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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

v

MICHAEL MASSEY AND LUKE HAWKINS

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STEPHENS J

Introduction

[1] Michael James Massey and Luke Hawkins on Tuesday 4 December 2007 on the sixth day of your trial a second count was added to the indictment. You were then both arraigned on that count and you each pleaded guilty to the offence of conspiracy to wound contrary to Section 20 of the Offences Against the Person Act 1861 and Section 9 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983. The particulars of the offence being that on 20 August 2005 in Newtownards, County Down, you conspired together with other persons not before the court to wound Jonathan Hillier.

[2] Under the first count on the indictment you had been jointly charged that you had each attempted to murder Jonathan Hillier on 20 August 2005. You were arraigned in relation to that count on 17 November 2006 and pleaded not guilty. After you each had pleaded guilty to the new count on the indictment no evidence was offered by the prosecution in relation to the first count and accordingly I entered verdicts of not guilty in relation to the charge that you each had attempted to murder Jonathan Hillier.

Factual background

[3] The factual background has been outlined to this court at some length by Mr Kerr QC on behalf of the prosecution when opening the case at the start of the trial. The injured party, Jonathan Hillier, was a taxi driver operating in the Newtownards area. At 12.20 am on 20 August 2005 Mr Hillier's taxi was

third in line at a taxi rank in Regent Street, Newtownards. Both of you were waiting for a taxi but ignored the first two taxis at the taxi rank. You both got into Mr Hillier's taxi. You, Luke Hawkins, got into the front passenger seat and you, Michael Massey, got into the rear of the vehicle. You, Michael Massey, then made a mobile telephone call and you were heard to say, "That's us, we will be there in a few minutes". There was discussion in the taxi to the effect that you were both going to a party. Mr Hillier was directed to an address at 8 Stirling Avenue in the West Winds estate, Newtownards. It did not look to Mr Hillier that a party was in progress at that address. He parked his taxi in a small car parking area. You, Luke Hawkins, then got out of front passenger seat and went around the front of the taxi towards the driver's side. Neither of you participated in the actual physical attack that then ensued. Mr Hillier was aware of something behind him. He heard a bang and noise consistent with glass breaking. He became alarmed and decided to reverse his vehicle but observed a small blue car blocking his path from behind. He attempted to drive over the pavement to his front but was unable to drive away from the scene. He then ran from Stirling Avenue and as he did so he heard shots. He felt numbness and pain. He ultimately arrived at 10 Cumberland Park in the West Winds estate. He had gunshot wounds to his neck and left chest. It subsequently transpired that he had a pneumothorax in his left chest. He also had a fracture of the transverse process of his first thoracic vertebrae and a fracture of the inferior aspect of the seventh cervical vertebrae. Two bullets were removed under local anaesthetic.

[4] In advance of today's hearing the factual basis of the prosecution case, to which you have both pleaded guilty, has been set out in a written submission to the court ("the submission"). The submission was made available to your respective counsel, Mr. John McCrudden Q.C. and Mr. Adair Q.C. It has been agreed as being accurate by your counsel in an amended form.

[5] I set out that part of the submission which deals with the factual basis of the prosecution case to which you have pleaded guilty.

1. The prosecution accepted a plea of guilty of conspiracy to wound contrary to section 20 of the Offences Against the Person Act 1861.
2. The prosecution say that by their plea both acknowledge that they were aware of and knew that the (injured party) was to be subjected by others to a physical attack which might be sufficiently serious to cause wounding to him.
3. They agreed to and did lure the (injured party) to the location where the attack took place and they informed their co conspirators that the (injured party) was on his way to that location.
4. It is accepted that they are not proved to have known the exact nature of the attack nor intended that it would definitely cause wounding or

serious harm. But equally they knew and agreed and intended that he would be attacked in such a way that a wounding injury *would* be caused.

[6] The factual basis of the plea was articulated on a somewhat different basis by Mr McCrudden Q.C. on behalf of you Michael Massey as follows:-

1. The plea of guilty by the accused Massey to the count of conspiracy to wound, is entered on the basis that he was - as is evidenced by his plea - party to an understanding that the injured party be *assaulted*, and, that in his (Massey's) contemplation, the said injured party might sustain a wound, i.e., the breaking of skin, but no more than that.

2. The actus reus of the offence, on Massey's part, is his being party to the said understanding and nothing more.

3. There is no evidence that a shooting attack – far less any such as was actually later visited on the injured party by his assailant or assailants - was, premeditatedly, connived at by the accused, or agreed to by him, nor is there any evidence that it was even contemplated by Massey as a possible incident of another or others going outside the assented to compact.

4. Massey is only responsible for, and culpable in respect of, the criminal *conspiracy* as hereinbefore described.

5. There is of course nothing to suggest that the accused Massey was ever to physically carry out *the assented to* assault (far less any greater assault)

[7] Mr Kerr accepted that the emphasised word "*would*" in paragraph 4 of the submission was a typographical error for "*could*". All the parties then accepted that there was no substantive difference between the two descriptions of the factual basis for your pleas of guilty. Accordingly I accept the contents of the submission with that amendment and also the contents of the factual basis of the plea as articulated by Mr McCrudden. I will proceed to impose sentence on that factual basis and that basis alone.

