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Judgment: approved by the Court for handing down | *Delivered:* **17/09/09**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

-v-

DAMIEN WILLIAM McKENNA, GARY TOMAN AND SEAN GERARD PATRICK McCONVILLE

TREACY J

[1] Damien William McKenna, Gary Toman and Sean Gerard Patrick McConville on the opening day of your trial you each applied to be re-arraigned and pleaded guilty to the second count on the indictment of possession of explosives with intent contrary to Section 3(1)(b) of the Explosive Substances Act 1883.On the application of the prosecution Count 1 (conspiring to cause an explosion) is to remain on the court record and not to be proceeded with without the leave of the court. The third count (possession of explosives in suspicious circumstances) was an alternative to the second count.

[2] Following a surveillance operation the accused were arrested on 29 March 2007 together with a fourth person on the Antrim Road in the Lurgan area. That evening a military surveillance team were in the area of the Cornakinnegar Road and North Circular Road and at around 10.00 pm members of the patrol observed a group of three men including Damien McKenna in the general area of the Antrim/Cornakinnegar Road. There were no other persons about. One of the officers shortly afterwards observed activity taking place in a nearby field (marked on the map, Exhibit 69, as incorporating the area including the legend "find of items"). This witness was unable to observe how many persons were present or the activity they were engaged in.

[3] A short time later a group of three men were observed coming from the direction of the field in the direction of the North Circular Road. Before reaching the North Circular Road they were joined by a fourth person. They turned into North Circular Road and went to a car park in Lurgantarry where they approached a Nissan Primera. They then turned to the right and stood for some minutes at a gable wall. All four then stood around another vehicle

for a period. The tallest, McConville, walked back to the Primera followed by a second man. McConville felt around the area of the driver's wheel arch. They were joined by the other two standing at the car looking around. McConville got into the driver's seat and they all got into the car. The lights of the car were flashed 6 or 7 times to the junction of Cornakinnegar/North Circular Road. The car then went to that junction and turned right towards Lurgan where it was stopped a short distance away by the police and the occupants arrested.

[4] During the period of the surveillance referred to above aerial surveillance of the scene was also taking place. From this aerial surveillance a group of men were seen to the north of the field across Malone's Bridge which is marked on the map Exhibit 69 in the area of the railway line. They then entered the field at the north end, moved south in the field to an area obscured from the road for 15 minutes, then moved to the hedge line at the Cornakinnegar Road for 25 minutes, then returned to the same position in the south of the field and then to the area marked find of weapons where they remained for at least 4 minutes. There appeared to be three persons present one of whom went away from the others for a number of minutes. These three persons were therefore in the field for over half an hour.

[5] The three defendants were taken from the vehicle they were stopped in and searched. All three had wet and dirty trousers and footwear. The fourth man who is not before the court did not.

[6] The hands of driver McConville were dirty. When asked where he was coming from he said "Nowhere" and when asked who owned the vehicle he said he did not know. He was asked if he had stolen it and he said no the keys were already in it and that he had just got in. He made no comment after caution. His coat was seized.

[7] McKenna was the front seat passenger. His hands were also dirty. In his jacket and trouser pockets the police recovered a circuit tester with wire, a wire cutter, a wire stripper and a pair of gloves. These items can be seen in photograph 5 exhibit 79. He was cautioned in relation to these items and gave no reply. At the custody suite he said he was a plasterer/labourer. His clothing was seized.

[8] Toman was in the rear side passenger seat. In front of him on the floor was a black sock which was seized. Beside him was a green jacket. He was the only occupant of the car who was not wearing a coat.

[9] In the car the police recovered four large square batteries from the boot which are shown in photograph 6 of exhibit 79. The fourth occupant was searched and two dog whistles were found in his right hand.

[10] Over the next two days a search of the field was undertaken. This search proved negative. The defendants were interviewed. McKenna and McConville remained silent. Toman give an account suggesting he had met the others a short time earlier and was merely getting a lift home.

