and the role it in fact plays at the trial will be the subject of careful monitoring by the judge.

[46] Finally, the court reminds itself that another counter-balancing measure relates to how the judge will ultimately direct himself. As put in the prosecution's skeleton argument:

> "The notional jury will be directed in general terms in respect of hearsay that they have not had the chance of observing the witness… [and] will receive a tailored direction from the judge about the treatment of hearsay evidence in [the] particular case."

The notional jury will also be reminded about the inability to cross examine the witness.

[47] The court accepts that such notional directions will be of assistance and are in the nature of a safeguard in a context where a hearsay statement has been admitted in evidence.

**Conclusion**

[48] In this case, on its particular facts, the court, having taken into account all of the above, including the "triangulation of interests" and "fair balance" principles referred to *supra*, is of the view that it should decline to admit the statement of Mrs Kennedy (in DVD form) under the 2004 Order as hearsay evidence and should exclude it from admission pursuant to Article 76 of the 1989 Order. Its principal reason for so concluding can be expressed succinctly. It is of the view having carefully read the transcript of Mrs Kennedy's evidence and, even more important in the present context, having viewed the DVD in full, it seems to the court that the reliability of the evidence itself falls below the minimum standard of being "potentially safely reliable". To admit the evidence in these circumstances would create an unacceptable risk of unfairness.

[49] If the interview was to be admitted as evidence, it seems to the court, that it could have a significant impact on the position of the defendant in that if its contents are put before the tribunal of fact, it would be open to that tribunal to conclude that the defendant, having been identified by the witness as having done so, hit Damien Fleming over the head with an iron bar. In the context of this case this would be a serious finding against this defendant as none of the other witnesses make the same allegation against him (though they do make other serious allegations against him, *inter alia*, in the context of the assault upon Damien Fleming). Mrs Kennedy's evidence must therefore be carefully scrutinised to see if it meets a minimum standard of reliability to enable it to be placed before the tribunal of fact. The court has carried out this exercise but finds itself unable to conclude, essentially for the

reasons expressed by Mr Brolly in argument and set out above, that the requisite minimum standard has been reached. The key points are those set out at (i) to (iii) in paragraph [37] *supra*. The court has struggled to find any acceptable explanation for the internal discrepancies to be found in respect of these key points. It is difficult to understand why the witness would have left the comparative safety of her house in the middle of such a serious incident but if she did it is difficult also to understand why this would not have been mentioned from the outset of the interview. Equally the court is left wondering how it could come about that at one point in the interview she is unable to identify the defendant as the lead assailant of Damien Fleming but within a very short time later she does so in definite terms. If the assault on Damien Fleming occurred as the witness said it did, the court is also left wondering why the prosecution was unable to point to other witnesses referring to the use of an iron bar on him by this defendant and why likewise the prosecution has failed to identify any witnesses who can testify to the presence of Mrs Kennedy, at her age a noticeable person, outside her house in the very serious circumstances which were prevailing during the time when the assault was occurring. Finally, Mrs Kennedy's interview, in the court's view, is replete with confused and confusing accounts and descriptions of those involved in the various incidents referred to.

[50] In the court's view, when so much is at stake, these matters cannot do other than cause serious doubts to be entertained about whether any tribunal of fact could possibly rely on them. In these circumstances the court has anxiously considered whether the testing measures which could be deployed and the counterbalancing measures which are built into the arrangements for admission of the evidence as hearsay represent a sufficient safeguard of fairness in the circumstances. While cross examination would have the capacity to test the evidence in a significant way, the court has difficulty in regarding the ability to compare and contrast the internal contradictions in the evidence or to compare and contrast Mrs Kennedy's account with other accounts as being enough to offset the disadvantage which on the particular facts of this case may be engendered by the admission of the evidence. Sometimes, perhaps even often, these techniques may be appropriate to enable a court to be satisfied that despite the existence of doubts about the reliability of the hearsay evidence it may, nonetheless, be admitted, but where the nature of the court's concerns, as here, relate to fundamental shortcomings in respect of very important evidence the court should be astute to ensure that its introduction will not involve a significant risk of potential injustice to the defendant.

[51] The adverse effect which admission of the statement would be likely to have on the fairness of the proceedings impels the court to the conclusion it has arrived at. In these circumstances this application fails.