[8] In outlining the facts I also note that on 20 August 2005 after leaving Mr Hillier's taxi in Stirling Avenue you both made your way to the house in Bristol Park in the West Winds estate of the brother-in-law of you, Luke Hawkins. You stayed at that house until approximately 2.00 am and when you were leaving the house to get into a taxi you were both spoken to by a police officer. You were both standing together and you, Luke Hawkins, told the police officer that you had been at a party at that house in Bristol Park and

had been there since 10.00 pm. Neither of you made any mention of the incident in Stirling Avenue.

[9] On 23 August 2005 you both voluntarily attended at Newtownards police station stating that you both had been passengers in Mr Hillier's taxi and were witnesses to what had occurred in Stirling Avenue. You were both arrested and taken to the Serious Crime suite at Antrim Police Station. You both gave accounts during interview consistent with you being innocent passengers. You both stated that you thought that the shots were being directed at you and so you ran away. Neither of you made any admissions to the police as to the role that you did in fact play in these events.

[10] In the course of these proceedings you, Michael Massey, then incorporated your answers to the police interviews as a part of your original and amended defence statements. You, Luke Hawkins, did not seek to correct, alter or add to your answers during interview. The first formal indication of any change in either of your accounts was when you pleaded guilty to count 2 on 4 December 2007.

Personal circumstances

[11] I take into account the background of you, Michael James Massey. You are now 22 years of age having been born on 15 July 1985. You were 20 at the time that you committed this offence. You live in Newtownards. You come from a stable and supportive family. Since leaving school you have been in regular employment. At the time that this offence was committed you were in employment with a local firm who manufacture and fit UPVC windows. Your employer has indicated that your job is still available to you. I accept that you have a good work record. As a juvenile you associated with a negative peer group who would have consumed alcohol at weekends. Your alcohol consumption increased in 2002. You have attempted to reduce your alcohol consumption and to distance yourself from negative peer groups. You have tried to engage in more constructive use of your time. You regret the impact which your behaviour has had upon your mother and sister. You have yourself identified a need to address anger management and you acknowledge that your consumption of alcohol has created problems for you in that you are likely to act impulsively without thought for the consequences.

[12] I take into account the personal background of you, Luke Hawkins. You are also now 22 years of age having been born on 20 September 1985. You were 19 at the time that you committed this offence. You live with your parents in Newtownards. You have a supportive family background and your parents remain supportive though they do not condone your behaviour. As a teenager you moved beyond the control of your parents and frequently stayed out of the family home for days at a time without permission as you associated with a criminal peer group and misused alcohol and prescription

drugs. In addition you used cannabis daily and cocaine on a weekly basis. You have completed a drug/alcohol awareness course from which you say you have benefited. Your behavioural problems disrupted your schooling. Since leaving school you have had a number of casual jobs but have been unemployed for the past 3-4 years.

Attitude to the offence and risk of further offending

[13] The probation officers in preparing their pre sentence reports found that it was not possible to analyse the risk of harm to the public nor the likelihood of re offending by virtue of the fact that neither of you discussed the current offence. There is no evidence before the court as to the attitude of either of you or as to your motives for committing this offence.

Injuries sustained by the victim and victim impact

[14] I do not take into account the actual injuries that were in fact sustained by Jonathan Hillier. Those injuries were caused by other unknown persons. I repeat that the conspiracy to which you have both pleaded guilty was a conspiracy to wound contrary to Section 20 of the Offences Against the Person Act 1861. It was not a conspiracy to attack Mr Hillier in the manner in which he was attacked nor was it a conspiracy to cause the injuries which he in fact sustained. The degree of injury which you both conspired to facilitate on the basis that it might occur was far less than the injuries that were actually sustained. I take into account that lesser level of injury.

[15] A statement from Mr Hillier dated 3 January 2008 has been made available to me setting out the damaging and distressing effects that have resulted from the violent attack that was in fact perpetrated upon him. One of the constituent elements of the punishment that I impose on you both is retribution for the offence that you have committed. In that respect the statement is to be taken into account but on a strictly limited basis. It is only those effects which have been caused by the crime which you committed that should be taken into account. The degree of injury which was contemplated in the conspiracy was far less than the degree of injury actually inflicted upon Mr Hillier. One has to separate out, and I do, the fear and apprehension actually caused to Mr Hillier, which I do not take into account, from the fear and apprehension that he would have suffered if the offence to which you have pleaded guilty was the only offence perpetrated against Mr. Hillier.

Sentencing guidelines

[16] There was a perception in this case, and perhaps a general perception, that the increases in the maximum sentence on conviction on indictment for an offence under section 20 of the Offences Against the Persons Act 1861 brought about by Article 4(1) of the Criminal Justice (No 2) (Northern Ireland)

Order 2004 only applied where the offence was aggravated by hostility under Article 2 of that Order. Furthermore that perception also applied in relation to all the other increases purported to be affected by Article 4 of the 2004 Order and in particular in relation to the maximum sentences for offences under section 47 of the Offences Against the Persons Act 1861. This perception was based on the fact that the maximum sentences in England and Wales for an offence under Section 20 was 5 years unless the separate offence under sections 28 and 29 of the Crime and Disorder Act 1998 as amended by the Anti Terrorism, Crime and Security Act 2001was committed, which is a section 20 assault racially or religiously aggravated. Only in the latter case would the maximum be 7 years. Accordingly when this case was first listed for plea and sentence all counsel stated that the maximum sentence for your offence was 5 years. At that stage I observed that there did not appear to me to be any limitation on the increase in the maximum sentence in respect of any of the offences listed in Article 4 of the Criminal Justice (No 2) (Northern Ireland) Order 2004, and specifically, for the purpose of this case no limitation on the increase in the maximum sentence in respect of Section 20 offences under Article 4 (1). I adjourned to permit further consideration of this issue. I acknowledge the assistance provided by counsel.