[11] On 5 April a further search of the field took place. On this occasion obscured by dead loose grass, a mortar and mortar tube were recovered. Explosive ordinance disposal action by the ammunition technical officer (ATO) was required to make the mortar safe. The items recovered are shown in exhibit 77 photographs 8-18.

[12] The items recovered were forensically examined and in his report the senior scientific officer Mr McAuley described the items as disrupted (by ATO) remains of an improvised mortar bomb with an electrical initiation system designed to function on impact. There was a support tube and propulsion unit suitable for use with the mortar bomb. The bomb was to be electrically initiated by the use of a command wire. Samples recovered by the ATO were of PETN/RDX commercial grade semtex. There was also gun powder.

[13] The prosecution case was that this was a complete functional explosive device ready for use once the command wire was attached which in Mr McAuley's opinion was capable of causing severe damage to an armoured vehicle thus inflicting injury or possible death to the occupants.

[14] Forensic tests continued and after these were reported on the defendants were re-arrested and interviewed and gave no replies.

[15] In the case of McKenna the examinations revealed the presence of PETN on his jeans, jacket and cream gloves. In the case of the gloves high levels were found indicating direct contact with a concentrated source of the compound or a surface heavily contaminated with it. In the case of McConville fibres from the gloves found in the coat seized from him were found on the mortar shell and mortar launch frame. In the case of Toman he was linked by DNA to the black sock found under the front passenger seat fibres from which were recovered from the mortar launch frame. Toman was the only one not wearing a jacket on arrest and he was linked by DNA to the green jacket found on the off-side rear seat. PETN was found on a glove recovered from the pocket of this jacket.

SENTENCING RANGE

[16] The defendants are all young adults. I shall treat them all as having clear records (disregarding a minor conviction in the case of one of the defendants).As to their respective roles in this offence neither the prosecution nor the defence sought to distinguish between them. On any showing they

were all deeply implicated in the sinister events which I have summarised above. During their pleas in mitigation counsel on behalf of each defendant asserted, on instruction, that their role was that they had merely gone to check the location of the device and to conceal it – an account not accepted by the prosecution.
Prior to their pleas no such case was ever advanced by any of the defendants. Challenged as to the weight, if any, to be attached to such a late and self-serving assertion Mr Pownall QC (for McConville) initially submitted that the court was "bound" to accept this statement of their role. When pressed he withdrew this submission and indeed helpfully drew the courts attention to a passage in Blackstone (2009 Edn) at para D19.9 which makes it clear that the court is not so bound
In my view acceptance of the role the defendants each attempt to ascribe to themselves would, in light of the evidence, require an astonishing degree of naivety. As the prosecution pointed out such a role is inconsistent with the length of time they were in the field, the fact that there were three of them and their established movements.
In my view the only significant mitigating factor in this case is the fact that each of the defendants pleaded guilty. However their plea was belated and came only on the first day of their trial.

[17] It is clear that sentencing for such an offence following a plea of **not guilty** will attract much more severe penalties. Thus the Court of Appeal in The Queen v O'Reilly (1989) NI 120 upheld a sentence of 17 years imprisonment upon the conviction of a ringleader stopped in possession of explosives. The court commented that where a person was convicted of possession of explosives with intent and it was clear that he was actively and willingly involved, in the absence of any exceptional circumstances, a **heavy deterrent sentence** should be passed. And that in such a case as the one that they were dealing with involving a large quantity of explosives a sentence of **20 years and upwards** was appropriate.

[18] In R v Connolly (1994) NIJB 226 the Court of Appeal upheld a sentence of 20 years imprisonment upon conviction following a not guilty plea in respect of a bomb maker (responsible for incendiary devices as well as anti-personnel devices). In its judgment the Court of Appeal said that "As criminal activity using firearms and explosives continues, sentences in excess of 20 years imprisonment will neither be wrong in principle nor excessive. Each case depends on its own facts and a factor in sentencing is that if the existing level of sentences for a particular offence is failing to deter then the level of sentencing **may well have to rise**". In that case not only did the court consider that the sentence of 20 years was in no way excessive but they went on to say that the appellant was fortunate that a sentence was not in or about **25 years**.

