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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MARTIN RAYMOND JUDE MURRAY
LIAM PATRICK KEVIN MURRAY
KEVIN MICHAEL CHARLES TOYE
and
WILLIAM McDONAGH

Appellants

Before: HIGGINS LJ, McLAUGHLIN J and Sir A HART

HIGGINS LJ (delivering the judgment of the Court)

[1] Following a trial before Treacy J sitting without a jury the applicants were on 13 April 2011 convicted of various offences arising out of incidents which occurred in the town of Dungannon in the early hours of Saturday 13 September 2008. They appeal against those convictions and the sentences which ensued.

[2] On Friday 12 November 2008 members of the Hughes family gathered at the Irish National Forester's Club in Scotch Street, Dungannon, to celebrate the 18th birthday of Siobhan Hughes. The party, which was by invitation only, included the immediate and extended family as well as some friends of the family. Siobhan's parents Eamon and Eileen Hughes were present as well as her brother Kevin Hughes. The celebration was held in the function room in the premises, access to which was through the main bar close to the toilets. The main bar was open and among the many persons present there were Kevin Murray (known as Bugsy), a brother of Martin Murray, the first Appellant, and cousin of the second appellant Liam Murray, and a man named

Dane Jackson an associate of the Murray family. Kevin Hughes arrived at approximately 10pm and observed Kevin Murray and Jackson seated together in the bar both of whom were known to him. On one occasion Kevin Hughes went to the men's toilet. Jackson was present and he called Kevin Hughes an abusive name and words were exchanged between them. Kevin Hughes returned to the function room and Jackson to the bar. A short time later Jackson entered the function room accompanied by at least one other person. They were observed by members of the Hughes family who asked that they be removed and they were escorted from the function room by a member of staff.

[3] The party ended about 1.00 am and the Hughes family and others left through the bar. When Kevin Hughes was leaving a further confrontation between himself and Jackson took place which resulted in a fight between them in the street for some minutes before others intervened and separated them. Jackson and his companion then left the area heading in the direction of an area known as the 'Ponderosa'.

[4] The Hughes family invited some of the party present to return to their house in the Lisnahull estate. The route they walked was along John Street, Newell Road and into Lisnahull Road which would take about fifteen minutes.

[5] Earlier that evening Darius Macjchrzak, a taxi driver and Polish national, took Kevin Toye and William McDonagh, the third and fourth appellants, to a night club in Cookstown. The vehicle was a Toyota Avensis with a sign on the roof 'Home James Taxi'. They arranged that he would collect them around 1.30am and return them to Windmill Drive in Dungannon. He observed they were a 'bit tipsy' and aggressive as if they were looking for a fight. During the return journey they spoke to someone on a mobile phone following which the taxi driver was directed to take them to 5 Ranaghan Way in the White City area of Dungannon. His passengers had by then calmed down. After dropping them off about 1.30 – 1.45am he received a radio call to collect a man from 24 Windmill Drive and to take him to 5 Ranaghan Way. On doing so he observed this man was the same person he had seen earlier when first picking up Toye and McDonagh. He was now carrying a box of beers. During the journey to Ranaghan Way at the Ballygawley Road/Newell Road roundabout, he observed the Hughes party, numbering ten or more, walking in the direction of Newell Road and the Lisnahull estate.

[6] On arrival at 5 Ranaghan Way the taxi driver was instructed to drive to Newell Road taking Toye, McDonagh and Martin and Liam Murray as well as at least one other person. He described them as aggressive and agitated as if they were looking for a fight and he felt scared and threatened. The trial judge was satisfied that the purpose of this journey was to confront the Hughes group about what had occurred at the Club, for which it was accepted (at least on behalf of Martin Murray) there was abundant evidence. The driver followed their instruction as to the route to be taken as well as not to slow down and on

one occasion to drive through a red light. It was not a pleasant journey. From their conversation the driver figured out that they were going to Newell Road to 'find somebody' probably 'to fight with someone, like revenge or something like that'. After turning left onto Newell Road he drove past Lisnahull Road and was told to stop and reverse and to drive into Lisnahull Road which he did. As he was driving along Lisnahull Road away from Newell Road he saw the group he had earlier observed at the roundabout. They were then probably near Lisnahull Gardens. When he drove passed the group he was told to stop. McDonagh told him to 'wait two minutes, stay here, don't go away'. All of the passengers got out. He then drove further up Lisnahull Road, reversed and drove a short distance back down the road.

[7] When the five passengers (referred to as the Murray group) alighted from the taxi, according to the trial judge, they initiated a confrontation with the Hughes party on the road. Martin Murray was armed with a knife which he was brandishing aggressively and Liam Murray had a bottle held by the neck. There was much shouting and gesturing and goading. Belts were removed and one of the Hughes group threw a piece of concrete at Martin Murray who moved to the side and it hit the bonnet of the taxi. Eamon Hughes was observed striking Martin Murray with a belt whereupon Murray stabbed him in the chest with the knife. Eamon Hughes fell to the ground fatally injured. The taxi driver tried to drive away but according to his evidence he could not do so because of the crowd on the road and there was a fight going on which got more aggressive. The taxi driver said that at some point McDonagh was at the driver's side of the taxi trying to get the keys and trying to pull him out as if to drive it away. At that time Toye was in the rear of the vehicle. He described the man with the concrete object walk past the taxi from left to right and throw it, he thought, at McDonagh but it did not strike any one. He described McDonagh being attacked with a chain or belt. McDonagh then jumped onto the bonnet of the vehicle and lay on it with his face on the windscreen and holding on with his left hand gripping the windscreen edge. The driver closed the door on McDonagh's hand as he wanted to drive off. Someone tried to hit McDonagh again with a chain or something but missed and cracked the windscreen. The Murray group were repelled and all withdrew to the taxi and were driven from the scene a short distance to Corrainey Gardens with McDonagh lying on the bonnet with his left hand trapped in the driver's door. It was not disputed at the trial that Martin Murray had stabbed Eamon Hughes, but it was claimed that he acted in self-defence. Martin Murray did not give evidence.

[8] At Corrainey Gardens the taxi driver was forcibly removed from the driver's seat by McDonagh, whereupon Toye jumped into the driver's seat and the vehicle was driven off at high speed with the Murray group still on board. The vehicle returned to the scene at Lisnahull Road at speed. Several of the Hughes group were around Eamon Hughes where he lay on the left hand lane of Lisnahull Road (the same lane the taxi should have been driving on). The

persons around Eamon Hughes included Martina Donaghy and her daughter Emma who were tending to him. As the taxi approached it overtook a vehicle parked on the left side of the road and then swerved towards its own side and at speed was driven into the Murray group tending Eamon Hughes. The vehicle struck Martina and Emma Donaghy, who were grievously injured as a result. The taxi drove on and away from the scene and on to the Ponderosa estate in Dungannon where it was set on fire. The trial judge rejected the evidence of Toye, Liam Murray and McDonagh that the purpose of taking the taxi and the route they took was to escape from the area.

[9] Count 1 in the Bill of Indictment charged each of the appellants with the Murder of Eamon Hughes. Count 2 charged each of the appellants with the Attempted Murder of Martina Donaghy. Count 3 charged each of the appellants with the Attempted Murder of Emma Donaghy. Count 4 charged each of the appellants with the Common Law offence of Affray. In his judgment the learned trial judge convicted Martin Murray of the Murder of Eamon Hughes and acquitted each of the other appellants as the evidence did not satisfy him, to the necessary standard, of their knowledge of the knife used by Martin Murray. In convicting Martin Murray of the Murder of Eamon Hughes the judge concluded that the actions of Eamon Hughes, where Martin Murray was the aggressor, were not such that Murray was entitled to defend himself with a knife. The trial judge convicted Toye of the Attempted Murder of Martina and Emma Donaghy and acquitted each of the other appellants of these charges. The judge found that the evidence of affray was clear and convicted each of the appellants of this offence.

Martin Murray - Appeal against Conviction for Murder of Eamon Hughes

[10] The Grounds of Appeal are –

> Amended Grounds of Appeal
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> 1. Throughout the trial the learned trial judge showed an unwillingness to entertain, even the concept, that the Crown might fail in disproving the issue of self-defence in circumstances where a defendant was carrying a knife.
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> 2. The learned trial judge failed to properly address all of the issues of self-defence raised on the evidence. He considered that "it was bordering on the perverse for this defendant to claim self-defence". The issue of self-defence was properly before the court on the evidence of three Crown witnesses, Colm Thomas, Nathaniel Sherry and Darius Majzharak. It was not a perverse defence.

3. The learned trial judge afforded insufficient weight to the evidence of Colm Thomas, the only witness to the act causing the death of the deceased. Further, he failed to afford sufficient weight to the evidence of the state pathologist whose conclusions were entirely consistent with Martin Murray's account as to how the wound was caused.

4. The actions of Eamon Hughes (occurring as they did after the Murray group had attempted to flee the scene) was a discrete assault which was separate from incident that had occurred at or about the speed ramp identified in evidence as the location where the initial confrontation occurred. The usual legal issues affecting self-defence should have been applied to the case rather than those expounded in R v Keane (2010) EWCA.

5. The learned Trial Judge considered that the violence "offered by Eamon Hughes was not so out of proportion to the first defendant's own actions as to give rise to a reasonable apprehension that he was in immediate danger from which he had no other means of escape". This failed to acknowledge that the violence offered by the Applicant in the first instance was by way of threats rather than physical violence; that there was a clear difference in their respective actions in that Eamon Hughes had run 80-100m in order to attack the Murrays; that he and others did physically assault the Applicant with belts and concrete blocks without any retaliation; that at a point in time there was a clear desire to flee the scene attested to by a number of witnesses; and that while the Applicant was clearly trying to escape Eamon Hughes assaulted him with his belt. On the run of the evidence, it was wrong of the judge to conclude as he did that the actions of Eamon Hughes were anything other than a premeditated assault by a large group of men whose violence was capable of being fatal to any one of them.

