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

ICOS No: 21/62064

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IN THE CROWN COURT OF NORTHERN IRELAND  
SITTING AT BELFAST

THE KING

v

Mark Reynolds  
Niall Reynolds  
Robert Rooney  
Gavin McKenna

Her Honour J Smyth

*Introduction*

[1] This is a defence application at the conclusion of the prosecution case that none of the four defendants have a case to answer. In determining this application, I am required to rule on the admissibility of recognition evidence by police officers in the course of controlled viewings.

[2] The charges arise out of an incident of civil disturbance in the Kilwilke estate in Lurgan on Sunday 23 August 2020. Police had been in the area dealing with a suspect device which had been abandoned. A number of neighbourhood officers on foot and in vehicles were tasked to engage with the local community and explain the police presence. A hostile crowd began to form and within a short period of time there were four petrol bomb attacks on police. Fortunately, there were no injuries.

[3] The petrol bombers were masked. The prosecution relies on a combination of evidence, namely recognition evidence at the point when the suspects are not masked and are identified by police officers in controlled viewings, coupled with the evidence from footage from a camera on top of a landrover (EGT), bodyworn footage, aerial footage (ASU) and social media footage. The prosecution relies in particular on the evidence of Constable Nick Gray regarding the tracking of the suspects in terms of time and place on the footage and the identification of clothing. The recovery of items of clothing footwear and accessories from police searches is relied on as supporting evidence.

[4] The court admitted the evidence of Constable Gray on the basis of *A-G Reference (No 2 of 2002)* [2002] EWCA Crim 2373, where the English Court of Appeal, relying on *R v Clarke and Peach* [1995] 2 Cr App R 333, held that a witness, who did not know the defendant, acquired special knowledge that a tribunal of fact did not have by spending time viewing and analysing photographic images from the scene. On that basis the witness could give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the contemporary photograph were available for the tribunal of fact.

[5] Constable Gray's evidence was that he had viewed the footage and the images for around 150 hours. He was permitted to draw the court's attention to relevant features on the footage and from stills taken from the footage but he was not permitted to give a commentary that he had prepared or to give evidence relating to his conclusions.

[6] I remind myself that while the court is entitled to have regard to this evidence and to the comparisons made by Constable Gray as an expert on the basis of the special knowledge acquired, when coming to its conclusions, having given the matter careful consideration it does not have to accept his evidence, nor does it have to act upon it. It must remember that the expert evidence relates only to part of the case and while it may be of assistance it must reach its verdict only after the totality of the evidence is considered. In any event, even if evidence is admissible, the court must decide the weight that should be attached to it.

[7] Since this case concerns identification evidence I remind myself of the principles in *R v Turnbull* [1977] QB 224 that there is a special need for caution before convicting a defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification and there have been wrongful convictions in the past as a result of such mistakes. I remind myself in particular that an apparently convincing witness can be mistaken as can a number of apparently convincing witnesses. The circumstances in which the identification by each witness was made must be carefully examined and any specific weaknesses must be considered.

[8] Since this is a case that depends on circumstantial evidence, I also remind myself that such evidence needs to be examined with great care for a number of reasons. First of all, such evidence can be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. The standard direction given to juries reminds jurors that this is particularly important

because of the tendency of the human mind to look for (and often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant.

*Principles with regards to a submission of no case to answer in a circumstantial case*

[9] The prosecution case should be taken at its height at this stage. Blackstone (2023 ed.) at D16.64, explains that on the proper application of the test in *Galbraith* the prosecution is not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution.

[10] In *Goddard* [2012] EWCA Crim 1756 at para 36, the court stated that the question was whether a jury not all reasonable juries could, on one possible view of the evidence, be entitled to reach that adverse inference. (See also *R (Boota) v Gwent M.Ct* (2012) EWHC 3550 (Admin).

[11] Those principles have recently been reviewed and approved in *R v Michael Grimes* [2017] NICA 19.

[12] Applying the principles at this stage of the proceedings, there are broadly, two questions for the court to consider:

(i) Is the recognition evidence of the police officers at the controlled viewings admissible?

(ii) If the answer is "yes", is there sufficient evidence on which a reasonable jury could conclude that each defendant is guilty of the offences charged?

*Is the recognition evidence of the police officers at the controlled viewings admissible?*

[13] In Northern Ireland, the Police and Criminal Evidence Order (NI) 1989 ("PACE") Code of Practice D which came into effect after 31 May 2015, deals with evidence of recognition of persons from film photographs and other images, including by police officers from D:3.35-D:3.38 part 3 (B). For the purposes of this ruling, the relevant paras of the Code are set out:

*Evidence of recognition by showing films, photographs and other images*

3.35 ...

3.36....

3.37 A record of the circumstances and conditions under which a person is given an opportunity to recognise the individual must be made and the record must include:

(a) whether the person knew or was given information concerning the name or identity of the suspect.

(b) what the [person] has been told before the viewing about the offence, the person(s) depicted in the images or the offender and by whom.

(c).....

(d). ....

(e) the arrangements under which the person viewed the film or saw the individual and by whom those arrangements were made.

(f) whether the viewing of any images was arranged as part of a mass circulation to police and 7 the public or for selected persons.

(g) .....

(h).....

(i) ....

(j) whether the person was familiar with the location shown in any images or the place where they saw the individual and if so, why.

(k) whether or not on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone known to them, and if they do -

(i) the reason

(ii) the words of recognition

(iii) any expression of doubt

(iv) what features of the image or the individual triggered the recognition.

3.38 ...

[14] The purpose of Code D is to avoid the mischief that a police officer may merely assert that he recognises someone without any objective means of testing the accuracy of such an assertion. For that reason, where there is a breach of any provision, its impact on the fairness of the admission of the evidence must be carefully assessed.

[15] *Archbold* (23<sup>rd</sup> ed) at paras 14-33 cites *Reid v R* [1990] AC 363 PC and *Ramsden* [1991] Crim L.R. 295 et seq as authority for the following principles:

(i) The Turnbull guidelines apply equally to police officers.

(ii) Honest police officers are likely to be more reliable than the general public.

(iii) Provided that the usual warnings are given, the reasons scrutinised, and the integrity of the witness is not in any doubt, the tribunal can give effect to what is only common sense.

[16] With regard to recognition from CCTV footage, the prosecution relies on *Archbold* 14-63 citing *Att-Gen's Ref (No. 2 of 2002)* [2002] EWCA Crim 2373 which identifies three circumstances where a jury may be invited to conclude that the defendant committed the offence on the basis of an image taken from the scene of the crime;

(a) where the image is sufficiently clear to allow comparison with the defendant in the dock;

(b) where the image is identified by a witness who knows the defendant sufficiently well to recognise him; and this may be so even if the image is no longer available for the jury; or

(c) where the identification is based on opinion evidence.

