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**08/44421**

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**IN THE CROWN COURT FOR NORTHERN IRELAND SITTING AT LONDONDERRY**

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**THE QUEEN**

**–v-**

**JAMES OLIVER MEEHAN, BRENDA DOLORES MEEHAN and SEAN ANTHONY DEVENNEY**

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**SENTENCING: MINIMUM TERM**

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**McCLOSKEY J**

## I INTRODUCTION

**[1]** The indictment in this matter comprised three counts. The first alleged that all three Defendants murdered James McFadden ("*the deceased*") on 5th May 2007, in the County Court Division of Londonderry. The second alleged that, on the same date, all Defendants assaulted one Jason Graham, thereby occasioning him actual bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861. The third count asserted a freestanding charge of common assault, to the effect that the second-named Defendant, Brenda Dolores Meehan, assaulted Ashling McFadden on the same date. The Defendants, who are, in sequence, stepfather, mother and son and who all resided together at the material time, initially denied all the charges until the third day of trial, when, following rearraignment, the following revised pleas were made:

(a) James Meehan pleaded not guilty to murder but guilty to manslaughter.

(b) Sean Devenney similarly pleaded not guilty to murder but guilty to manslaughter – and, a little later, he entered a revised

plea of guilty in respect of the second count on the indictment viz. assaulting Jason Graham, thereby occasioning him actual bodily harm.

The not guilty pleas of the third Defendant, Brenda Meehan, to all three counts on the indictment remained unaltered throughout the trial.

**[2]** Following a trial lasting approximately two-and-a-half months, the jury, unanimously, returned the following verdicts:

(a) *James Oliver Meehan*: guilty of murder as a primary party and guilty of the Section 47 count.

(b) *Sean Anthony Devenney*: guilty of murder as a secondary party.

(c) *Brenda Dolores Meehan*: guilty of murder as a secondary party; not guilty of the Section 47 count; guilty of the common assault count.

I shall address later in this judgment the circumstances in which the primary party/secondary party distinction came about and its significance for each of the Defendants.

## II THE PROSECUTION CASE

**[3]** The evidence adduced by the prosecution invited the jury to consider three separate, though inter-related, phases of events. During the first phase, certain events unfolded at the Carlton Redcastle Hotel in County Donegal, a short distance from Londonderry. The final phase concerned the events which occurred at and in proximity to the address of the deceased in Moyola Drive in the Shantallow Estate of the city, both immediately prior to and at the time of his death. Evidence was also adduced relating to what might be described as an intermediate (second) phase, concerning (a) the taxi journey undertaken by all three Defendants from the hotel to their home in the Galliagh Estate in the city, (b) what transpired at this address (mainly by inference) and (c) the transit of the Defendants between this address and Moyola Drive.

**[4]** In summary, the prosecution sought to establish that all three Defendants instigated the critical events during the final phase of the sequence which culminated in the death of the deceased and the commission of the other two alleged offences. While joint enterprise on the part of the three Defendants in concert featured in the opening outline of the prosecution case to the jury, this was not further particularised in respect of the Defendants individually. The prosecution case was that there were very recent hostilities, at the Redcastle Hotel, between the two groups in question viz. the Defendants (on the one hand) and the injured parties and McFadden family members (on the other). The thrust of the case against the Defendants was that following this they determined to prolong these hostilities and

to achieve what they perceived to be revenge, in a deliberate, planned and calculated manner.

**[5]** The prosecution alleged, *inter alia*, that, upon returning home from the wedding reception, the Defendants changed their clothing and, effectively, hatched a plan to attack the deceased and others, which they duly implemented. This entailed, firstly, driving from their home to the vicinity of the home of the deceased. The prosecution contended that such explanation as had been proffered by the Defendants for their intentions, movements, direction of travel and, ultimately, presence at the scene of the offences was utterly implausible. It was alleged that the Defendants were waiting for their victims at a location adjacent to the victims' home, where they instigated a violent confrontation when the McFaddens and others returned home from the wedding. It was contended that the cause of death was a laceration of the heart, giving rise to a rupture. This, according to the prosecution case, was almost certainly caused by blows to the chest of the deceased – a forceful kick to the chest or stamping. In summary, it was contended that the deceased was the victim of a brutal and unprovoked attack.

**[6]** The Crown also adduced evidence of statements made by two of the Defendants (Brenda Meehan and Sean Devenney) immediately before and during a taxi transit from the wedding reception to their home, which were said to be indicative of a planned and determined attack. Evidence of the movements of the Defendants' vehicle immediately before and in the aftermath of the commission of the alleged offences was also adduced. There was, further, forensic evidence linking both the trousers and the boots worn by the Defendant James Meehan to the deceased. In addition, there was forensic evidence linking the tee shirt worn by the Defendant Sean Devenney to the deceased. Evidence was also led in an attempt to establish a deliberate scheme by the Defendants to dispose of contaminated clothing worn by them, in the aftermath of the killing.

**[7]** The salient aspects of the testimony of Professor Crane were these:

(a) The various injuries in the area of the right ear of the deceased were of a shape and pattern that were indicative of having been inflicted by the sole of footwear, from behind.

(b) Death was caused by three separate lacerations of important structures of the heart, inflicted either by a forceful kick to the chest or by stamping on the chest by a shod foot.

(c) There were fractures of the sternum and of several ribs, on both sides.

Both Professor Crane and Professor Adgey maintained that the heart injuries had been caused by blunt trauma. Professor Crane testified that the injuries had probably been caused by forceful kicking or stamping on the chest. Professor Crane's main report stated:

> "*The injury to the heart was somewhat unusual but similar injuries have been described in the literature due to blows to the chest. It seems likely that the mechanism of injury is a combination of direct impact and compression of the heart chambers leading to rupture. In this case it would seem probable that the injury was either due to a forceful kick to the chest or as a result of his chest having been stamped upon by a shod foot.*"

Both prosecution witnesses highlighted the extent and severity of the cardiac injuries, describing the blunt trauma to the chest wall as severe.

**[8]** The jury heard medical experts from both sides. On behalf of this Defendant, two issues in particular were ventilated. The first was whether the heart injuries could have been caused by a heavy fall, in the manner alleged by this Defendant, who made the case that while he was wrestling with the deceased, the latter fell over or through the hedge, face first, into the adjoining garden and this Defendant fell on top of him, following which there was no further physical contact of any kind between the two men. The gist of the evidence of Professor Crane and Professor Adgey was that having regard to the position, extent and severity of the deceased's heart injuries, they could not have been sustained in this way. This Defendant's medical expert, Professor Cassidy (State Pathologist, Republic of Ireland) promoted his case, to a limited extent only. She testified that she had never experienced heart lacerations of this kind occurring as a result of the type of fall alleged by this Defendant. In essence, she adhered to the view that, notwithstanding that this was unprecedented in her experience, it could possibly have occurred. I consider that by their verdict, the jury have plainly rejected this possibility. Given the somewhat diffident and plainly qualified terms in which it was mooted by Professor Cassidy and having regard to the evidence of Professor Crane and Professor Adgey for the prosecution, which strongly dismissed this possibility, I find this unsurprising. The second issue canvassed on behalf of this Defendant related to the fractured sternum and the five rib fractures: could any of these have been caused by trained ambulance or medical personnel, in the resuscitation attempts at the scene of the attack and subsequently in hospital? This suggestion was refuted strongly by the ambulance and medical personnel concerned. More important, all three professors were in agreement that whatever the cause of the fractured sternum and fractured ribs, these injuries (in the words of Professor Adgey) "*played no part whatsoever in the death*".

## III <u>THE DEFENCE CASE</u>

**[9]** Bearing in mind that all three Defendants denied the charge of murder from beginning to end of the trial, and taking into account the pleas of guilty to manslaughter of the first and second Defendants, which the jury ultimately did not accept, it is appropriate to juxtapose the jury verdicts of guilty against each of them with the defences proffered by them individually. I shall summarise these in the following paragraphs.