6. The learned trial judge failed to distinguish those actions which might properly be held to amount to behaviour before the tables turned (brandishing and threatening) from those which arguably and on the Appellant case were after the tables had turned. The judge appears to have been influenced in deciding whether the table had been turned by reference to the

> Appellant's behaviour before the table might have turned. On this rationale the Appellant could never have the tables turned on him. The fact that the Appellant was still armed and had previously brandished that knife to Mr Hughes was irrelevant to the issue of whether the deceased was acting violently and had turned the tables on the Appellant.
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> 7. The learned trial judge's conclusion in his sentence remarks dismissing an intention to cause GBH was not supported by the evidence. The Appellant's culpability fell to be mitigated by an intention to cause GBH rather than an intention to kill.

[11] Prior to the commencement of the trial it was contended by this appellant that he was not the person who had the knife. The trial proceeded and many witnesses were cross-examined to the effect that this appellant did not have a knife. On 5 January 2011, after many days of evidence, the appellant conceded that he was the person who carried the knife and in an amended defence case statement contended that his use of the knife in the killing of Eamon Hughes was in the course of lawful self-defence. The defence case statement read –

> "The defendant believes that Eamon Hughes was one of those persons attacking him. He was unaware that the knife made any contact with Eamon Hughes. He did not see any other person with a knife. He was unaware that he had been stabbed until news reports the following day"

In law a man who is attacked is entitled to defend himself but in doing so may only do what is necessary. Everything depends on the facts and circumstances at the relevant time.

[12] Professor Crane gave evidence that Eamon Hughes died from a stab wound to the heart, the blade of the knife having gone through the breastbone upwards and backwards and to the right penetrating the heart, in all a depth of 4–5 cms. It was put to a witness Nathaniel Sherry that this stab wound occurred when Eamon Hughes was beating Martin Murray with a belt. Sherry replied that he did not see this. The judge inquired of counsel if this was the point at which this appellant stabbed Mr Hughes and counsel replied that it was. Martin Murray did not give evidence. The only other evidence about what happened to Eamon Hughes came from Colm Thomas. He heard someone in the Murray group shout 'come on you Provie bastards'. He saw Martin Murray at the front of the taxi with a knife in his hand making a 'come on' gesture. He saw the taxi move off slowly with Martin Murray hanging on

trying to get into it still with the knife in his hand. He saw Eamon Hughes fall forward into the car and then fall back. He ran to help him and called an ambulance. Professor Crane was asked to consider the possibility that the stab wound was caused accidentally. He said that a degree of force was required for a bladed weapon to pierce the body. It would have to be a thrusting movement through clothing skin and the breast bone and then the heart. He agreed that if the deceased was behind someone and they were motioning backwards with a knife in a cropped arm that movement could be consistent with the track of the wound. There was no evidential basis for that suggestion by counsel. Professor Crane later stated that the wound was consistent with an upward thrust of the knife into the deceased's chest.

[13] On behalf of the appellant Mr Kelly QC submitted that the defence of self-defence by this appellant was grounded in the evidence of three witnesses (Colm Thomas, Nathaniel Sherry and Darius Majzharak, the Polish taxi driver) and was not a perverse defence. It was contended that the actions of Eamon Hughes in attacking the appellant with a belt occurred after the Murray group attempted to flee the scene back to the taxi and was separate from the incidents which occurred at the speed ramp on Lisnahull Road. In those circumstances the usual legal principles grounding self-defence should have applied rather those which were illustrated in R v Keane on which the trial judge relied. The judge, while accepting that the evidence of Colm Thomas was a reliable and truthful account of the circumstances leading up to the death of Eamon Hughes (with which the appellant's counsel was in broad agreement subject to two caveats) failed to distinguish the actions of the parties in order to determine whether and in what circumstances 'the tables had been turned' (the language of the trial judge in his summing up to the jury in R v Harvey and referred to by Moses LJ in the appeal in that case – 2009 EWCA Crim 469) or the roles of aggressor and defender reversed. It was contended that the full extent of the aggression of the Hughes group was never revealed probably as a result of an orchestrated attempt by them to minimise their actions. The ABE interview of Thomas together with the statement which derived from it referred to the charge by the Hughes group towards the Murray group, the violence of the Hughes group as well as the chase by Eamon Hughes and his assault on the appellant. In cross-examination he claimed not to remember the details of these incidents but stated on a number of occasions that he had told the truth in his ABE interview. Counsel complained that this witness hindered the defence as he failed to give verbal evidence to the court about these incidents claiming that he could not remember them. In those circumstances it was not sufficient for the trial judge simply to endorse the reliability of this witness without dealing with this aspect of the witness's testimony. Furthermore, it was not an accurate summation of the evidence that the Murray group initiated a confrontation which was repelled by the Hughes group. The trial judge should have analysed the various acts of violence into separate incidents to which the normal legal principles of self-defence could be applied. In particular once the appellant turned his back on the Hughes group and ran

to the taxi his initial aggressive acts (brandishing the knife) had ceased and the pursuit of him by Eamon Hughes and the attack by him with the belt became a separate act or incident to which the normal principles of self-defence should have applied. Alternatively if all the violence (from the taunting at the taxi to the death of Eamon Hughes) was part of the same act or incident then the trial judge failed properly to apply the special principles relating to self-defence, which he had set out, to the facts of the case. The judge's findings were set out in a short paragraph 66 of his judgment. It is contended that the judge did not offer reasons why he had come to the multiple conclusions set out in this paragraph. In particular it was submitted by Mr Kelly QC that the applicant was entitled to a finding whether or not the Hughes group had 'charged up the road with their belts off ready for battle'. The absence of such a finding made it difficult to understand how the judge could have found that the actions of Eamon Hughes were not so out of proportion to what the appellant did that it could be said the roles of each had been reversed. In addition he failed to consider in the context of the evidence whether the appellant had no other means of escape and that the appellant was in the course of trying to get into the taxi in order to leave the scene. The question the judge should have asked was whether the behaviour of Eamon Hughes was such that 'the tables had turned' in a way that justified the appellant in defending himself. The judge's conclusion that the stabbing with the knife was plainly more than was necessary to protect himself from attack was made without reference to any evidence that justified the finding.

[14] Mr Mooney QC on behalf of the prosecution submitted that there was ample evidence to justify the factual findings of the trial judge and that his analysis of the law was correct and the conviction was indisputable.

At the conclusion of the hearing of the appeal against conviction we dismissed the appeal and said we would give our reasons later which we now do.

[15] Central to the decision of the trial judge was his finding that this appellant was the initial aggressor armed with a knife. That finding led to the judge's conclusion that the retaliation meted out by Eamon Hughes with a belt was not such that the appellant was entitled to defend himself in the manner in which he did. Mr Kelly submitted that the judge was wrong to state so in the first sentence of paragraph 66 of his judgment. We do not agree. Was the judge entitled to find that the appellant was the initial aggressor? There was ample evidence to support that view and the judge's task was to decide what evidence he accepted on that issue. In the circumstances of this case we do not think that finding is open to challenge nor are the consequences that flow from it. Having found that the appellant was the initial aggressor the judge rightly accepted that the appellant was still entitled to rely on the defence of self-defence which he then considered. He found that such violence as was offered by Mr Hughes, with a belt, was not so out of proportion to the appellant's actions with the knife, to turn the tables and cause the appellant to feel that he was in immediate

danger from which he had no other means of escape. That is more a matter of common-sense. We did not consider those findings were open to challenge. Stabbing the deceased in the heart was plainly more than was necessary to protect the appellant from assault by a belt. Mr Kelly QC was critical of the trial judge for not approaching the issue on the basis of the normal rules relating to self-defence. These provide that a man may defend himself if he is attacked. But he may only do what is reasonable necessary in order to do so. The judge set out at paragraphs 60, 61 and 62 the law relating to self-defence which was not challenged. He said:

> "[60] The Court has to decide whether in the defendant's position the use of force was reasonable having regard to the danger and pressure to which he or others were exposed and the time in which he had to decide his action: Hegarty [1986] NI 343.
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> [61] A person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person. This comprises two tests, the first subjective and the second objective:
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> (i) A genuine belief in facts which if true would justify self-defence is a defence to a crime of personal violence because the belief negatives the intent to act unlawfully.
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> The Court must decide whether the defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. The defendant must be judged in accordance with his honest belief, even though that belief may be mistaken.
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> (ii) An objective test is required in respect of the degree of force used. The degree of force used by an accused may not be regarded as reasonable if he uses excessive force or has over-reacted. Of course a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.
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> [62] If the Court found that in a moment of unexpected anguish the defendant only did what he honestly and instinctively thought was necessary that would be potent evidence that only reasonable defensive action was taken. But it is not enough to

> show that the defendant believed the force used was reasonable. In judging whether the defendant had only used reasonable force, the Court has to take into account all the circumstances, including the situation as the defendant honestly believed it to be at the time, when he was defending himself. In this instance the defendant Martin Murray has given no evidence to the Court about his belief."

[16] What is reasonably necessary will depend on the facts and circumstances of the case. Relevant to this is the person's genuine and honest belief relating to the circumstances. If the person attacked does not give evidence as to the facts and circumstances as he saw them and that his actions were what he honestly and reasonably thought were necessary, then the tribunal of fact will be deprived of a critical aspect of the defence. That is not to say that a person attacked must give evidence but the absence of his evidence will impact greatly on whether the defence is sufficiently raised and if so whether the prosecution have disproved it. This is so whether the normal rules relating to self-defence or the principles set out in R v Keane relied on by the trial judge apply. The judge's comment that it was bordering on the perverse for this appellant to rely on self-defence was apt.

