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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **17/11/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

JOHN THOMPSON AND JAMES McAFEE

Before: GIRVAN LJ, COGHLIN LJ and HORNER J

COGHLIN LJ (delivering the judgment of the court)

[1] Both these appellants appeared before Weatherup J at Belfast Crown Court in May 2014. On 6 May 2014 James McAfee pleaded guilty to a single offence, namely: that he, with others, on 24 May 2009 in the County Court Division of Antrim unlawfully fought and made an affray contrary to Common Law. On 13 May 2014 John Thompson pleaded guilty to a number of offences including:

(i) unlawfully and maliciously causing grievous bodily harm to Damien Fleming with intent contrary to Section 18 of the Offences Against the Person Act 1861;
(ii) assaulting Kevin McDaid thereby occasioning him actual bodily harm contrary to Section 47 of the Offences Against the Person Act 1861;
(iii) that he, with others, on the 24th day of May 2009 in the County Court Division of Antrim, unlawfully fought and made an affray, contrary to common law;
(iv) without lawful excuse destroying or damaging a window pane of a PSNI police van intending to destroy or damage or being reckless as to whether such property would be destroyed contrary to Article 3(1) of the Criminal Damage (NI) Order 1977.

[2] On 1 July 2014 James McAfee was sentenced to a determinate custodial sentence of 3 years' imprisonment comprising a custodial period of 18 months and a licence period of 18 months. John Thompson received a sentence of 8 years'

imprisonment for the offence of causing grievous bodily harm with intent, 4 years' imprisonment for the offence of assault occasioning actual bodily harm, 3 years' imprisonment for the offence of affray and 6 months' imprisonment for the offence of criminal damage. The last mentioned sentence was made consecutive to the sentence imposed for causing grievous bodily harm resulting in a total sentence of 8½ years imprisonment.

[3] For the purposes of the appeals James McAfee was represented by Ms Karen Quinliven QC and Mr McGarrity, John Thompson was represented by Mr Barry Macdonald QC and Mr Moriarty while Mr Ciaran Murphy QC and Mr Russell appeared on behalf of the Crown. The court wishes to acknowledge the assistance that it derived from the well prepared and carefully constructed written and oral submissions advanced by all sets of counsel.

The Background Facts

[4] On 24 May 2009 two Scottish Association football matches were being played to decide the fate of the Scottish Premier League Championship. The progress of the matches was being followed by a number of supporters of Glasgow Rangers FC who were watching the match on television in Scott's Bar in New Market Street, Coleraine. In the area of Coleraine commonly known as 'the Heights' a number of supporters of Glasgow Celtic FC were also watching the matches either in their homes or at the homes of friends. The Heights includes the area of Pates Lane and Somerset Drive. Many members of both these groups appear to have been drinking heavily for a considerable period of time on that occasion. It seems that, throughout the afternoon, communications took place between the two groups either by telephone or by some form of social media.

[5] During the afternoon police became aware of rising tensions between the two groups and an effort was made to communicate with community representatives. At about 5.30pm Sergeant Thompson and Constable Forbes travelled in a police car to Scott's Bar where they observed a number of people wearing Rangers shirts. Sergeant Thompson wound down the window of the police vehicle and observed the appellant John Thompson whom he described as being "very drunk". During a subsequent police visit, a short time later, John Thompson took a piece of timber about 3½ feet long and 2-3 inches square from a skip with which he attacked the police vehicle breaking the window in the sliding door behind Sergeant Thompson.

[6] Shortly thereafter it appears that the individuals who had been drinking in Scott's Bar learned that Celtic flags and a tricolour had been erected on lamp posts at the entrance of Somerset Drive. A large number of those individuals made their way to the Heights, some on foot and some in vehicles, including taxis. The flags were removed and a violent confrontation took place with the opposing supporters and some local residents. During the course of that confrontation Damien Fleming was beaten with fists and weapons and knocked to the ground where he was brutally

kicked around the body and head. As a consequence of the assaults Mr Fleming suffered extremely serious injuries and was taken to hospital where his condition was life-threatening. He has sustained a traumatic brain injury and requires permanent care. During the same incident Mr McDaid was knocked to the ground where he received blows to the head and other injuries. It seems that Mr McDaid had previously suffered from a weak heart. An expert cardiologist confirmed that it would not be possible to establish a causal link between the assault perpetrated upon him and his subsequent death. Police attended at some stage during the course of the violent confrontation only to be met with such a degree of aggressive violence that it became necessary for one of the officers to draw his firearm when attempting to prevent further assaults upon Mr Fleming.

