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*(subject to editorial corrections)**

IN THE CROWN COURT FOR NORTHERN IRELAND

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LONDONDERRY DIVISION

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THE QUEEN –v- SEAN CRUICKSHANK and EDWARD McELENEY

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SENTENCING: MINIMUM TERM

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McCLOSKEY J

I INTRODUCTION

[1] The prosecution of these Defendants was based on an indictment comprising two counts. By count 1, both Defendants were accused of murdering one Liam Anthony Devlin on 4th August 2007, in the County Court Division of Londonderry. Following a contested trial, the jury returned a unanimous verdict of guilty against both Defendants. From the outset, the first-named Defendant, Sean Cruickshank, pleaded guilty to the second count, which accused him (only) of assaulting John Devlin (the younger brother of the deceased) thereby occasioning him actual bodily harm, on the same date, contrary to Section 47 of the Offences Against the Person Act 1861. The Defendants must now be sentenced by the court accordingly.

II THE PROSECUTION CASE

[2] In the particular circumstances, having regard to, *inter alia*, the duration of the trial and the number of witnesses who testified against the Defendants, I consider it appropriate to rehearse the salient aspects of the evidence in a little detail. In summary, it was the prosecution case that Liam Devlin died as a result of serious head injuries inflicted during an attack perpetrated by both Defendants and, specifically, caused by kicking and stamping on his head. In the opening outline, it was represented to the jury that the evidence would establish that both Defendants kicked Liam Devlin repeatedly on the head and that they were acting with a

common purpose, intending to support each other and intending, as a minimum, to cause serious bodily harm.

[3] The following is a digest of the salient aspects of the evidence which was adduced on behalf of the prosecution. Stephen Hutton, a companion of Liam Devlin, described an incident which effectively had three phases. During the first phase, Liam Devlin went to the ground, though this witness could not describe precisely how this occurred. Next, the Defendant Cruickshank was booting Liam Devlin in the head, as he lay on the ground, roughly ten to twelve times. The Defendant McEleney then joined in, kicking him in the head more than once. Liam Devlin was defenceless. During the second phase, there was a physical engagement involving Neil Gillespie and Cruickshank (on the one hand) and an engagement of sorts involving Stephen Hutton and the Defendant McEleney (on the other). The Defendant Cruickshank then "*got back at*" Liam Devlin, kicking and kicking him on his head and the Defendant McEleney then did likewise, having first exhorted Cruickshank to jump on their victim's head. Liam Devlin was defenceless and did not throw a single punch throughout.

[4] According to the second prosecution witness, Declan Gillespie, the Defendant Cruickshank and Liam Devlin squared up to each other. The Defendant McEleney then pushed (or pulled) Cruickshank out of the way and attacked Liam Devlin by head butting him. Then Cruickshank jumped in and Neil Gillespie tried to pull him away. Both Defendants were "*hitting*" Liam Devlin, with Cruickshank throwing punches at him, whereupon Liam Devlin went to the ground. This was the first phase described by this witness. This was followed by two separate fights or confrontations – McEleney/Hutton and Cruickshank/Neil Gillespie. By this stage, Liam Devlin was back on his feet. Next, the two groups separated, the impression created by this witness being that the incident was finished. However, the two Defendants came back down towards the larger group, whereupon this witness exhorted that any further fight take place on a "*one on one*" basis. Liam Devlin stated that he did not want to fight. This witness then described a second phase, beginning with Cruickshank striking Liam Devlin, who fell backwards to the ground (for a second time). Then both Defendants were kicking Liam Devlin in the head, repeatedly. The witness thought that he heard the Defendant McEleney say "*Jump on his face*", adding that he knew that McEleney told Cruickshank to jump on Liam Devlin's head. They desisted from their attack, then recommenced it. As the Defendants stopped attacking Liam Devlin, a taxi approached and the Defendants jogged away from the scene. Liam Devlin was defenceless throughout and was unconscious at the end.

[5] The evidence of Neil Gillespie (brother of Declan Gillespie), in common with the first two witnesses, also divided the incident into two basic stages. According to him, the first of these stages involved an attempt by the Defendants to attack Liam Devlin, apparently with limited success on account of the intervention of Stephen Hutton and this witness. This precipitated two confrontations or attacks involving Cruickshank/this witness (on the one hand) and McEleney/Hutton (on the other).