[17] Mr Kelly QC submitted that the trial judge failed to appreciate the significance of the evidence of Colm Thomas and that in reality he was attempting to help his friend. It was suggested that there was a conspiracy among the Hughes group (following consultation which they, except Thomas, had with the same legal representative) to limit their involvement in the incident and to give false accounts of the actions of the Murray group. It was noteworthy that the judge placed great weight on the evidence of Thomas. He had given an ABE interview and it was submitted that the contents of this interview made clear what had happened and as it was in evidence the judge should have acted on it. The judge accepted the evidence of Thomas who was cross-examined about his ABE interview. This interview was not in evidence as a narrative account in the same way as the sworn testimony of Thomas. It was before the court as containing previous consistent or previous inconsistent statements about what had occurred. The judge can hardly have failed to appreciate the significance of it. Nonetheless he had to decide whether he accepted the sworn evidence of Thomas or otherwise. Having considered the submissions of counsel on this he found he could rely on the evidence of Thomas and we do not think that factual aspect of the case is open to challenge.

[18] Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in any other case. In R v Pollock [2004] NICA 34 Kerr LCJ analysed Section 2(1), various authorities and the approach of the Court of Appeal in an appeal against

conviction. At paragraph 32 of the judgment he set out the principles that could be distilled from the authorities.

> "32. The following principles may be distilled from these materials: -
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> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
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> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

We adopt this approach in this and the other appeals. We are not persuaded that the verdict is unsafe nor do we have sense of unease about its correctness nor the judge's conclusion that this was not a case of grievous bodily harm.

The Appeal against Conviction of Kevin Toye

[19] Kevin Toye was convicted of the attempted murder of Martina Donaghy and the attempted murder of Emma Donaghy. At paragraph 70 of his judgment the trial judge set out correctly the law relating to attempted murder, which is not challenged. This appellant gave evidence and at paragraphs 52 and 53 the judge summarised his evidence about this particular part of the incident as well as part of the evidence of Liam Murray another appellant, about this journey in the vehicle.

> "[52] Liam Murray denied in his evidence inciting or encouraging anyone to drive the car into anyone. Martin "BooBoos" Murray did not give evidence. Kevin Toye denied in his evidence that anyone had said or done anything to incite or encourage him to

> drive into anyone. He [Toye] remembered hearing a bang. He said he had no recollection of who else was in the car before it headed off down the road other than he was first in or of anyone else getting in or out. He said that he had no idea who the person was who pulled the taxi driver from the car and that he made the decision to get into the driver's seat only after the driver was pulled out and no one had got in to drive the car. He said the other people in the taxi were those he had travelled to the scene with. He agreed the first time he talked about turning the car around was in his evidence in court that day. Challenged as to why – said he couldn't remember where he had turned the car. He said no one in the car tried to stop him or challenged him.
>
> [53] In relation to the journey thereafter he said there were probably words spoken but he couldn't recall what was being said. He said the car was very near the Newell Road when he turned around and the other country route was full of pot holes and not conducive to a vehicle driving at speed. He said no one had any intention to kill and he didn't swerve in to hit anybody. He could not explain the accident other than to repeat that he had not seen the girls. He had no recollection of seeing Mary Tennyson's taxi and thought he had driven at all times up the left hand lane. He had no explanation for how the accident happened but agreed that he drove the rest of the journey without further incident. He drove the car to the Ponderosa estate where it was abandoned and burnt. None of the defendants could assist the court as to who burnt the car."

[20] At paragraphs 35 – 47 the judge summarised the evidence of those on or close to the road about the manner of the driving of the vehicle and the collision with those on the road tending Eamon Hughes. At paragraph 48 he referred to evidence of Colm Thomas as to what he had observed and also to the transcript of his contemporaneous telephone call to Ambulance Control as to the events.

> "[48] Colm Thomas said he saw the taxi coming back up the road from Corrainey Park and it swerved into the left hand side of the road to hit them. He said the car came up over the ramp as hard as it could go and just went over at an angle and hit Martin and Emma. He made a 999 call for an

> ambulance and while talking to the ambulance operator he said:
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> 'They're coming back for it, they're coming back for it, they're coming back for it'
>
> A bang is then heard
>
> 'Oh holy fuck auck no way Jesus Christ they're only after hitting three people there
> Oh please you've got to help us here we need cops or something here. The hoods are only after driving over people and everything, three people. I think they are dead'".

He then referred to the evidence of William McDonagh, the appellant, who was in the taxi at the time

> "[49] In his evidence William McDonagh said he pulled the taxi driver out of the car and told him to run, to get out of the estate that he wasn't driving nowhere. Before he could get into the driver's seat he said Kevin Toye jumped into it. He then said there was shouting in the car. Prior to the collision he said Chucky and BooBoos were shouting 'hit them, hit them' and Kevin Toye [the driver] was building up his courage. After the collision he said the Murrays were shouting 'we got the bastards' [BooBoos and Chucky being the nicknames of the first and second defendant respectively].
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> [50] He said that as soon as that happened he started arguing with them. He knew 'something serious was done, not too sure what part of the road that was ... angry as if they had achieved something'. He agreed something could have been said in the car to give him the impression that Toye was building up his courage. He said he heard the words after the u-turn but he didn't have time to do anything. He said 'BooBoos was psyched up to fuck ... and Chucky ... we hit them, we hit them'.
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> [51] In interview he told police that it was the three of them shouting we hit them we hit them but now says it was Martin and Liam, then agreed 'If I says it, then it must have been'. He remembered

> hearing the following comments from Liam and Martin 'them boys were all proud of their self like, we got the bastards, do you know what I mean, we hit them, we drove over them'".

[21] The Judge's conclusions relating to the Counts of Attempted Murder are set out at paragraph 72 of the judgment:

> "[72] Toye is charged as a principal in relation to the attempted murders of Martina and Emma Donaghy as he was the driver of the hi-jacked taxi which struck them. I am satisfied beyond reasonable doubt that the taxi was commandeered and driven by this defendant. This was not as claimed for the purpose of effecting an escape. If that had been, and remained, the purpose the car would have driven out onto the Newell Road. Toye turned the car round and drove back into the area from which he professed a desire to flee. There is overwhelming evidence, which I have set out above, that the vehicle was driven at speed up the Lisnahull Road and deliberately driven into the people on the road – people who were trying to help the dying Eamon Hughes and who were on their knees oblivious and with no means of escape. Toye himself could offer no explanation for the 'accident' [see para 52]."

[22] The Grounds of Appeal are –

> The verdict of the Learned Trial Judge in the Trial that the Accused Kevin Toye was guilty of Attempted Murder is unsafe for the following reasons –
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> 1. It cannot be justified on the basis of the evidence in the Trial.
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> 2. The said verdict is inconsistent with the verdicts on Counts 2 and 3 in respect of other Defendants.
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> 3. The Learned Trial Judge misdirected himself on the law relating to the specific intent to murder.
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> 4. The Learned Trial Judge made no specific finding as to the issue of when the intent to kill was formed.

5. The irresistible inference from Paragraph 35 of the Judgement herein is that the Defendants were acting in concert in taking the vehicle from the taxi driver, and that the "unfinished business" was murder.

6. The Learned Trial Judge appeared to find that the Actus Reus of the Attempted Murder consisted of the Defendant deliberately swerving the vehicle at the injured parties specifically with an intention of killing both.

7. In making the finding referred to at 6 above the Learned Trial Judge made no attempt to analyse the evidence relating to the position of the Deceased Eugene Hughes.

8. There was a wealth of evidence relating to the causation of the collision and the consequential injuries which completely refuted the scenario suggested by the Learned Trial Judge as the basis of his finding that the defendant deliberately aimed the vehicle with the intent to kill.

9. The Learned Trial Judge had no regard to the evidence of the State Pathologist and other prosecution medical experts as to the manner in which the injuries were caused and the improbability of any swerving manoeuvre as the mechanism of injury.

10. In the course of the entire judgement the Learned trial Judge did not on a single occasion remind himself of the partisan nature of almost all the direct evidence in the case despite the obvious factual character of the incident.

11. The reliance of the Learned Trial Judge on the evidence of Mary Tennyson as to the incriminating 'swerve' was perverse given her avoidance of the police at the outset of the investigation and her probably role in providing weapons at the scene for one or more member of the Hughes faction.

12. The Learned Trial Judge had no regard to the Prosecution own reconstruction of video showing the conditions specifically the light, on the Lisnahull road at tor about eh time of the incident and the effect of speed

bumps on the overall driving conditions at the time of the collision.

13. The Learned Trial made no finding as to whether the defendant was aware that Mr Hughes had been stabbed and was lying on the road when the taxi turned and came back.

14. Paragraph 73 of the judgment suggests that the vehicle was aimed at the injured parties.

Eileen Hughes, the wife of the deceased, told the Court in her evidence that had the vehicle "swerved" it could not have avoided hitting her.

16. The Learned Trial Judge had no regard to the fact that a witness Patrick Vincent who was with Mrs Hughes tending to the deceased was completely uninjured by the vehicle as it went past. Both these witnesses had position at the head and feet respectively of the deceased and their escape demonstrates the improbability, not to say the impossibility of the scenario apparently relied upon by the Learned Trial Judge.

17. The conviction of Attempted Murder herein is not based upon a proper assessment of the evidence.

[23] Mr McDonald QC who with Mr McStay appeared on behalf this appellant submitted that the findings of the trial judge were not justified by the evidence that was given at the trial. Furthermore, the judgment lacked any analysis of the evidence of the witnesses to the incident which caused undoubted grave and life changing injuries to Martina and Emma Donaghy and how that had come about nor of the nature of the injuries themselves and what could be deduced from them. In addition there was no proper analysis of how the judge arrived at the conclusion that the appellant had the specific intent for Attempted Murder, namely, intent to kill. The verdict of guilty of Attempted Murder was inconsistent with his findings of not guilty in relation to the others present in the vehicle who were inciting the driver.

[24] Mr Mooney QC on behalf of the prosecution submitted that the injuries caused to the Donaghys could not be viewed in isolation and had to be seen in the context of the incidents that occurred before the vehicle struck the two ladies. Viewed in that way, the findings of the trial judge were the only logical conclusions to be drawn from these events.