In this case, the prosecution relies on (b).

[17] At 14-65 (first para) of *Archbold* the principles regarding recognition by a witness from CCTV are set out as follows:

(i) There is no distinction in principle between a witness who observes an incident on video and a witness who observes the actual incident.

(ii) Where a witness gives evidence of recognising or identifying a person from video the Court applies the *Turnbull* guidelines not only to the witness but also to the position of the camera, the opportunity for viewing it depicts and the clarity of the film or recording (see *Taylor v Chief Const.*)

(iii) The tribunal of fact should be directed to the strengths and weaknesses of the evidence as per *Turnbull*, see *Archbold* 14.22.

[18] Counsel for both the prosecution and the defence referred me to a number of cases where on the facts, the court either admitted or refused to admit the recognition evidence of police officers from CCTV:

*Smith* [2008] [EWCA] 1342

Evidence of recognition by an officer was not admitted, where contrary to the evidence, the court concluded that it would not have been possible for anyone to see

the suspect's eyes and the witness was "driven to assert "that she could recognise him only "by the stature, the clothing, it's everything, it's not one particular thing, it's the whole really." The court emphasised the importance of a record in place to assist in gauging the reliability of the assertion and of setting out the officer's initial reactions so that they can be subject to scrutiny. Whether the recognition was on first viewing was important and the words used may also be of importance along with a record of what it is about the image that is said to have triggered the recognition. Absent any such record, it will not be possible to assess the reliability of the recognition.

*Chaney* [2009] 1 Cr.App R 35

Evidence of recognition by an officer was admitted where the officer was sent an email by a colleague which named the appellant as the suspect and to which the officer then sent a reply confirming that he could identify that named suspect (para [8]). The Court of Appeal considered that the email from the officer was in effect his immediate reaction to the recording viewed and took into account the words used by way of recognition and the fact that his email was not intended to be given in evidence. The fact that the name had been provided by the other officer was before the jury, but also relevant was the fact that the photograph in question was reasonably clear and could be examined by the jury. The Court considered that the officer had not provided details of how he recognised the suspect but noted that this may be difficult to identify features in a recognition case (paras [21] - [24])

*McGrath* [2009] EWCA Crim 1758,

Evidence of recognition was admitted where the footage was shown to a number of officers at a police station by an officer who already knew the name of the suspect. One officer identified the suspect who he had interviewed the previous year. There was no formal procedure and no contemporaneous record of how the officer recognised the defendant at the time, nor was there a record from the officer who showed the footage. The identifying officer did give evidence with regard to how she could recognise the appellant (para 9). In addition, the Court noted that the appellant did not dispute that the officer knew him but simply asserted that her purported recognition was wrong (para [10]) The officer who recognised the appellant had not been provided with his name and her knowledge had come from her previous dealings with him.

*Moss* [2011] EWCA Crim 252

Evidence of recognition was admitted where the officer had made a cursory note of his recognition in his notebook at the time and provided a subsequent explanation for his recognition six months later. This was considered a sufficient basis on which the jury could judge the reliability of his evidence (paras [23] - [24]), because the

officer could explain how he had come to know him, when he had last seen him and which of his features he particularly relied on to identify him.

*JD [2012] EWCA Crim 2637*

Evidence of recognition was not admitted where the officer had to rely on recollection some 6 months after the event with regard to the circumstances of the viewing and the defence could not test his account that he watched the footage alone and that nobody else was present. The officer was given the name of the suspect, no record was made of any question of doubt, what features of the image triggered the recognition or the words of recognition and no contemporaneous note was made as to the officer's recollection as to what he recalled about seeing the appellant on earlier occasions. The identifying officer had visited the appellant at his home (between 2002 and 2006, when the incident occurred in 2011) and he had interviewed him for a number of minutes on two occasions in 2010. He looked at the CCTV three times.

*Yaryare [2020] EWCA Crim 252*

The court admitted the recognition despite the lack of contemporaneous recording of the words used, expressions of doubt and features of the appellant. The Court cited paragraph 39 of *Lariba* with regard to the quality of the images in respect of which the jury were being asked if the recognition based upon it was reliable:

“... Once the judge concluded that the images were of sufficient quality to permit the evidence to be given, it remained the task of the jury to assess whether they could be sure that the recognition based upon it was reliable. The advantage that a jury has in a case of recognition from a scene of crime image is that they can see exactly what the witness saw and the image is permanent. That is not the position when there is no photographic record and the jury is considering only the quality of identification evidence given by an eye-witness to an ephemeral scene. In our judgement these images were of sufficient quality to enable the jury to assess whether a recognition made from them was one on which they could rely even though they were not of sufficient quality to permit an identification of their own.”

[19] *Archbold* (2023), at paras 14-57, deals with the court's approach to a breach of the Code and any resulting unfairness. Two preliminary issues are, firstly, did the breach occasion the mischief which the code was designed to prevent and secondly was the breach caused by a flagrant disregard of the code. See also *Blackstone* (2023) at F19.4.

*The evidence of the police officers*

[20] Mr Steer on behalf of the prosecution has helpfully summarised the evidence of the police officers into appendix A , which is attached. The defence do not agree this document but have not identified any errors within it. I am satisfied that it accurately represents the evidence to the court.

[21] It is not disputed that an electronic briefing page was sent by Cyber Support Unit at Mahon Road police station to police officers (ABC POET) enclosing a number of photographs of suspects which included persons other than the defendants ) and requesting assistance in identifying those persons. No names were provided. The incident was labelled on the email as "Lurgan 10 disorder - identification required ".

[22] The electronic briefing page included the following instructions:

-If you can identify any of the persons in these briefing pages you must not discuss with colleagues....

-If you can identify any of the persons in these briefing pages you MUST NOT (subject to operational requirements) carry out any research on such persons by any means, including internal Police Systems.....

[23] Those officers who responded in the affirmative to the e-briefing then attended at Lurgan police station on dates between Friday, 28 August and Wednesday, 2 September. Constable Boyd was responsible for the conduct of controlled viewings of video footage. He handed each officer a briefing form, appendix A and asked the officer to read it. Each form was then collected and marked with an exhibit number and signed and dated. Constable Boyd told each officer that they would be shown video footage which depicted events on Sunday, 23 August 2020. Each officer was handed a viewing form, appendix B and told that he/she should not discuss what was observed either during or after the viewing but should note all observations on the form provided. They were told that the video footage would be played at normal speed but could be fast- forwarded, re-wound or stopped upon the officer's direction. Each appendix B was then collected and marked as an exhibit.