[17] The prosecution now submits that the increase in maximum sentence affected by Article 4(1) of the 2004 Order is of general application and is not limited to cases involving the aggravating feature of hostility under Article 2. Your counsel maintained that the maximum sentence without any element of hostility is still 5 years. They call in aid the explanatory notes to the 2004 Order. Those notes refer to two consultation papers. The first is a consultation paper issued by the Northern Ireland Office in 2002 entitled "Race Crime and Sectarian Crime in Northern Ireland" and the second is a "separate public consultation" in 2003 entitled "Road Traffic Penalties in Northern Ireland".

[18] Mr John McCrudden QC accepted that Article 4(1) of the 2004 Order if taken on its own was unambiguous and clear but contended that there was ambiguity if the Order was read as a whole and particularly when considering Article 2 with Article 4. I consider that Article 4 of the 2004 Order is unambiguous and clear. The increases in sentence are not limited to only those cases in which the court finds hostility under Article 2. Article 4 has not been drafted to refer to Article 2. I consider that Article 2 puts on a statutory footing a strong message that the features listed, that is motivation towards a person's race, religion, sexual orientation or disability, *shall* be treated by a court as an aggravating feature and that this *shall* be stated in open court. This is a combination of a clear message and the removal of discretion.

[19] When considering what approach to adopt in view of the fact that I do not consider that there is any ambiguity I have had regard to the decision of Girvan J in *F A Wellworth & Co v Philip Russell Limited* [1996] NI 558. The issue

raised in that case was the interpretation of a provision in the Licensing (Northern Ireland) Order 1990 requiring "notice of the application to be displayed on or near the premises for which the licence is to be sought". It was argued this required, although not expressly stated, the notice to be displayed in a place where it could be conveniently read by the public. Girvan J stated at page 564:-

> "Where a statutory provision falls to be construed and applied by the court the court's task is ascertain the meaning of the words used and when ascertained to apply them. If the words of the statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural meaning. As Lord Parker CJ stated in *R v Oakes* [1959] 2 QB 350 at 354—
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> > '... where the literal reading of a statute ... produces an intelligible result ... there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament.'
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> In *Gwynne v Burnell* (1840) 7 Cl & Fin 572 at 696 Lord Brougham said:
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> > 'If we depart from the plain and obvious meaning on account of such views [as those pressed in argument on the statute], we in truth do not construe the Act but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the Legislature could easily have supplied, and are making the law, not interpreting it.'
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> However, if the alternative lies between either supplying by implication words which appear to have accidentally omitted or adopting a construction which deprives certain existing words of all meanings it is permissible to supply the words.
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> In this case, in relation to the wording in para 1(b) the words as used produce a perfectly intelligible and workable result. A requirement to display the relevant notice 'on or near the premises' can easily be understood and complied with. It would have been open to the legislature to add the words which appear in the 1964 Act or the words used in the 1985 Order (although incidentally it may be noted that the wording in the 1964 Act differs somewhat from the wording used in the 1985 Order and the subtle difference may give rise to a somewhat different effect). It would be mere speculation to ascribe a reason to the decision to word the provisions of para 1(b) differently. When a statutory provision prescribes a defined procedure which must be complied with to confer a jurisdiction on the court it is particularly

> important that a party seeking to fulfil the procedure should know precisely what is required of him and in such a case it would be particularly inappropriate to ascribe a speculative interpretation to the statutory provision."

Applying the principles set out by Girvan J in that case I conclude that the words used in Article 4(1) of the 2004 Order produce a perfectly intelligible and workable result. Accordingly I hold that the Article 4(1) increase in maximum sentence is not limited to cases in which the aggravating feature of hostility is present under Article 2. I would have so held in respect of every increase in Article 4.

[20] In arriving at that conclusion I also bear in mind that in England and Wales the maximum sentence upon summary conviction in the Magistrates' Court for an offence under section 20 is 6 months imprisonment. However by virtue of Article 46 of the Magistrates' Court (Northern Ireland) Order 1981 the maximum sentence which can be imposed upon summary conviction of a section 20 offence is 12 months imprisonment. Therefore there is already a substantial disparity in the sentencing powers between England and Wales and Northern Ireland where the offence is prosecuted in the Magistrates' Court. I do not consider that it would be anomalous for the maximum sentence for section 20 offences on conviction on indictment to be 7 years in Northern Ireland and only 5 years in England and Wales.

[21] I also bear in mind that Article 4 of the 2004 Order also purports to affect an increase in the maximum penalty for dangerous driving. If the increases in sentences in Article 4 are to be limited to cases in which the aggravating feature of hostility is to be present then one would have to have a situation where dangerous driving could be aggravated by that feature. It is hard to conceive of such a situation. Mr McCrudden accepted one could not have dangerous driving aggravated by hostility.