The second phase was initiated by a "one to one fight" statement by Cruickshank, which elicited a negative response from Liam Devlin. Cruickshank then ran and punched or head butted Liam Devlin, who went to the ground, where Cruickshank held him down and was kicking him. Cruickshank was kicking Liam Devlin in the head and was stamping on him, while holding him down "by the scruff". This "one to one" engagement continued until McEleney joined in, kicking Liam Devlin more than once.

[6] The fourth prosecution witness who was present at the scene of these attacks was Conor Porter. He too described two separate stages of the incident. During the first, McEleney was the sole aggressor, initially. He head butted Liam Devlin and was then fighting with him. This stimulated a second fight involving Cruickshank and Neil Gillespie. These fights lasted one or two minutes. As a result, Liam Devlin was dizzy, stumbling and could barely stand, was holding his head and was expressing himself to be unwell. There followed a "*one on one fight*" suggestion by McEleney to Cruickshank, which was duly implemented by the latter, notwithstanding the protestations of Liam Devlin that he was too sick to fight. At this stage, according to this witness, the Defendant McEleney shouted that Liam Devlin was "*faking it*" and exhorted Cruickshank with the words "*Go down and slap him*". Cruickshank thereupon attacked Liam Devlin, got him to the ground and was then kicking him three to five times in the head. After the first or second of these kicks, McEleney joined in and kicked Liam Devlin in the head two or three times. The kicking lasted a minute or two. Liam Devlin was defenceless throughout.

[7] Evidence was also adduced from three persons who were friends with either or both of the Defendants. This evidence was to the effect that they were all in the house of Blathnaid Dobbins, McEleney's girlfriend. She testified that McEleney received a call on his mobile phone, following which, visibly shaken, he stated that a boy with whom he was fighting earlier was dead and he would be going to hand himself in. Matthew Colby also described McEleney's reaction to this telephone communication. He testified that McEleney stated "*The boy I kicked died*" and, elaborating, claimed to have "*swung a boot*". According to this witness, McEleney also stated that the Defendant Cruickshank "*… got him on the ground and was dancing on his head*" (per his statement to the police). By the use of the plural "*we*", McEleney appeared to implicate both Defendants in the attack on the deceased. Evidence was also given by Ryan Fahy, who testified that some time after the incident, Cruickshank stated that he had kicked Liam Devlin twice. Further, Constable Reilly, who arrested McEleney, testified that, following caution, McEleney repeatedly stated "*I only booted Devlin once on the head*".

[8] There was much evidence about the consumption of alcohol by both the aforementioned prosecution witnesses and also the Defendants. The types of alcohol consumed were mainly beer, cider (or something similar) and vodka. The quantities may be described uncontroversially as quite substantial and these varied from one person to another. In addition, there was evidence about the consumption of drugs. Neil Gillespie testified that, at an earlier stage of the evening in question, he took two

Ecstasy tablets. Detective Constable McLaughlin, who began an interview of Neil Gillespie at 6.30am on 4th August 2007 (i.e. within three to four hours of the incident), gave evidence of his contemporaneous record, which attributes to Neil Gillespie the statement "*I had taken E tabs (5) about 9.00pm …*". Then he added that there were five Ecstasy tablets altogether, divided between Liam Devlin and him.

[9] The evidence of Conor Porter was that Neil Gillespie told him that Liam Devlin and Neil Gillespie had consumed two Ecstasy tablets each. This witness initially denied that he had consumed any Ecstasy tablets. He was then questioned extensively about an entry in the notebook of a police officer (Detective Constable Henry) recording this witness having said "*I had one tab of Ecstasy*". He agreed that he must have said this and that it must be correct, while asserting that he could not now remember taking the tablet. Nor could he remember whether he had taken more than one Ecstasy tablet. He also admitted that he had consumed virtually a half bottle of vodka and a large bottle of "Boost". He conceded that he could have been drinking other alcohol in the Gillespies' house. He agreed that his recollection of certain events was impaired and that this could be explained by his consumption of alcohol and Ecstasy.

