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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

STEPHEN ROBERT FULLEN and
JEROME JUSTIN ARCHIBALD

Appellants

Before: Carswell LCJ and McLaughlin J

McLAUGHLIN J

[1] The appellants were charged on Bill of Indictment No 236/01 with eight other co-accused. The indictment contained 11 counts including murder, affray, inflicting grievous bodily harm, possession of offensive weapons, criminal damage and assisting offenders and the charges arose out of events on the Stiles housing estate, Antrim, on the early morning of 1 January 2000. The case came on for trial on 9 September 2002 and both appellants pleaded guilty, with some others, at the outset. The remaining accused pleaded guilty at various stages after the trial commenced and it was then adjourned to allow reports, including pre-sentence reports, to be obtained. The sentences were handed down on 25 October 2002.

The Background

[2] The residents of some of the streets in the Stiles estate celebrated the Millennium with a series of parties. Most of these were entirely peaceful and law biding. Some of them however involved consumption of large quantities of alcohol by some of the participants and possibly other intoxicating substances as well. The events giving rise to these charges occurred well into the early morning of 1 January at a time when many of the witnesses and participants were intoxicated and it was extremely difficult to get an entirely coherent and consistent picture of what took place. The learned trial Judge

has set out the circumstances in his detailed sentencing remarks and the following summary is taken from his analysis of the facts.

[3] It appears that the early focus of the celebrations was a street party in Ardnaglass Gardens which was organised by the residents of that street and the surrounding area and which commenced on New Year's Eve. It appears that the Stiles estate is a mixed community and the party was organised on a non-sectarian basis. This was reflective of the attitudes and wishes of the majority of the community on the estate but it would seem that it was not to the liking of certain paramilitary organisations who were trying to exercise influence over the residents. At midnight the Old Year was seen out and the new Millennium welcomed in an atmosphere described by the Judge as one of "gaiety and celebration accompanied by fireworks". At about 1.00am the party began to break up and some of those who had attended it drifted off to bed whilst others retired to nearby houses to continue the celebrations. It seems also that some persons who had not been at the street party began to arrive home from other locations and there was quite a large number of people standing around in different groups in a peaceful atmosphere.

[4] One group of mainly young people, from both communities, gathered at 35 Andraid Close, which was on the opposite side of the road from Ardnaglass Gardens. They continued drinking there. As the early morning wore on however incidents of disorder began to occur and the prosecution alleged that during this period considerable hostility was displayed towards the persons at 35 Andraid Close. Some of them were inside the house and others had gathered in the small garden outside. At some point two young men and two young women passed the house walking along the pavement. As they did so an altercation arose between them and some of those in the garden. A fight broke out for a short period and the two males and females then moved away. This does not appear to have been a particularly serious incident. It would appear that the events leading to these charges originated with that incident however, because sometime later a crowd of men numbering between 12 and 15, all of whom were armed with implements of various kinds, gathered outside No. 35.

[5] Prior to this a group of persons had also gathered to celebrate the New Year at a social club in the Memorial Hall at the Chimney Corner. One of these was Denver James Smith, whose death was the subject of the murder charges on the indictment. He went there with a lady friend, her daughter and the boyfriend of the daughter. She came from another part of Northern Ireland and did not know all of the men with whom the deceased was in company that evening. At some stage her daughter became sick and she accompanied her to the toilet. When they emerged the deceased and a number of his friends had disappeared without any prior warning. It seems that all or some of them left to go to 35 Andraid Close, possibly in response to some form of summons to attend there.

[6] After the group began to assemble close to No. 35 they moved towards the house and some of them went up an alleyway to the rear. Those at the front then commenced a most violent assault on the house and its occupants and the persons at the rear joined in the attack. The learned trial Judge expressed himself satisfied that those inside No. 35 were in considerable fear throughout the period of the attack. Amongst those in the house were two women and four children. At one point one of the ladies was in the upstairs bedroom, went to the window and called out to the men below pleading with them to desist because there were children in the house. This was met with a response from some of the crowd that they did not care who was in the house, threatened that they had 24 hours to get out and that they intended to return with real bullets. In the meantime a concerted attempt was made to break down or force open both the front and back doors and windows were broken. The attackers were shouting sectarian remarks including "fenian bastards". The occupants had to hold the doors in order to prevent those attacking from getting inside.