**[10]** The Defendant James Meehan testified that upon returning home from the wedding, the three Defendants (in his words) "*… decided to go up to Shantallow to try and sort it out*". His evidence regarding the events at Shantallow was that he walked towards the deceased, who raised a crutch in a striking motion. This gave rise to a physical struggle between the two men, resulting in the deceased going over a hedge, with this Defendant falling on top of him. This Defendant claimed that he did not strike the deceased with any blows. He made the case that he was acting in self-defence. He accepted that he contemplated the possibility of "*a bit of roaring and shouting and maybe a couple of punches thrown*", but denied that he had any intention to kill or seriously injure the deceased. He could not account for the presence of the deceased's blood on his boots or trousers. He could not explain the wound to the deceased's head. He admitted that it was he who orchestrated the concerted attempts to dispose of certain items of clothing, in the aftermath.

**[11]** The Defendant Brenda Meehan maintained initially in her evidence that the purpose of the car journey from their home was to purchase cigarettes. She effectively made the case that the encounter with the wedding bus and the Meehans was pure coincidence. She equipped herself with a piece of wood, before alighting from the vehicle and running towards the McFaddens. She denied committing any physical assault of any kind on anyone, though she admitted some kind of grappling with Ashling McFadden on the ground. She asserted an inability to describe in any detail the conduct of either James Meehan or the third Defendant, her son Sean Devenney. She later admitted that the purpose of the outing had been to go to Moyola Drive, to confront the McFaddens. She further accepted the evidence of certain prosecution witnesses regarding hostile and threatening utterances made by her at the scene.

**[12]** In his evidence, the third Defendant, Sean Devenney, testified that the purpose of the car excursion from the family home was "*… more to go and sort out what had happened at the wedding … it would just have been a few punches, roaring and shouting*". He maintained that he did not contemplate that anyone would suffer death or serious bodily injury. Upon alighting from the vehicle, he ran towards the McFaddens and Jason Graham, whom he punched from the side. Both then fell and he continued to attack him. He professed an inability to describe his stepfather's conduct at the scene, with the exception of some struggling with the deceased at the beginning of these events. He claimed that Jason Graham, rather than the deceased, was his personal target.

**[13]** The jury also heard evidence that following their arrest, the Defendants were extensively interviewed by the police. At a late stage of the interviews, a written statement made by each of the Defendants, individually, was submitted by their solicitors to the police. Evidence of the contents of these statements was adduced. The cross-examination of the Defendants highlighted significant inconsistencies between their evidence to the jury and their written statements. There were marked discrepancies, which the Defendants were unable to satisfactorily clarify or explain.

The sworn testimony of the Defendants was largely self-exculpatory. Any inculpatory admissions of inappropriate conduct or criminality were of a limited nature.

**[14]** I consider it clear that, by their verdicts, the jury have accepted the central core of the prosecution case and have rejected as untruthful and implausible the thrust of the defence advanced by each of the Defendants. Furthermore, the rejection by the jury of the two pleas of guilty to manslaughter is clearly indicative of their refusal to accept the essence of the case made by the first and second Defendants as set out in their Defence Statements, as amended during the trial, and in their sworn testimony, I consider that the sentencing of the Defendants must proceed on this basis.

## IV PUNISHMENT FOR MURDER

**[15]** The punishment for murder is fixed by law and consists of life imprisonment. The meaning of this has been explained repeatedly by both first instance and appellate courts. In ***Regina –v- Doyle*** [2004] NICA 33, the Court of Appeal stated:

> "**[15]** *The system of fixing minimum terms in life sentence cases was described with admirable clarity by Carswell LCJ in R v McCandless and others [2004] NICA 1. For those who wish to have a clear understanding of that system we commend the judgment in that case. Despite the precision of the explanation that the judgment contains, it is, sadly, evident that there remains a widespread misconception as to the essential features of the system …*
>
> **[16]** *As the judgment in McCandless makes clear, a minimum term fixed by a judge in a life sentence case does not represent the totality of the sentence imposed. Every adult convicted of murder in the United Kingdom must be sentenced to life imprisonment. This does not in practice mean that he will be detained for the whole of the rest of his life, save in a few very exceptional cases. Under the Life Sentences (Northern Ireland) Order 2001 a judge who sentences a person to life imprisonment is required to fix a minimum term that must be served by the prisoner before his release can be considered. This exercise involves the judge making an estimate of the period that is necessary to satisfy the requirements of retribution and deterrence …*
>
> **[17]** *What has perhaps been lacking in the past is a clear understanding that the judge does not fix the total term that a prisoner must serve. He decides what minimum period must be served before the prisoner's case is considered by the Life Sentence Commissioners under*

*article 6 of the 2001 Order. When the matter has been referred to them, under article 6(4)(b) the Commissioners must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined, and if they are so satisfied they will then direct his release, pursuant to article 6(3)(b) of the Order. Moreover, a life sentence prisoner when released does not obtain unconditional freedom. He is released on licence and will be subject to recall to prison if he breaches the terms of the licence. Finally, what has not emerged with sufficient prominence in press reports of this type of sentencing is that a minimum term sentence, unlike other determinate sentences passed by judges, is not subject to normal remission rules. Thus a minimum term sentence of, say, ten years is the equivalent of a determinate sentence of twenty years on which full remission is earned."*

**[16]** Thus the task of this court is to determine the minimum term, sometimes labelled "the tariff". This is explained in the statutory language as follows:

"*(1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.*

*(2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it*".

See Article 5 of the Life Sentences (Northern Ireland) Order 2001 ("*the 2001 Order*").

It is also instructive to recall the observations of Carswell LCJ in ***Regina –v- McCandless and Others*** (*ibid*) at paragraph [2]:

"*When a Defendant in a criminal matter is sentenced to imprisonment for life, that does not in practice mean that he will be detained for the whole of the rest of his life, save in a few very exceptional cases. He will ordinarily be released after a period has elapsed which is regarded as appropriate to reflect the elements of retribution and deterrence, provided it is no longer necessary for the protection of the public to detain him. The factual*

> *background of murder cases is infinitely variable and the culpability of individual offenders covers a very wide spectrum. Reflecting this variation, the terms for which persons convicted of murder have actually been detained in custody have accordingly varied from a relatively few years to very long periods, even enduring in a few cases to the rest of the offender's life*".

Notably, the Lord Chief Justice added, at paragraph [8]:

> "*We think it important to emphasize that the process is not to be regarded as one of fixing each case into one of two rigidly defined categories, in respect of which the length of term is firmly fixed …*
>
> *Not only is the Practice Statement intended to be only guidance, but the starting points are, as the term indicates, points at which the sentencer may start on his journey towards the goal of deciding upon a right and appropriate sentence for the instant case*".

As the Lord Chief Justice further observed, the statutory regime in this sphere has evolved during recent years, largely to reflect the requirements of the European Convention on Human Rights and Fundamental Freedoms and the relevant jurisprudence of the European Court of Human Rights.

**[17]** As a result of the decisions in ***McCandless*** and ***Doyle***, the selection of the minimum term in a murder case requires consideration of two different "starting points", which are, respectively:

(a) The "normal" starting point of twelve years.

(b) The "higher" starting point of fifteen/sixteen years.

The Practice Statement discussed in the decisions mentioned above was promulgated by Lord Woolf CJ on 31st May 2002, reported at [2002] 3 All ER 412. In ***McCandless***, Carswell LCJ stated:

> "*[10] … We consider that the levels laid down in the Practice Statement, which accord broadly with those which have been adopted for many years in this jurisdiction, continue to be appropriate for our society*".

In the same passage, his Lordship stated that the level of minimum terms prescribed in the Practice Statement "*… in our view represent a just and fair level of punishment to reflect the elements of retribution and deterrence*".