[24] It is accepted that the "PSNI Procedures and Guidance" used were outdated and new Guidance was applicable from June 2020. In particular, at para. 3 (f), the updated guidance expressly instructs officers to avoid "any research on such persons by any means including internal police systems ". This instruction was however, included in the e-briefing . Despite that instruction, Constables McKenna and Copeland in respect of Niall Reynolds, Constable Copeland in respect of Robert Rooney and Constable McKenna in respect of Gavin McKenna admitted accessing the Niche system. The prosecution does not rely on their evidence.

[25] The prosecution does rely on the evidence of seven police officers who gave recognition evidence as follows:



*Mark Reynolds* was identified by Const Morrow, Const. Galbraith and Const. Walters.

*Niall Reynolds* was identified by Const. Morrow, Const. Galbraith, Const Walters and Const. McLoughlin.

*Robert Rooney* was identified by Const. Galbraith, Const. Walters and Const. McLoughlin

*Gavin McKenna* was identified by Sgt. Carolan, Const. Galbraith, Const. Walters, Const. McLoughlin Const. Anderson and Const. Deuchar.

### *The alleged breaches of Code D*

[26] The defence submit that the Code has been breached regarding the recording of the circumstances and conditions under which the officers were given an opportunity to recognise any individual. In general terms, it is submitted that the title of the e-mail accompanying the briefing page, "FW: Lurgan Disorder: Identification Required ", impacted on the objectivity of the identification process despite the fact that the images were shared across the PSNI Intranet. The title had the effect of directing the contents to a much smaller localised set of PSNI officers. The defence further submit that the initial identifications in response to the e-briefing were made in entirely uncontrolled and unrecorded circumstances.

[27] The specific breaches of the Code alleged are:

- 3.37(a) - There is no record as to what each officer knew or whether they were given information concerning the name or identity of the suspect(s). Whilst that is correct, Constable Boyd confirmed in evidence that no names of suspects were given to any officer and the e-briefing did not contain details of any suspects. All of the officers confirmed that they had viewed the footage alone and that the only discussion with Constable Boyd was with regard to the procedure. A contemporaneous record of the video viewing was kept which indicated the police exhibit number and timecode. This contains the precise image relied upon for the identification which allows the court to examine it and assess the quality of the image and the reliability of the recognition.
- 3.37(b) - There is no record of what each officer had been told before the viewing about the offence, the person(s) depicted in the images or the offender and by whom. To some extent this replicates the complaint at 3.37(a). It is however apparent from the e-briefing that the incident related to public disorder in Lurgan on the relevant date. It is correct that constable Anderson did not record that he was present during the

incident nor that he recalled seeing Gavin McKenna in the area beforehand, but 3.37(b) relates to a record of what the person was told.

- 3.37 (e) The defence submit that neither Constable Boyd nor the relevant identifying officer him/herself, was able to give any clear or consistent account of the specific arrangements in place during the actual controlled viewing(s), in particular, whether the two separate video footages were watched individually, repeatedly, if they were stopped/started during the procedure, re-wound etc, or the reasons for same. That is correct.
- 3.37 (f) Constable Boyd accepted in evidence that he did not record whether or not the POET images sent by e- Brief had been circulated across the wider PSNI, to a more targeted range of local officers (explicitly or implicitly) or whether there had been any sharing of this material with the public. Constable Galbraith in his evidence conceded the possibility that he may have received a targeted email seeking assistance with identification of suspects given his previous posting in Lurgan in 2014. That is correct.
- 3.37 (j) There is no record as to whether the officer undertaking the controlled viewing was familiar with the location shown in any images or the particular location where the individual was recognised and if so, how he was familiar. That is correct.
- 3.37 (k)(i)-(iv) - There is no record of the reason that each officer was able to recognise each individual. The words of recognition do not include facial or other physical features in respect of Suspect 5 (alleged to be Niall Reynolds) and refer only to a description of clothing. The position is the same in respect of Suspect 4 (alleged to be Robert Rooney, although he made admissions that he was the person identified in a black and white T shirt and jeans). In respect of Suspect 3 (alleged to be Gavin McKenna) the recordings make reference only to clothing and a baseball cap covering most of his head. There is no specific feature noted that “triggered the recognition.” In addition, there is no reference to an expression of doubt by any officer – at whatever stage, whether upon viewing the e-Brief or upon participating in the procedure itself. In respect of Suspect 3 (alleged to be Gavin McKenna) the defence points out that none of the six officers who are now relied on to recognise him were able to identify him at the beginning and the end of the EGT footage where the prosecution case is that he can be seen clearly and undisguised (at 14:34 and 15:09 respectively). That is correct apart from the fact that the evidence was that the clearest images were chosen for recognition purposes.

*The prosecution response re admissibility*

[28] The prosecution submits that the recognition evidence is relevant, cogent and admissible. Of the seven officers who had *not* accessed a Niche record, six had made a notebook entry and all had sent an email purporting to be able to identify the suspects after their initial viewing of the still images on the electronic briefing page.

[29] Furthermore, the prosecution submits that the court can have confidence in the reliability of the officers' recognition of the suspects from the footage because the quality of the footage was extremely good.

[30] Whilst the prosecution accepts that there is no record of *how* the identifying officer recognised the suspect in breach of Code D, where the quality of the image is very good, this failure is not significant given that, as per *Yaryare* and *Lariba* (see para 18 above) any such features can be viewed by the tribunal of fact in assessing the reliability of the recognition.

[31] Whilst the prosecution also accepts that there is no record in respect of how often the footage was re-played or the words used at the time of the identification in breach of code D, the PSNI had erroneously failed to include this requirement in the controlled viewing documentation and even in the updated guidance dated June 2020. Neither Constable Boyd nor the interviewing officers can be said to have deliberately flouted their own guidelines.

[32] In addition to ensuring that a contemporaneous record was made of the viewing (Appendix B), Constable Boyd recorded witness statements immediately afterwards which confirmed the conduct of the video-viewing. The prosecution submits that this should provide the court with further confidence in terms of the reliability and veracity of the recognition evidence and the desire on the part of Constable Boyd to ensure that there was a contemporaneous record.

[33] The prosecution relies on the fact that no error in the recognition has been averred in cross-examination, nor has any challenge been made to the evidence of the officers regarding their knowledge and familiarity with the defendants.

[34] The prosecution rejects the criticism of the use of the e-briefing document, disseminating photos of suspects via the PSNI intranet. It submits that the provisions of PACE are broadly drafted to incorporate different factual provisions, this is exemplified by the fact that even PACE Code D 3(B) does not specifically relate to controlled viewings but gives principles of general application to viewing procedures. The practice of internal distribution of images within the Police is a common practice and is necessary to identify whether any officer is *capable* of making an identification from the footage. The officer is not simply asked to compare the still they have already seen with the footage but are instead required to confirm if they recognise someone from the footage.