[7] One of the persons identified taking part in this attack, Denver James Smith was established to have been present in the Memorial Hall at the Chimney Corner. It also seems clear from forensic evidence, and by reasonable inference, that the deceased was one of the men in the attacking group. At the time of his death he was 32 years old, 6 feet tall and weighed 23½ stones. He was closely associated with, possibly a member of, a Loyalist paramilitary organisation. An Ulster Volunteer Force (UVF) memorial was erected in his memory after his death.

[8] The attack was resisted successfully, the persons in the house were able then to break out and there is no doubt that a major counter-attack took place. Due to a lack of evidence, and no doubt impaired recollection due to alcohol, it is difficult to make any accurate finding of the actual timescale that these events occupied. One woman suggested that the attacking group mustered at about 3.30am and the only certainty appears to be that a taxi driver radioed his base to alert the police to a serious assault which was taking place. That call was logged at 4.48am and it is probable that the assault he witnessed was the fatal attack on Mr Smith.

[9] Those in No. 35 were helped by persons from a nearby house. Some kind of pitched battle appears to have occurred for a short period before the attackers began to retreat and were ultimately put to flight. As the attackers were repelled the affray moved onto a grassy hillock nearby and it was there that the deceased was found. It appears probable that because of his size, and possibly due to a level of intoxication, he was trapped by his pursuers, felled and beaten savagely whilst lying on the ground. He was kicked, struck blows with implements such as pieces of fencing, it is probable that he was shot or stabbed with a crossbow bolt and a knife blade which was found close by

may have been used on him as well. The fatal injury was probably caused by a blow to the head with a hatchet.

[10] Throughout the course of the attack on No. 35, the breakout and affray outside, no call was made to the police. Had it not been for the arrival in the estate of the taxi driver they might not have been called at all. It seems that the retreat of the original attackers was a tactical one because as they did so the threat was repeated that they would return but this time with real bullets.

[11] The aftermath of these dreadful events was not just the death of Mr Smith but also an atmosphere of intimidation, fear and apprehension on the part of innocent people living in the estate. Many of those involved in the counter attack have been the subject of grave threats since, including death threats. Many people have left the estate and gone into hiding and one young man from the estate has been murdered in circumstances which may be connected to these events.

THE APPEAL OF STEPHEN ROBERT FULLEN

[12] Fullen was charged in count 5 of the indictment with the murder of Mr Smith. The Crown indicated its willingness to accept a plea to manslaughter and this course was approved by the learned trial Judge. He was one of the persons present in No. 35 when the attack began and was later seen leaving it after the attack was halted. He was therefore part of the affray and counter attack. At approximately 5.00am he entered No. 3 Ardnaglass Gardens when his clothes were observed to be stained and he obtained a replacement of his upper garment. He left later and returned home. Whilst in No. 3 the police spoke to him and he made what was regarded as a statement about his role in the events in the estate that day. Later, when he heard that the police were looking for him, he telephoned them and arranged that they should come and pick him up. At that time he was fearful for his safety. A pair of jeans and a pair of ankle boots were recovered from his home. No blood was found on the jeans on later examination but these had been washed by Fullen after he had returned home from No. 3 Ardnaglass Gardens. Blood with DNA characteristics similar to the deceased was found on his boots however. A spot of blood was found on the right boot on the front upper portion and a faint smear was found on the edge of the sole at the toe. Blood was also found on the left boot on the outside between the laces and the sole. The evidence of the forensic scientist was that the spots of blood had been projected onto the shoes and these supported the proposition that Fullen was close to the deceased whilst he was bleeding. The smear blood mark on the right boot was thought to be consistent with contact with a bloodstained object. A grey t-shirt and a blue and white knitted pullover found at No. 3 Ardnaglass Gardens belonged to Fullen. When discovered these were wet and had been soaked. No blood was found on these items.