**[18]** The terms of the Practice Statement are reproduced in ***Doyle,*** where Kerr LCJ stated:

> **"[20]** *As in all manner of criminal offences, our courts have striven to achieve a measure of consistency in sentencing when fixing a minimum period to be served by those sentenced to life imprisonment. In* ***McCandless*** *the Court of Appeal adopted as a principal guideline the Practice Statement issued by Lord Woolf CJ on 31 May 2002 and reported at [2002] 3 All ER 412. This set out the approach to be adopted in respect of adult offenders in paragraphs 10 to 19: -*
>
> > *'The normal Starting Point of 12Yyears*
> >
> > *10. Cases falling within this starting point will normally involve the killing of an adult victim, arising from a quarrel or loss of temper between two people known to each other. It will not have the characteristics referred to in para 12. Exceptionally, the starting point may be reduced because of the sort of circumstances described in the next paragraph.*
> >
> > *11. The normal starting point can be reduced because the murder is one where the offender's culpability is significantly reduced, for example, because: (a) the case came close to the borderline between murder and manslaughter; or (b) the offender suffered from mental disorder, or from a mental disability which lowered the degree of his criminal responsibility for the killing, although not affording a defence of diminished responsibility; or (c) the offender was provoked (in a non-technical sense), such as by prolonged and eventually unsupportable stress; or (d) the case involved an overreaction in self-defence; or (e) the offence was a mercy killing. These factors could justify a reduction to eight/nine years (equivalent to 16/18 years).*
> >
> > *The Higher Starting Point of 15/16 Years*
> >
> > *12. The higher starting point will apply to cases where the offender's culpability was*

*exceptionally high or the victim was in a particularly vulnerable position. Such cases will be characterised by a feature which makes the crime especially serious, such as: (a) the killing was 'professional' or a contract killing; (b) the killing was politically motivated; (c) the killing was done for gain (in the course of a burglary, robbery etc.); (d) the killing was intended to defeat the ends of justice (as in the killing of a witness or potential witness); (e) the victim was providing a public service; (f) the victim was a child or was otherwise vulnerable; (g) the killing was racially aggravated; (h) the victim was deliberately targeted because of his or her religion or sexual orientation; (i) there was evidence of sadism, gratuitous violence or sexual maltreatment, humiliation or degradation of the victim before the killing; (j) extensive and/or multiple injuries were inflicted on the victim before death; (k) the offender committed multiple murders.*

*Variation of the Starting Point*

*13. Whichever starting point is selected in a particular case, it may be appropriate for the trial judge to vary the starting point upwards or downwards, to take account of aggravating or mitigating factors, which relate to either the offence or the offender, in the particular case.*

*14. Aggravating factors relating to the offence can include: (a) the fact that the killing was planned; (b) the use of a firearm; (c) arming with a weapon in advance; (d) concealment of the body, destruction of the crime scene and/or dismemberment of the body; (e) particularly in domestic violence cases, the fact that the murder was the culmination of cruel and violent behaviour by the offender over a period of time.*

*15. Aggravating factors relating to the offender will include the offender's previous record and failures to respond to previous*

*sentences, to the extent that this is relevant to culpability rather than to risk.*

*16. Mitigating factors relating to the offence will include: (a) an intention to cause grievous bodily harm, rather than to kill; (b) spontaneity and lack of pre-meditation.*

*17. Mitigating factors relating to the offender may include:*

*(a) the offender's age;*
*(b) clear evidence of remorse or contrition;*
*(c) a timely plea of guilty.*

*Very Serious Cases*

*18. A substantial upward adjustment may be appropriate in the most serious cases, for example, those involving a substantial number of murders, or if there are several factors identified as attracting the higher starting point present. In suitable cases, the result might even be a minimum term of 30 years (equivalent to 60 years) which would offer little or no hope of the offender's eventual release. In cases of exceptional gravity, the judge, rather than setting a whole life minimum term, can state that there is no minimum period which could properly be set in that particular case.*

*19. Among the categories of case referred to in para 12, some offences may be especially grave. These include cases in which the victim was performing his duties as a prison officer at the time of the crime or the offence was a terrorist or sexual or sadistic murder or involved a young child. In such a case, a term of 20 years and upwards could be appropriate'."*

**[19]** A significant feature of the present case is that the jury have returned verdicts that the second and third Defendants were guilty of murder *as secondary parties* (formerly known as accessories and sometimes described as aiders and abetters). In England and Wales, the Practice Statement, which has been adopted in this jurisdiction, has been overtaken by the statutory regime of Schedule 21 to the Criminal Justice Act 2003. In ***Attorney General's Reference No. 24 of 2008*** (***Sanchez***)

[2008] EWCA. Crim 2936, the English Court of Appeal considered the question of the application of this regime to secondary party murderers. It was specifically argued on behalf of the offender that the regime did not govern secondary parties. The court rejected this argument. Thomas LJ stated, at paragraph [33]:

> "*We cannot accept that submission. It is clear, not least on the judgment of this court in* ***Height and Anderson****, that the approach of a court to a sentence of life imprisonment for murder whether the offender is a principal or a secondary party is governed by the provisions of Schedule 21.*"

Although this statutory regime does not extend to Northern Ireland, it has its origins in the Practice Statement. Logically, it seems to me appropriate to hold that the extra-statutory regime which prevails in this jurisdiction applies to all those found guilty of murder, whether as primary or secondary parties. The correctness of this conclusion is reinforced by the terms of the Practice Statement and the related pronouncements of the Court of Appeal, the combined effect whereof is that this regime possesses the intrinsic adaptability and flexibility to cater fairly and proportionately for any person found guilty of murder as a secondary party. In particular, the culpability of the convicted murderer is one of the dominant themes of the regime and, plainly, where the jury verdict is guilty of murder as a secondary party the issue of culpability will invariably assume substantial prominence. In ***Sanchez***, Thomas LJ added:

> "*Furthermore, the type of case where one person inflicts violence, with one or more than one encouraging or assisting him, is not these days uncommon. Although the culpability of the secondary party may in many cases be less than the principal, the sentences must be viewed proportionately in the light of the policy of the law, that he who encourages the commission of a murder or assists with the commission is to be dealt with as a murderer*".

I consider that these sentiments apply fully to the regime prevailing in this jurisdiction. I would add that the correctness of the decision in ***Sanchez*** was not challenged by counsel representing the second and third Defendants.

**[20]** While the effect of Schedule 21 to the Criminal Justice Act 2003 is to establish a sentencing regime for murder which has more elaborate and seemingly more prescriptive features than its predecessor (which prevails in this jurisdiction), the English Court of Appeal have specifically cautioned that the sentencing court must be alert to avoid an excessively rigid or mechanistic approach. In ***The Queen –v- Peters and Others*** [2005] 2 Cr. App. R(s) 101, the Lord Chief Justice stated:

> "*[8] One problem arising from the legislative framework is that the sentencing court may approach the decision, or be*

> *invited to do so, as if the ultimate sentence represents a mathematical calculation. It does not …*
>
> *Too many factors interlink …*
>
> *In the final analysis, the true seriousness of the offence, which the minimum term is intended to reflect, inevitably represents a combination, and simultaneously a balancing, of all the relevant factors in the case.*"

His Lordship further emphasized the importance of determining the appropriate starting point at the beginning of the exercise: see paragraph [12]. The court also held that identification of the appropriate starting point is not influenced by the consideration that the intention of the offender was to cause really serious bodily harm, rather than death:

> "*[13] … an intention to cause serious bodily injury is a sufficient intention for murder and violence inflicted with such an attempt remains an offence of the utmost seriousness requiring the mandatory life sentence in the same way as murder resulting from an intent to kill. It has however long been recognised that, all other features of the case being equal, the serious of a murder committed with intent to kill is* ***normally*** *more grave and serious than one committed with intent to cause grievous bodily harm*".

[My emphasis].

The Lord Chief Justice added:

> "*[16] … It cannot be assumed that the absence of an intention to kill necessarily provides any or very much mitigation. It does not automatically do so.* ***That said, in many cases, particularly in cases where the violence resulting in death had erupted suddenly and unexpectedly, it will probably do so and it is more likely to do so, and the level of mitigation may be greater, if the injuries causing death were not inflicted with a weapon*****".**

While I have added some emphasis to this passage, as it may resonate in the particular circumstances of this case, the court will always have to balance the offender's state of mind, as inferred, with all other material factors, ultimately forming an overall judgment about the seriousness of the killing in question.