[22] Accordingly I hold that the maximum sentence for an offence under section 20 of the Offences Against the Persons Act 1861 was increased from 5 years to 7 years by Article 4 (1) of the Criminal Justice (No. 2) (Northern Ireland) Order 2004. This increase in sentence came into effect in respect of offences committed on or after 28 September 2004 by virtue of the commencement provision of the 2004 Order. Article 1 (2) provides that the Order will come into operation 2 months from the date of the Order being made. The Order was made on 27th July 2004 and therefore came into operation on 28 September 2004. The maximum sentence remains at 5 years in England & Wales. An increase was also made in Northern Ireland to the maximum sentence under section 47 of the Offences Against the Persons Act 1861. The maximum sentence for conviction on indictment for the offence of assault occasioning actual bodily harm is increased from 5 years to 7 years and the maximum sentence for conviction on indictment for common assault (contrary to section 47) is increased from 1 year to 2 years. Again the

maximum sentences were not increased in England & Wales. The maximum sentence for conspiracy to commit a statutory offence is the same as for that offence. Accordingly the maximum sentence in your case is a sentence of imprisonment of 7 years.

[23] The Court of Appeal in *R v McCartney* [2007] NICA 41 made it clear that sentencing courts should take into account statutory increases in sentences. Starting points after a statutory increase in sentence should be revised upwards to take account of the new increased maximum.

[24] I consider that I should revise upwards any previous starting points to take account of the new increased maximum. That I should bear in mind the differences in maximum sentences when considering decisions in England & Wales. That I should bear in mind the increase to the statutory maximum when considering any sentence past in Northern Ireland in respect of an offence committed prior to 28 September 2004.

[25] There are a number of methods of revising upwards the starting points to take account of the new increased maximum sentence. For instance, to take account of the percentages increase in the maximum and apply that percentages increase in respect of the starting point for the offence. Alternatively, as in *R v Saunders* [2000] 1 Cr App R 458, that it would be appropriate to consider adding the amount of the increase onto the sentence which would otherwise be appropriate. I consider that that later approach would not be appropriate generally in respect of offences under Section 20. It may be an appropriate method of dealing with an offence under Section 20 which has the aggravating feature of hostility under Article 2 of the 2004 Order. I consider that when dealing with offences under Section 20 which do not have the aggravating feature of hostility under Article 2 of the 2004 Order that I should bear in mind in a general way the percentages increase in the maximum sentence.

[26] Mr Kerr QC, who appeared on behalf of the prosecution with Mr Gary McCrudden, indicated that cases in Northern Ireland dealing with Section 20 at Appeal level are rare. He observed that those reported are normally associated with other offences. He referred me to the following Northern Ireland cases *R v Thomas Samuel Tourish* [2003] NICA 40, *R v Terence Joseph Ritchie* [2003] NICA 45 and *R v Joanne Elizabeth Mitchell* [2005] NICA 30. He also referred me to Blackstone's Criminal Practice 2008 at paragraph B2.41 and to the decision of the Court of Appeal in England and Wales in *R v Jason Brown* [2001] 2 Cr App R (S) 14. Mr John McCrudden QC who appeared with Mr McCreanor for you, Michael James Massey, in addition referred me to *R v Malcolm Robertson* [1998] 1 Cr App R(S) 21. Mr Adair QC, who appeared with Mr Chambers, for you, Luke Hawkins, indicated that the Courts of Appeal in Northern Ireland and England & Wales have only considered offences of Section 20 wounding on a very limited number of occasions. Mr Adair

observed that the cases which had already been identified to the Court were so factually different to the instant case as to be of very limited assistance, save that it was submitted that they highlighted that in each of those cases the defendants' culpability was much greater than that of yours in this case.

[27] The primary submission made by Mr John McCrudden and Mr Adair was that for a principal convicted of an offence under Section 20 an appropriate sentence on a plea would be in the region of 2 years imprisonment with the upper end of the acceptable bracket of sentencing being 3 years. Mr John McCrudden relied on a passage in *R v Malcolm Robertson* [1998] 1 Cr App R(S) 21, a decision of the Court of Appeal in England & Wales, in support of that proposition. That was a case in which the defendant pleaded guilty to unlawful wounding. The defendant was drinking in a public house when he attacked a man by thrusting a beer glass into the left side of his face. The glass broke and caused wounds to the victim's face though there was no lasting damage to the victim. The defendant had been drinking. The whole incident in the public house occurred in a very short period of time. The defendant and the victim were not known to each other. Prior to striking the victim the defendant had said "Do you want to be scarred?" That was a feature suggesting that the defendant had in mind a deliberate attack, albeit, by his plea, whatever he intended he did not intend to cause really serious harm. The facts also established that it was not a planned attack or a pre meditated attack. The defendant was suffering from anxiety by reason of uncertainties in relation to his job. It is also clear that he was having difficulty controlling his drinking. His only previous conviction was an offence of driving whilst he had excess alcohol in his blood. The defendant consistently expressed genuine remorse. The defendant had recognized that he had a serious alcohol problem. Not only had he recognized it, but he was addressing it. He was sentenced to two-and-a-half years' imprisonment. The Court of Appeal stated

> "The position in our judgment is that, in the light of those authorities, the Court should look with some care at sentences over two years' imprisonment for an offence under section 20 to see whether in truth there is a real justification for a sentence of the length in question on the facts of the particular case."

The sentence was reduced from 30 months to 2 years imprisonment.

[28] Mr. John McCrudden also relied upon a passage from *R v Jason Brown* [2001] 2 Cr App R (S) 14, another decision of the Court of Appeal in England & Wales. That was a case in which the defendant was convicted of inflicting grievous bodily harm contrary to section 20 of the Offences Against the Persons Act 1861 and of cruelty to a child. The victim of the offence was the appellant's son, aged six weeks at the time. The defendant was a man of

previous good character who had been acquitted of causing grievous bodily harm with intent. His acts, as found by the jury, were described by a paediatrician as consistent with the acts of an exasperated parent on an isolated occasion due to loss of temper. The Court of Appeal had reached the conclusion that this was an act of substantial violence on a six-week-old child which caused brain damage leading to developmental deficit. There was no plea of guilty and the whole incident lasted about two-and-a-half-hours in all. The defendant had been sentenced to 3 years imprisonment. The Court of Appeal concluded that:-

> "This sentence is at the upper end of the acceptable bracket of sentencing."