[13] During lengthy interviews with the police he denied he was involved in the assault on the deceased. He alleged that he had observed the assault and was never closer than 50 yards to where it took place. He asserted that the deceased's blood could not be on any of his clothing. When told later that the deceased's blood had been found on his footwear he gave a number of explanations as to how this might have happened. He explained the presence of his wet clothes soaking in the sink of No. 3 by saying that when he had gone there someone had said there was blood all over him and that he should get his clothing, into the washing machine. He maintained that there was no blood on his clothing rather that the stains had been caused by a spillage of some kind of vodka punch containing pink or red liquid which was spilt on him earlier in the evening.

[14] Whilst there was no doubt that Fullen was present throughout the whole of these events it was difficult to pin down specific acts which he perpetrated. In the event the prosecution accepted the plea of guilty to manslaughter on a basis stated by the learned trial Judge in the following terms:

> "Prosecution counsel summarised the case against him in this way: by his presence he participated in a causative way in the death of Denver Smith, without an intention that serious bodily harm be inflicted upon him. It was accepted that there was no evidence of specific intent, nor evidence that Fullen struck any blow or did any specific act during an attack on the deceased."

[15] That summary has been relied upon by defence counsel in advancing the appeal. Whilst we accept that he did not have the specific intent for murder, did not strike a blow and that no specific act could be shown to have been committed by him, it is clear he admitted that by his conduct he contributed in a material way to the death of Mr Smith.

[16] Before this court Mr Patrick Lyttle QC and Mr Charles McCreanor argued three points in support of the appeal:

> (i) That the sentence of 7 years was excessive in the light of the authorities.
>
> (ii) That the culpability of the appellant was no greater than that of the defendants Bradshaw and Guiney, who were charged initially with murder also, and who ultimately received lighter sentences.

> (iii) That the learned trial Judge failed to give sufficient weight to the pre-sentence report, failed to give adequate consideration to the desirability of imposing a custody probation order and failed to state his reasons for not imposing such an order.

As a similar argument to the latter is relied upon by Archibald we shall deal with this issue at a later stage of this judgment.

The Propriety of the Sentence

[17] In support of his submissions that the sentence of 7 years on the manslaughter count was manifestly excessive, Mr Lyttle QC referred us to a considerable number of cases, but relied heavily on *R v Eaton* (1989) 11 Cr App R (S) 475 and *R v Redfern & Ors* [2001] 2 Cr App (S) 155. The other cases were decided in the intervening period and Mr Lyttle referred to these principal cases as "the bookend cases" in respect of sentencing in manslaughter cases arising from street fighting where a person was kicked or beaten to death.

[18] In *Eaton* the appellant pleaded guilty to manslaughter and violent disorder. He was involved in two incidents in the street in the early hours of the morning in the course of which two groups of men were attacked. The appellant chased one man, knocked him to the ground and kicked him on the head. The unfortunate man died from a sub-arachnoid haemorrhage suffered in consequence of the attack. A sentence of 7 years imprisonment was imposed in respect of the manslaughter charge and 3 years concurrent for violent disorder. Lord Lane CJ in commenting on the range of sentences open to a sentencing judge in manslaughter cases made the following remarks at page 478, which have been often relied upon since:

> "If one inspects the various cases to which our attention has been drawn, one can see that sentences varying from 2 to 7 years or more have been imposed in respect of offences of involuntary manslaughter arising out of fights in the streets, similar to the situation which was presented to the judge in the present case. Some of the cases differ very little from accidental death: for instance where the victim is discovered to have an abnormally thin skull, and where consequently, by falling to the ground and hitting his head, the skull has been fractured. At the other end of the scale are cases where a knife or other weapon has been used, where the distinction between manslaughter and murder is wafer thin.