The Involvement of the Appellants

[7] On behalf of each appellant pleas were entered upon the basis of written documents agreed between the prosecution and the defence. In the case of James McAfee the agreed basis of his plea was:

> "The defendant, James McAfee, entered the area of Pate's Lane on 24 May 2009 and was party to an affray. It is not alleged that he was involved in the assault of any person at that time."

[8] In the case of the appellant John Thompson the agreed basis of the plea was:

> - "The defendant is pleading to a Section 47 assault on Kevin McDaid on the basis that he punched him once and was part of a joint enterprise to cause him actual bodily harm but did not personally inflict further violence on him.
> - He is pleading to a Section 18 assault on Mr Fleming on the basis that he was part of a joint enterprise to cause him grievous bodily harm but did not personally inflict violence on him.
> - This conduct constituted his involvement in the affray."

The Sentencing Exercise

[9] In setting out his approach to sentencing those who had pleaded guilty to offences as part of a joint enterprise the learned trial Judge said:

> "Now I have indicated that the basis of the plea in each case is on what is called joint enterprise and that plea is on the basis that each of the defendants agrees that they place themselves as part of the enterprise but each places

himself in a secondary role. There is limited admission of anyone throwing any punches at the victims, or of the use of weapons, or of kicking on the ground and in some cases the indication has been that the defendants were not present at the assault on the victims. It is the case and the court must recognise in dealing with sentencing that there is limited evidence of actual engagement by any individual defendant. There are forensic matches that have been made of DNA on weapons or a victim's blood on clothes or shoes but it cannot be shown to result from actual engagement as opposed to proximity of the offence or in contact with others who were present at the commission of the offence.

Now joint enterprise is a legal concept which recognises the responsibility of those engaged in a criminal enterprise even if they were not active participants in all aspects of the enterprise. Joint enterprise can be a blunt instrument in establishing legal responsibility. In sentencing in respect of those who are found guilty or plead guilty to offences on the basis of joint enterprise, it is the individual culpability of each defendant that should be dealt with. That individual culpability is not identical to the concept of legal responsibility for joint enterprise."

[10] With regard to the offence of affray the learned trial Judge set out his approach in the following terms:

"In respect of offences of affray, to which some of the defendants have pleaded guilty alone, I refer to the case of McDonald decided in our Court of Appeal in 2006. This recognised the sentencing appropriate for such an offence and indicated a number of principles that should be recognised:

Active central participation will normally attract more condign punishment than peripheral or passive support for affray reflecting the same sort of comments made about grievous bodily harm.

The use of weapons will generally merit the imposition of greater penalties.

> The extent to which members of the public have been put in fear will be a factor that will influence the level of sentence.
>
> A distinction should be drawn between an affray that has ignited spontaneously and one that has been planned.
>
> Heavier sentences should be passed where the affray consists of a number of incidents rather than a single self-contained episode."

[11] For the purpose of determining the appropriate commensurate sentences for the various offences the learned trial Judge carefully reviewed and analysed a number of relevant authorities and, having done so, he concluded that, in the circumstances, the offence of causing grievous bodily harm with intent had caused a high degree of harm and attracted high culpability. He noted that the offence was aggravated by sectarianism and decided that, on a contest, the appropriate sentence was one of 10 years' imprisonment before consideration of the individual circumstances of the offenders. He expressed the view that similar considerations with regard to harm and culpability applied to the offence of affray and concluded that the commensurate sentence for that offence on a contest in the circumstances of this case should be one of 5 years' imprisonment. The learned trial Judge indicated that credit would be given for the pleas of guilty although he was not satisfied that they had been entered at the first opportunity, for the delay of 5 years from the occurrence of the offences to the date of sentencing and for any relevant period spent in custody on remand. He also indicated that 50% of any custodial sentence would be served on licence.

[12] The learned trial Judge also identified an additional factor for which he was prepared to give credit which has been the subject of comment by both Ms Quinlivan and Mr Macdonald. In the course of sentencing the learned trial Judge said:

> "I also give credit for the absence of forensic connection between a number of the defendants and the offences themselves."

He later explained that he would take account of a DNA connection as an indication of an offender being 'an active participant'. The learned trial Judge continued:

> "By that I mean not that he is identified as a perpetrator of the attack on the victims while they were lying on the ground but he is active to the extent of being in proximity to the offence or to the offenders so as to leave a DNA trace."