[29] I consider that the facts of this case are entirely different from the facts of *R v Jason Brown* and *R v Malcolm Robertson*. Accordingly I do not consider that in England & Wales I would be bound by a bracket of 2 – 3 years for the offence before me or alternatively there would be a real justification for a sentence in excess of 2 – 3 years. In addition the maximum sentence in England & Wales is lower than the maximum sentence in Northern Ireland and accordingly I do not consider that those authorities are applicable in Northern Ireland. Ordinarily they would be very persuasive, if not binding, by virtue of the decisions of the Court of Appeal in Northern Ireland in, for instance, *R v Orr* [1990] NI 287. Applying a percentages increase based on the increase in maximum sentence would put the guidelines in the cases in England and Wales up from an upper end of the acceptable bracket of 3 years to a figure of approximately 4 years and 8 months. If I am wrong in either of those conclusions I consider that there are a number of aggravating factors that take this case out of that bracket.

Procedural requirements for a custodial sentence

[30] Pre sentence reports from Jacqueline Nicholson and Mary Cumming, both probation officers, have been made available to me and I have considered them in accordance with the provisions of Article 21 of the Criminal Justice (Northern Ireland) Order 1996. In determining your respective sentences I have borne in mind the provisions of Article 19(2) (a) and Article 19(4) of the Criminal Justice (Northern Ireland) Order 1996. I consider that the offence which you have both committed is so serious in its content that only a custodial sentence is justified and that, given that your offence was a violent offence, I also consider that only such a sentence will be adequate to protect the public from serious harm from both of you. I am of that opinion for the reasons set out in this judgment. I emphasise that you both have committed a serious offence. You are both a danger and a risk to others.

Aggravating features in relation to the offence

[31] Public Place. The conspiracy was for an assault to take place in a public place.

[32] Breach of trust. The conspiracy that you both carried out had as one of its constituent elements advantage being taken through your deceit of the trust of your intended victim. You both were persons in whom Mr Hillier had placed his trust by virtue of his employment as a taxi driver. Mr Hillier's job, as a taxi driver, performing a service to the public, requires him to trust those persons who engage his services. He, and all taxi drivers, are vulnerable to breaches of that trust particularly outside ordinary working hours at night and in the early hours of the morning. They have no security precautions or protection. They work on their own. Their jobs take them on occasions to isolated areas with which they are unfamiliar. They can be removed from areas where there is a significant police presence to areas in which they are particularly vulnerable to attack. You both planned to and did take advantage of that trust. I view the breach of trust as a most serious aggravating factor in this case with a need for a clear deterrent message.

[33] Pre meditation and planning. You both set about taking and directing Mr Hillier to Stirling Avenue in a pre-planned manner and coordinated his arrival by mobile telephone call with those lying in wait for him. Whether the planning included the use of a second motor vehicle to trap Mr Hillier's taxi once he had parked is unclear and accordingly I do not take that part of the planning and pre meditation into account. Nevertheless there was a degree of planning in this conspiracy well beyond the cursory.

[34] Numbers of people involved in the conspiracy. I also take into account the numbers of people involved in this conspiracy as an aggravating feature. It was not only a conspiracy between you both but involved not "another" but "others", as appears from the particulars of the offence to which you have pleaded guilty. I approach the case on the basis that four people were involved in the conspiracy.

[35] Hours of darkness. This was an offence committed during the hours of darkness. A victim is more vulnerable while in darkness than during daylight. The degree of fear that you anticipated would be experienced was likely to be greater during the hours of darkness. I take that into account as an aggravating factor.

[36] Element of abduction. You both took Mr Hillier away by deception.

[37] In considering the aggravating factors I recognise that there is a degree of overlap between some of the aggravating features but nevertheless I consider that the breach of trust and the aggravating features cumulatively

make this a most serious case of its type. I consider that the level of punishment can rise sharply with the presence of a number of aggravating factors. In your case there are six such factors. I also consider that there is a clear need for deterrence so that it is absolutely clear that condign punishment will ensue for conduct such as yours in relation to taxi drivers.

[38] For the avoidance of doubt I emphasise that in arriving at the sentence which I impose on you I do not take into account that a firearm was used. The basis of the plea of guilty is that the conspiracy was for a far lesser degree of violence to be inflicted on Mr Hillier which by definition would not have involved a firearm. Indeed there is no evidence that it involved the use of any weapon.

[39] In view of your lack of openness with the police when you were interviewed there is no evidence as to the precise role that either of you played in this conspiracy. Accordingly there is no evidence that either of you were ringleaders. Again for the avoidance of doubt I do not consider that there is any evidence that either of you were ringleaders in this conspiracy. There may be an inference that both of you played a subordinate part in the conspiracy on the basis that what actually occurred went beyond what your co conspirators had planned with you and therefore that your co conspirators were in reality directing matters. There is no direct evidence to that effect and I am not prepared to draw that inference. Even if I did so I do not consider that it would materially affect the sentence that I should impose on either of you in view of the fact that your co conspirators would thereby be guilty of a much more serious offence.