> The present offence is unhappily an example of the comparatively recent manifestation of brute violence starting off with excessive drinking by young men in their late teens or early twenties and developing into a group attack, each member of the group stimulating the others to violence, a sort of `wolf pack' syndrome, the violence to be wreaked upon another group, because of some supposed slight."

[19] The court in that case expressed its determination to make clear that violence in those circumstances which causes death should lead to a substantial term of imprisonment. It expressed the hope that by doing so it may be possible to reduce the amount of alcohol which people in these circumstances seem to drink and might reduce the incentive to resort to violence at the end of an evening's entertainment. The court nevertheless reduced the sentence of 7 years to 5½ years as it considered that "perhaps insufficient credit was given for the plea of guilty". It was made clear however that but for the plea a sentence of 7 years or something very close would have been unappealable.

[20] In *R v Redfern & Ors* the appellants, who had been drinking heavily, attacked a 40 year old man in a carpark. The man was punched to the ground and kicked by all three appellants in a deliberate and violent beating. On admission to hospital the victim was deeply unconscious and died from an extensive brain haemorrhage. The appellants were sentenced on the basis that they did not intend to cause grievous bodily harm but all were involved in an attack which involved the combined use of violence and the kicking of the victim after he fell to the ground. Each appellant had a substantial criminal record. They were sentenced to terms of 6½ years imprisonment/detention in a young offenders institution and in the case of two of them an order was made extending supervision to 8 years under the Crime and Disorder Act 1998. The sentences were reduced to 5½ years.

[21] The rationale for the reduction of sentence appears at para 11 of the judgment at page 159 where Potter LJ stated that:

> "It appears clear in this case that the sentences of 6½ years were imposed following an indication from the judge that he had particularly considered the case of *Eaton,* without any suggestion that the present case was to be distinguished from it in terms of seriousness. It seems likely that the judge considered that *Eaton* was simply a guideline case and that the appellant's case was more serious than that of the appellant in *Eaton*. There was

> room for such a view because, although in *Eaton* the defendant had committed an offence on bail, he was involved in a street fight, whereas in this case there was an unprovoked picking on a single individual which could be seen as worthy of more serious attention.
>
> Nonetheless it is quite plain that all counsel, who were leading counsel of experience, received the message that the judge regarded *Eaton* as a comparable case, so far as the circumstances and level of sentence were concerned. Since all leading counsel regarded 5½ years as an appropriate or acceptable sentence they did not seek to address the judge further on the basis that he contemplated a higher sentence than was imposed in *Eaton*. They simply, in mitigation, addressed the position of their individual clients in relation to their youth and/or record in an effort to reduce the sentence from the level imposed in *Eaton*, not appreciating that the judge had in mind a higher level of sentence. Thus the appellants complain that, in effect, though no doubt it was not the intention of the judge, the appellants were deprived of an opportunity to argue that the case was indeed indistinguishable from *Eaton*, or at least, that for various reasons, the sentence imposed on the appellants should not exceed the level of sentence in that case."

[22] Mr Lyttle argued that all of the cases in the intervening period of 11 years to which he referred us would show that we would be hard pressed to find a case in England and Wales where, upon a plea of guilty, and where a weapon had been used, or a blow struck, had resulted in a 7 year sentence. Indeed he argued that *Eaton* was support for the proposition that 7 years was towards the upper limit even in a contested case.

[23] We were also invited to consider the case of *R v Kane & Hagan* (unreported, 24 March 1995) noted in Volume 1, Sentencing Guideline Cases, published by the Judicial Studies Board for Northern Ireland, page 4.42. In that case both appellants had been sentenced to 9 years imprisonment on a charge of manslaughter. The judgment of the Court of Appeal was delivered by MacDermott LJ. He noted the background circumstances in the following terms. On 5 July 1992 an army sangar was located at North Howard Street which runs between the Falls and Shankill Roads. This had been the site of sectarian rioting in the past and clashes between opposing hostile crowds

occurred frequently. On the night in question two crowds gathered during which insults and missiles were exchanged. At about 3.00am a youth who was engaged in this activity told a Guardsman that they were going to "do" a Catholic that night. A small group worked its way towards the Catholics followed by a larger Protestant rush. The Catholics retired but one was caught and struck to the ground where he was kicked not only by the persons in the first group but also some of the larger second group. The appellant Kane was one of the second group. A second person who was kicking was caught by a police officer but broke loose and another constable caught a youth running past him. There was some debate as to whether or not this was the same person who had broken loose. The learned Lord Justice reviewed a number of cases, including *Eaton* and in refusing to reduce the sentence the Court of Appeal stated:

> "We have already commented upon the unacceptable sectarian nature of this incident and the appalling manner in which Abram was killed. This was not just a `level' fight which had an unfortunate result – there was an organised plan to `cut out' a member of the opposing faction and attack him in a merciless fashion. The plan was carried out in a ruthless manner. Those involved merit no sympathy. We do not consider that 9 years was an excessive sentence."

Kane's appeal against the sentence of 9 years was dismissed. Hagan's sentence was reduced to 7 years, probably on the basis that the court could not be sure that Hagan was the man who had escaped from the first police officer's grasp and his culpability was therefore taken to be less than that of Kane.

[24] We consider that the events which took place on 1 January 2000 in the Stiles estate during the course of the attack on No. 35 and the subsequent events were disgraceful and originated in sectarian animosity. We accept the statements from counsel for both Fullen and Archibald that whilst the original attacking crowd was clearly of a Protestant or Loyalist kind that their clients should not be branded as being sectarian since each of them would be perceived to be Protestant. Indeed Archibald has had to move to a Nationalist/Catholic area for his own safety.

[25] Whether the offences originated in sectarianism or thuggish criminality the consequence has been the same. A man has been left dead as a result of burning hatred and savage violence fuelled by alcohol and possibly drugs in some cases. It is a striking example why this society must confront the reality of the depth of the problem of the binge drinking culture which has become deeply embedded in the lifestyles of many young people. When this is mixed

with the propensity for violence or other criminal activity it has disastrous results. Judges sitting in this jurisdiction cannot be but aware of the remorseless trend towards increasing violence where this binge drinking culture has free reign. The Court of Appeal in England and Wales in *Eaton* in 1989 considered that violence starting off with excessive drinking by young men in their late teens or their early 20s, which developed into a group attack, the "wolf pack syndrome", was a comparatively recent manifestation. The experience of the courts has been that over the intervening period matters have only got worse. Substantial terms of imprisonment, in the hope that they may effect some degree of deterrence are still necessary in our opinion in order to attempt to bring a halt to this trend.

[26] In 1995 when the judgment was delivered in *R v Kane & Hagan*, MacDermott LJ concluded by stating:

> "By way of conclusion we would wish to state that a sentence of 9 years is not to be considered the maximum appropriate for this type of manslaughter. If sectarian rioting should return to the streets in the future and in its course a death or deaths occur, then it must be anticipated that sentences for manslaughter (if that be the appropriate offence) may be well in excess of 10 years. The public is entitled to expect that the courts will seek to deter such behaviour by lengthy custodial sentences".

We can do no better than echo those remarks and express the view that they are entirely apposite at the present time even if a sectarian element is absent. We consider the sentence of 7 years in this case, even on a plea at an early stage, with no evidence of direct assault and no allegation of possession of a weapon, is entirely proper.

Comparisons with Bradshaw and Guiney

[27] The original indictment charged Fullen, Guiney and Bradshaw with the murder of Mr Smith. Guiney was also charged on count 7 with affray to which he pleaded guilty and was sentenced to five years imprisonment. Bradshaw was also charged on count 6 with inflicting grievous bodily harm on the deceased, affray on count 7 and assisting offenders on count 9. Ultimately he pleaded guilty to counts 6 and 9 only and received sentences of 2½ years and 3 years respectively, to run concurrently.