**[21]** Most recently, the importance of identifying appropriate distinctions between individual Defendants was highlighted in ***Attorney General's References Nos. 7, 8***

***and 9 of 2009*** [2009] EWCA. Crim 1490, where there were significant differences between the roles of the three Defendants in the appalling crimes which were perpetrated. The Lord Chief Justice emphasized:

> "*[33] … However, we must remember the difference between the three offenders. It is not right, nor would it be just, to cast all three of them in precisely the same role …*
>
> *They must not be sentenced for what happened … as a result of the activities of someone else in which they did not participate*".

The words "*or indirectly by encouragement*" must, however, be duly noted. Later, the Lord Chief Justice observed that the sentencing judge had borne in mind that she "*… had to reflect the relative criminality of each of the offenders within the overall criminality of the ordeal to which the victim was subjected*": see paragraph [73]. It is also appropriate to highlight the acknowledgement of the Lord Chief Justice that even where the sentencing is taking place within the ambit of definitive guidelines promulgated by the Sentencing Guidelines Council (and bearing in mind the related statutory provisions – which do not of course apply in this jurisdiction) the overarching obligation on the judge is "*to do justice in the circumstances of an individual case*", with the result that:

> "*Sometimes justice will require a more merciful sentence than a guideline level may indicate; sometimes a more severe one. Sometimes the facts of the case will not fit into the structure of any definitive guideline*".

See paragraph [37].

**[22]** In outlining the correct approach in principle to be applied to the threefold sentencing exercise to be performed in the present case, I would, finally, highlight the guidance to be derived from the decided cases on the question of taking into account the personal circumstances of and impact of sentencing upon the offender. This issue arises with particular focus in the case of the third Defendant, Brenda Meehan. In ***The Queen –v- Attuh-Benson*** [2005] 2 Cr. App. R(s) 11, a drug trafficking case, the court rehearsed extensively the personal circumstances of the offender – a married Ghanaian national, separated from her baby to whom she had given birth in prison and from her husband and other children, residing in Ghana, beset by ill health and other substantial personal difficulties. The offender was suffering from clinical depression and was a model prisoner. The Court of Appeal concluded:

> *"[25] Having borne in mind that the terms of the granting of leave by the full court and the possibility that they may have raised the appellant's hopes, we have considered*

> *whether or not this sentence should be reduced. There is no doubt that the sentence of 10 years is well within the existing guidelines for cases of this kind. However, given this appellant's particular difficulties which we do not need to rehearse in any greater detail, and given the way in which she has behaved within the prison system and her medical condition, we are satisfied that, as an act of mercy, some modest reduction in the sentence passed upon her is possible. Accordingly, the sentence of 10 years' imprisonment will be quashed and substituted for it will be a sentence of 8 years' imprisonment. To that extent and that extent alone this appeal succeeds."*

The above passage serves as a reminder of the observation of Lord Lane CJ in ***Attorney General's Reference No. 4 of 1989*** [1990] 1 WLR 41 that leniency is not in itself a vice. The Lord Chief Justice continued:

> "*That mercy should season justice is a proposition as soundly based in law as it is in literature*".

**[23]** In Northern Ireland, the most extensive treatment of this discrete issue is found in ***Attorney General's Reference No. 1 of 2006 [McDonald and Others]*** [2006] NICA 4, paragraphs [36] – [41]. While the invocation of personal family circumstances was unsuccessful in that case, it is evident that the Court of Appeal was disposed to accept, *in principle*, that a sufficiently severe impact on family members occasioned by the imprisonment of the offender could, exceptionally, justify the imposition of a custodial term shorter than that which would otherwise be appropriate. Most recently, in ***The Queen –v- Akman*** [2009] EWCA. Crim 1087, the English Court of Appeal, in deciding to depart from the SGC guidelines in a case of dangerous driving causing death (substituting a sentence of twelve months imprisonment for one of three years), took into account, *inter alia*, that a custodial sentence would be particularly onerous for the Defendant, having regard to his state of health.

## V JAMES MEEHAN

**[24]** There are two reports relating to this Defendant. I take into account his difficult and tragic childhood, as detailed in the report of Dr. Harbinson, consultant psychiatrist. This Defendant was aged six years when his father shot and killed his mother. He was the second youngest of eight children. As he grew older, it appears that he was an enterprising person and it seems that he was in regular employment. He asserted that he had been drinking throughout the day in question. Dr. Harbinson, while describing him as having a predisposition to heavy drinking, appeared to accept this as some kind of explanation for his conduct. However, this conclusion must now be considered in the light of the jury verdict, which has plainly rejected the core of Mr. Meehan's case, which he had recounted to Dr. Harbinson.

**[25]** This Defendant is not a person of good previous character. On 2nd February 2000, he was convicted at Londonderry Crown Court of two offences of assault occasioning actual bodily harm and common assault, both committed on 22nd July 1998. The offences arose out of an attack by this Defendant and two others on a male adult at a night club, which involved punching and head butting the victim. This was followed by the Defendant assaulting a second male adult, who was rendered unconscious. Although asserting self defence initially, this Defendant later pleaded guilty to both charges.

**[26]** This Defendant's criminal record is one of the matters considered in the pre-sentence report, which discloses that he continues to make a series of self-exculpatory assertions about his conduct which, in my estimation, are belied by the jury verdict. The author of the report states:

> "*These offences were clearly premeditated and, despite Mr. Meehan's denial, the depositions indicate that he confronted Mr. McFadden and Jason Graham in a violent and aggressive manner from the outset. The depositions also highlight that the Defendant acted in what could be described as an unconcerned manner following his vicious assaults on an innocent man and young boy in front of young children, worrying only about the potential consequences for himself if detected …*
>
> *While on the one hand Mr. Meehan suggests he could have handled the situation differently at the point of his approach to the victims in this case, it is clear that he puts responsibility on them for what he sees as instigating the initial animosity and over- reaction. Clearly, he is taking little or no responsibility for his behaviour, the murder of Mr. McFadden or the assault on Jason Graham*".

I would highlight also the author's observation that this Defendant's perception of his previous convictions "*… demonstrates a limited acknowledgement of the inappropriateness of his behaviour with his main focus being on the consequences for himself rather than others*". This sounds on the issue of remorse, upon which I shall comment further presently.

**[27]** In his submissions on behalf of this Defendant, Mr. McCartney QC (appearing with Mr. Talbot) entered *certain* caveats about the pre-sentence report, which I have duly noted. However, it seems to me that those aspects of the report with which issue was taken are not of central importance and do not bear on the crucial issue of this Defendant's interaction with the deceased at the material time. The passages highlighted in paragraph [26] above contain a mixture of factual statement and evaluative judgment. As regards the former, I am satisfied that there is an adequate evidential foundation. As regards the latter, the evidential

foundation is relevant, added to which I have no reason for questioning the professional assessment of the author. Moreover, no conflicting professional assessment was laid before the court. At this juncture, at the end of a lengthy trial, and duly equipped with all the information now available, the professional assessment upon which I propose to act seems to me both balanced and sustainable.

**[28]** The verdict of the jury that this Defendant was guilty of murder as a primary party distinguishes him from the other two Defendants. At the conclusion of the trial, before retiring to consider their verdicts, the jury were instructed that the case against this Defendant was that he was guilty of murder as a primary party, having inflicted a forceful kick or kicks or stamping to the chest of the deceased, giving rise to certain lacerations and ruptures of important structure of the heart which caused his death. By their verdict the jury have plainly accepted the prosecution case and have concluded that this Defendant possessed the necessary *mens rea* viz. an intention to kill the deceased or to inflict serious bodily injury on him.

**[29]** On behalf of the prosecution, Mr. Connell submitted that the higher of the two Practice Statement starting points applies to this Defendant, by virtue of two factors:

(a) The vulnerability of the victim.

(b) The extensive injuries inflicted on the victim.