[25] The appeal by this appellant on the counts of Attempted Murder involves essentially condemnation of the judges' principal findings of fact. A judge hearing a criminal charge in the absence of a jury has no summing-up to deliver. He is not obliged to state every relevant legal proposition or review every fact or argument on either side. His task is to reach conclusions and to give reasons to support them view and to notice any difficult or unusual points of law. In general terms his obligation is to demonstrate how his view of the law informed his approach to the facts (R v Thompson [1977] NI 74). The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury were summarised in four points by Lord Lowry LCJ in R v Thain [1985] NI Reports 457 at 474, based on earlier observations by Lord Lowry in the Court of Appeal in Northern Ireland Railways v Tweed [1982] 15 NIJB.

> "1. The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.
>
> 2. The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusion.
>
> 3. The trial judge can be more readily reversed if he had misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose his judgement may be analysed in a way which is not possible with a jury's verdict.
>
> 4. The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusion."

[26] There was ample evidence that after the incident at the club that the Murray group went looking for the Hughes group and that having passed them on the Lisnahull Road stopped and confronted them. During this part of the incident Eamon Hughes was fatally stabbed and the Murrays retreated in the taxi driven by the Polish taxi driver. A short distance away he was told to stop and then dragged from the vehicle which was then commandeered by the Murray group. The route thereafter taken was not one which would have taken the Murray group away from the area and the Hughes group. Rather the contrary. The judge's conclusion that the taxi was not taken to effect an escape,

as claimed, is unassailable. It was then driven along the Lisnahull Road in the direction of the Hughes group. Parked on the left hand carriageway was the taxi of Mary Tennyson which the taxi driven by the appellant had to overtake to proceed. The group tending Eamon Hughes was on the same carriageway a short distance beyond. The appellant only had to proceed in the same carriageway used for overtaking Tennyson's vehicle and he could have avoided the Hughes group. Instead he returned to the left hand carriageway and proceeded at speed into the Hughes group. The appellant was unable to offer any explanation for making contact with them. The group on the carriageway would have been plainly obvious to anyone driving a vehicle in their direction. We have seen the video reconstruction of the route driven by the appellant. This was no urban street closely bounded by a row of terrace houses. This was a modern housing estate with ample lighting and the areas to either side of the roadway were common areas of grass. Mr McDonald QC was critical of the judge for making no finding that the appellant knew the group were on the road and submitted that there should have been a finding that he saw them. At paragraph 73 of the judgment the judge stated that he was satisfied beyond reasonable doubt that "he aimed the car at the people on the road". It is implicit in the use of the word 'aimed' that the appellant saw the group and drove at them. In the same paragraph the judge noted that Mr McDonald had accepted that it would not be difficult to infer an intent to kill on the part of a person who aimed a vehicle at speed at another person. A vehicle wrongly handled is as much a lethal weapon as a firearm or a knife.

[27] The appellant McDonagh gave evidence that one of the Murrays had incited this appellant to drive into the Hughes group. His uncertainty about which Murray did so led the judge rightly to find the charge of attempted murder not proved against them. He was however satisfied that there had been incitement. In all these circumstances the judge's conclusion that there existed an intent to kill was justified. For these reasons we dismissed the appeal of this appellant. Following this Mr McDonald informed the court that the appellant would not be pursuing his appeal against sentence.

The Appeals against Sentence

Martin Murray

[28] Following the dismissal of his appeal against conviction counsel on behalf of Martin Murray applied for an extension of time within which to appeal against sentence. This was granted.

[29] This appellant was sentenced to life imprisonment and the trial judge specified that appellant should serve a minimum term of eighteen years before the release provisions of the Life Sentences (Northern Ireland) Order 2001 should apply. In addition he was sentenced 10 years imprisonment for affray. In determining the minimum term the trial judge, in accordance with the

practice statement adopted in R v McCandless & Others [2004] NI 269, concluded that this was a higher starting point case in which there was no evidence of remorse but a number of aggravating actors were present. He identified the aggravating factors as –

> "1. The attack on the Hughes party was pre-meditated.
>
> 2. The appellant armed himself with a knife and used it in the attack on Eamon Hughes after aggressively brandishing it towards them.
>
> 3. The appellant's record for violent offending and the fact that he had not responded to previous sentences to correct his behaviour.
>
> 4. The devastating effect the death of Eamon Hughes had on his widow, daughters, son and other relatives.
>
> The trial judge rejected the defence submission that the appellant should be sentenced on the basis that his intention was to cause grievous bodily harm and not to kill."

[30] The appellant appealed against the determination of the minimum term on the basis that it was manifestly excessive in that:

> i. The learned judge was not justified in his conclusion that this was a higher starting point case.
>
> ii. This was a normal starting point case as it involved the death of an adult following a quarrel and did not have any of the features identified in paragraph 12 of the Practice Direction which is a pre-requisite to a normal starting point.
>
> iii. The learned trial judge found as a fact in his judgment convicting the Appellant of murder that there was an intention to kill. This issue has yet to be resolved by the Court of Appeal. If the defendant used excessive force in self-defence this is mitigation which was rejected by the learned trial judge and would justify a reduction in the tariff.

[31] Mr Kelly QC submitted that having set out the Practice Statement the trial judge failed to adopt its guidelines. In particular he failed to identify a starting point but went straight to the absence of mitigating circumstances and then classified the murder as one involving an intention to kill which was premeditated. In doing so he failed to identify the features which in his view promoted this case from a normal starting point case to a higher starting point case. It was submitted that there were no features present which brought this case into the higher starting point category. If the injury was caused by the cropped arm movement demonstrated by Mr Kelly QC to Professor Crane then this was not a case of murder with intent to kill but one of an intent to cause grievous bodily harm. In stating that the offence was premeditated the judge was in error and in concentrating on an intention to kill, which the appellant disputed and which the judge did not find in his judgment, he determined a minimum term which was excessive. Mr Kelly did not submit that this was a normal starting point case and accepted that there were aggravating features to it. He accepted that the judge was entitled to take into account the impact on the Hughes family of the death of Eamon Hughes. In a case of murder an intention to kill cannot be an aggravating factor, however a disproportionate use of force in a self-defence situation would be a mitigating factor. He disputed the judge's finding that this was a pre-meditated murder but accepted that in part it could be so described. He accepted that the appellant's criminal record disclosed a history of failing to respond to earlier sentences but disputed that such could increase the starting point.

[32] The appellant's date of birth is 7 January 1987 and when sentenced he was 24 years of age. He was convicted of disorderly behaviour and common assault on an adult in the Youth Court and sentenced to probation. At the Crown Court in October 20007 he was sentenced to a custody probation order of 18 months detention and twelve months' probation for three assaults occasioning actual bodily harm. At the same court he was sentenced to four months detention for receiving stolen property, namely three firearms and fined for possession of a firearm other a handgun without a certificate. At the Crown Court in April 2008 he was sentenced to 9 months' imprisonment for breach of the custody probation order. A pre-sentence report indicated that he displayed limited victim awareness and empathy and that he posed a high likelihood of committing further offences and presented a significant risk of serious harm to others.

[33] The Practice Statement of 2002 identifies two categories of case, those with a starting point of 12 years and those with a starting point of 15/16 years. Having selected a starting point the judge can vary it upwards or downwards to take account of aggravating or mitigating circumstances either relating to the offender or the offence. Thus the statement is a guideline with great flexibility and not a straightjacket. Having set out the practice statement the trial judge at paragraph 8 concluded that there were no mitigating circumstances but identified four aggravating factors (see above). It was submitted to the trial

judge that the offence of murder was one arising from an intention to cause grievous bodily harm and that the appellant should be sentenced on that basis. At paragraph 9 he rejected that submission in strong terms and concluded that it was a 'deliberate stabbing by someone who had armed himself with a knife, threatened to kill, did kill by deliberately inflicting a stab wound' and had shown no remorse. At paragraph 10 he stated that having regard to the foregoing he concluded that this was a higher starting point case and fixed the minimum term at 18 years. That description of the offence in paragraph 9, which is not open to challenge, clearly demonstrates that this was not a normal starting point case and could only be a higher starting point case. The absence of mitigating circumstances presented no reason for varying the higher starting point downwards, but the presence of aggravating factors provided every reason to vary it upwards, not least the severe impact of the death of Eamon Hughes on his immediate family as evidenced by the number of victim impact statements which the judge found at paragraph 2 bore witness to the intense suffering pain and anguish suffered by them. In those circumstances a variation upwards of 2/3 years of what was clearly a higher starting point case could not be described as excessive never mind manifestly excessive. The culpability of the appellant in respect of this offence was particularly high. For these reasons the appeal against sentence is dismissed.

Liam Murray

[34] This appellant was convicted of Affray. At paragraph 78 of his judgment the judge set out his finding.

> "[78] On Count 4, the evidence is clear. Each of the accused was voluntarily present at a confrontation at Lisnahull Road and the fighting was such that, in that it involved the carrying of weapons together with threats and aggressive acts, it was such conduct directed at another that it would cause a person of reasonable firmness who was present at the scene to fear for his personal safety. Accordingly, I find the defendants guilty of affray."