[28] From the sentencing remarks of the learned trial Judge it is clear that Guiney was in the thick of these events. He was one of those present in No. 35 and blood with the same DNA characteristics as his was found on the

trousers of the deceased and on a tracksuit bottom and towel which were dropped onto the pavement by another co-accused when the police were already present. Guiney was injured in the fighting receiving a slicing type wound to his arm which bled and required stitching. The learned trial Judge stated that he was "in close proximity to the deceased at some time during these events". When arrested several days later he admitted that he was present in No. 35 but claimed that he had left the house to go home between 1.00am and 2.00am.

[29] Bradshaw was also deeply involved in all of these events. Smears of blood were found on the toe and outside edge of his left boot which contained DNA profiles matching that of the deceased. He gave a number of different accounts of events during interview to the police. At one stage he claimed that his boot had caught on the deceased when he tried to jump over him and on another occasion he admitted that he had laid into the deceased's stomach and called him a bastard. At a later stage he said that he ran down past the deceased who was being beaten by 5 or 6 persons. Finally he said he was going to make one more statement. At that point he said that he ran past the deceased but stopped sooner than he had claimed at an earlier point. He said he stood with his back to the deceased and could hear him being beaten and the whacks of the blows. He heard someone shout "let's get out of here and lift all the stuff". At that stage he turned around, bent down to near the deceased's head, picked up a stick and saw something splurting out of the deceased's mouth. He said he picked up another stick and glass and then laid a boot into the deceased calling him a bastard before running away. He said he threw the sticks and the glass into an alleyway in order to remove evidence. The prosecution accepted that he had inflicted grievous bodily harm on the deceased after the deceased had been seriously and fatally assaulted.

[30] It is clear that each of these three people was closely involved in the events leading up to the death of the deceased. There are some significant differences in the sentences imposed. The charges to which each of the accused pleaded guilty, which were accepted by the Crown, and the factual basis upon which these pleas were entered, differed substantially in each case however. Fullen alone pleaded guilty to manslaughter on the basis that he contributed in a material way to the death of Mr Smith, a factor which is missing from the cases of Bradshaw and Guiney. The different sentences were imposed by the learned trial Judge after a most detailed and careful analysis of all the facts and circumstances and the differences are readily explained given the approach adopted by the prosecution to the difficulties of reconciling all of the evidence. It is not suggested that the learned trial Judge misunderstood the grounds upon which any of the accused, these three in particular, had offered their pleas of guilty. Given the very different nature of the charges therefore and the differing nature of the intent and act required to

justify each charge we are satisfied that the differences in sentence are neither wrong in principle nor demonstrate any disparity.

THE APPEAL OF JEROME JUSTIN ARCHIBALD

[31] Archibald was 23 years old at the time of the offence. He resided at 28 Ardnaglass Gardens and was one of a number of people who left it after the attack on No. 35 commenced and became involved in the affray which occurred outside the house under attack. His precise role is unclear and the sentencing remarks of the learned trial Judge show that he proceeded upon the agreed basis that there was no allegation of any specific assault by him on any person or of him having possession of any weapon. The latter point is important because a crossbow was found in his house during a later follow-up search and he was charged on count 8 of the indictment with possession of an offensive weapon in respect of same. This charge was ordered to remain on the books on the usual terms. After the police arrived on the scene and established that persons associated with No. 28 had been involved in the affair he was approached by them. He was hostile and aggressive and refused them entry to his home so that force had to be used. When interviewed he denied any involvement in the affray, knowledge of the attack on No. 35 or its occupants and denied he was ever near the electricity substation which was close to where Mr Smith was killed. When charged he remained in custody from 4 January 2000 to 24 November 2000 when he was released on bail. His partner and children had to leave Antrim in the meantime.

[32] Mr Seamus Treacy QC and Mr Gavin Duffy, on his behalf, emphasised the agreement by the prosecution that he had not participated in any specific assault or possessed any weapon. It was further emphasised that his plea was put forward on the basis that he had been involved in the affray only in its initial stages as an extension of the defence of the persons in No. 35. It was said that he was removed temporally and geographically from the later incidents when the violence escalated and the attack on Mr Smith occurred. In other words that he was guilty because of his presence in the early stages of the affray and by participating in it.