The first of these submissions highlighted the substantial differences between the respective physiques and bodyweights of the two adults concerned. To this it may be added that this Defendant was patently carrying out a planned and determined attack, while, in sharp contrast, his victim was caught unawares, unaided by any prior warning; was accompanied by his wife and four young children, one of them walking on crutches due to injury; and, immediately beforehand, had been preoccupied by the condition of his youngest child, who had been physically sick on the footpath. Furthermore, the dimensions of the threat posed by this Defendant and the planned, determined and violent nature of his intentions are amply confirmed by the reactions of the second oldest child, who threw one of her crutches to her father. It was common case throughout the trial that this occurred. I am satisfied that the conduct of this Defendant (amply supported and aided by the other two Defendants) provoked shock and fear in Mr. McFadden and instilled sheer terror in Mrs. McFadden and the four McFadden children. The image readily conjured up is one of a marauding attacker, ready and determined to engage in acts of extreme violence directed to a sole victim, Mr. McFadden. This assessment is reinforced by the evidence of various eye witnesses (members of the McFadden family, neighbours and an assortment of onlookers) which, in my view, the jury have implicitly accepted. I consider paragraph 12(f) of the Practice Statement ("*The victim was a child or was otherwise vulnerable*") to be couched in deliberately non-prescriptive and flexible terms. The court is enjoined to have regard to the particular facts and circumstances of the individual case. Approached in this way, I

find that the victim, Mr. McFadden, was especially vulnerable in the circumstances prevailing.

**[30]** I further find that, having regard to the injuries inflicted on Mr. McFadden, summarised in paragraph [7] above, paragraph 12(j) of the Practice Statement is potentially engaged. However, taking into account the principled framework set out exhaustively in paragraphs [15] – [20] above, a conclusion that the higher starting point of 15/16 years applies does not follow inexorably from these findings. Rather, the court is required to adopt a broad and panoramic approach, unconstrained by rigid prescriptions and categories. In determining this issue, I have reflected particularly on the opening sentence of paragraph 12 of the Practice Statement which, in my view, both dominates and informs what follows, coupled with the immediately succeeding words. Furthermore, I must bear in mind that the ensuing list of factors is neither prescriptive nor exhaustive. I consider that this Defendant's culpability was unquestionably high and I find without hesitation that Mr. McFadden was in a vulnerable position, for the reasons elaborated above. However, I believe that paragraph 12 is directed to killings belonging to a more elevated plane of abhorrence and repulsion. While I consider this Defendant's case to be positioned very close to the borderline separating the two categories, I propose to resolve the misgivings which I have about this matter in his favour. I am also alert to the need to avoid an inappropriately mechanistic mindset. Adopting this approach, I conclude, albeit by a narrow margin, that the normal starting point of twelve years applies to this Defendant.

**[31]** Having thus concluded, in the determination of the minimum term of imprisonment to be served by this Defendant the court is now required to consider the question of aggravating and mitigating factors. With reference to paragraph 11 of the Practice Statement, and taking account of the jury verdict, I consider that this case does not belong to the margins of the borderline separating murder and manslaughter. Furthermore, this was plainly not a case of over-reacting in self defence and there was no provocation (in the non-technical sense). Having regard to the respective physiques of this Defendant and the deceased, coupled with the absence of any real warning of attack, and the availability of substantial and energetic support from the other two Defendants, this was, in my view, an unbalanced and unequal physical contest between two male adults. This Defendant was plainly the aggressor and the deceased had no real prospects of effectively defending himself. The prosecution portrayed this attack as a vicious and brutal assault on a relatively defenceless person. I consider that the jury verdict is consistent with an acceptance of this depiction of this Defendant's conduct. The offending of this Defendant entailed, in my view, a high degree of culpability. I consider the submission to the contrary to be confounded by the evidence laid before the jury and upon which they have presumptively returned their verdict. Furthermore, the killing of Mr. McFadden has deprived his wife and four children, who are aged twelve to eighteen years, of a loving and devoted husband and father for the remainder of their lives. The impact on the McFadden family was manifest

throughout the trial and is discernible also in the sad and poignant language of the victim impact statements.

**[32]** I find that the offending of this Defendant is aggravated by three factors:

(a) The first is planning and premeditation. It is unequivocally clear, in my view, that the attack on Mr. McFadden was planned and premeditated. The seeds of the plan can be traced to the utterances of the Defendant Brenda Meehan during the taxi journey from the wedding reception to the Defendants' home, which she did not challenge. The conduct of all Defendants at their home and during the phase which ensued immediately thereafter, namely the vehicle transit from their home to the scene of the murder, demonstrates clearly that what followed subsequently was a planned and premeditated attack. This conclusion flows not only from the progressive admissions made by the Defendants during their evidence at the trial but also the evidence of a series of witnesses who described in detail the movements of the Defendants' vehicle immediately prior to the attack and the conduct of the Defendants when their vehicle halted at the scene. To this one must add the manifest implausibility of their initial claims that they drove from their home for the innocent purpose of making some purchases. These claims were plainly mendacious.

(b) The second aggravating factor is the impact of the killing of Mr. McFadden on his family. A devoted wife and four relatively young children have been deprived of a husband and father for the remainder of their lives. This profound loss is exacerbated by the circumstance that the attack which brought about Mr. McFadden's death was carried out in their presence. Furthermore , by virtue of the ferocity of the attack perpetrated by this Defendant and the violence and aggressions of the other two Defendants, Mrs. McFadden and her children were helpless and unable to assist the victim in consequence.

(c) The third aggravating factor is this Defendant's relevant criminal record: see paragraphs [25] – [26] above.

**[33]** The mitigating factors urged on the court by Mr. McCartney QC were spontaneity, this Defendant's childhood and family circumstances, his good working record, the destruction of his family life, his preparedness to accept some responsibility for the killing and the suggestion that the death was the product of an intoxicated quarrel between two male adults. While I have already acknowledged the salient features of this Defendant's upbringing and have sympathy with him in his respect, they do not, in my view, constitute a mitigating factor properly so-called viz. a consideration which serves to reduce this Defendant's high degree of culpability for the deliberate and brutal killing of Mr. McFadden or to moderate the seriousness of his offending. Further, while I have considered the issue of alcohol

consumption, this does not, in my view, qualify as a mitigating factor, having regard particularly to the calculated planning evidenced by this Defendant's conduct from the time when he returned home from the wedding until his violent confrontation with Mr. McFadden. As I have already observed, the suggestions of a lack of premeditation and pure coincidence were exposed as self-serving and manifestly untruthful when all three Defendants gave evidence. While I do not underestimate the impact of a lengthy period of imprisonment on this Defendant, I do not consider this to be one of those exceptional cases where a shorter period of incarceration should be measured, having regard to the principles outlined in paragraphs [22] – [23] above.

**[34]** As regards the other factors urged on the court as mitigating features, I consider that there is a substantial gap between the limited degree of responsibility enshrined in this Defendant's Defence Statement and his evidence (on the one hand) and the jury verdict (on the other). The suggestion that Mr. McFadden's death was precipitated by a drunken quarrel between two adults seriously underplays and distorts the true picture, as my earlier comments and assessments make clear. This Defendant's culpability was indisputably of an elevated nature, from the beginning to the end of the attack on Mr. McFadden. Furthermore, while I am disposed to accept that this Defendant's initial intention was to inflict serious bodily injury, this is offset by the brutal and prolonged nature of the attack and the injuries sustained by the deceased. This assessment is reinforced by this Defendant's determined willingness to carry out an attack of extreme violence against Mr. McFadden in the presence of his wife and young children, his hasty retreat from the scene and the callous disregard with which he treated his victim.

**[35]** The pre-sentence report relating to this Defendant indicates an absence of genuine remorse. I balance this with the statement in Dr. Harbinson's report that this Defendant "*… shows considerable remorse for his offending*". However, Dr. Harbinson's report predates the trial, is relatively uninformed and is notably uncritical. Furthermore, it is based on a self-serving account of events which was exposed at the trial as implausible and untruthful in many respects and simply cannot survive the jury verdict of guilty of murder as a primary party. In addition, Dr. Harbinson was evidently unaware of this Defendant's criminal record. Statements in the report such as "*He is adamant that they had no plans to confront the McFadden family … He had no intention of being aggressive … When he got out of the car James McFadden swung a crutch at him … He would deny any planning or intent to cause James McFadden serious injury or death …*" are, in the light of all the evidence (including that of this Defendant) and the jury verdict, simply unsustainable. Moreover, in the light of the trial, its outcome and all the information presently available, I am unable to share the strong degree of sympathy for this Defendant expressed in the final paragraph of Dr. Harbinson's report. On this discrete issue, I consider that the dominant emotion is self pity, rather than true remorse.