[10] Dr. Ingram, Assistant State Pathologist for Northern Ireland, testified that the consumption of Ecstasy can give rise to an appearance of intoxication, comparable to the effects of alcohol consumption. It can cause increased heart rate, increased blood pressure and a sense of elation. It is also capable of causing paranoia and hallucinations, including distorted auditory perception. In addition, it may alter a person's awareness and perception of situation. In the witness's experience, it does not give rise to unsteadiness on one's feet. Generally, it can have effects comparable to those caused by the consumption of alcohol. Dr. Ingram testified that the injuries causing death were a traumatic axonal injury, bruising to the brain and oedema of the brain. The injuries described by Dr. Ingram included a bruising and abrasion injury to the back of Liam Devlin's head, overlying the prominence of the occiput. Dr. Ingram was asked whether, in the absence of other injuries, there was a reasonable possibility that this injury could have caused all of the injuries within the brain, thereby giving rise to the death. He replied affirmatively, without any qualification.

[11] The jury also heard the testimony of a forensic scientist, which was to the effect that there was "*weak*" supporting evidence for the proposition that the Defendant Cruickshank's footwear caused the bruising marks and impressions found beneath the right eye of Liam Devlin. Similarly, there was "weak" supporting evidence for the proposition that the Defendant McEleney's footwear caused certain specific impressions located above the left ear. The hierarchy of grades has five levels, ranging from no supporting evidence (the lowest) to conclusive supporting evidence (the highest). Weak supporting evidence constitutes the second lowest grade.

[12] Evidence was also adduced of the interviews under caution of the Defendants by the police. The Defendant Cruickshank asserted that the initial combatants were the Defendant McEleney and Liam Devlin (compare with the evidence of Declan Gillespie and Conor Porter). This Defendant suggested that he was initially fighting with one of the Gillespies. This was followed by a "one to one" fight between this Defendant and Liam Devlin. This Defendant described punching Liam Devlin, who fell backwards to the ground. He denied kicking him. He acknowledged that Liam Devlin did not strike him. Overall, he purported to describe a relatively uneventful, routine physical street fight which did not entail excessive force.

[13] Evidence was also given of the interviews of the Defendant McEleney. A major feature of these interviews was the emphasis which this Defendant sought to place on the aggressive conduct of the co-Defendant, Cruickshank, vis-à-vis Liam Devlin. According to McEleney, describing the initial phase of the events, Cruickshank "*battered*" Liam Devlin. At a later stage, the Defendant Cruickshank was involved in attacking Liam Devlin again. According to McEleney, Cruickshank "*… was kicking him and punching him … was throwing boots and all … in the chest and all …*" [second interview, pp. 16 and 18]. Cruickshank was "*…kicking him … hitting him hard …* " [third interview, p. 3]. Following McEleney's engagement with him, Liam Devlin "*… got up after I hit him …* [then Cruickshank] *battered him again … he never even got up … he tried to get up*" [fourth interview, pp. 17 and 25-26]. Liam Devlin was defenceless throughout, "*… he was getting a hiding …*" [fourth interview, p. 10]. McEleney admitted saying to one of his peers (Matthew Colby) that the Defendant Cruickshank had been "*dancing on his head*", offering the explanation that "*I meant standing on his head and all like … hitting him boots in the face you know …*" [fifth interview, pp. 12-13].

[14] McEleney was questioned in detail about his own physical interaction with Liam Devlin. He stated that after Cruickshank's initial "battering" of Liam Devlin, Declan Gillespie attempted to intervene, stimulating a reactive intervention by this Defendant, who attempted to head butt Declan Gillespie, struck him around his neck and lost his balance, falling in the process. At this stage, Liam Devlin was on the ground. The essence of this Defendant's account was that Liam Devlin "*… was getting up and I threw a boot*" [see first interview, p. 12]. This Defendant repeated this account throughout his interviews. He suggested that the boot which he admittedly administered was "*… up round the chest or the head … it was a good boot … in the upper body or head*" [first interview, pp. 20 and 22]. Liam Devlin was effectively on the ground when this Defendant booted him, with the laced part of his shoe or the instep, "*on the chest, the chest around the head*" [third interview, pp. 11-12]. When this Defendant swung his boot at Liam Devlin, the latter "*went down again*" [fourth interview, p. 17]. Liam Devlin was in a defensive posture, trying to protect himself, when this Defendant swung a boot at him [fourth interview, p. 28]. This Defendant denied the specific suggestion that he had booted Liam Devlin in the head. He also denied the verbal statements attributed to him by the prosecution witnesses. This Defendant acknowledged that he had meant to hurt Liam Devlin, while denying any intention to kill him.

[15] It is also appropriate to record that, after considering submissions on behalf of the Defendants following completion of the prosecution case, the court ruled as follows:

(a) Both Defendants had a case to answer.