[35] He was sentenced to an Indeterminate Custodial Sentence with a minimum period of detention of five years. The trial judge was satisfied that the offence was a serious and specified offence within the meaning of the Criminal Justice (Northern Ireland) Order 2008 (the 2008 Order). This Order created two new types of sentence – the Indeterminate Custodial Sentence (ICS) and the Extended Custodial Sentence (ECS). These sentences can only be imposed when the Court is of the opinion "that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences" [Art 13(1)(b) and Art 14(b)(i) respectively]. In the case of this appellant the judge was satisfied that this risk

existed and that an extended custodial sentence would not be adequate for the purposes of protecting the public from serious future harm. Counsel on behalf of this appellant at the trial conceded that the threshold of dangerousness was met but contended that the imposition of an ECS rather than an ICS was sufficient protection for the public. At paragraph 15 the judge stated that the information before the court about this appellant and the offence impelled the court to the conclusion that the public would enjoy a greater level of protection from the imposition of an ICS. At paragraphs 16–20 the judge summarised the information about this appellant:

> "[16] Liam Murray is a 24 year old male from Dungannon who, prior to his remand in custody, resided with his mother, her partner and his younger brother at 1 Windmill Court which is described as a socially deprived area of Dungannon which has experienced high levels of anti-social behaviour. He has no contact with his biological father. Educated at St Patrick's Primary School and St Patrick's College Dungannon he was permanently excluded from that school at the age of 14 for fighting and challenging behaviour. He has no relevant employment record. Within the prison regime he has "basic" prisoner status and is not currently involved in any constructive use of time. The Probation Officer also stated that it was difficult during interview to get any sense of victim awareness or victim empathy and that whilst he had expressed regret for his involvement in the matter for which he was convicted he expressed little in the way of remorse. He appears before the Court with eight previous convictions from six Court appearances. On 10 November 2006 he was convicted of the manslaughter of a Lithuanian National on 16 January 2005. According to the Prosecution Summary this offence related to an incident where the defendant and another male went to a house in the Dungannon area and the other male became involved in an altercation with the foreign national who was chased and then fatally stabbed by Liam Murray. He died a short time later from a stab wound to the heart. He was sentenced to a Custody Probation Order ("CPO") comprising six years' imprisonment and two years' probation. He claimed to the Probation Officer to have limited recall in respect of the offence as he was "out of my head" through drugs and alcohol at the time. The

Probation Officer's understanding was that the unfortunate victim was stabbed eight times. Liam Murray was released from the Young Offenders Centre on 2 April 2008 which was not long before the events giving rise to his present conviction [13 September 2008]. After he had been released to serve the probation element of his CPO the records indicate that he did not engage as required with the probation element of the CPO. He refused to engage with addiction services, generic counselling and work to address his offending behaviour or employment services. Victim awareness work was commenced but he presented with no victim awareness or empathy. Breach proceedings had been initiated and a summons lodged with the Court was extant at the time of the events giving rise to his present conviction. On 26 September 2008 [less than 2 weeks after the murder of Eamon Hughes] he was sentenced to 12 months custody for breach of the CPO.

[17] Furthermore, on 8 May 2008, five weeks after his release from imprisonment for the manslaughter of the Lithuanian national he committed the offences of disorderly behaviour and assault on police in respect of which custodial penalties were ultimately imposed in November 2008.

[18] Concerns have also been raised about Liam Murray's conduct whilst he has been on remand. He has been involved in two adjudications for having a razor blade concealed in his jeans and for attempting to head-butt a Prison Officer. Indeed, on the morning of the pre-sentence report interview at Maghaberry Prison Liam Murray informed the Probation Officer that he was required to attend an adjudication at 11.00am for "self-medicating" on diazepam medication.

[19] Unsurprisingly, it may be thought, Liam Murray was assessed by the Probation Officer as posing a high likelihood of reoffending in the next two years.

[20] So far as the future risk of serious harm within the meaning of the 2008 Order is concerned a

multi-disciplinary risk management meeting including PBNI and PSNI representatives was convened in respect of Liam Murray on 11 May 2011. The following risk factors were identified:

- Previous conviction for manslaughter;
- Aggressive/volatile nature;
- Propensity to act impulsively;
- Propensity to involve himself in risk taking behaviour;
- Limited consequential thinking;
- Non-amelioration to treatment;
- Impact of drugs and alcohol on his behaviour;
- Lack of constructive use of time;
- Impact of his negative peer group on his behaviour;
- Behaviour within the prison resulting in adjudications;
- Lack of victim awareness;
- Poor decision making skills.

On the basis of this information the risk management meeting concluded that Liam Murray posed a risk of serious harm to others at this time."

[36] He now appeals against the imposition of the ICS on the following grounds:

i. an indeterminate custodial sentence as opposed to an extended custodial sentence was wrong in principle;

ii. an indeterminate custodial sentence was not required to in order to protect members of the public from serious harm; and

iii. a minimum appropriate sentence of 10 years was manifestly excessive.

[37] Mr Harvey QC and Mr McCreanor appeared on behalf of this appellant. Mr Harvey QC did not appear in the court below. He informed the court that he would be making no submissions about the appropriateness of an ICS as opposed to an ECS. He confined his submissions to the length of the minimum term namely five years. This term he submitted was both wrong in principle and manifestly excessive and represented a determinate sentence of ten years for this particular offence of affray whereas five years should be the maximum. This was so particularly where another person was amenable for the death that occurred in the course of the affray. The facts relating to the affray required to

be separated from the incidents in which Eamon Hughes died and in which Martina and Emma Donaghy were grievously injured. A person guilty of affray should be sentenced for his individual role in the affray and not have his sentence increased by reason of the acts of others. Mr Harvey QC further submitted that the various factors in an affray cannot be elevated into aggravating features. He highlighted the role of the appellant as being in possession of a bottle, not having a knife, getting out of the taxi, brandishing the bottle but not using it and then getting back into the taxi. He accepted the first three of the features (i–iii) identified by the trial judge in paragraph 26 of his judgment as true. He disputed (iv) as a proper aggravating feature and accepted (v) as true because of the actions of others. He disputed (vi) submitting that affray is confined to a single incident and did not extend to the actions of the man with the knife or the person who drove the taxi. He accepted (vii) the most serious offence being the conviction for manslaughter in November 2006 for which he was sentenced to 6 years' imprisonment and released on 2 April 2008.

[38] Mr Mooney QC on behalf of the Crown contended that the minimum term of five years' imprisonment could not be described as excessive. He submitted that the incident could not be divided up as it commenced with the Murray group gathering and setting out to find the Hughes group to confront them and continued after the confrontation on the Lisnahull Road. From the outset the Polish taxi driver was put in fear and each of those in the taxi would have aware of the behaviour which he described. He submitted that the actions of this appellant could not be separated out from the whole incident.

[39] Affray in Northern Ireland remains an offence against the Common Law, the maximum penalty for which is life imprisonment. It can be committed by one person but invariably involves a number of persons acting in concert or in confrontation. The offence consists of a violent disturbance of the peace by one or more persons which takes place in such circumstances as to cause terror to one or more persons of reasonable firmness. The most common form of affray is a fight between two or more men or more usually groups of men which terrifies bystanders. The disturbance of the peace may be a display of force for example brandishing an offensive weapon without actual violence. The offence on this occasion involves very considerably more than these minimal definitions. Laying down guidelines for such an offence is difficult due to the infinite variety of circumstances which may comprise the offence. In AG's Reference (No1) of 2006 [2006] NICA 4, quoted by the trial judge at paragraph 25 of his judgment, this Court stated at paragraph 25:

> "[25] Because of the infinitely varying circumstances in which affray may occur and the wide diversity of possible participation of those engaged in it, comprehensive rules as to the level of sentencing are impossible to devise. Certain general

> principles can be recognised, however. Active, central participation will normally attract more condign punishment than peripheral or passive support for the affray. The use of weapons will generally merit the imposition of greater penalties. The extent to which members of the public have been put in fear will also be a factor that will influence the level of sentence and a distinction should be drawn between an affray that has ignited spontaneously and one which has been planned – see R v Anderson and others (1985) 7 Cr App R (S) 210. Heavier sentences should in general be passed where, as in this case, the affray consists of a number of incidents rather than a single self -contained episode."

[40] The present offence was not an isolated incident in the public street which was of short duration. The preparations for the offence began in Ranaghan Way and commenced when the Murray group set off to locate and confront the Hughes group. It continued until the taxi was abandoned and set on fire. A lot occurred between those two events. It is not possible to isolate someone's role simply by the actions they are found to have taken. Of course active participation will attract more condign punishment than a more peripheral role. In this instance the appellant was present at the outset and in the taxi throughout until it was abandoned. He was on the street in the confrontation with the Hughes group and present in the taxi as it was driven back towards the Hughes group and when it struck Martina and Emma Donaghy and thereafter. The judge was entitled to find that the potential for violence of an unpredictable kind must have been contemplated (see paragraph 26(iv)) particularly as the offence was pre-meditated and occurred over time and at different locations. We can find no fault in the judge's reasoning as to the seriousness of this offence and his approach to it. We are satisfied that it justified condign punishment and that the minimum term fixed was neither manifestly excessive nor wrong in principle and dismiss the appeal against sentence.

The Appeal of William McDonagh

[41] This appellant was convicted of Affray and paragraph 78, quoted above, applied to him as well. He was sentenced to an Extended Custodial Sentence with an appropriate custodial term of 8 years and an extended period on licence of five years. The appellant's significant history and the judge's reasons for the sentence imposed are set out at paragraphs 30–34 of the sentencing judgment.

> "[30] William McDonagh**,** like Liam Murray convicted of affray, also comes before the Court with a relevant record although it is somewhat shorter than his co-accused. Of particular significance is the fact that on 26 February 2009 he was convicted of

possession of a prohibited weapon namely a taser gun which offence occurred on 5 September 2007 in respect of which he received a suspended prison sentence. The taser gun was found by the police in a vehicle owned by William McDonagh which had been stopped and searched. When arrested he admitted ownership of the taser gun but claimed he had bought it to go hunting with. On the same date at Ballymena Magistrates Court he was also convicted of possessing an offensive weapon (a hurley) in a public place on 14 March 2008 for which he received a two month sentence of imprisonment suspended for 18 months. He was bailed in respect of this latter charge, which involved a large number of people, on 20 March 2008. He breached in respect of this bail on 20 May 2008 and was readmitted to bail. Whilst on bail (for that offence) he committed the offence for which he appears before the Court today.

[31] Whilst on High Court bail for the instant offence (which at that time included murder and attempted murder of which he was subsequently acquitted) he was involved in an incident in Ballymena where he was observed by police to be carrying a machete with a 12" blade and a co-accused was observed carrying a long handled axe with which he struck the police car. William McDonagh threatened to kill the police officer stating 'I'm going to kill you, you bastard so you will have to shoot me'. He then used the machete to smash the rear window of the police car. Police were obliged to draw their firearms on this occasion. William McDonagh was later arrested for breach of High Court bail, possession of an offensive weapon, threats to kill and criminal damage. This case has been dealt with at the Crown Court. It is understood that William McDonagh pleaded guilty to affray and criminal damage and is currently awaiting sentence.