[35] The prosecution submits that there is no unfairness in this procedure and relies on *An application for Judicial Review JR 38 [2013] NIQB 44*, which involved a challenge

to the PSNI publishing images of young persons in the media involved in public disorder. The Court noted, without criticism, that this followed a failure to identify these suspects following internal distribution within the police and was satisfied that the public distribution of such images did meet a legitimate need in pursuit of the identification of perpetrators of crime.

[36] Applying the *Turnbull* guidelines to the EGT footage and bodyworn footage in this case as per *Taylor v Chief Constable* (see para 17 (ii) above), the prosecution submits that the EGT footage was positioned on top of a police landrover which was parked at a height at the junction. The bodyworn footage was positioned at the same height as the defendants and is taken a short distance away from the defendants.

[37] Furthermore, the footage was in colour, the lighting conditions were good (it was a bright summer afternoon), the EGT camera and the bodyworn footage provided direct views of the suspects at close proximity, the EGT footage was able to pan and zoom in, the suspects were shown in different aspects being full frontal view as well as side profile while they were walking or running, both towards and away from the camera. In particular, there was a clear view of the suspects face, hair and clothing.

[38] The prosecution submits that the overall quality of the footage was extremely good, particularly the EGT footage which was not affected by distortions such as excess shaking and whilst there was some shaking with the bodyworn footage it did not interfere with any identification.

[39] As already stated, at no point was it disputed that the officers knew the defendants for lengthy periods of time or that they would have seen them frequently. Indeed, this is a case in which none of the defendants has ever advanced a line of defence other than to require the prosecution to prove its allegations.

[40] The interviewing officers accepted that Gavin McKenna has a twin brother but maintained that they knew both of them and could clearly distinguish them. The distinguishing features were not positively challenged other than to submit that there was some degree of inconsistency in terms of evidence regarding build, which the prosecution rejects as being significant.

[41] Two of the officers who were able to provide evidence of recognition were no longer based in Lurgan Police station, being Const. Walters who had moved to Banbridge shortly before the incident and Const. Galbraith who had left in 2014 and was now in Antrim Road. The prosecution submits that this further supports the independence of the identification process and contradicts the suggestion in the defence skeleton at para 17 which appears to aver that there was contamination between the officers within a relatively small local community police team. At no

point was it put to the officers that they had colluded with each other with regard to the identification of the suspects. The prosecution submits that the quality of the footage used to identify the suspects is again a contra-indication that this occurred.

[42] The prosecution relies on the fact that it was not put to any officer that the quality of the image identified by them from the footage was insufficient to make a recognition, or that it was not possible to make out identifiable features from the images or footage.

[43] The prosecution submits that whilst the defendants at para 1 of their skeleton argument remind the Court of the risks of mistaken identity, it was never put to any identifying officer that they were mistaken or even that they could have been mistaken in their recognition. No inconsistent features were identified on the footage as pointing away from the defendants.

#### *The defence rejoinder*

[44] The defence served a rejoinder taking issue with the prosecution reliance on the dicta in *Yayare* to support the admissibility of the recognition evidence and raising a new issue of confirmation bias, citing Colton J's judgment in *R v Mc Laughlin* [2018] NICC 10.

[45] In *Yayare*, the court said that:

*"...notwithstanding the failure to apply Code D, including in Chaney promptings by other officers, if a detailed explanation is given of the basis for the recognition, particularly where the jury is in a position to view the relevant material itself, it may- depending on other factors, be fair to admit the recognition evidence."* (emphasis added)

The defence do not accept that a detailed explanation of the basis for the recognition can be deemed to exist where the words of recognition do not include facial or physical features and refer only to a description of clothing. The defence submits that in the absence of recognition by facial or physical features, the tribunal of fact is merely left with an identification based on the fact that the officer knew the defendant which was deemed inadmissible in *Smith*.

[46] The defence further submits that the number of police officers who purport to recognise the defendants is of no assistance to the court because of the concept of "confirmation bias". The facts of *McLaughlin* are instructive. Mc Laughlin was charged with the murder of the prison officer, Mr Black and the primary witness connecting him to the car used in the attack was a reluctant witness, necessitating a hearsay application. For reasons which are immaterial, the court expressed concern about the admissibility of the hearsay and the prosecution sought to bolster its

reliability with reference to apparently independent recognition by a number of AGS and PSNI officers.

[47] Applying the *Turnbull* guidelines, the court concluded that it could not be sure that the identifications were reliable because:

“In summary, all but one of the officers knew that the defendant was charged with murder when the identifications were made and it was clear from the timings of the identifications that they were arranged because of the difficulties with the identification made by the reluctant witness. Two officers made identifications while interviewing the defendant and four others were shown clear stills at the same time as being asked to view the CCTV, and two officers who did know the defendant were unable to make an identification from the CCTV. It was in those circumstances that the trial judge considered that there was a high risk of confirmation bias regarding the identification.

[48] Finally, and “most importantly” the judge commented on the poor quality of the CCTV:

“any attempt to identify the person shown on CCTV is fraught with difficulty. He is moving most of the time, wearing a beanie hat which makes it difficult to see his facial features because of the height at which the camera is in relation to him, only a very short time when he looked at the camera, the quality of the footage is poor and grainy...”

The judge also noted that the CCTV did not reveal any other details such as height, posture or age which might assist the identification.

[49] Dealing firstly with the concept of “confirmation bias” in the context of identification evidence, this is a matter that should always be at the forefront of the court’s mind. However, *Mc Laughlin* is an example of a case where, on the specific facts, the court could not be sure that the purported recognition was reliable. It therefore may be considered along with *Chaney*, *McGrath*, *Smith*, *Moss* and *Yayare*.

[50] It is the strengths and weaknesses of the recognition evidence in this case and any resulting unfairness from a breach of Code D that I must consider in order to determine whether the evidence should be excluded under Article 76 of PACE.

[51] In terms of unfairness, none has been alleged other than a suggestion that the knowledge that identification was sought of those involved in civil unrest in Lurgan on the said date somehow increased the risk of an incorrect recognition.

[52] In this case, I accept that the EGT and the bodyworn footage from which purported recognitions were made are generally of good quality. I merely observe

at this point that the aerial footage is not of the same quality and the prosecution accepts that no identification could be made from it (see para [68] onwards) The precise images viewed and noted are available and each officer responded independently to the email circulated before attending at the controlled viewing. It was not suggested on behalf of any of the defendants that a reliable identification was not possible from those images or that the identifying officers did not have the familiarity with the defendants that they purported to have. I accept that the procedures in Code D were not followed exactly but the accuracy of the recognitions has not been challenged in any substantive way and no specific unfairness has been established in evidence. Taking account of all of the evidence, I am not satisfied that I should exclude the evidence of recognition in the exercise of my discretion pursuant to Article 76 of PACE. Ultimately, as is the case with all admissible evidence, the question of weight will remain to be considered.