**[36]** I find that there are aggravating factors of substance which are counterbalanced to a very limited degree only by some mitigation in this

Defendant's favour. I conclude that the minimum term necessary to satisfy the requirements of retribution and deterrence having regard to the seriousness of this Defendant's offending is fourteen years imprisonment. I impose a sentence of three months imprisonment, to operate concurrently, in respect of the verdict that this Defendant was also guilty of the second count in the indictment. Thus the effective minimum term is fourteen years imprisonment.

## VI SEAN DEVENNEY

**[37]** This Defendant pleaded guilty to the manslaughter of Mr. McFadden on the basis that he went to Moyola Drive as part of a joint enterprise, intending to cause some harm to others but not having an intention to kill or to cause serious bodily harm. He asserted that he did not contemplate that he or anyone else would inflict serious bodily harm on Mr. McFadden or kill him. Before the jury began considering their verdict, they were instructed that the prosecution put their case against this Defendant in the alternative. Their primary case was that this Defendant was directly and personally involved in the fatal attack on Mr. McFadden, with the requisite state of mind. Alternatively, the prosecution contended that if the jury were to conclude that this Defendant was not a direct participant in the fatal attack, he was nonetheless guilty of murder on the basis that he assisted or encouraged James Meehan or Brenda Meehan, or both of them, to kill Mr. McFadden, coupled with the requisite state of mind. By their verdict of guilty of murder as a secondary party, the jury have clearly accepted the *alternative* prosecution case.

**[38]** When interviewed by the Probation Officer in compiling the pre-sentence report, this Defendant indicated that he "*… accepts responsibility for Mr. McFadden's death in that he feels he started a chain of events by his inappropriate comment*". This limited acknowledgement of responsibility is demonstrably inconsistent with the jury verdict. Furthermore, his protestation that alcohol consumption "*… played a major role in his behaviour …* " is not easily reconciled with his sworn testimony. During his examination-in-chief, alcohol ingestion did not really feature and there was no attempt to suggest that this was a cause of any lack of self-control. When cross-examined, this Defendant stated that he had been drinking at the wedding reception but had not drunk anything since 10.00pm i.e. several hours before the fatal events. The pre-sentence report suggests that this Defendant "*… presented as remorseful for his behaviour*". However, it is difficult to find in the body of the report any foundation for concluding that there is genuine remorse.

**[39]** The report of Dr. O'Kane, consultant psychiatrist, must also be considered. This report contains the following quotation attributed to this Defendant:

> "*Mr. McFadden wasn't in my focus that night. It was Jason Graham and I thought I had settled my score with him when we both fought it out of our system. I am bewildered that I find myself*

> *in this situation when I felt no malice towards that man. I am culpable in that I became involved in a situation where someone died but it was not my intent to kill anyone.*"

In a later passage, Dr. O'Kane records an assertion by this Defendant that he is "… *deeply remorseful …* [and] *describes distress at the impact on Mr. McFadden's family and his own family as a result*". Albeit with a certain degree of hesitation, I accept that this Defendant has some genuine remorse for his actions.

**[40]** On behalf of this Defendant, Miss McDermott QC (appearing with Mr. Reel) submitted, praying in aid especially paragraphs [2] and [11] of ***McCandless***, that the appropriate starting point is one of twelve years, which should be substantially reduced on account of this Defendant's lesser degree of culpability, as evidenced by the jury verdict and the suggestion that this case resides around the margins of the boundary separating murder from manslaughter. It was further submitted that this offender's culpability is mitigated by his age at the time, the involvement of his adult parents and his remorse and that this Defendant's plea of guilty to manslaughter was indicative of some acceptance of responsibility for Mr. McFadden's death.

**[41]** Having regard to the decision in ***Sanchez*** and the starting point which I have determined in respect of the first Defendant, James Meehan, the point of departure in relation to this Defendant must logically be a term of twelve years imprisonment. Paragraph 11 of the Practice Statement suggests that this can be lowered where the offender's culpability is "*significantly reduced*". In my view, having regard to the evidence adduced at the trial and the verdict of the jury that this Defendant is guilty of murder as a secondary party, his case falls within paragraph 11. I accept that this Defendant's main target was Jason Graham, though this acknowledgement must be tempered by the consideration that, by his conduct, this Defendant minimised the possibility of any intervention in aid of the deceased. The jury have clearly found that he provided encouragement to the primary offender, Mr. Meehan, by his presence and conduct and, further, that he provided some assistance, in the same way. I accept that throughout the events his contemplation was the infliction of serious bodily injury, rather than death. Bearing these factors in mind, I consider it appropriate to reduce the normal starting point to one of eight years.

**[42]** I am disinclined to regard this Defendant's criminal record as an aggravating factor, having regard to the circumstances in which his offending occurred and the nature of the offences committed. While the commission of these offences constituted also a breach of this Defendant's bail conditions, prior to the commencement of this trial, he has already been punished for this by the revocation of bail. However, I consider his offending to be aggravated by its planned and premeditated nature and the considerations pertaining to the McFadden family and the deceased, set out in paragraphs [31] and [32] above. A combination of his age at the material time (nineteen years), his good working record and some remorse for what occurred qualifies, in my view, as mitigation to a certain extent. However, I

consider that the balance of aggravating and mitigating factors pushes the notional pendulum in an upwards direction.

**[43]** This Defendant is also to be punished in respect of the second count on the indictment viz. the Section 47 assault perpetrated against Jason Graham, to which he pleaded guilty from the outset. I consider that this conduct differs in no way from the conduct giving rise to the jury's verdict that he was guilty of the murder of Mr. McFadden as a secondary party. Furthermore, both offences combined to constitute a single transaction. For these reasons, concurrent, rather than consecutive, sentences are indicated. I conclude that for this Defendant the minimum term of imprisonment appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of his offending is nine years. I impose a sentence of imprisonment of one year in respect of the second count. These sentences will operate concurrently. Thus the effective minimum term for this Defendant is nine years imprisonment.

## VII <u>BRENDA MEEHAN</u>

**[44]** The prosecution case against this Defendant was advanced in essentially the same manner as the case against Sean Devenney. The primary case was that this Defendant had participated directly and physically in the attack on Mr. McFadden, bringing about his death, coupled with the requisite state of mind. The alternative case was that this Defendant had assisted or encouraged either James Meehan or Sean Devenney, or both of them, to kill Mr. McFadden. The jury verdict of guilty as a secondary party indicates clearly that the secondary prosecution case has prevailed.

**[45]** In this respect, it is appropriate to recall paragraph [12] of the ruling of the court rejecting the submission of no case to answer on behalf of all Defendants:

> "*The collection of principles belonging to the framework of the doctrine of joint enterprise fall to be considered, having regard to the portrayal of the prosecution case against the Defendants Brenda Meehan (in particular) and Sean Devenney (in the alternative to the suggestion that he is liable as a principal party). I have already adverted to this briefly in paragraph [5] above. I begin with the exposition contained in the opinion of Lord Bingham in* ***The Queen – v- Rahman*** *[2008] UKHL 49:*
>
> *'THE CRIMINAL LIABILITY OF ACCESSORIES*
>
> ***[7]*** *In the ordinary way a Defendant is criminally liable for offences which he personally is shown to have committed. But, even leaving aside crimes such as riot, violent disorder or conspiracy where the involvement of multiple actors is*

*an ingredient of the offence, it is notorious that many, perhaps most, crimes are not committed single-handed. Others may be involved, directly or indirectly, in the commission of a crime although they are not the primary offenders. Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.*