(b) The jury would not be directed to disregard completely the evidence of Neil Gillespie and Conor Porter.

(c) The prosecution case against the first-named Defendant, Sean Cruickshank, was that he was guilty of murder as a principal only. There was no viable secondary, alternative case.

(d) The prosecution case against the second-named Defendant, Edward McEleney, could proceed on two alternative bases. The primary case was that he was guilty of murder as a principal. The secondary, alternative case was that he was guilty of murder as a secondary party, in the sense that he aided or abetted or counselled the murder by his conduct and/or words.

(e) As regards both Defendants, it would be open to the jury to return an alternative verdict of guilty of manslaughter and they would be instructed accordingly.

III THE DEFENCE CASE

Sean Cruickshank

[16] In his defence statement, Sean Cruickshank made the case that he was approached by the deceased, who formed part of a group of approximately six males. The deceased challenged this Defendant in relation to an earlier assault on his brother (reflected in the second count in the indictment). The deceased "*squared up to*" this Defendant in a manner consistent with the intention of inflicting violent retribution. This Defendant, in defending himself against the deceased, punched him thereby causing him to fall to the ground, perhaps more than once. It was asserted that the ability of the deceased to protect himself was reduced by reason of drug consumption. This Defendant specifically denied either kicking the deceased or striking him in a manner contributing to his death. This Defendant further claimed that, in any event, his conduct was not causative of the death.

[17] This Defendant gave evidence in his own defence. The essence of his evidence was that there were two separate physical confrontations involving the deceased. In the first, the participants were the second-named Defendant, Edward McEleney and the deceased, with no involvement of this Defendant. The second physical exchange entailed a fight between this Defendant and the deceased,

stimulated by an exhortation by one of the prosecution witnesses, Declan Gillespie that they should fight. This Defendant testified that, during this confrontation, he punched the deceased in the area of the head once only. He denied subjecting the deceased to any other blows. He asserted that the deceased fell backwards to the ground, whereupon the fight terminated and both Defendants walked from the scene.

Edward McEleney

[18] In both his defence statement and his sworn evidence, this Defendant proffered a markedly different version of events. In the former, he made the case that after he had stated in terms that any fight should be on a "*one to one*" basis, the first-named Defendant, Sean Cruickshank and the deceased began fighting. This Defendant asserted that he was prompted to participate by the intervention of Declan Gillespie, one of the prosecution witnesses. This Defendant claimed that, in intervening, he attempted to head butt Declan Gillespie, whereupon he overbalanced and fell to the ground. In getting to his feet, he "*… swung his foot towards the deceased who had his arms raised at the time …* [kicking him] *… in the upper front area of his torso …*". This Defendant specifically denied that he either stamped on or kicked the deceased's head. He asserted that his co-accused perpetrated an assault against the deceased "*involving his repeatedly punching and standing on his head*".

[19] In his evidence to the jury, this Defendant testified that there were two separate fights involving the deceased. However, according to him, the combatants in the first fight were his co-accused and the deceased, during its first phase. There was a second phase, precipitated by an alleged intervention of Declan Gillespie, whereupon this Defendant attempted to head butt the latter but overbalanced, falling to the ground in consequence. He claimed that while getting to his feet, he swung his foot towards the deceased and struck him in the upper part of his body, in the area of the chest/head. He asserted that the co-accused and the deceased continue to fight thereafter.

IV THE JURY VERDICT

[20] As recorded above, the jury found both Defendants guilty of murder. There are two particular factors of significance, in this respect. The first is that the jury were directed that manslaughter was an alternative verdict as regards both Defendants. Secondly, in the specific case of Edward McEleney, the jury were directed that a verdict of guilty of murder as a secondary party was a further alternative. The jury were duly instructed in the differences between murder and manslaughter (on the one hand) and murder as a primary party (or principal) and murder as a secondary party (on the other).

[21] I consider it of no little significance that, in the completed issue paper, the jury expressly found both Defendants guilty of murder as principals. This conveys to me

that the jury were fully alert to the aforementioned distinctions and properly understood the instructions given to them. It is also appropriate to recall the documentary exhibits which the jury requested to see at an advanced stage of their deliberations. This, coupled with the guilty verdicts ensuing shortly afterwards, supports the suggestion that they acted on, *inter alia*, the expert forensic evidence summarised in paragraph [11] above. In passing, I note that the English Court of Appeal has very recently reaffirmed the twofold proposition that (a) the mere fact that as a matter of scientific certainty it is not possible to exclude a proposition consistent with innocence does not justify withdrawing a case from a jury and (b) juries are required to consider expert evidence in the context of all other relevant evidence and to make judgments based on realistic and not fanciful possibilities: see ***The Queen –v- Gian and Another*** [2009] EWCA. Crim 2553, paragraph [22] especially. I consider it clear that, by their verdicts, the jury have accepted the central core of the prosecution case (as outlined above) and have rejected as untruthful and implausible the thrust of the defence advanced by both Defendants. The sentencing of the Defendants must proceed on this basis.