*Is there sufficient evidence on which a reasonable jury could conclude that each defendant is guilty of the offences charged?*

*Mark Reynolds*

[53] Mark Reynolds is charged with the following counts:

Count 1- Riot, contrary to common law [jointly charged with Diarmuid McKee, Niall Reynolds, Robert Rooney and Gavin McKenna]

Count 2 Throwing a petrol bomb, contrary to section 3 of the 1969 Act. The prosecution alleges that this defendant threw a petrol bomb at the junction of Lake Street and Leven Road at approximately 14:44 hours. It is further alleged that he is with Diarmuid McKee, who has pleaded guilty to this offence.

Count 3 Possessing petrol bombs, contrary to section 2(b) of the 1969 Act. The prosecution alleges that the defendant is the person seen coming down from the roof of the property at 74 Kilwilke Road with a petrol bomb in his hand. The prosecution also alleges that this defendant was in the area of the alleyway between number 75 and number 77 Kilwilke Road interacting with other defendants in preparation of petrol bombs.

Count 4 Throwing a petrol bomb, contrary to section 3 of the 1969 Act. The prosecution alleges that this defendant threw a petrol bomb from the roof of 74 kilwilke Road.

[54] Count 2 relates to the third petrol bomb attack. Count 4 relates to the fourth petrol bomb attack.

[55] The prosecution case is that the offence of riot is committed at the same time as the petrol bombs are allegedly thrown by Mark Reynolds. The prosecution submits

that if the court is not satisfied of the identity of Mark Reynolds as the person who throws or possesses petrol bombs but is satisfied that he was present in the alleyway between number 75 and number 77 Kilwilke Road as part of the preparation of petrol bombs thrown by others, then he is guilty of the common law offence of riot.

[56] The evidence of identification may be summarised as follows:

Between 13:00:15 hours – 13:03:23 hours Mark Reynolds is identified wearing a grey hoody, dark blue jeans and light brown / tan boots. He was seen to walk along Levin Road in the direction of Kilwilke Road.

Between 13:26:00 hours – 13:29:14 hours he was on the corner of Levin Road and Lake Street. He was observed to be wearing glasses with a receding hair line and a close cut / shaved hairstyle, with his hair observed to be grey / white in colour. He was observed to be wearing a grey hooded jacket, dark blue jeans and light brown / tan boots and a dark red top with a collar purportedly in the style of a polo shirt.

He was identified as having a “pot belly / beer belly”. He was observed to smoke a cigarette with his left hand. It was noted that the jeans had faded areas on the lower thighs / upper shins. A dark red polo shirt was noted. A pouch of tobacco was noted in the rear of his jean pockets.

Between 14:34:58 hours – 14:35:55 hours the defendant was noted on foot walking along Kilwilke Road, smoking with his left hand. He was noted to be in a blue jacket. He was noted to be wearing dark blue jeans. He was noted to no longer be wearing glasses. The officer purports that the jacket had a ½ length white zip and a white 11 Degrees logo. It was noted that the defendant was talking to two other individuals before breaking into a run. It was noted that his arms hang down by his side and then swing as he runs. No offending behaviour was noted.

[57] The features identified in relation to the disguised petrol bombers may be summarised as follows:

#### *Petrol bomb 3*

Between 14:44:16 hours – 14:44:57 hours the bomber, alleged to be the defendant, emerged from Kilwilke Road with Diarmuid McKee (who has pleaded guilty).

Both had their hoods up and faces covered with balaclavas with only eyes and part of their nose visible.

As the person, believed to be the defendant runs forward, Constable Gray gave evidence that part of a “red polo shirt” could be seen underneath his blue jacket and a white crosshatch belt.

A petrol bomb was thrown by this individual.



Dark blue jeans with faded areas on the lower thighs and upper shins were noted along with a top with a white 11 Degrees logo.

The officer further gave evidence that he noted the bomber had a “pot belly/beer belly”.

A blue trainer with a white sole was further noted.

The officer gave evidence that he was able to note something in the rear of this person’s pocket and further noted him to be wearing gloves.

#### *Petrol bomb 4*

Between 14:40:25 hours – 14:40:28 hours Constable Gray gave evidence that the bomber crossed to the opposite side of Kilwilke Road from number 77, and white detailing could be seen on his trainer.

Between 14:41:13 hours – 14:42:00 hours the bomber was with Diarmuid McKee, advancing towards police and throwing petrol bombs.

Between 14:43:30 hours – 14:44:19 hours the defendant is alleged to have emerged from the alleyway between number 75 and number 77 Kilwilke Road. He was not wearing a blue jacket. He was observed wearing a dark red polo shirt, dark blue jeans and blue trainers with lower white edging.

Between 14:49:28 hours – 14:47:21 hours the defendant is alleged to pull on a pair of gloves.

Between 14:50:34 hours – 14:50:45 hours the defendant is alleged to be standing in the alleyway and pulling on light coloured gloves.

Between 14:51:39 hours – 14:52:13 hours the defendant is alleged to be putting on what were described as yellow builders’ gloves.

Between 14:53:01 hours – 14:52:15 hours another suspect was observed handing what were alleged to be dark articles of clothing to a person alleged to be the defendant.

Between 14:54:58 hours – 14:55:08 hours the defendant is alleged to be seen in a dark jacket with a hood up over his head.

Between 14:55:12 hours – 14:55:33 hours he is alleged to be seen to walk diagonally across a green area.

Between 14:58:00 hours – 14:58:01 hours he is alleged to be observed in yellow gloves leaning over 2 sets of ladders.

Between 14:58:27 hours – 14:59:00 hours the defendant is alleged to be seen carrying ladders in his left hand. He is alleged to be wearing blue trainer style shoes with white lower edging.

Between 14:59:13 hours – 15:00:13 hours the defendant is alleged to be standing at the end of the alleyway holding ladders.

Constable Gray gave evidence that he could observe blue trainer style shoes with white lower edging and a white 11 Degrees logo on the blue jacket with white zip.

Between 15:01:25 hours – 15:01:29 hours the defendant is alleged to be picking up a ladder with his left hand.

Between 15:02:50 hours – 15:04:28 hours the defendant is alleged to walk up a pitched roof at 74 Kilwilke Road wearing a blue jacket, dark blue jeans, blue trainers with lower white edging and throw a petrol bomb.

Between 15:06:19 hours – 15:06:39 hours the defendant is alleged to have a petrol bomb in his hand, with blue trainers with lower white edging and white soles. He was further observed wearing dark blue jeans and a blue jacket.