[32] As the prosecution rightly submitted the pattern of previous offending of this and indeed all of the defendants reveals persons who have a propensity to use violence against others with little or no provocation, without restraint and with the

intention of alarming and injuring those who cross their path. I accept the Prosecution submission that this pattern shows that they have not learnt from the past, have not responded to supervision and have shown little remorse for their actions.

[33] William McDonagh was convicted of affray. He has a record of violent public order offences. He was on bail for such an offence when the present offence was committed. Indeed, whilst on bail (then for murder, attempted murder and affray) he reoffended in the very serious manner set out above.

[34] Following enquiry from the relevant probation officer he confirmed that his conclusions as to risk were 'finely balanced'. I have before me somewhat more detail and emphasis regarding the nature and pattern of this defendants offending which I have set out above. In the light thereof and the probation officer's frank recognition of the finely balanced nature of the risk in his case I have formed the opinion that this defendant does pose the requisite significant risk of future serious harm. I have however, not without difficulty, concluded in his case, given his more limited record and the contents of the PSR, that an ECS would be adequate for the purpose of protecting the public. Accordingly I propose to impose an ECS. An ECS is composed of the appropriate custodial term and the extension period as defined by Art 14(3). The meaning of the appropriate custodial term is defined by Art 14(4). I refer to my earlier general comments regarding affray. Given your more limited record the commensurate sentence would have been one of 8 years. I consider that this is the appropriate custodial term in your case. After you have served at least one half of that period the date of your release will be determined by the Parole Commissioners. I consider the extension period (i.e. the period for which the offender is to be subject to a licence and must be of such length as the Court considers necessary for the purpose of protecting members of the public from serious harm) should be the maximum of 5 years [see Art 18(a)]. This is for the reasons summarised in paras 30-33 above. After you are released from prison this is the period you

will remain on license. I consider this period to be necessary to protect the public from serious harm."

[42] This appellant appeals against the appropriate custodial term and the Extended Custodial Sentence. The Grounds of Appeal are:

1. In respect of the appropriate custodial term for the offence:

(a) that having regard to all the circumstances surrounding the commission by the Applicant of the offence, the additional material placed before the Learned Judge and the level of sentencing for such offences as appearing from decided cases, the sentence of 8 years was not the appropriate custodial term and was manifestly excessive.

(b) that in deciding upon the appropriate custodial term for the offence the Learned Trial Judge was excessively influenced by the prosecution submissions surrounding the nature and extent of the Applicant's involvement in the commission of the offence and, in particular, the submission

(i) that the Applicant was an active central participant in the affray;

(ii) as to the extent to which, in the case of the Applicant, the scope of the offence was pre-meditated;

(iii) that the Applicant must have contemplated 'the potential for violence of an unpredictable kind' at the time he embarked upon the joint enterprise, and whether such state of mind, as claimed, was an aggravating feature;

(iv) that the Applicant's admitted hi-jacking of a taxi was, as argued by the prosecution, part of an ongoing offence of affray, implicit within which was the claim that at such time he was still motivated by an intention to commit further offences and that this aggravated the case of affray against him;

(v) that there was evidence in the trial which supported the prosecution's claim of the Applicant's involvement in the aggravating destruction, by arson, of the getaway car;

(c) that in deciding upon the appropriate custodial term to be one of 8 years the Learned judge appeared excessively influenced by the previous and subsequent criminal convictions of the Applicant and, in particular, the commission by him of the offence of affray on 12 July 2010 at Ballymena for which, having pleaded guilty to same, the Applicant was awaiting sentence at Antrim Crown Court.

The Applicant submits that the commission of such offence subsequent to the date of commission of the index offence was relevant to his consideration of Article 14 matters rather than the appropriate custodial term to be imposed for the index offence.

(d) The Learned Judge failed to reflect the lesser culpability and involvement of the Applicant in the overall offending on 13 September2008;

2. In respect of the imposition upon the Applicant of an Extended Custodial Sentence:

(e) the Learned Trial Judge appeared to accept and attach undue weight to the prosecution submission, in respect of the Applicant's previous (and subsequent) convictions and antecedents, that he presented to the Court as 'at high risk of re-offending and that potential offences pose a serious risk of harm to the public' and that, consequently, he satisfied the requirements of Article 14(1) of the 2008 Order.

(f) That it was against the weight of the evidence and incorrect for the Learned Trial Judge to depart from the assessment of risks of re-offending and future risk of serious harm to the public (by reason of the commission of further serious and specified offences) arrived at by the author of the Pre-Sentence Report and that, in so doing, on the available evidence, he fell into error;

(g) That in deciding whether the imposition of an Extended Custodial Sentence was justified, the learned

Trial Judge was not entitled to conclude that, to any material degree, he had 'somewhat more detail and emphasis regarding the nature and pattern of (the Applicant's) offending' (paragraph 34 of the Judge's sentencing remarks) than the author of the pre-sentence report and was, accordingly, wrong to reject the probation officer's assessment of the Applicant's dangerousness and replace it with his own Article 15 assessment.

(h) That having received verbal confirmation in court from the Author of the pre-sentence report to the effect that in preparing his report and when he conducted his risk assessment of the Applicant he was acquainted with the circumstances of the subsequent offence of affray (in Ballymena on 12 July 2010), the Learned Trial Judge thereafter erred in failing to alert the defence that, nevertheless, he was considering departure from the conclusions of the probation officer on the issue of dangerousness.

(i) That, in the alternative, both having regard to the appropriate custodial term at which the Learned Trial Judge arrived and on the material placed before him the period of extension, of itself and in its totality with the appropriate custodial term chosen, was manifestly excessive.

[43] It was submitted by Mr McCrudden QC, who with Mr Moore appeared on behalf of this appellant, that his role in the affray was limited and that he was very much in the background. In particular he highlighted that he did not have a weapon, he did not become involved in violence or in giving abuse to anyone, and that in attempting to seize control of the taxi he was endeavouring to escape the situation. Any pre-meditation relating to the offence or contemplation of violence was at the lower end of the scale. He disputed the aggravating feature identified at sub-paragraph (iv) of paragraph 26 of the sentencing judgment (see above) and submitted that the death of a person in the course of an affray was not an aggravating feature when another person was made amenable for that death. It was submitted that the offence of an affray was complete following the confrontation on Lisnahull Road and paragraph 78 of the judgment suggest that the judge recognised that this appellant's role in the offence of an affray ended when the vehicle was driven from that scene. The Probation Officer had assessed the appellant as being of medium risk of re-offending and it was submitted that, contrary to what the judge stated, the judge was not in possession of any more information of significance to determine otherwise. This appellant had no convictions for

causing serious personal injury. The judge should not have determined that the appellant did pose a significant risk of future serious harm to members of the public by the commission of further specified offences.

[44] Counsel on behalf of the Crown disputed the extent of the appellant's involvement in the affray and submitted that the judge's assessment of the risk of future serious harm to members of the public was justified. The Probation Officer in his report had stated that the appellant did not meet the PBNI assessment of posing a significant risk of harm to the public. When he gave evidence before the trial judge he stated that this conclusion was finely balanced. The trial judge was not obliged to follow the assessment made by the Probation Service and was entitled to reach his own conclusion on this issue. It was further submitted the history of the appellant's offending justified the view that the risk of future serious harm was significant. Counsel also drew the court's attention to the differing accounts given by the appellant in relation to his knowledge of other persons involved.

[45] On behalf of this appellant an application was made for leave to present fresh evidence. This was in the form of a report compiled by Dr A East a Consultant Forensic Psychiatrist based at the Longstone Hospital in Armagh, following sentence of the appellant. The Crown then applied to have the appellant examined by their Psychiatrist, Dr F Browne. The appellant declined to consent to such examination. Subsequently the appellant agreed to the examination and the appeal was adjourned to enable this examination to take place. Leave to present the fresh evidence was granted de bene esse. Later a hearing was arranged at which both Psychiatrists were present and gave evidence.

[46] Dr East found no evidence of mental illness in the appellant. He found the appellant not to be a wholly honest historian relating to his life style (use of alcohol and illegal drugs) and his possession of potential weapons (taser and hurling stick). Having interviewed him and read the relevant papers in the case he concluded:

(i) that the likelihood of the appellant committing specified offences in the future was noteworthy and of more than a mere possibility; and

(ii) that he could find no evidence to support the view that any future offending was likely to cause serious physical or psychological harm to others.

Consequently he did not consider he was a proper candidate for a public protection order. Dr East was of the opinion that the word 'serious' was the key aspect of this particular case. He did not find the definition of 'serious harm' in the Criminal Justice Order of assistance but found the definition used

in the Department of Health in its Public Protection Arrangements literature to be more helpful. The provenance of this literature was never revealed but it was clear that it was not in the context of criminal justice. This Departmental definition was – serious harm is that which causes death or injury from which recovery would be difficult or impossible whether physical or psychological. Dr East stated that the most predictive factor in assessing the future likelihood of an offence causing serious harm was past offending causing such serious harm. He found a lack of violence in the appellant's criminal record and this was crucial to his opinion. He stated that he was looking for the potential to cause serious harm to others and the capacity in the person's psychiatric make-up and physical abilities to be willing and to carry out such an offence. He did not dispute that a person with the appellant's criminal record could commit an offence causing serious harm. He found possession of an offensive weapon to be a common offence and cautioned against the assumption that the willingness to possess such a weapon meant an ability to actually use it. He found no evidence of a capacity to cause serious harm to others, principally in the absence of such an offence in his previous criminal record. The fact that the appellant might have been in a group wishing to start a fight did not to his mind demonstrate that capacity.