V PUNISHMENT FOR MURDER

[22] 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."*

[23] 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.

[24] 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*".

[25] 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'."

[26] 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*".**

[Emphasis added].

While I have added some emphasis to this passage, as it has a certain resonance in the particular circumstances of this case, I consider that 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.

[27] 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]).

VI <u>SEAN CRUICKSHANK</u>

[28] This Defendant is now aged twenty-one years. He was nineteen years old when his two offences were committed. He is a person who was of previous good

character until he committed the first of his two offences (see the second count) on the night in question. It seems that after leaving school he was in reasonably steady employment. When interviewed for the purpose of the pre-sentence report, he admitted fighting with the deceased and claimed that this "*… involved swinging punches some of which may have connected with Liam Devlin's face/head area … both parties then fell to the ground and … he then got up and left the scene*". I would observe that this is a substantially fuller admission of blows inflicted by this Defendant on the deceased than what was accepted or acknowledged by him during the police interviews, in his defence statement or in his sworn evidence (see paragraphs [16] and [17], *supra*). He maintained his denial of having either kicked the deceased or stamped on his head and suggested that the forensic evidence was "*not conclusive*". The report continues:

> "*It seems that neither of these offences were* [sic] *premeditated. Sean Cruickshank presents as extremely remorseful and demonstrates significant understanding regarding the traumatic impact of these offences for the Devlin family. He also expressed concern regarding the impact of his behaviour on his own family. It was noteworthy during our meetings that Mr. Cruickshank demonstrated minimal concern regarding the consequences of his actions for himself.*"

This Defendant expressed an intention to engage in constructive and productive activities during his imprisonment and enunciated his willingness to participate in any appropriate programmes designed to avoid reoffending.

[29] The materials provided to the court included a report of Dr. Curran, consultant psychiatrist, who assessed this Defendant on 7th December 2009. This highlights his upbringing, educational attainments, employment history and personal circumstances. During the assessment, this Defendant reiterated his feelings of remorse. I interpret Dr. Curran's report to indicate that, psychologically, this Defendant has no abnormalities and I note the observation that he had "*a certain naivety and immaturity of character*". I have also considered the various testimonials submitted in respect of this Defendant. The broad thrust of these is that, previously, this Defendant was a law abiding person with certain good qualities. A central theme of the testimonials is the suggestion that the very serious offending of which he has been found guilty is not easily reconcilable with his previous lifestyle and conduct generally.

[30] The stance adopted by Mr. Mateer QC (appearing with Mr. Connell) on behalf of the prosecution was that the "normal" starting point of 12 years should apply to both Defendants. With regard to aggravating features, Mr. Mateer, with some degree of diffidence, submitted that the court should reflect on two factors, namely the vulnerability of Liam Devlin during the attack which caused his death and the impact on the family of the deceased. Mr. Mateer's third main submission consisted of an acknowledgement that the state of mind of both Defendants

consisted of an intention to cause grievous bodily harm, rather than kill. Finally, it was submitted on behalf of the prosecution that the court should reflect carefully on whether the evidence available establishes true remorse on the part of both Defendants. It was not submitted that the court, in determining the minimum term, should make any distinction between the Defendants.

[31] On behalf of this Defendant, Mr. McCartney QC (appearing with Mr. McAteer) submitted that the death arose out of an explosive incident, in the nature of a violent quarrel, in which his client's conduct was spontaneous and unpremeditated. The evidence established, he submitted, that the deceased had made a decision to confront his client, who was then encouraged to fight by others, including associates of the deceased. No weapon was used and, it was submitted, the evidence pointed firmly to an intention to cause grievous bodily harm rather than kill. This Defendant's youth, his previous good character and the remorse recorded in the pre-sentence report were also highlighted.