Mitigating factors in relation to the offence

[40] The submission includes a paragraph as follows:-

> "It is accepted that a plea to this lesser charge was only acceptable to the prosecution at a late stage and up until that time would not have been accepted. "

On the basis of that part of the submission counsel on behalf of both of you have contended that you are entitled to a full discount for your pleas of guilty.

[41] In *Attorney General's Reference No. 1 of (2006***)** NICA 4 the facts in relation to the pleas of guilty which were entered by the offenders can be summarised in the following way. The offenders were arraigned on 20 April 2005. At that stage they pleaded not guilty to all the counts then on the indictment. On 11 October 2005, an amended indictment, introducing the offence of affray contrary to common law as a fourth count was presented. On that date the offenders pleaded guilty to the new count of affray and

certain of the original counts on the indictment. It was suggested that since the offence of affray was not preferred until 11 October 2005 the failure to plead guilty to the other offences at an earlier stage was in some way mitigated. That suggestion was firmly scotched by the Court of Appeal which at paragraphs [18] and [19] went on to state:

> "**[18]** … If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea he should be in a position to demonstrate that he pleaded guilty *in respect of that offence* at the earliest opportunity. It will not excuse a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with.
>
> **[19]** To benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset. None of the offenders in this case did that. All either refused to answer or denied guilt during police interview. On no basis, therefore, could any of them expect to obtain the maximum reduction for their belated guilty pleas. We wish to draw particular attention to this point. In the present case solicitors acting on behalf of two of the offenders appear to have advised them not to answer questions in the course of police interviews. Legal representatives are, of course, perfectly entitled to give this advice if it is soundly based. Both they and their clients should clearly understand, however, that the effect of such advice may ultimately be to reduce the discount that might otherwise be available on a guilty plea had admissions been made at the outset."

[42] In *R v Harwood* (2007) NICA 49 a question arose on appeal to the Court of Appeal as to whether sufficient discount had been given for a plea of guilty by the trial judge. The Court of Appeal was dealing with a different factual situation in relation to the offender's plea of guilty than the factual situation in *Attorney General's Reference No. 1 of (2006***)**. In *R v Harwood* the offender was charged with murder. The offender and the victim had been drinking heavily

for some three days. The offender made the case that the victim had gone at him with a knife. The offender had a wound to the palm of his left hand which could have been a defensive wound. In his defence statement he made the case that he was acting in self-defence. His trial commenced on 6 September 2006. On the second day of his trial he pleaded guilty to manslaughter and that plea was accepted by the prosecution. Discussions between counsel had commenced before the end of June 2006 and at that stage an indication had been given by the defendant that he would plead to manslaughter if the prosecution would accept that plea. Thereafter it was an important part of the prosecution's decision-making process as to whether to accept a plea to manslaughter to investigate the injury to the offender's hand. When it was eventually determined by the prosecution that the plea of guilty to manslaughter would be accepted this was communicated to defence counsel whereupon the offender pleaded guilty. Accordingly in *R v Harwood* there was an indication some months prior to the trial commencing that the offender would plead guilty to manslaughter if that plea was accepted by the prosecution. The indication was informal rather than formal by way of an amended defence statement or entering a plea of guilty to manslaughter. To have given a formal indication

> "would have thrown away his defence of self-defence".

In the same paragraph the Court of Appeal stated:-

> "In appropriate circumstances allowance should be made for cases in which deferral of a plea of guilty is objectively justified. Thus there is some merit in counsel's submission that this appellant pleaded guilty at the first available opportunity, that is, when he knew his plea to manslaughter would be accepted on the murder charge. To have done so earlier would have thrown away his defence of self-defence."

In the event the offender's appeal against a sentence of thirteen years imprisonment was dismissed on the basis that the "proper sentence on a contest was above fifteen years by at least two years". The precise amount of the reduction for the plea of guilty was not specified. The Court of Appeal having held that a sentence of at least 17 years was appropriate then it appears that the reduction for his plea of guilty was in the region of 23%-24% or more bringing the sentence down to thirteen years.

[43] In *R v Black* (2003) NICA 51 the offender, charged with attempted robbery, offered to plead guilty to attempted burglary at quite an early stage but the Crown declined to reduce the charge. An amended defence statement was filed admitting attempted burglary. It was eventually agreed that the

charge should be reduced and the offender duly pleaded guilty to attempted burglary. Carswell LCJ stated:

> "The appellant understandably was unwilling to plead guilty to attempted robbery, a charge for which the factual basis was insufficient. He offered, according to his counsel, to plead guilty to attempted burglary at quite an early stage, but the Crown declined to reduce the charge. When the amended defence statement was filed it was eventually agreed that the charge should be reduced, and the appellant duly pleaded guilty when the charge of attempted burglary was put to him. In these circumstances he is in our view entitled to be given a degree of credit for his plea comparable with that which he would have received if he had been originally charged with the lesser charge and pleaded guilty to it on arraignment. It is to be observed that he was caught virtually red-handed, and on that account the credit may be to some extent moderated."