[47] Dr F Browne is a Consultant Forensic Psychiatrist, now retired, with many years' experience of mental health issues in the criminal justice system. Having interviewed the appellant and considered the papers in the case he agreed that there were no mental health or medical issues involved. He ventured no opinion on the likelihood of the appellant committing a future offence of serious harm as he did not consider this to be a matter for a psychiatrist.

[48] Following the evidence of the psychiatrists it was submitted by Mr L McCrudden QC that in the absence of evidence of a likelihood of the appellant committing an offence likely to cause serious and with the positive evidence of Dr East that the appellant was not likely to commit such an offence the finding of the trial judge could not be maintained and should be discharged and the appellant re-sentenced.

[49] Chapter Three of the Criminal Justice (Northern Ireland) Order 2008 introduced new sentencing provisions in respect of a category of offenders who are regarded as 'dangerous'. Articles 13 and 14 made provision for the imposition of an Indeterminate Custodial Sentence and an Extended Custodial Sentence respectively where the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. The shorthand for this concept of risk of serious harm is 'dangerousness'. Beyond the description of the risk in Article 13 (1)(b) and Article 14 (1)(b) there is no definition of 'dangerous'. Article 15 (1)(b) repeats the concept of risk of serious harm and Article 15(2)

makes some provision for the assessment of 'dangerousness'. Article 15(2) provides:

> "(2) The court in making the assessment referred to in paragraph (1)(b) -
>
> (a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
>
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms a part; and
>
> (c) may take into account any information about the offender which is before it.

[50] 'Serious harm' is defined in Article 3(1) as – death or serious personal injury, whether physical or psychological. Thus 'serious harm' for the purposes of the Criminal Justice Order includes serious harm, though serious at the time it is suffered, is harm from which recovery may be swift or long delayed. It is the nature of the harm as suffered which is crucial. Modern medicine has made recovery from such serious harm more likely, but it does not render the harm any less serious. This is the test which is set out in the legislation and which governs the court. Therefore the test adopted by Dr East, based on the Public Protection Arrangements, and relied upon in this instance, is not the correct test for the purposes of the Criminal Justice Order. Nor is the application of the test curtailed in any way by a requirement that the person, the subject of the assessment by the court, has previous convictions whether involving the infliction of serious harm or otherwise. Therefore the opinion of Dr East that in order to find a significant risk of the commission of further offences, the offender would require to have a previous conviction for causing serious harm is not borne out in the legislation. Article 15 is quite clear that the assessment is one to be made by the court. In making that assessment it is mandatory for the court to take into account all such information available to it about the nature and circumstances of the offence, and the court may take into account any information about a pattern of behaviour of which the offence forms a part and may take into account any information about the offender. Therefore, the court has a discretion about the information to be taken into account other than information about the offence itself. Of course a court should take account of any information before it which is relevant to the sentence to be imposed. The legislation makes no provision for the involvement of a psychiatrist in the assessment of 'dangerousness' and to that extent their views are not relevant. Dangerousness is not a concept in itself which falls within the realms of psychiatry. It is a shorthand way of describing a significant risk of serious harm to the public within the legislation about which expert psychiatric

evidence is not relevant. In most cases involving an assessment of dangerousness psychiatric evidence would be inadmissible. On the other hand if there was a mental health issue relating to the offender which bore on the question whether there existed a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences then that may be relevant to the court's assessment and the imposition of an indeterminate or extended sentence. Absent such mental health issue the opinion of a psychiatrist or other medical practitioner would not be material and admissible. Even if there was a mental health issue and a psychiatrist has expressed a view on the risk being considered, the court has a discretion whether to take such information into account and would not be bound by the opinion of a psychiatrist about that risk. However, the presence of a mental health issue and an opinion of a psychiatrist on how the mental health issue might assist the assessment of significant risk would be information which a court might welcome in order to determine the outcome of the court's assessment. Much will depend on the nature and circumstances of the case. For the purposes of this case the opinion of Dr East does not assist in determining the assessment of dangerousness nor is the court bound by such. Therefore we look at the assessment carried out by the trial judge on the information he had before him. That information was significant, in particular that set out at paragraph 31 of the sentencing judgment. We find no reason to differ from that of the trial judge as to the assessment and do not find the term of years to be manifestly excessive. Therefore the appeal against the imposition of the extended custodial sentence is dismissed.

[51] We accept that the sentences imposed in this case were at the upper end of the range for such offences. However, the seriousness of this confrontation which was sought out rather than arising spontaneously and the extended incident to which it gave rise and its consequences, cannot be underestimated. In this regard it is worth remembering the words of the trial judge, who heard this case over fifty days, found in paragraph 32 of his sentencing judgment:

> "[32] As the prosecution rightly submitted the pattern of previous offending of this and indeed all of the defendants reveals persons who have a propensity to use violence against others with little or no provocation, without restraint and with the intention of alarming and injuring those who cross their path. I accept the Prosecution submission that this pattern shows that they have not learnt from the past, have not responded to supervision and have shown little remorse for their actions." [Our emphasis]

[52] Following the hearing of the appeal and whilst awaiting a decision of the Supreme Court whether to grant leave to appeal in a case involving issues

about the concept of dangerousness and the Criminal Justice Order 2008, requests were made on behalf of the appellants Martin Murray and Liam Murray for information about applications for bail by the four appellants and for details of the dates of the applications and by whom they were heard. It was intimated that the trial judge may have heard such an application. It would appear that new solicitors had become involved on behalf of some of the appellants. Previous solicitors would have been aware of some details of any applications for bail. When the details of the bail applications were obtained the court directed that CD recordings of the applications be made available to the appellant's solicitors. Later directions were given that written transcripts of the relevant applications be obtained and all this information sent to the respective solicitors. This took considerable time and effort on the part of the court staff for which the court is grateful. Later fresh grounds of appeal were lodged and the court directed skeleton arguments be prepared including a factual chronology of events surrounding the applications for bail. The fresh ground of appeal as amended (and which covers the point made on behalf of both appellants) was:

> In all the circumstances of the case, there appears to be a real danger of bias concerning the tribunal so that justice requires that the decision of guilt should not stand. There is a real danger that the appellant has not received a fair trial.

[53] The appellants were arrested on 13 September 2008 and detained until 16 September 2008. After appearing before the Magistrate's Court they were remanded in custody. Applications for bail were subsequently made on behalf of all four appellants and these were heard by a number of Judges of the Court of Judicature.

[54] On 16 April 2009 applications on behalf of these two appellants were listed before Deeny J The application of Martin Murray was adjourned and Liam Murray was refused bail. Martin Murray's application was relisted before the trial judge on 14 May 2009, part heard and adjourned to 25 June 2009 when it was further part heard and adjourned to 30 June 2009 when the application was refused. At the hearing on 14 May 2009 Martin Murray's criminal record was opened to the judge and the judge commented on the serious contents of it. The judge was concerned about the issue of delay and when making his ruling commented that there had been delay. On 25 September 2009 the application for bail was renewed before the trial judge when references were made to the criminal record of Liam Murray and comparisons made. Thirteen months later the four accused were arraigned and pleaded not guilty and the trial fixed for later November. Early in November an application was made for the admissibility of bad character evidence in the trial. This was heard by the Disclosure Judge (Hart J). In view of the proximity of the trial this application was refused, the judge not being prepared to extend the time within which the

application should have been made. The defence regarded this as significant matter in their favour and that no opportunity should be afforded to the prosecution to renew the application. For the purposes of the further ground of appeal counsel and solicitor who were on record at the trial made affidavits and exhibited email exchanges about the time of and subsequent to the rejection of the bad character application. It appears that about that time the identity of the trial judge became known. It is clear that the solicitor instructing counsel was aware that the trial judge had heard applications for bail made by Martin Murray. He consulted with Martin Murray who raised with him the fact that the nominated trail judge had heard an application for bail. The solicitor emailed counsel inquiring whether there was an issue arising from the fact that he had heard applications for bail and asking him whether this should be raised at the application for the admission of bad character evidence to be made the following day. He discussed the issue with counsel that evening who advised that any decision should be made after the determination of the bad character application. After the bad character application had been rejected the matter was discussed again with counsel and it was not recommended that a recusal application be made as this would lead to an adjournment of the case and a subsequent bad character application. It was felt that if the judge had any recollection of the bail applications he would have mentioned it himself. The solicitor and counsel aver that the issue was discussed with Martin Murray before the commencement of the trial and a tactical decision was made not to make an application to the judge with which Martin Murray agreed. Martin Murray avers that this issue was never raised with him by either counsel or solicitor. However, on 22 October 2013 he told his present solicitor that when he discovered the name of the nominated trial judge he spoke to his earlier solicitor and informed him that he would not get a fair trial as a result of what had arisen during his application for bail. The appellant's accounts are not wholly consistent. In an affidavit Martin Murray averred that 'I did not want this judge to hear my trial but just thought that there was nothing that could be done about it and that was just my bad luck'. He also averred that following a bail application that his then counsel informed him that he was likely to be granted bail due to delay. "All the signs seem to suggest that bail was likely to be granted. This accorded with my own assessment as the application seemed to go well …". Counsel averred that this appellant was not shy about expressing his opinions and a portion of the bail transcript at the last hearing would tend to bear that out, as indeed does the appellant in his affidavit. Where the judge had not raised the matter of bail applications with counsel it could be assumed that the judge did not recall his involvement and counsel raising the matter with the trial judge would then bring the issue to his attention and thereby lead to the adjournment of the trial which counsel wished to avoid. Thus in the case of Martin Murray there was a tactical issue as to how to deal with the trial judge's involvement in the bail hearings and according to counsel the matter was discussed with him including the consequences of an adjournment of the trial and a renewal of the bad character application.