VII EDWARD McELENEY

[32] This Defendant is now aged twenty-two years. He was twenty years old at the material time. He has a criminal record, consisting of, firstly, two previous convictions for disorderly behaviour. One of these was the subject of a bad character evidence ruling [see Ruling No. 4 – (2009) NICC 69], which was based on propensity. As a result, the jury received evidence, in agreed form, to the effect that on 23rd December 2006, in a public place, this Defendant was seen kicking another male person lying on the ground. Notably, this stimulated a prosecution for disorderly behaviour, rather than a more serious offence. Further, neither of his previous convictions generated a custodial punishment. However, it must be noted that arising out of this Defendant's second conviction for disorderly behaviour, he was sentenced on 30th July 2007, just four days prior to the date of these offences and his punishment consisted of a probation order of 12 months duration. Most recently, on 26th November 2009, this Defendant was convicted of further offences of disorderly behaviour, resisting arrest and obstructing the police. The court was informed that all of these offences arose out of a single incident, which occurred on 18th July 2008, when this Defendant was in breach of his bail conditions. The court was further informed that, following the commission of these offences, this Defendant absconded for a period of some months, ultimately surrendering himself. For these further offences, he was punished by a commensurate sentence of three months imprisonment.

[33] The impression conveyed by the pre-sentence report and the testimonials supplied to the court, which included oral testimony from one Mr. O'Doherty, a highly respected community leader (who effectively testified on behalf of both Defendants), is that, notwithstanding the aforementioned convictions, this Defendant was a reasonably stable member of the community. He seems to have been industrious and was also an active footballer. It is recorded that this Defendant co-operated fully in relation to his previous probation sentence. During interview

by the Probation Officer, this Defendant appears to have accepted that he kicked the deceased once on the head. He claimed that "*… he didn't think that the deceased was so badly injured or he wouldn't have kicked him*". He denied punching the deceased. The report continues:

> "*He displayed genuine regret and remorse for his actions and stated he never meant for this to happen. He appears to be distressed at being responsible for ending the life of Liam Devlin and states that he is 'heartbroken' for what he has done. He was also very concerned about the impact his offending has on the Devlin family. He claims that as well as being involved in the death of Liam Devlin he has also ruined the life of the deceased's family…*
>
> *The Defendant also displayed genuine empathy for his own family whom he recognises have also been devastated by his role in this offence …*
>
> *Mr. McEleney has a good insight into how his offending impacted on the local community.*"

The Probation Officer considered that this Defendant was genuinely remorseful and appeared motivated to avoid further offending. This Defendant expressed a determination to engage in constructive activities while imprisoned.

[34] On behalf of this Defendant, Miss McDermott QC (appearing with Mr. Mallon) informed the court that her client had accepted from an early stage that he was guilty of manslaughter, as demonstrated by his offer to plead guilty to this lesser charge, which the prosecution rejected at an early stage of the trial. It was submitted that the jury's verdict is not inconsistent with the view that this Defendant's offending lay very close to the borderline separating murder from manslaughter. It was further submitted that, in common with his co-accused, his state of mind consisted of an intention to cause grievous bodily harm rather than kill. Miss McDermott, realistically, was disposed to accept that the jury's verdict is consistent with a rejection of her client's acknowledgement of some very limited physical interaction with the deceased (in particular merely throwing a boot towards his upper chest/head) and a conclusion that he had kicked the deceased in the head.

VIII CONCLUSION

[35] I conclude, firstly, that the appropriate starting point in each Defendant's case is that the minimum term should be of 12 years duration. Secondly, I consider that both Defendants intended to inflict grievous bodily harm, rather than kill the deceased. Thirdly, I view the culpability of both Defendants as relatively high, given that, based on the jury verdicts, this is a case where two assailants attacked a single victim who, according to a substantial body of evidence, was defenceless

throughout. The jury verdicts are also consistent with a finding that the deceased suffered repeated blows, including kicks to the head. I have reflected on whether these considerations aggravated the seriousness of the Defendants' conduct. It seems to me appropriate to balance these factors with the evidence that the deceased was exhorted by his associates to fight, coupled with the non-intervention of any of these associates at the critical time. On the other hand, neither Defendant suffered the slightest injury, neither suggested that the deceased posed any real physical threat to them and neither of them challenged the evidence that the deceased was defenceless throughout the attack.