[44] In deciding on the appropriate discount for your pleas of guilty I have sought to apply the principles set out in those cases and I have also considered two guidelines issued by the Sentencing Guidelines Council in England and Wales both entitled "Reduction in Sentence for a Guilty Plea" and dated respectively December 2004 and July 2007. In *R v Pollock* (2005) NICA 43 the Court of Appeal in relation to the December 2004 guideline stated:

> "[15] … This guidance as to how the discount should be handled, although it might be considered by sentencers in this jurisdiction to be a useful tool, is not compulsory and there may well be occasions where a rather more comprehensive and less compartmentalised manner of dealing with the various issues in a sentencing exercise will be preferred. Judges will therefore want to consider whether the structure recommended in the guideline suits the particular circumstances of the case in which they are passing sentence but they are not bound to adopt it."

I do not intend to deal with the reduction for your pleas of guilty and any question of remorse on your part in the strictly compartmentalised way suggested by the guidelines but by adopting that course of action I emphasise that I will give the appropriate discount for your pleas of guilty and for any

genuine remorse that you can establish either evidenced by your pleas or evidenced in some other manner.

[45] I reject the submission that either of you are entitled to a full discount for your pleas of guilty. To be entitled to a full discount you would have had to have admitted your guilt at the outset. Neither of you did that. You both denied your guilt during police interview. You Michael James Massey then adopted your replies during interview as part of your original and amended defence statements. You Luke Hawkins did not seek to correct alter or add to any part of your response during those interviews. I have been informed that there had been discussions between counsel about potential pleas of guilty to some other offences post arraignment. You have by your pleas accepted that your answers during police interviews were untruthful to your knowledge. In short that you both lied. In those circumstances you were not throwing away a defence supported by some objective evidence such as the wound to the hand of Mr Hillier but rather you were throwing away lies. To give a full discount to either of you for your pleas of guilty would mean that you would obtain the same discount as a defendant who gave a truthful account to the police and who intimated either formally or informally at the very earliest stage to the prosecution the nature of the criminal conduct which was accepted.

[46] I do however take into account when fixing the discount for your pleas of guilty the fact that the count to which you both pleaded was only preferred on 4 December 2007 and that it was only at that stage that the prosecution indicated that a plea to that count would be accepted. That you then, without any delay, sought to be re-arraigned and pleaded guilty. I also take into account that there was some willingness to admit some criminal activity at an earlier stage by virtue of the informal discussions that took place between counsel. Accordingly I am prepared to give you both a discount somewhat greater than would ordinarily be the case for a plea at the door of the court or after a trial had commenced.

[47] I also take into account as a mitigating factor the degree of injury involved in the conspiracy and which might have been caused. That is obviously a relevant factor but it is not of itself determinative as to the level of sentence which should be imposed. I bear in mind that the Sentencing Guidelines Council in England & Wales published in June 2007 a "Consultation Guideline on sentencing offenders for assault and other offences against the person." The highest starting points and sentencing range is reserved to situations in which permanent injury or disfigurement results. This is a consultation document and it is for England & Wales where the maximum sentence is less. In *R v Bingham* [2003] NICA 22 the Court of Appeal cited with approval the words of Lord Lane CJ in *R v Nicholas* (The Times 23 April 1986) who said:

> "I say again – we have said it frequently in the past – guidelines are guidelines and they are not meant to be measuring rods to be applied rigidly to every case. They are there for assistance only and not to be used as rulers never to be departed from.""

Aggravating factors in relation to the offenders

[48] Michael Massey, you have a short but relevant criminal record. You have 3 previous convictions. On 26 January 2002, when you were 16, you committed an assault and you were sentenced to 12 months probation. On 31 May 2003, when you were 17, you committed an assault occasioning actual bodily harm. The pre sentence report records your description of that offence as follows:-

> "… the defendant tells me that, a large number of people were involved in a brawl between two groups of friends and several suffered injuries."

You were sentenced to be detained in a young offenders centre for 6 months which sentence was suspended for 3 years. That sentence was imposed at Newtownards Magistrates' Court on 21 March 2005. On 12 June 2004, when you were 18, you were guilty of the offence of disorderly behaviour. I consider that your failure to respond to the suspended sentence, which was imposed on you just some 5 months prior to this offence, and your record, is an aggravating feature.

[49] Luke Hawkins, by contrast you have a somewhat more extensive criminal record and it also contains relevant convictions. On 8 July 2000, at the age of 14, you committed criminal damage. You were given a conditional discharge and ordered to pay modest restitution. In 2001, at the age of 15, you committed various minor offences but on 27 June 2002, at the age of 16, you committed an armed robbery and on the 28 June 2002 you attempted to commit an armed robbery. You were given an 18 month period of detention in a young offenders centre but the sentence was suspended for 3 years. You committed further offences in 2003 and 2004 and on 31 May 2003 at the age of 17, you committed aggravated assault and assault occasioning actual bodily harm. The pre sentence report records your description of that offence as follows:-

> "… He states the context of these offences was a fight in the street following excessive alcohol use. He tells me there was some suggestion of a sectarian motive to the offences, though states he denies this was the case."

For both of those offences you were sentenced at Newtownards' Magistrates Court on 21 March 2005 to a total of 8 months in a young offenders centre suspended for 3 years. I consider that your failure to respond to 2 suspended

sentences, which were imposed on you just some 5 months prior to this offence, and your criminal record, is an aggravating feature.

Mitigating factors in relation to the offenders

[50] I take into account the youth of you both at the time that these offences were committed. The age difference between you is 2 months. You were respectively 20 and 19 years of age at the time that you committed these offences. Your youth does not alleviate your culpability though it is a factor to be taken into account in the selection of sentence.

[51] I take into account your personal circumstances. However in doing so I emphasise that this does not weigh heavily in reduction of penalty where the offence is, as in this case, serious.