Between 15:10:53 hours – 15:13:24 hours the defendant is observed on Kilwilke Road close to Levin Road. He was not wearing a blue jacket. He is alleged to be wearing a dark red polo shirt with dark collar as well as dark blue jeans and trainer style shoes with lower white detailing.

[58] Four pairs of jeans were seized from the defendant's home. However, none of them match the jeans worn by the bomber. No blue trainers with a white sole similar to those worn by the bomber were located nor was a blue jacket although the defendant was wearing blue trainers with a white sole when he was arrested. A crosshatch belt similar to that worn by the petrol bomber in the third attack was seized although the court also notes that the defendant was not the only male who lived at this address. Tan boots were also seized.

[59] The starting point for consideration of the prosecution case against each of the defendants is the acknowledged danger in relying on identification evidence to ground a conviction. The inherent risk of mistaken identification is such that the court must examine with extreme care all of the circumstances in which the identification was made along with any supporting evidence. That is particularly important in this case because all of the bombers' facial features were disguised and none of them were wearing the same clothes that the defendants were observed to be wearing when they were identified during the controlled viewings.

[60] Whilst I have admitted Constable Gray's evidence as an expert on the basis of the many hours of viewing that he has carried out, it is the court that has to make the

ultimate decision. In determining the weight that should be attached to his evidence, I accept that Constable Gray is an honest witness and has done his best to carry out an accurate identification of suspects. However, even a witness who is convinced of the accuracy of his identification after studying footage for many hours can be mistaken.

[61] In this case, there is also a real risk of confirmation bias (where a witness unconsciously looks for information that confirms existing beliefs), because the tracking of the suspects was part of a concerted effort to identify those involved in a serious incident which endangered the lives of police officers. An example of confirmation bias may be evidenced in relation to Mark Reynolds. Constable Gray describes the fragment of red clothing visible under the petrol bomber's jacket as being a "red polo shirt". It is correct to say that a very small part of a red shirt or top can be seen - but since the collar cannot be seen, it is impossible to be sure that this is a "polo shirt". The defendant was identified as wearing a red polo shirt with a dark collar in the controlled viewings.

[62] There is no dispute that the clothes worn by individuals captured on the footage are likely to be mass produced items with similar markings and design, typical of clothing bought and worn throughout the community. Identification by clothing is therefore fraught with particular difficulty.

[63] In respect of Mark Reynolds, he is identified at the controlled viewing wearing a grey hooded jacket - this is before any petrol bomb attack. The petrol bomber was wearing a blue jacket. The defendant is alleged to be wearing a blue jacket in some of the later images, but in my judgment it is not possible to be sure of that identification because whilst Constable Gray has made a comparison of the crown area of the head, that person in blue is not wearing glasses and in all other images where the defendant is identified, he is wearing glasses.

[64] The defendant is identified at the controlled viewing wearing light brown/tan boots while the petrol bomber is wearing blue trainers with a white edging. While the defendant was wearing blue trainers with a white edging when he was arrested on 3 September, these are mass-produced items and it is impossible to say with any degree of confidence that they are the same shoes worn by the petrol-bomber.

[65] The defendant is also identified wearing dark blue jeans and the prosecution case is that in some images, faded areas can be seen on the front which are very similar to the faded areas on the jeans worn by the bomber. Leaving aside the fact that none of the four pairs of jeans seized from this defendant's home matched those of the bomber, an identification based, even in part, on faded areas on jeans is extremely problematic. Depending on a combination of light, the position of the body and the angle of the camera, it is likely that many pairs of jeans may show areas of shading, particularly those that are well worn.

[66] The defendant is identified wearing glasses and having a receding hairline however, in view of the balaclava worn by the bomber it is impossible to identify any issue regarding hair and the bomber does not appear to be wearing glasses. The defendant is observed smoking with his left hand while the petrol bomber clearly uses his right hand when throwing the bomb. The bomber is alleged to use his left hand to carry the ladders before the fourth attack from the roof of number 74 Kilwilke Road.

[67] The prosecution relies on the white crosshatch belt seized from the defendant's home which I accept is very similar to that worn by the bomber. However, there is no evidence that this is not mass produced. The prosecution also relies on the defendant's "no comment" interview and that whilst another male was living in the house, no positive case has been made against that person. However, it is the Crown case, taken at its height, that must be considered at this stage.

[68] It is important to note that the quality of the footage from which the purported identification of the bomber is made, is not the same. The bodyworn and EGT footage are all of good quality. However, the aerial footage, which captures the events in the alleyway and the area described as "the preparation area" before the fourth attack from the roof of number 74, does not have the same clarity or definition.

[69] It is conceded that no positive identification could be made from this footage alone. The individuals are moving, no facial features can be made-out and it is impossible to gauge height or build accurately. The prosecution case is that by identifying the defendant at the controlled viewing and then tracking that person's movements along with some aspects of clothing, the court could be sure that the defendant is the person in the green area where the petrol bombs were made and who carries out the alleged offences.

[70] It is in relation to this part of the prosecution case that the dangers of mistaken identification are of particular concern.

[71] From the aerial footage, the defendant is allegedly identified in the preparation area, undisguised and wearing a red polo shirt. Whilst I accept that this defendant is in all likelihood the person seen in the preparation area, the clarity and definition is such that no court could be sure of it.

[72] Even if the court could be sure of that identification, the footage in the alleyway lacks the definition which would be required to enable the court to be sure that it is the defendant who is the person who changes into the blue hooded coat who ultimately throws the bomb from number 74. At no time is that person's head or face visible in the footage or the stills from the roof of number 74.

[73] I therefore have concluded that there is insufficient evidence on which a reasonable jury could conclude that Mark Reynolds is guilty of the offences charged and there is no case to answer.

*Niall Reynolds*

[74] Niall Reynolds is charged with the following offences:

Count 1 Riot contrary to Common Law.

Count 5 Throwing a petrol bomb contrary to section 3 of the Protection of the Person and Property Act (Northern Ireland) 1969. The prosecution alleges that the defendant threw a petrol bomb at 14:15 hours at the junction of Lake Street and Levin Road.

Count 6 - Throwing a petrol bomb contrary to section 3 of the Protection of the Person and Property Act (Northern Ireland) 1969. The prosecution alleges that the defendant threw a petrol bomb at 14:30 hours at the junction of Lake Street and Levin Road.

[75] Count 5 and Count 6 relate to the first two petrol bomb attacks.

[76] The evidence of identification may be summarised as follows:

Between 13:01:- 13:03 hours ,the defendant is alleged to be on the corner of Leven Road and Lake Street, wearing a grey hooded top with the hood up and black jogging bottoms before walking along Road in the direction of Kilwilke Road.