[13] The learned trial Judge considered that there was a DNA link in the case of John Thompson which thereby constituted him 'an active participant.' With regard to James McAfee the learned trial Judge observed:

> "There is a DNA connection which has been noted in this particular case. He has denied involvement in the event. Particulars have been given of the timings where he was seen on different locations and I note a late arrival confirmed by the particulars which I don't propose to repeat."

The Submissions on Behalf of the Appellants

James McAfee

[14] On behalf of the appellant McAfee Ms Quinlivan submitted that the determinate sentence of 3 years' imprisonment was manifestly excessive and that the learned trial Judge in coming to the view that such a sentence was appropriate had made a number of errors of law or principle and/or misapprehensions of fact.

[15] Ms Quinlivan argued that the sentence imposed was higher than the broad range of dispositions appropriate to the relevant type of offending and that the learned trial Judge had failed to give adequate weight to the agreed basis upon which the appellant had pleaded guilty when assessing the relevant level of culpability. She submitted that the learned trial Judge had placed unwarranted reliance upon the sentences meted out to the appellants in R v Keys & Ors [1987] 84 Crim App R 204. The offenders in Keyes had been found guilty of a number of offences committed during the Broadwater Farm riots including that of affray. Those convicted of affray had received sentences of 3½ years' imprisonment. Ms Quinlivan submitted that the circumstances of the Broadwater Farm riots were significantly more serious than the confrontations in which the appellant was alleged to have been involved even taking that incident at its height. She pointed out that it was clear from the relevant CCTV footage that Mr McAfee was not a member of either of the two main groups that proceeded from Scott's Bar to the Heights but was shown to be walking by himself along the relevant route some 5 minutes behind the second group. Timings agreed between the Consultant Engineer called on behalf of the appellant and the PSNI indicated that by the time that Mr McAfee arrived at the locus many of the 999 calls relating to the confrontation and the assaults had already been received by the emergency services.

[16] Ms Quinlivan referred to the statement by the learned trial Judge that there was a "DNA connection" in the appellant's case followed by the statement that:

> "He has denied involvement in the event."

She submitted that, given the overall context of his judgment, the learned trial Judge could only have meant that such a connection proved that the appellant had been "an active participant".

[17] Ms Quinlivan provided the court with a careful analysis of the source and extent of the DNA connection to the appellant. It appears that a small spot of blood with a profile matching that of Damien Fleming was recovered from the broken end of a wooden stair spindle. Swabs recovered from the broken spindle were found to contain a Low Copy DNA profile matching that of Mr McAfee. Dr Whittaker, the Forensic Scientist who conducted the DNA examination on behalf of the prosecution reached the following conclusion:

> "In my opinion these DNA profiling results are in keeping with either Mr McAfee having handled the spindle at some time such that his DNA has been transferred to the surface swabbed or alternatively that the swabbed area has had some other contact with his skin such that his DNA/cells have been transferred; for example by him having been hit with it."

Ms Quinlivan confirmed that her solicitors had obtained a report from Dr Krane, Professor of Biological Sciences, which dealt with the process of Stochastic Statistical Sampling and which contained the following conclusion:

> "James McAfee cannot be excluded as a possible contributor to JRB3 and K though the very small amount of template DNA used by the FSS (less than 20 cells) is consistent with a very wide variety of means by which his DNA could have come to be associated with the sample."

That report appears to have been provided to the prosecution but Dr Krane did not give evidence nor was the report made available to the learned trial Judge although it appears that he was made aware of its existence. There was no evidence as to the location from which the broken stair spindle had been recovered. Ms Quinlivan further argued that the learned trial Judge had failed to give adequate weight to the appellant's personal circumstances and that the marked disparity between the sentence received by the appellant as compared to that imposed upon two co-defendants convicted of affray was disproportionate and gave rise to a justified and substantial sense of grievance.

The Appellant John Thompson

[18] Mr Macdonald helpfully informed the court that the appeal conducted on behalf of Mr Thompson was focussed upon the sentence of 8 years' imprisonment

that had been imposed upon him in respect of the offence of causing grievous bodily harm with intent. He submitted that, apart from the case of Frank Daly, there was no proper basis for distinguishing the appellant from those of the other individuals who had pleaded guilty to such an offence and who had received sentences of 5 years, 6 years and 7 years. In particular, Mr Macdonald criticised the learned trial Judge for his classification of the appellant as an "active participant" by virtue of a DNA connection.