***[8]*** *English law has developed a small number of rules to address this problem, usually grouped under the general heading of "joint enterprise". These rules, as Lord Steyn pointed out in R v Powell (Anthony), R v English [1999] 1 AC 1, 12, [1997] 4 All ER 545, 162 JP 1, are not applicable only to cases of murder but apply to most criminal offences. Their application does, however, give rise to special difficulties in cases of murder. This is because, as established in R v Cunningham [1982] AC 566, [1981] 2 All ER 863, 145 JP 411, the mens rea of murder may consist of either an intention to kill or an intention to cause really serious injury. Thus if P (the primary offender) unlawfully assaults V (the victim) with the intention of causing really serious injury, but not death, and death is thereby caused, P is guilty of murder. Authoritative commentators suggest that most of those convicted of murder in this country have not intended to kill.*

***[9]*** *As the Privy Council (per Lord Hoffmann) said in Brown and Isaac v The State [2003] UKPC 10, para 8:*

> *'The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability.'*

*It is (para 13) "the plain vanilla version of joint enterprise". Sir Robin Cooke had this same simple model in mind when, giving the judgment of the Privy Council in Chan Wing-Siu v R [1985] AC 168, 175, [1984] 3 All ER 877, [1984] 3 WLR 677, he said:*

> *'. . . a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling,*

> *inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert.'*

*Countless juries have over the years been directed along these lines, the example of a bank robbery in which the masked robbers, the look-out man and the get-away driver play different parts but are all liable being often used as an illustration. In this situation the touchstone of liability is the intention of those who participate.*

***[10]*** *But there is what Sir Robin Cooke in Chan Wing-Siu v R, p 175, called a "wider principle". In R v Powell (Anthony), R v English, above, as Lord Hutton made plain in the opening sentence of his leading opinion (p 16), the House had to consider a more difficult question: the liability of a participant in a joint criminal enterprise when another participant in that enterprise is guilty of a crime, the commission of which was not the purpose of the enterprise. In the first appeal, that of Powell and Daniels, three men (including the two Appellants) had gone to the house of a drug dealer in order to buy drugs, but when he had come to the door one of the three men (it was not clear which) had shot him dead. Since neither Powell nor Daniels could be identified as the gunman, they could be convicted only as accessories, but it was submitted on their behalf that they could not be convicted as accessories unless it was proved against them, to the criminal standard, that they had had the mens rea necessary for murder, namely an intention to kill or to cause really serious injury. An accessory could not, it was argued, be convicted on a basis which would not suffice to convict the primary killer.*

***[11]*** *While acknowledging an element of anomaly in its decision (Lord Steyn, p 14; Lord Hutton, p 25), the House rejected that submission. Drawing on a strong line of authority which included R v Smith (Wesley) [1963] 3 All ER 597, 128 JP 13, [1963] 1 WLR 1200; R v Anderson; R v Morris* [1966] 2 QB 110*, [1966] 2 All ER 644, 130 JP 318; Chan Wing-Siu v R, above; Hui-Chi-ming v R* [1992] 1 AC 34*,* [1991] 3 All ER 897*, [1991] 3 WLR 495; and McAuliffe v R (1995) 69 ALJR 621 the House held (p 21) that "participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another*

*participant in the enterprise". Thus the House answered the certified question in the appeal of Powell and Daniels and the first certified question in the appeal of English by stating that (subject to the ruling on the second certified question in English) "it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm". Thus in this context the touchstone is one of foresight."*

*Lord Bingham also noted that in* ***The Queen –v- Smith (Wesley),*** *at pp. 1206/1207 –*

*... it had been recognised that a radical departure by the primary killer from the foreseen purpose of an enterprise might relieve a secondary party of liability'."*

I also refer to paragraphs [13] – [16]. In the same ruling, I concluded that it was appropriate to allow the jury to determine whether this Defendant had been guilty of the murder of Mr. McFadden as a principal party: see paragraphs [28] – [31]. The ruling continues:

"**[32]** *There are two further possible bases of liability for murder to be considered, as regards this Defendant. The first is that she aided and abetted the murder, in the sense that she provided assistance and/or encouragement. The second is that the murder was the culmination of a joint enterprise, to which this Defendant was a party. The question is whether there is sufficient evidence at this stage of the trial to leave the final determination of these issues to the jury also.*

**[33]** *I shall consider, firstly, the issue of assistance and/or encouragement. Here, the spotlight is mainly, though not exclusively, on the conduct of this Defendant at the scene of the offences – since her anterior conduct, as alleged, could also inform the jury's consideration and determination of these issues. The evidence of Ashling McFadden that this Defendant (a) attacked Jason Graham with her wooden weapon and (b) pushed the witness to the ground falls to be considered. It is also appropriate to consider the evidence of numerous witnesses about this Defendant's aggressive, threatening utterances at the scene and her aggressive conduct in other respects: see paragraph [19](i), (j), (k), (l), (m), (n), (o), (p) and (q). This includes evidence that this Defendant had to be restrained from re-entering the*

*gateway of the McFaddens' home. Having regard to all this evidence, I consider that it will be open to the jury to conclude that this Defendant was an active, armed aggressor throughout the events at Moyola Drive, from the moment when she "jumped" [a term employed by several witnesses] out of the family vehicle until her return to it.*

**[34]** *Furthermore, there is evidence that all of the three female McFaddens felt compelled to go and seek help and that two of them (and possibly all three, (depending on the jury's final view) did so before the incident terminated. The jury could, on all of this evidence, find that this Defendant actively assisted James Meehan, by (a) participating in disabling Jason Graham (whose evidence was that he was trying to help Mr. McFadden), (b) attacking Ashling McFadden, and (c) deterring and discouraging any possible defensive interventions by the three McFadden ladies, to the extent that they were driven to run to fetch help. According to the evidence, she was the only armed person at the scene. Taking all of these factors into account, the jury could conceivably conclude that her conduct either assisted or encouraged - or both assisted and encouraged - James Meehan in his commission of the alleged murder. Furthermore, as a matter of law, conduct of this kind is potentially sufficient to constitute this Defendant guilty of murder as a secondary party: see Smith and Hogan, Criminal Law [12th Edition], pp 191-193].*

**[35]** *The relevant mens rea, in this respect, is a twofold intention:*

> *'It must be proved that D intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime. There are two elements – an intention to perform the act capable of encouraging or assisting and an intention, or a belief, that that act will be of assistance [in facilitating the principal offender's conduct]'.*

*[Smith and Hogan, **Criminal Law**, 12th Edition, p. 194].*

*There is a third mental element involved. Taking into account the specific nature and features of the present case, this constitutes a requirement of proof that the secondary party was aware of the essential aspects of the conduct of the alleged principal party: see the exposition of this*

*discrete requirement in Smith and Hogan (op. cit.) at pp. 201-202 especially:*

> *'In summary, D must know:*
>
> *(i) The conduct element of P's offence, although not all of the details of when, where etc. the commission of the* ***actus reus*** *will occur;*
>
> *(ii) As to consequences, D cannot know of them before they arise, but he must foresee the possibility (not merely a probability) of the offences occurring; [and]*
>
> *(iii) The fact of P's* ***mens rea****. Thus, if D foresees/knows that P might beat V up, but does not foresee/know that P will perform that action with the intention of killing or causing V grievous bodily harm, D will not have knowledge of the 'essential matters' comprising the principal offence of murder.'*

*As the authors further observe, there is no requirement that the secondary party (D) be possessed of the same mens rea as the principal party (P).*

*Clearly, proof of these matters to the requisite degree will require the jury to make appropriate inferences, based on the evidence of this Defendant's conduct both before and during the events at Moyola Drive. In this discrete context, I discount the evidence of her conduct following departure from Moyola Drive. In my view, there is sufficient evidence to leave all of these matters to the jury. The evidence is sufficient, in my view, to enable the jury to properly conclude that both the actus reus and the mens rea are satisfied, in the portrayal of this Defendant as guilty of murder from this particular perspective.*

**[36]** *Finally, I turn to consider the state of the evidence against this Defendant from the perspective of joint enterprise. As stated by Lord Bingham in* ***Rahman****, the touchstone in this context is that of foresight. In this respect, the submissions on behalf of this Defendant and the Defendant Sean Devenney coincide. It is argued that while some degree of physical force on the part of James Meehan was foreseeable, and could be found by the jury to have been actually foreseen by them, the nature and severity of the*