[33] Mr Treacy argued that the sentence of 4 years imprisonment in respect of the affray was:

> (i) Manifestly excessive and wrong in principle.
>
> (ii) Disproportionately severe having regard to his role compared to others.

> (iii) Wrong in that a custody probation order should have been made and that the Judge had failed to analyse sufficiently the relevant materials or express his reasons for refusing to impose such an order.

[34] The first and second of these points may be taken together. Mr Treacy first asked us to consider the maximum sentence which may now be imposed for the offence of Affray contrary to Section 3 of the Public Order Act 1986. This Act abolished the common law offences of riot, rout, unlawful assembly and affray. It introduced a statutory definition of affray and imposed a maximum term of imprisonment of 3 years upon conviction on indictment. The 1986 Act has not been replicated in Northern Ireland and affray remains an offence at common law punishable by up to life imprisonment. Mr Treacy argued that it was not unreasonable to ask the court to have regard to the maximum sentence in England since it had been the product of consideration by Parliament. He pointed out that the definition in the Act was similar to the definition of the offence at common law and the maximum sentence had been set after full consultation, including consideration of the views of the Law Commission.

[35] We were referred to the case of *R v Hobson*, in which the decision of this court was given on 25 October 1999. This case attained some considerable notoriety. The conviction arose out of events on the evening of 26 April and early morning of 27 April 1997. A Landrover carrying four police officers was positioned close to a road junction in the centre of Portadown which was a recognised interface and potential trouble spot. As a result of a sectarian clash involving about 50 Loyalists and 12 Nationalists a member of the Nationalist group was beaten to the ground, attacked savagely, rendered unconscious and died some 12 days later in hospital. Hobson was convicted after a contest before McCollum LJ and was sentenced to 4 years imprisonment. His appeal against the sentence was refused.

[36] We were also referred to *R v Anderson & Ors* (1985) 7 Cr App R (S) 210 where Robert Goff LJ said:

> "When one is dealing with a case of an affray, plainly a distinction has to be drawn between those cases where the affray is premeditated and those cases where it is spontaneous".

Mr Treacy argued that the affray on the part of those associated with No. 35 was entirely spontaneous in that they had simply been drinking when attacked by those who arrived in the estate with that purpose in mind. The persons who had been part of the original attacking party had received sentences between 15-24 months. He argued that Archibald's role could not

have been worse than those who attacked the house. He also referred to the sentences imposed on Bradshaw, in particular the term of 2½ years in respect of the charge of inflicting grievous bodily harm on the deceased, and said this was further evidence that the sentence on his client was wrong in principle. He pointed to the fact that Archibald's involvement arose from a desire to help those in No. 35 who were under attack.

[37] We consider that there are some similarities between this case and that of *R v Hobson* and, given the fact that a sentence of 4 years was imposed in that case after a contest, there is force in the argument that the same term imposed in present circumstances after a plea was entered at an early stage, and where the prosecution is unable to say that any assault was committed by the defendant, or that he had used a weapon, is significant. Since his involvement was also confined to the early stage of the affray following the breakout from the house, and possibly sometime before the fatal attack took place, we consider that there are sufficient differences to warrant a reduction of sentence.

[38] We have also been mindful of the maximum period which may be imposed under the Public Order Act 1986. As the maximum sentence for this offence at common law in Northern Ireland is life imprisonment however we do not consider that courts here should regard themselves as limited by the provisions of the 1986 Act. For the present there remain sufficient differences between the public order problems in Northern Ireland and Great Britain to reserve to these courts a greater degree of flexibility in sentencing than is available under the 1986 Act.

[39] Finally we do not consider that there is any valid comparison to be drawn with the sentences imposed upon the four co-accused who were part of the original attacking group. Although each of them was charged with affray none of them pleaded to that count. Pleas were accepted from each of them to the charge of causing criminal damage which was the second count on the indictment.