Between 14:00:07 – 14:01:05 hours the defendant approaches the corner of Lake Street and Levin St, having walked from the direction of kilwilkie Road. The grey hood was described as having a front zip top with black jogging bottoms and trainers. The black jogging bottoms are described as having three vertical stripes on the outside of each leg. The stripes are dark grey and presumed to be reflective as they are more noticeable depending on how the defendant is standing. A white Adidas logo is alleged to be on the outside of the upper leg of the jogging bottoms.

The defendant is alleged to be wearing trainers that have the appearance of running shoes. The running shoes have a white lower edging and lower heel. A small red logo on the running shoes at the side is observed. Towards the rear of the side of the shoe a dark area is observed just below the red logo. The design of the shoe gives a white – black – white effect. He is alleged to have remained on the corner of Lake Street and Leven Road for around 60 seconds and he was observed smoking and as having a receding hairline.

[77] The features identified in relation to the disguised petrol bombers may be summarised as follows:

*Petrol bomb 1*

Two individuals are noted beginning to run forward to launch an attack, from the corner of Kilwilke Road. A white-black-white design on the lower part of running

shoes of one of the bombers was observed. After throwing the petrol bomb, they both run towards Kilwilke Road. One is observed to be wearing a dark glove on his right hand.

#### *Petrol bomb 2*

Between 14:29:50- 14:30:30 the bomber (alleged to be the defendant) approaches from the corner of Kilwilke Road and Leven Road. He is wearing a dark coloured balaclava and a grey hooded top, which has a dark grey hood and dark grey sections on each shoulder. The hooded top has white drawstrings and a full-length white centre zip and the hood is down. The bomber is wearing black jogging bottoms that feature three vertical grey stripes on each side of the leg and a white Adidas logo on the left leg and is wearing trainers that have a grey/dark grey pattern, a small red logo and have white detailing along the bottom and heel of the shoe, giving a white - black - white effect.

The bomber is wearing a blue glove on his right hand. In his right hand, he has a small glass bottle containing liquid. A piece of rag is present on top of the bottle. The bomber runs in the direction of the police, stopping momentarily to light the rag on the top of the bottle, with the red cigarette lighter held in his left hand. The bomber holds the petrol bomb with his right arm out slightly behind him and throws it. It lands inside the garden area of number 2 Levin Road, before bouncing up and hitting the black railings of the boundary wall.

Between 14:44:11 - 14:45:09, the defendant is observed wearing a dark blue T-shirt that features a small white North face logo on the left side of his chest. He is also wearing black jogging bottoms with three grey vertical stripes.

Between 14:43:30 - 14:44: the defendant is observed emerging from the alleyway between number 75 and number 77 kilwilke Road. He walks to the front of number 77 kilwilke Road to engage with other individuals, including the defendant Mark Reynolds. The white Adidas logo on the black jogging bottoms is observed as well as the white - black - white affect from the lower edging of the running shoes. The defendant walks back into the alleyway between number 75 number 77 to interact with other individuals.

[78] Nike Training shoes caked in mud and Adidas jogging bottoms were found in a blue bin in the rear garden of the defendant's home. The trainers appear similar to those worn by the bomber in terms of markings on the sole, an apparent small red logo and white-black markings (although they were not caked in mud). In any event, they are likely to be mass produced items. The prosecution relies on marks on the front right of the joggers and on the stripes on the left side of the joggers found in the bin which it alleges match similar marks on the joggers worn by the bomber in the second attack. The prosecution also relies on the location in which the items were found, namely the bin.

[79] While it is possible to see, what appears to be a mark on the right thigh area of the bomber's joggers, the clarity and definition of the stills is not of sufficient quality to enable a court to be sure that it is the same or even sufficiently similar to the marks on the front of the joggers found in the bin. While some stills of the defendant do show marks on the striped area of his joggers, the clarity and definition of those stills are not of sufficient quality to enable a court to be sure that those joggers are the same as those seized from his bin. Dirty, marked or grubby items of clothing are not distinctive in themselves. It is also important to note that there is an obvious tear on the seized item which is not apparent from the footage of the bomber. While it is highly suspicious that similar items were found in the defendant's bin, I am unpersuaded that a reasonable jury could conclude from any of the circumstances relied on by the prosecution, either individually or collectively that there is a case to answer.

*Robert Rooney*

[80] Robert Rooney is charged with the following offences:

Count 1 Riot contrary to Common Law

Count 7 possessing a petrol bomb

[81] The defendant is charged with possession of petrol bombs on the roof of 74 Kilwilke Rd .

[82] The evidence of identification may be summarised as follows:

Between; 13: 48: 44 hours; 13: 49:25 hours the defendant is observed walking on Victoria Street wearing a short-sleeved T-shirt which has a lower black half and an upper white half. White lettering of a logo is observed on the black lower half. He was wearing black jeans. The defendant accepts in interview that he is wearing these clothes.

Between 14:14:07-14:14:08 hours the defendant is observed walking onto Leven Road and his white and black T-shirt is observed to feature a single black stripe on each sleeve. His black jeans are observed to have a pattern and design on them. Below both rear pockets a light-coloured curved design or patch is observed. In the lower part of the jeans, on the rear of the calf areas, a light-coloured faded area is observed.

Between 14: 30:25- 14:30: 29 hours the defendant is observed leaning against a fence at number 87 Kilwilke Rd. Part of a logo on the T-shirt is observed along with the letters R, N and X on the front. This is in white lettering positioned on the lower half of the T-shirt. The white arms of the T-shirt picture a single black stripe running down each arm. The alleged defendant was observed wearing black leather boots.

*The features identified in relation to the disguised petrol bombers may be summarised as follows:*

#### *Petrol Bomb 4*

The alleged defendant is observed walking towards the alleyway running between number 75 and number 77 Kilwilke Road. He is alleged to walk down the alleyway, following the defendant Mark Reynolds and put on a grey top which is unzipped with the hood was down.

He is then allegedly observed wearing bright yellow builders gloves. Part of his white and black T-shirt including part of the white logo is allegedly observed. The grey hooded top had dark grey patches across the shoulders and a dark grey hood.

The defendant is alleged to walk diagonally across the green area along with the defendant Mark Reynolds and who was carrying ladders in his left hand towards a white van.

This defendant is allegedly observed interacting with others at the preparation area.

It is alleged that this defendant and Mark Reynolds walk across the road towards 74 Kilwilke Rd and both of them climb on to the rear area of the roof. The bomber who is alleged to be this defendant, is wearing a balaclava that is dark brown or black in colour and only his eyes and part of his nose are visible. He is alleged to be wearing a front zipped grey hoodie with white drawstrings, dark coloured sections on each shoulder and a dark coloured hood. He is also alleged to be wearing dark military style boots and distinctive jeans similar to those worn by the defendant in stills where he is identified.