[52] I do not accept that either of you have any remorse for your actions. You, Michael Massey, have expressed regret for the impact which your behaviour has had on your mother and sister but you have expressed no regret for the impact which your behaviour has had on Mr Hillier.

Custody probation

[53] As you must both receive a substantial period of imprisonment in excess of 12 months I am required by Article 24(1) of the Criminal Justice (Northern Ireland) Order 1996 to consider whether I should impose a custody probation order. In considering that issue I have sought to apply the principles set out by the Court of Appeal in *Attorney General's Reference (No 1 of 1998) (McElwee)* NI 232, *R v. Lunney (03/99)* and *R v. McDonnell.* The Court of Appeal pointed out in *R v. Quinn (2006)* NICA 27 at paragraph 29 that:-

> "A custody/probation order should only be made where it is considered that the offender would benefit from probation at the conclusion of a period of custody and that it is deemed necessary to enable him to reintegrate into the society or because of the risk that he would otherwise pose."

[54] I have decided not to impose a custody probation order. I have reached that decision for the following reasons:-

(a) Michael Massey you were granted bail and you breached your bail conditions by drinking alcohol. Bail was revoked. I do not consider that you would abide by any requirements of the probation order.

(b) Luke Hawkins, you were granted bail on 2 occasions and on both occasions you breached your bail conditions by drinking alcohol and absconding. Bail was revoked. I do not consider that you would abide by any requirements of a probation order.
(c) Neither pre sentence report recommends a period of probation.
(d) I have no evidence as to your motives for committing this offence and accordingly I am unable to assess whether you would benefit from probation.

Conclusion in relation to the offence of 20 August 2005

[55] I have considered both of you separately when fixing the punishment to be imposed. There are differences between you in relation to your personal circumstances and your criminal records. However your culpability for this offence is the same. I do not consider that I should make any distinction between you in relation to the offence that you committed on 20 August 2005 though I do bear in mind that there will be a slight total difference between you when I take into account your suspended orders for detention.

[56] I sentence you Michael James Massey to 4 years imprisonment.

[57] I sentence you Luke Hawkins to 4 years imprisonment.

Suspended sentences

[58] There is then the matter of the suspended sentences. The power to activate a suspended sentence is contained in Section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 with the substitutions effected by Article 9 of the Treatment of Offenders (Northern Ireland) Order 1989. I have sought to apply the principles set out by the Court of Appeal in *R v Andrew Larmour* 19/04/1991, *R v Samuel Brown Lendrum* (1993) 7 NIJB 78, *Re Price's Application* [1997] NI 33 and *R v Colin Hughes* [2003] NICA 17. In *R v Alan Alfred Price* Carswell LCJ stated:-

> "… I want to make it clear from this Court that suspended sentences are meant to have effect."

and went on to state that

> "… suspended sentences should be generally applied in full, unless there are circumstances which indicate that there should be a reduction."

In *R v Samuel Brown Lendrum* Hutton LCJ stated that

> "The fact that an offence committed during the operational period of a suspended sentence is of a different character from the offence for which the suspended sentence was imposed is not in itself a ground for not activating the suspended sentence"

In *R v Colin Hughes* Carswell LCJ when considering the totality principle stated that

> "If the sum of the two sentences makes for a total which would have been unjustifiable as punishment for the original offence plus the instant offence, then the suspended sentence could properly be put into operation for a shorter period."

I have sought to apply these principles when considering the question as to whether to activate the suspended sentences and if so for what period.

[59] Section 19(3) of the Treatment of Offenders Act (Northern Ireland) provides:-

> "Where a court orders that an order for detention in a young offenders centre, which has been suspended by an order made under section 18(1) or (1A) shall take effect, with or without variation of the original term, the court shall, if the offender has attained the age of twenty-one years or may, if he will have attained that age at the time when the said order for detention takes effect, order that the order for detention shall be treated as a sentence of imprisonment."

Accordingly if I decide to activate your suspended sentences I would order that the orders for detention shall be treated as sentences of imprisonment.

[60] In both of your cases the "breach offences" or "trigger offences", that is the offences of 20 August 2005 were serious offences and as I have ruled they were offences which were sufficiently serious to warrant significant custodial sentences. The breach or trigger offences and the original offences committed by you both in 2003 were offences of violence.

[61] In relation to you Michael James Massey the offence committed on 20 August 2005 was committed during the operational period of a suspended 6 month order for detention in a young offenders centre. I order that

> (a) the suspended order for detention shall take effect with the original term of 6 months unaltered,
>
> (b) the order for detention in a young offenders centre shall be treated as a sentence of imprisonment
>
> (c) the term of 6 months shall be consecutive to the sentence which I have already imposed of 4 years.

In making those orders I have borne in mind the totality principle.

[62] Accordingly the total period of imprisonment for you Michael James Massey will be 4 years and 6 months imprisonment.

[63] In relation to you Luke Hawkins the offence committed on 20 August 2005 was committed during the operational period of two suspended orders for detention in a young offenders centre totalling 8 months detention. I order that

> (a) the suspended orders for detention shall take effect with the original terms totalling 8 months unaltered,

(b) the orders for detention in a young offenders centre shall be treated as a sentence of imprisonment

(c) the total term of 8 months shall be consecutive to the sentence which I have already imposed of 4 years.

In making those orders I have borne in mind the totality principle.

[64] Accordingly the total period of imprisonment for you Luke Hawkins will be 4 years and 8 months imprisonment.