[40] Having regard to all of the circumstances above outlined, we accept that some reduction is appropriate. We note that this accused has a considerable number of previous convictions however. He has appeared before the courts on a total of 12 occasions in the past, including the Crown Court, and has a total of 49 previous convictions for offences including burglary, possession of drugs, disorderly behaviour, assault on the police, handling stolen goods, criminal damage and various motoring offences. We consider that the appropriate sentence in his case should be one of 2½ years imprisonment.

Whether Custody Probation Orders should be made in either case

[41] Each appellant argued that the learned trial Judge omitted to deal with the possibility of imposing a custody/probation order. We are satisfied from a reading of the learned trial Judge's sentencing remarks that he considered each of the accused individually who appeared before him, including the present appellants, to decide whether he should impose such an Order under Article 24 of the Criminal Justice (Northern Ireland) Order 1996. He had before him detailed pre-sentence reports which dealt with this specific issue and was one of the purposes in requesting them in the first place. In respect of Archibald he referred in particular to the fact that he had been the subject of probation and suspended sentences in the past and had reoffended thereafter. In fact Archibald was the subject of a probation order on at least two occasions, the most recent being in June 1998 when he was subject to an order for a period of 12 months. He has served a number of sentences in the Young Offenders Centre and has been given the benefit of conditional discharges in the past together with community service orders. Although the Probation Officer did indicate that a custody probation order might be of some value to the appellant we consider that in the light of his record, his previous involvement with the Probation Service and the fact that other community based sentences as well as custodial sentences have been imposed upon him with little apparent effect, he would not benefit from a period of supervision on probation when released. We note also that he has served a total period in custody of approximately 16 months and so he has a realistic prospect of being released immediately or in the very near future. For these reasons we consider it not to invoke the powers under Article 24 in his case.

[42] Mr Lyttle has also argued that in the case of Fullen we should consider the possible imposition of a custody probation order. There are significant differences between Archibald and him. He has a significant criminal record, having been convicted of a total of 15 offences arising out of six separate court appearances. The record is clearly divisible into two parts. He appeared in court three times in 1993–1994 upon charges of shoplifting, criminal damage, disorderly behaviour and consuming intoxicating liquor while a minor. As he was born in September 1978 he was aged 15-16 at the time these offences were committed. He was put on probation for two years in respect of charges in 1993 and a further period of 12 months was imposed in respect of the offence of consuming intoxicating liquor while a minor. Since 1994 however all of his convictions relate to road traffic matters. The most serious offences concern driving without insurance and the heaviest penalties imposed were fines of £150 on each charge. In short, therefore, Fullen has no convictions since 1994 other than traffic offences and he has never been sentenced to imprisonment prior to his conviction for manslaughter.

[43] The relevant principles to be borne in mind by sentencers when considering the imposition of a custody probation order have been set out by this court in *R v Lunney* [1999] NI 158. We do not propose to repeat what the court has set out clearly so recently. In the light of the positive

recommendation contained in the pre-sentence report, his previous positive engagement with the Probation Service, the fact that he has been sentenced to imprisonment for the first time and for a substantial period it is likely that he would benefit from some supervision by the Probation Service upon his release. We are therefore prepared to vary his sentence of imprisonment from 7 years and to impose instead a custody probation order of 6 years imprisonment followed by 12 months probation, provided he indicates his consent to such an order being made. We are satisfied that the period of supervision specified will protect the public from harm sufficiently and help prevent the commission of further offences and so justify making such an order.

[44] Finally we should point out that the learned trial Judge did not set out expressly his reasons for not imposing a custody probation order. We would remind trial judges of the duty to do so, which is contained in Article 24(4) of the 1996 Order, and which is in the following terms:

> "(4) Where in any case a court does not consider a custody probation order to be appropriate, the court shall state in open court that it is of that opinion and why it is of that opinion."

Whilst a failure to state such opinions does not invalidate the sentence it does deny the appellate court and the accused full insight into the reasoning of the trial Judge.

[45] For the reasons which we have set out, we shall allow both appeals and vary the sentences to the extent which we have indicated.