[19] Various bloodstains together with samples of skin/hair were recovered from a wooden pickaxe handle found at the scene. DNA analysis of the skin and hair and two spots of blood were found to be consistent with samples taken from Damien Fleming and smears of blood together with ridge detail from possible fingerprints in blood matched profiles obtained from the appellant Thompson and the co-accused Frank Daly. Mr Macdonald drew the attention of the court to a medical report from Dr Patrick McGrath who had medically examined the appellant Thompson after the incident and found that he had sustained injuries to his left temple, anterior abdominal wall and left forearm. Mr Macdonald informed the court that, subsequent to delivery of the sentencing judgment, he had drawn the attention of the learned trial Judge to a possible misapprehension with regard to the DNA evidence in so far as the presence of Mr Thompson's blood on the pickaxe handle suggested that the implement had been used to attack Mr Thompson. The exchange appears to have been as follows:

> "Mr Macdonald: Your Worship will remember that I referred to a medical report including the injuries on him and so the DNA connection is in connection to an assault on himself rather than to an assault on anyone else.
>
> Judge: Well I did regard it as such Mr Macdonald."

[20] Mr Macdonald also submitted that the learned trial Judge had failed to give adequate weight to the personal circumstances of the appellant including the fact that he himself had been born in the Heights area and knew many people in that neighbourhood, that his parents still lived at the top of Pates Lane and that his primary reason for visiting the area on the evening in question had been to reassure himself of the safety of his parents. It appears that their house had been previously attacked on Christmas night 2008 when a window had been broken and damage had been caused to his father's van. Mr Macdonald reminded the court of the appellant's good work record, the fact that he was in a stable domestic relationship and that extremely serious criminal charges had been "hanging over his head" for approximately 5 years.

The Approach of the Learned Trial Judge

[21] The learned trial Judge had to deal with pleas of guilty by six defendants to the offence of unlawfully and maliciously causing grievous bodily harm with intent to do grievous bodily harm and four cases of pleas limited to affray. The latter offence is constituted when an offender participates in unlawful fighting or a display of force such as to terrify members of the public. The learned trial Judge recorded that all the relevant pleas had been qualified by reference to "joint enterprise". He went on to explain that each of the defendants had placed themselves as part of the joint enterprise in a secondary role. As noted above, these appellants pleaded guilty on the basis of written agreements with the prosecution. The learned trial Judge noted that joint enterprise can be a blunt instrument in establishing legal responsibility and that it was the individual culpability of each defendant pleading guilty to offences on the basis of joint enterprise that had to be considered.

[22] It is quite clear that, when he came to look at the relevant individual circumstances of the appellants the learned trial Judge placed significant weight upon the presence or absence of a "forensic connection" between the appellants and the offences. As noted above he appears to have formed the opinion that the presence of such a connection constituted an offender an "active participant" in the sense that, in order to establish such a connection, a participant must have been in close proximity to the offence or the offenders directly involved in carrying out the assaults. While counsel on behalf of Aaron Beech, who was the last to make representations on behalf of his client, does seem to have conceded in an exchange with the judge that the blood connection suggested that Beech had been in the "middle of this," he also referred the judge to the basis of the plea and pointed out that the blood could have been the result of secondary transfer. Mr Macdonald on behalf of Thompson and counsel for Daly concentrated their submissions upon dissipating any suggestion that the forensic evidence indicated that their clients had been using weapons, a matter which they said would have been developed in detail during any trial. Ms Quinlivan, on behalf of McAfee, after noting that Dr Krane's report had been served on the prosecution, placed strong emphasis on the possibility of secondary transfer either at the scene or in Scott's Bar.

[23] Before this court Mr Russell, on behalf of the prosecution, accepted that no attempt had been made by the prosecution to distinguish between the individual culpability of the appellants as compared to the other defendants facing the same charges whether on the basis of a forensic connection or otherwise. Before delivering his sentencing remarks the learned trial Judge does not appear to have raised with counsel that any established forensic connection could be used to identify "active participants" or that absence of such a connection could attract credit when sentencing or the weight to be allocated thereto. Given the different approaches that counsel had clearly taken on behalf of their clients during their submissions relating to the forensic evidence and the variation in the nature and distribution of the

evidence itself, in our view that constituted an unfortunate error in the particular circumstances of this case.