*physical force which, on the Crown case, brought about the death of Mr. McFadden lay outwith this ambit. In my view, having regard to all the evidence, it will be open to the jury to find otherwise. There is sufficient evidence to support findings that this was a determined revenge mission, a planned ambush, a calculated venture designed to inflict serious bodily injury on the deceased, in circumstances where the Defendants' passions were inflamed, they were enraged, their judgment was impaired by consumption of alcohol and their honour had been insulted.*

**[37]** *The jury will also be entitled to take into account the membership of the two groups. As regards the McFaddens, this will include the predominantly female gender of the older members, the youthful ages of Ashling and Danielle and the tender ages of the two younger brothers. Furthermore, the main male member of the McFadden group, Mr. McFadden, has been described in the evidence as a person of light bodyweight and slight physique. On the other hand, the membership of the Defendant's group consisted of a large burly male, formerly employed as a "bouncer" (James Meehan), a younger male who had earlier boasted that he had been involved in boxing for twelve years (Sean Devenney) and an armed female (Brenda Meehan), all duly clad for the occasion. I consider that the evidence of these matters sounds properly on the questions of common purpose and venture and the foresight of the alleged secondary parties. Furthermore, while Mr. Montague draws particular attention to the absence of any evidence of when or where the joint enterprise was hatched or what its precise terms were, I consider that it will be open to the jury to make appropriate inferences in this respect. I would further observe also that it is not submitted that evidence of the aforementioned kind is an essential ingredient in a murder of this character and I concur with the absence of any submission to this effect. Accordingly, I am satisfied that there is sufficient evidence to allow the jury to determine whether this Defendant should be convicted of murder on the basis of joint enterprise."*

These passages serve to illuminate the context within which the jury verdict against this Defendant of guilty of murder as a secondary party is to be understood and evaluated.

**[46]** I have considered the various reports and materials relating to this Defendant. When interviewed by the Probation Officer, this Defendant effectively

abandoned the myth that the outing in the family car following the wedding had been designed to purchase cigarettes, acknowledging that "*… she had intended to confront those who had hurt her son*". She further acknowledged arming herself with a piece of wood. The author of the report comments:

> "*These offences were clearly premeditated and evidence Mrs. Meehan acting in a violent and aggressive manner from the outset*".

This Defendant asserted that she "*… feels sorry for Mr. McFadden's widow and family*". There is no assessment of this issue in the report. According to the report of her general medical practitioner (Dr. Boyle), she had previously exhibited depressive symptoms and these reappeared following her arrest, culminating in an overdose of medication and a hospital admission in January 2009, successfully treated by medication. The history provided by this Defendant to Dr. Harbinson, who examined her on 2nd September 2009, discloses a resurfacing of the "innocent confrontation" and "pure coincidence" theories, indicative of a reluctance to accept full responsibility for her subsequent conduct and an attempt to minimise her culpability. While she claimed to be remorseful, the victims who emerge most clearly from the account provided by this Defendant to Dr. Harbinson are this Defendant's youngest children, who are aged ten and eight years respectively. This Defendant has expressed substantial concerns about their welfare and future, which I accept. I further accept that her depressive condition continues.

**[47]** On behalf of this Defendant, Mr. Montague QC (appearing with Mr. Lindsay) emphasized in particular his client's lesser degree of culpability, flowing from the jury verdict. He also highlighted the catastrophic impact on the younger Meehan children of their mother's convictions, the depression from which she has been suffering, the loss of the family home by arson, the positive testimonials in her favour, the difficulties which she has suffered in her adult relationships and the widespread opprobrium to which she has been subjected. It was further submitted that her conduct lay close to the borderline separating the offences of murder and manslaughter.

**[48]** As in the case of Sean Devenney, I consider that the point of departure for this Defendant is a minimum term of twelve years imprisonment. I must then give effect to paragraph 11 of the Practice Statement, since the evidence adduced against this Defendant and the jury verdict impel to the conclusion that her culpability for the death of Mr. McFadden is significantly less than that of the first Defendant, Mr. Meehan. I further consider that her acts of encouragement and assistance, which must have formed the basis of the jury verdict, belong to a level of gravity somewhat below that applicable to the second Defendant, Sean Devenney. Moreover, I am satisfied that, in her case, the contemplation both in advance of and throughout the incident was one of serious bodily injury. Fortunately for this Defendant , given the not guilty verdict on the second count , there is no proven allegation that she made

use of the wooden implement with which she equipped herself. For all these reasons, I consider that a starting point of six years is appropriate.

**[49]** In the balancing of aggravating and mitigating factors ,I consider , firstly , that this Defendant's offending is aggravated by its planned and premeditated nature, the act of equipping herself with a wooden baton and the considerations bearing on the McFadden family and the deceased, set out in paragraphs [31] and [32] above. I am prepared to accept that she has some remorse for her actions. However, I find that there is no other factor which truly mitigates the seriousness of her offending or her culpability for her actions.
The final question to be addressed in this Defendant's case is whether I should give effect to the principles outlined in paragraphs [22] and [23] above relating to the impact of imprisonment on the offender and the offender's personal circumstances. I acknowledge that the court should give effect to these principles only in exceptional circumstances. In some respects, it is difficult to imagine a more unique case. The younger Meehan children must be viewed by this court in a humane and compassionate manner. Almost incredibly, they have abruptly been deprived of both parents and the association of their older brother. They will now be reared by other adults. Their upbringing will take place in an unnatural environment. I consider that I must also take into account the pain, anguish and shame which this will inevitably inflict on their mother, this Defendant. On balance, the seasoning of justice with mercy seems to me appropriate in these highly unusual circumstances.

**[50]** I conclude that in the case of this Defendant, the minimum term appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offending and taking into account the various factors which I have highlighted is five years. As regards the conviction made against this Defendant in respect of the third count on the indictment, an additional penalty is plainly inappropriate, applying the reasoning set out in paragraph [43] above and the absence of any injury to the victim. I shall deal with this by imposing a sentence of one month's imprisonment, to operate concurrently. I would add that were it not for the exceptionality generated by the assessment in the preceding paragraph, I would have determined that the minimum term should be one of seven years. Thus the effective minimum term for this Defendant is five years imprisonment.

## IX CONCLUSION

**[51]** To summarise:

(a) James Meehan will serve a minimum term of imprisonment of fourteen years and a further term of three months, both sentences to operate concurrently, operative from the date when he surrendered to lawful custody, with credit given for all pre-verdict remand custody.

(b) Sean Devenney will serve a minimum term of imprisonment of nine years and a further term of one year, both sentences to operate concurrently, operative from the date of the verdicts, with credit given for all pre-verdict remand custody.

(c) Brenda Meehan will serve a minimum term of imprisonment of five years and a further term of one month, both sentences to operate concurrently, operative from the date of the verdicts, with credit given for all pre-verdict remand custody.

[See McCandless , paragraph 52].

**[52]** The effect of the legislation in this jurisdiction is that all of the Defendants will remain in prison for the whole of the minimum term determined in their cases individually. At the end of the minimum terms, the Defendants will not automatically be released from prison. Rather, the date of their release will be a matter for the Life Sentence Commissioners. They will form a judgment about this matter in the future, duly assisted by the information and reports available to them. They will authorise the release of the Defendants only if they consider it appropriate to do so. Such authorisation will be given only when the Commissioners are satisfied that the continued detention of the Defendants is no longer necessary for the protection of the public from serious harm. The Defendants will have an opportunity to contribute to these important decisions in due course. This court has no further role in the punishment of the Defendants after today.

**[53]** Finally, it is appropriate to record the dignified and stoical conduct of the members of the McFadden family throughout a lengthy and painful trial. They are to be commended for this. I have read in full the victim impact statements submitted on their behalf. These are couched in poignant terms and disclose a picture of acute human suffering and sadness. They are also noteworthy for their balanced and under-stated terms. I have considered these statements fully in the difficult sentencing exercises which have been performed concerning the three Defendants. The efforts of all those who strove to save Mr. McFadden's life and who came quickly and willingly to the aid of Mrs. McFadden and her children, including the young men whose actions may provide some spiritual comfort for the McFadden family, are also deserving of the utmost admiration.