[36] Whether viewed through the prism of a particularly vulnerable victim or the use of disproportionate force in the circumstances, I conclude that the offending of both Defendants is aggravated to some extent by the aforementioned factor. There is, in my view, a further degree of aggravation in both cases. In the case of Sean Cruickshank, this arises from the significant assault which he perpetrated against the brother of the deceased just a couple of hours before the death. As regards Edward McEleney, this relates to the consideration that his offending occurred on the fifth day of a one year probation order, imposed on him at Derry Magistrates Court less than one week previously.

[37] I consider that the series of considerations highlighted in mitigation on behalf of both Defendants resolve to two factors which operate to their credit. The first is the clear evidence of genuine remorse on the part of each of them. This is documented in the pre-sentence reports and I have no reason to disagree with these assessments. The second concerns their state of mind. Reflecting on a lengthy trial and all the evidence adduced, including the testimony of the Defendants, I am satisfied that their intention was to inflict grievous bodily harm rather than kill. Furthermore, I believe this to be reinforced by other factors, including their willingness to confront, rather than flee from, the criminal justice process upon learning of the death and the stance which both adopted from the outset of their interviews by the police. Simultaneously, I consider that I must also take into account that this lesser intention will frequently be an integral feature of paragraph (10) cases i.e. those attracting the "normal" starting point, so that care must be taken to avoid double reckoning. Furthermore, an absence of planning or premeditation qualifies to be evaluated in the same way I consider that this must operate to reduce the degree of mitigation available to both Defendants.

[38] As the above analysis demonstrates, there is very little indeed to choose between the two Defendants and, further, I believe that underlying the jury verdicts is an absence of any material differentiation between them. I am also mindful that the Crown did not seek to distinguish them. Accordingly, I propose to make no distinction between them. In balancing the aggravating and mitigating features which I have identified above, I consider that the notional pendulum swings in favour of the Defendants, to some degree. This means that the minimum term in each case should be something less than the starting point of 12 years. I have reflected anxiously on what this should be and, having done so, I conclude that the

minimum term appropriate to satisfy the requirements of retribution and deterrence, having regard to the seriousness of the offence – as required by Article 5(2) of the 2001 Order – is 11 years imprisonment in each case.

[39] The Defendant Sean Cruickshank is also to be sentenced for the separate offence of assault occasioning actual bodily harm to John Devlin, brother of the deceased. This Defendant's explanation for his conduct was that John Devlin was "*in the face of*" one of the teenage girls congregated with a large number of young people at the location. Mr. Mateer informed the court that there is no medical evidence relating to the injury sustained. While there was a suspected fracture of the nasal bones, this was not confirmed. The victim attended hospital on two occasions and no treatment other than analgesics was required. In light of this information, I take the view that if this had been a freestanding offence it would have been prosecuted summarily, with a likelihood of a non-custodial disposal, such as a probation order or a short suspended sentence. Mr. Mateer did not demur from this assessment and, indeed, he suggested that the sentencing of this Defendant for this further offence should not add to the minimum term. On balance, I agree and I further remind myself that I have already taken this into account as an aggravating feature: see paragraph [36] above. I consider that this outcome is best achieved by the imposition of a sentence of 2 months imprisonment, to operate concurrently. Accordingly, the gross period to be served by this Defendant will be one of 11 years.

[40] The effect of the legislation in this jurisdiction is that both 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. In the sentence calculation, both Defendants will be given credit for all pre-verdict remand custody: see ***McCandless,*** paragraph [52].

[41] Finally, it is appropriate to record the dignified and stoical conduct of the members of the Devlin 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 both Defendants. I should also record that the members of the Defendants' families who attended the trial daily also conducted themselves in a dignified and respectful manner

throughout. Though I do not underestimate the emotional and psychological complexities in play, if any *rapprochement* with the Devlin family is humanly possible, the court would strongly support this, bearing in mind the contents of the pre-sentence reports and the availability of experienced and conscientious community leaders such as Mr. O'Doherty.

[42] Furthermore, the efforts of all those who strove to save Liam Devlin's life are deserving of admiration. The death of this young man was an appalling, eminently avoidable tragedy, the product of street violence involving mature teenage youths which has become all too prevalent in contemporary society. The evidence adduced in this trial also highlighted the prevalence of another disturbing social evil, namely the liberal consumption by younger members of society of large quantities of alcohol and drugs, whether in isolation or in combination with each other. While this, properly, was not raised in an attempt to excuse, much less justify, the criminality of the Defendants' conduct it was one of the factors in the background to the critical events culminating in this tragic death.