[24] In R v Lucien [2009] EWCA Crim 2004 the appellant changed his plea from not guilty to guilty on the first day of his trial and the plea was tendered on a specific basis. In the course of delivering the judgment of the court Judge Loraine-Smith said at paragraph 11:

> "It is very apparent that the judge had taken a great deal of care over his sentencing remarks which were full and clearly reasoned but in this case, for some reason, the defence were unaware until the sentencing was actually in progress that the judge did not accept that the appellant's criminal involvement only began once the complainant was in the car. If a judge does not accept an important and relevant part of the basis of the plea he or she should make that clear so the defence can decide how they wish to proceed."

In this case the basis of the pleas had been agreed with the prosecution which had not sought to distinguish between the roles of any of the defendants pleading guilty to the relevant offences. Specifically, the prosecution had not sought to associate a forensic connection with a defendant as indicative of a greater or lesser culpability. We do not consider that the learned trial Judge should have introduced such a distinction in the course of delivering judgment but rather that, before commencing sentencing, if he was so minded, he should have invited submissions both for and against such a distinction from the prosecution and the defence – see R v Newton [1983] 77 CR App R 13 and R v Underwood & Ors [2005] 1 CR App R 178.

Conclusions

[25] The events that are the subject of these appeals had nothing whatever to do with sport and, at best, had only the most perfunctory connection with politics. The confrontation that took place at the car park to the rear of houses in Somerset Drive/Pates Lane was engendered by deep-seated bigoted sectarianism fuelled by alcohol and responding to perceived provocation. The repetition of "turf" or "interface" violent confrontations between mobs styling themselves as either 'loyalist' or 'nationalist' is depressingly familiar as a phenomenon that has continued in this jurisdiction over the years to the present day – see, by way of example, the various locations referred to at paragraphs [5] to [9] in the decision of this court in R v McKeown, Lynn and Ferris – DPP's Reference (Nos 13, 14 and 15 of 2013) [2013] NICA 63. The remarks in that case by Morgan LCJ with reference to riotous assembly have similar resonance for the offences in respect of which these appellants have pleaded guilty. At paragraph [10] of the judgment the learned LCJ expressed

the view that the gravamen of the offence was the decision to participate thereby causing fear and alarm to those members of the public affected. He went on to say:

> "[10] …...Each participant adds to the weight of numbers in the mob and fuels the level of aggression that has been evidenced to us in these cases. Even those who participate by presence and encouragement only, their culpability must be judged by the total picture of the disorder and violence caused.
>
> [11] Such persistent criminal conduct spread as it is across our community inevitably requires a deterrent sentencing framework. Those who chose to participate by presence and encouragement had the option of walking away. Those who actually used violence did so as part of the violent disorder. Their conduct cannot be viewed in isolation. Where a deterrent sentence is required previous good character and circumstances of individual personal mitigation are of comparatively little weight."

[26] The appellant Thompson had been drinking heavily since at least 2 o'clock in the afternoon at Scott's Bar in company with a large number of loyalists who were entertained, inter alia, by two loyalist bands. Various forms of communication with their counterparts in the nationalist area resulted in heightened tensions and by 5.30pm he was so drunk and emotionally inflamed that he took a piece of timber from a skip and set about attacking a police car. The CCTV recording showed Mr Thompson to be in the initial large group moving towards the scene of the confrontation and he accepted that he punched Mr McDaid as a result of which the latter fell to the ground. When the appellant was some 23 years of age he was convicted of serious terrorist offences for which he received an overall sentence of 12 years imprisonment.

[27] We have accepted that the learned trial Judge made an error in equating the DNA traces from Mr Thompson on the pickaxe handle with the role of "active participant". Mr Macdonald both at first instance and in this court maintained that it was Mr McDaid who had been armed with the pickaxe handle and it was, as a result of that attack, that appellant had punched Mr McDaid. We note that Mr Thompson did not make the case in the course of his police interviews that he had been attacked by Mr McDaid, or any other person, with a pickaxe handle nor does he appear to have explained how his bloody fingerprints came to be present on such an implement. Mr Thompson was some 30 years of age at the time of the offences and he seems to come originally from a non-sectarian background. It is difficult to understand how someone with such a background and of such a maturity would act as he did. That he did participate is a clear indication of the power of a drunken

sectarian mob and reinforces graphically the need for deterrent sentences. We have carefully considered all of the circumstances of Mr Thompson's case and, having done so, even after discounting any weight that the learned trial Judge may have given to the forensic evidence, we are quite satisfied that his sentence was not manifestly excessive. Indeed, in our view, there is at least a respectable argument that it was lenient. His application for leave to appeal will be refused.