[83] Dark military- style boots were seized from the defendant's home along with distinctive jeans which are very similar to those worn by the bomber.

[84] The events prior to the attack from the roof of number 74, in the preparation area, are captured on the aerial footage and I have already concluded that it is not of sufficient quality to make a positive identification or reach firm conclusions about what was actually happening. It is therefore not possible to be sure that the defendant is the person wearing a grey top with dark grey patches across the shoulders and a dark grey hood in that area or that he is the person walking diagonally across the green area.

[85] However, unlike the other defendants, this defendant made certain admissions during police interviews. He admitted being in the Kilwilke area and that he was wearing a pair of jeans and a white T shirt. He said that he saw a crowd gathering and went to see what was going on although he denied seeing petrol- bombs being thrown or any personal wrongdoing. He was shown images NG 3 A, B, C, D and E and he confirmed his identity. He admitted walking down to the entrance of the alleyway leading to the preparation area but denied being in the preparation area and challenged the purported identification of him in that area or that he was involved in the fourth petrol- bombing.



[86] He confirmed that he was wearing a pair of jeans on the date in question similar to the jeans with the distinctive pattern seized from his home. He also confirmed that the dark military- style boots seized were his, but said that he never wears them. He agreed that the petrol-bomber on the roof of number 74 was wearing similar distinctive jeans as he was wearing, but denied being the bomber.

[87] The stills from the roof of number 74 are of very good quality. Jeans worn by one of the bombers share a number of very distinctive features with those seized from the defendant's home, which the defendant admitted he was wearing on the day. The bomber is also wearing dark military- style boots similar to those seized from the defendant's home which the defendant admits belong to him. Despite his assertions that he "never wears" those boots I am satisfied from the footage and the stills from which he identified himself, that the court could conclude that he was wearing dark military boots with those jeans on the day. On the basis of the defendant's admissions, he was in the vicinity of the alleyway which led to the preparation area prior to the 4<sup>th</sup> attack. Whilst no positive identification can be made of those in the alleyway or the preparation area, I am satisfied from the combination of the distinctive clothing and his admissions, that a reasonable jury could conclude that the defendant is guilty of the offences charged and that he has a case to answer.

*Gavin McKenna*

[88] Gavin McKenna is charged with the following offences:

Count 1 Riot contrary to Common Law

Count 4 Throwing a petrol bomb. The defendant is jointly charged with Mark Reynolds who is alleged to have thrown the petrol bomb from the roof of 74 Kilwilke Road. The prosecution alleges that Gavin McKenna's actions in allegedly crossing the grass area at the alleyway, with two men, alleged to be Mark Reynolds and Robert Rooney, who are carrying the ladder and remaining at the scene and watching them whilst they go up onto the roof, makes him guilty as part of a *joint enterprise* to commit the offence of throwing a petrol bomb. Furthermore, the prosecution alleges that Gavin McKenna's actions in the alleyway beforehand with regard to obtaining and distributing clothing and interacting with others, preparing the petrol bombs are also relevant acts in respect of this joint enterprise and relevant to his intentions.

Count 7 Possession of petrol bombs. The defendant is jointly charged with Robert Rooney who is alleged to be in possession of a lit petrol bomb on the roof of number 74 which he does not throw. The prosecution case is that Gavin McKenna is liable by virtue of joint enterprise as he assists and encourages Robert Rooney by escorting him as he is carrying the ladder to this address and remains at the scene and watches him as he goes up onto the roof. The prosecution case is that his actions in the

alleyway beforehand with regard to clothing and interacting with others preparing the petrol bombs is also relevant to his attentions.

[89] Gavin McKenna is therefore not alleged to have physically thrown or possessed a petrol bomb.

[90] The prosecution alleges that the defendant must have been either a principal offender or an accessory/secondary party. It is not necessary for a jury to be satisfied whether he was a principal or an accessory, provided that they are satisfied that he participated with relevant mens rea.

[91] Gavin McKenna will be liable as an accessory (and not as a principal) if he assists or encourages or procures another person to commit the offence of throwing a petrol bomb without throwing it himself (the actus reus). It is not necessary that his act of assistance or encouragement was contemporaneous with the throwing of the bomb but his acts must have been performed before it was thrown. There is no requirement that he shared a common purpose or intent with the other person and if he joined in the offence without any prior agreement, that is immaterial.

[92] The prosecution does not have to prove the identity of the person who threw the petrol bomb, but in order to prove that the defendant assisted the offence the following matters must be proved:

- That Gavin McKenna's conduct assisted the offender in throwing the petrol bomb.
- That he intended that his conduct would assist that offender in throwing the petrol bomb or an offence associated with a riot.

*The evidence of identification may be summarised as follows:*

[93] Gavin McKenna is identified at the controlled viewing wearing a camouflage baseball hat, dark hoody and khaki trousers.

[94] The following Items were seized from the defendant's home:

- A green camouflage baseball cap.
- A dark blue hooded top featuring embossed lettering of the logo "crosshatch"
- A pair of grey trainers that had the style of running shoes with lower white edging and detailing

[95] The prosecution case against this defendant is wholly dependent on the quality of the aerial footage and what it shows in terms of acts of preparation and assistance.

[96] This defendant is not alleged to be disguised at any time. The person alleged to be the defendant in the alleyway and preparation area is wearing a baseball cap, appears to be dressed in similar clothes and in all likelihood is the defendant. However, as already stated, the lack of clarity and definition in the aerial footage does not permit the court to identify any facial features and notwithstanding Constable Gray's attempts to track his movements, is insufficient to enable the court

to be sure of the identification. Even if the court could be sure of his identification, the lack of definition means that it is not sufficiently clear what exactly he is doing in the alleyway.

[97] It is likely that he does accept clothing over the fence and that he gives it to individuals at the bottom of the alleyway who appear to change clothes before carrying out the petrol- bomb attack from the roof of number 74. However, that chain of events cannot be seen with the clarity which is needed in a criminal case. Thereafter, the person alleged to be the defendant is in the vicinity of the preparation area and indicates towards the hedging with his foot. Thereafter he accompanies two disguised persons across the green area. In a case where other unnamed persons are seen milling about the area (and one in particular is seen exiting a gate in a red top beside the preparation area) and who no doubt supported these attacks, the court must be extremely cautious before concluding that acts of encouragement or assistance can be proved from the poor definition of the aerial images. The final alleged circumstance relied on by the prosecution is that the defendant watches the 4<sup>th</sup> petrol bomb attack from roof of number 74. This alleged identification is completely unsustainable. It is simply impossible to be sure that it is the defendant watching the events unfold. In my view, the evidence is insufficient to establish the defendant's guilt, either as a principal or as a secondary party

[98] I have therefore concluded that there is no case to answer.