[55] Senior Counsel who appeared at the trial on behalf of Liam Murray was unaware of the disclosure at the bail application for Martin Murray that Liam Murray's criminal record had been referred to. Senior Counsel has indicated that he would have taken instructions from Liam Murray as to whether he wished him to make an application to the trial judge that he recuse himself. However, he makes clear that it is by no means certain that he would have advised that such an application be made. Although he felt that at time the trial judge was being unfair to his client he could not say in view of his acquittal of the more serious charges that the trial judge was unfair or biased against Liam Murray. Senior Counsel acknowledged that there was a prima facie case against his client on the murder and attempted murder charges and that there was a sufficiency of evidence to merit conviction on the charge of affray. At no time did he feel that the conviction was tainted by bias. He considered the sentence for affray was a stiff one but acknowledged that his client had to be assessed and sentenced under the provision of the Criminal Justice Order 2008 and that it was his belief that the judge considered his client's record to be a significantly aggravating factor.

[56] Mr Harvey QC and Mr Devine appeared on behalf of Martin Murray at the renewed hearing of the further ground of appeal. Mr Harvey made clear that there was no suggestion of actual bias on the part of the trial judge. Article 6 ECHR provided that a defendant was entitled to a fair hearing before an impartial tribunal. The sole question was, as he put it, whether it was possible to demonstrate a real possibility of latent bias. He accepted that the test was that laid down in Porter v Magill. He acknowledged the conflicting accounts but considered that this was not capable of resolution by cross-examination of those involved but if the matter was raised with the appellant it was done in the context of the circumstances (the rejection of the bad character application and the consequences of an adjournment). There was no reason to doubt counsel's recollection of the events or the reasons why decisions were made. However, there was a special responsibility on counsel where he is aware that the trial judge had heard application for bail. It was submitted that the circumstances disclosed a failure on the part of counsel and solicitor to take the initiative and provide the appellant with the necessary information to enable him to make an informed decision whether to proceed with the nominated judge or otherwise. Whether an adjournment of the trial to enable another judge to be nominated would have led to a further bad character application was speculative. This was a situation which should never have been allowed to happen and if the judge had been alerted he would have recused himself. He submitted that an ordinary observer knowing all the facts would have concluded that another judge should have been nominated to hear the case.

[57] Mr Berry QC and Mr Fox appeared on behalf of Liam Murray. They adopted the submissions made by Mr Harvey. Mr Berry stressed the primary concern was with the interests of justice and with it being undoubtedly and manifestly seen to be done. The judge was exposed to information which a trial

judge would not normally have received. It was submitted that it was not an answer that the judge was correct in his judgment.

[58] Mr Mooney QC submitted that a tactical decision was made by the lawyers and the appellant Martin Murray not to seek the recusal of the judge. In those circumstances he could not now allege that his trial was unfair. An impartial observer being aware of all the facts would have noted the acquittals entered by the trial judge as well as the late admission of Martin Murray that he had a knife despite his earlier denials. The judge found that it had not been proved that Liam Murray was aware of the knife, despite a conviction for manslaughter using a knife. In themselves the acquittals demonstrate a real lack of bias against either appellant. None of the matters referred to in the bail applications were used in the judgment to ground the convictions.

[59] Since the passing of the Northern Ireland (Emergency Provisions) Act 1973 Judges of the Court of Judicature have been called upon on a very regular basis to hear applications for bail. There has been a daily list of such applications (less so now due to legislative changes) with many applicants. The practice has been to assign a judge to hear the entire list and sometimes two judges and exceptionally more. Such applications give rise to three issues:

(i) will the accused appear at trial;

(ii) if released on bail is there a real risk of the commission of a criminal offence by him; and

(iii) if released is there a real risk that he may interfere with the investigation or with witnesses.

This is focus in any application for bail. Where an applicant has already been refused bail by a judge of the Court of Judicature any subsequent application must demonstrate a change of circumstance since the previous application, sufficient to warrant a different outcome. In the case of Martin Murray the applications before the trial judge were based on delay. It is perfectly understandable for a judge hearing a long list of applications or many applications during a legal year not to remember their details even a short time later. Once a decision is made the invariable tendency is to focus on the next case, putting the details of an earlier hearing out of the mind.

[60] The test for bias in a judge is: would a fair minded observer, having considered the relevant facts, conclude that there was a real possibility that the tribunal was consciously or sub-consciously biased – see Porter v Magill [2002] 2 AC 357. The relevant facts here are that the trial judge heard an application for bail by Martin Murray at which his criminal record and that of Liam Murray were disclosed. This was heard in April/May 2009 with a decision in September 2009. Ordinarily a judge who hears a bail application is not

nominated to be the trial judge in a trial without a jury. At the time of a bad character application before a different judge, solicitor and counsel became aware of the nominated trial judge. Consideration was given to an application to recuse but the rejection of the bad character application led to a tactical decision (to which Martin Murray was a party) that an adjournment might give the prosecution the opportunity to renew the application for the admission of bad character evidence, which evidence would have been detrimental to the accused. This was not speculative but highly likely. It is clear that the trial judge did not remember hearing the bail application as if he had he would have mentioned it to counsel. In a reasoned forensic judgment the trial judge found Martin Murray guilty of murder by stabbing Eamon Hughes, which stabbing by Martin Murray is not disputed and found him not guilty of two counts of Attempted Murder, in circumstances in which a prima facie case had been established in respect of them. He found Liam Murray not guilty of murder and two counts of attempted murder in circumstances in which a prima facie case in respect of each had been established, but found him guilty of affray in circumstances in which it was not disputed that he was one of the Murray group, that he journeyed in the taxi to Lisnahull Road, was on the road, was in the taxi when it was commandeered and when it was driven and collided with Martina and Emma Donaghy. In the judgment recording these verdicts there is no reference to any matter which was disclosed at any bail hearing. On the contrary there are ample grounds based on the evidence heard at the trial to justify them.

[61] In Hauschildt v Denmark 1989 12 EHRR 266 the applicant alleged that he had been denied a fair trial under Article 6(1) ECHR in circumstances in which the judge presiding at his trial and the judges who decided the case on appeal had already had to deal with the case at an earlier stage in the proceedings and had given various decision with regard to the applicant in the pre-trial process. It was alleged that these judges were not impartial. The Court held that the existence of impartiality had to be determined in accordance with a subjective test and an objective test. The subjective test based on the personal conviction of a particular judge in a given case and noted that in that case the applicant did not allege that the judges acted with personal bias. The court commented at paragraph 47 – "… the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof". Under the objective test it must be determined whether quite apart from the judge's personal conduct there are ascertainable facts which may raise doubts as to his impartiality. At paragraph 48 the Court observed –

> "[48] … This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is

> decisive is whether this fear can be held objectively justified."

In relation to the fact that the judges had made earlier pre-trial decisions the Court commented at paragraph 49 and 50:

> "[49] .. This kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.
>
> …
>
> [50] … Moreover, the questions which the judge has to answer when taking such pre-trial decisions are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether *prima facie* the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same. "

In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

[62] The Court went on to consider the decisions which the judges had to make pre-trial. These involved section 762(2) of the Administration of Justice Act. The application of this section required the judge to be satisfied that there is "a particularly confirmed suspicion" that the accused had committed the crime charged, that is a "very high degree of clarity as to his guilt". The Court found the impartiality of the court open to doubt. However, it is clear that it drew a distinction between decisions involving a degree of guilt and those involving decision like detention on remand involving a summary assessment of information then available.

[63] Thus the mere fact that a judge had already taken decisions before the trial could not of itself be regarded as justifying fears as to the impartiality of a judge. The issue of bias is fact-sensitive.

[64] In Datta v General Medical Council, a decision of the Judicial Committee of the Privy Council in 1985 Lord Griffiths made the following observation:

> "…Those entrusted with judicial or quasi-judicial functions must and can be trusted to try the case on the evidence before them and to put out of their minds knowledge arising out of any earlier appearance before them by the same accused person."

[65] In Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 the House of Lords considered the nature of the tribunal to be relevant. It was held that it could be assumed that a judge would be able to discount material which he or she had read and reach an impartial decision according to the law. At paragraph 23 Lord Rodger of Earlsferry stated:

> "In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartiality. Whilst those factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased."

[66] In President of the Republic of South Africa v South African Rugby Football Union 1999 4 AS 147 the Constitutional Court commented that the reasonableness of the apprehension of a lack of impartiality had to be assess in light of the judicial oath, which in this jurisdiction is 'to do right to all manner of people without fear or favour affection or ill-will'.

[67] Would a fair-minded observer knowing the facts of this case as they have been outlined above and with knowledge of the judicial oath and the duty and conduct of judges conclude that there was a real possibility of bias on the part of the trial judge in this case. No individual instance of bias, conscious or subconscious has been identified. The single most potent factor which militates against the existence of bias must be the findings of not guilty of serious charges in respect of which prima facie cases existed. We concluded that such

an informed observer would determine that no such bias has been made out in respect of either appellant and that each of the appellants received a fair trial.

[68] What this court is concerned with is the safety or otherwise of the convictions. Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in any other case. We have earlier in this judgment set out the principles that apply. We adopt the same approach. The failings of counsel may directly or indirectly lead to the conclusion that a conviction is unsafe. However, decisions made in good faith after proper consideration of the competing arguments and where appropriate after discussion with the defendant will not without more render a conviction unsafe, even where the court to disagree with the decisions. We are not persuaded that the decision of counsel in consultation with the appellant Martin Murray was wrong. It showed an awareness of the sensitivity of the situation and potential difficulties for the appellant in adopting a particular course. Indeed, the views expressed above by Senior Counsel who appeared at the trial but not on the appeal demonstrate that there can be two views about whether and in what circumstances an application should be made to a trial judge to recuse himself. This can clearly be a matter of tactical decision made in good faith.

[69] We have carefully examined all the evidence in this aspect of the appeal. In particular we have considered the judgment of the trial judge in light of the knowledge that he heard a bail application at which the usual disclosure of an applicant's and co-accused's background took place. We are not persuaded that the verdicts in this case are thereby unsafe nor do we have any sense of unease about their correctness. We grant leave to appeal on this issue and treat the hearing of the application as the hearing of the appeal and dismiss the appeals.