[28] The case of Mr McAfee is rather different. He and three others pleaded guilty solely to the offence of affray. The approach to sentencing for the offence of affray in this jurisdiction has been helpfully and lucidly analysed by Kerr LCJ in the course of giving the judgment of this court in Attorney General's Reference (No 1 of 2006) [2006] NIJB at paragraphs [22] to [25]. The general principles elucidated in that judgment were accurately recorded by the learned trial judge. There was no evidence to indicate that Mr McAfee had physically assaulted any person and there was clear CCTV evidence to indicate that he was not a member of either of the two main mobs that travelled from Scots Bar to the scene but in fact proceeded by himself arriving at a relatively late stage.

[29] A small spot of blood at the broken end of a stair spindle produced a DNA profile matching that of Damien Fleming. Low Copy Number DNA profiling applied to swabs taken from both ends of the broken spindle produced a profile matching that of Mr McAfee. The location from which the spindle had been recovered was never established nor was any history of its use produced.

[30] The learned trial judge recorded a positive work record on the part of Mr McAfee and noted a number of favourable references. He was not prepared to regard a single conviction for disorderly behaviour in 2006 as significant. In the paragraph of his judgment quoted above the learned trial judge referred to a DNA connection from which he must have inferred proximity to an offence or contact with others who were present at the commission of the offence. However, in the same paragraph he accepted that Mr McAfee's late arrival at the scene had been confirmed by CCTV. It is difficult to ascertain the respective weight attributed to these pieces of evidence by the learned trial judge in the absence of any detailed analysis of the circumstances in which the DNA trace was found and reconciliation of any such circumstances with the CCTV record.

[31] Ultimately, Mr McAfee received a sentence of three years imprisonment and Ms Quinlivan contrasted that outcome with the sentence of one year's imprisonment suspended for two years imposed upon David Cochrane. Mr Cochrane also had a single conviction for disorderly behaviour which the learned trial judge did not consider significant and he had a similar positive employment record and references to Mr McAfee. There was no "forensic connection" but, on the other hand, he was shown by CCTV to have been a member of the large group, including Mr Thompson, and, in interview, he accepted that he had assisted in the removal of a flag at Somerset Drive.

[32] The approach to an appeal based on, inter alia, disparity of sentence as compared to co-defendants was considered by this court in R v Murdock [2003] NICA 21 in which the judgment was delivered by Carswell LCJ. At paragraph [16] he referred to the convenient summary in R v Delaney [1994] NIJB 31 in which he approved the following passage:

> "In so arguing counsel was invoking the well-known line of authority in which it has been held that where one co-accused has been treated with undue leniency another may feel a sense of grievance when he receives a sentence which in isolation is quite justifiable but which is more severe than that imposed upon his associate. Rather than allow such a sense of grievance to persist, the court has on occasion reduced the longer sentence on appeal. It has only done so as a rule where the disparity is very marked and the difference in treatment is so glaring that the court considered that a real sense of grievance was engendered: see R -v- Brown [1975] Crim LR 177. The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in: R -v- Bell [1987] 7 BNIL 94, following R -v- Towle and Wintle (1986, The Times, 23 January).
>
> It should not be supposed, however, that the court will be prepared to invoke the principle and make a reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification. The examples in the decided cases where reductions have been made are generally cases of very considerable disparity. Where the disparity is not of such gross degree the courts have tended to say that the appellant has not a real grievance, since his own sentence was properly in line with generally adopted standards, and if his associate was fortunate enough to receive what is now seen as an over-lenient sentence that is not something of which the appellant can complain."

Those views have been subsequently confirmed by this court in R v Stewart [2009] NICA 4 and R v McBride, Benson and Barry [2014] NICA 45.

[33] We have already concluded that the learned trial judge was in error in his use of a forensic connection in the absence of raising such a connection with the legal

representatives prior to delivering his judgment. Accordingly 'something had gone wrong'. Leaving the forensic connection out of account and standing back we have reconsidered the case of the sentence imposed upon Mr McAfee. If anything, the objective evidence would appear to suggest that his participation was less direct than that of Mr Cochrane. However, we again emphasise the seriousness of this type of offence together with the need for deterrent sentences to be passed even in respect of those playing a relative peripheral part. We consider that, in the circumstances of the evidence against him, Mr Cochrane was indeed fortunate in receiving a very lenient sentence. Accordingly, we propose to quash the sentence of three years imprisonment passed upon Mr McAfee by the learned trial judge and substitute therefore a period of 1 year's imprisonment with the same conditions as to the proportion of imprisonment and licence as before. Mr McAfee's appeal will be allowed to that extent.