[19] Since those decisions the Court of Appeal in England has delivered judgment in R v Martin (1999) 1 Criminal Appeal Reports (S) 477 (Bingham LCJ, Tucker J and Richards J). From that case it is apparent that the sentencing range upon conviction in England was in the range of 20-35 years with the severest sentences being passed in cases involving a deliberate threat to human life. In that case a sentence of 35 years was reduced to 28 years reflecting the fact that the **primary object** of the planned explosions at a series of electricity sub-stations in England by the Provisional IRA unit (of which the appellants were members) was **not** death and injury. In that case Mr Ken McDonald QC on behalf of the appellants had submitted that the court in England should align levels of sentencing in England and Wales with those prevailing in Northern Ireland which it had been suggested were somewhat lower. Lord Bingham, rejecting that submission, said:

> **"There are, we accept, *indications* in some of the reported Northern Irish cases that sentences have been imposed lower than would be expected here, *although it may be that sentence lengths have been gradually rising in that province*. Be that as it may, we do not think it appropriate to recast English sentencing practice to bring it into line with that in Northern Ireland, even *assuming* the level of sentencing there, in cases of this kind, to be lower. The history, traditions and social conditions in Northern Ireland are in significant respects difference from those here; and it would be potentially misleading to adopt one aspect of Northern Irish sentencing practice in isolation from the general framework of sentencing."**

[20]In terms of the sentencing range for this type of offence following a **guilty** plea the prosecution placed the upper end of the range at 14/15 years. The defence were in broad agreement with the suggested parameters. Indeed the court was informed by counsel for the defence, without demur from the prosecution, that they could find no case in this jurisdiction where, following a plea of guilty to possession of explosives with intent a sentence in excess of 15 years had been imposed. By way of illustration of this point the court was referred to a number of cases including R v Donnelly and Others where following a guilty plea a sentence of 12 years imprisonment was imposed by Weir J in respect of a count of possession of explosives with intent, contrary to Section 3(1)(b) of the Explosive Substances Act 1883. The device at issue in that case was however significantly different from the device in the present case. It was an improvised explosive incendiary device relatively small in nature (although the judge did comment at paragraph 4 that it was difficult to say what other purpose it would have had than to cause injuries to innocent members of the public.") It was also noted at paragraph 2 of that decision

that the police view of the crime was that it was intended to advance the cause of dissident Republicans. The accused in that case was aged 36 and had a previous conviction for hijacking and causing a bomb hoax.
[21]The appropriate range of sentence where a guilty plea has been entered can only be properly fixed by reference to what sentence such an offence would carry upon conviction after a contest and then applying the appropriate discount for the plea. Herein lies a fundamental difficulty in this case since the decision of the English Court of Appeal in R v Martin *appears* to envisage severer penalties for comparable cases upon conviction – a point accepted by Mr Pownall.Martin is a relatively recent statement of sentencing policy and it is difficult to discern why a different approach to sentencing in terrorist cases would now be appropriate in terrorist cases in Northern Ireland particularly in view of the resurgence of serious terrorist violence. Those who are seduced by the false glamour of terrorism, perhaps those too young to remember or blinded to its horrific consequences should not allow themselves to be deluded. Upon conviction they face lengthy deterrent sentences.

[22] I do not accept that 15 years today represents the upper end of the range for a plea in respect of an offence of this kind. Such a submission can only have been advanced on the basis that R v Martin does not represent the current sentencing range in this jurisdiction. But I can discern no reason of policy as to why that should be so. Indeed given the resurgence of extreme violent terrorist activity in this jurisdiction similar deterrent sentences may be inevitable. In passing sentence for the most serious terrorist offences the court in Martin said that the court's object would be to **punish**, **deter** and **incapacitate** and that "**the appropriate sentence for any given offence will plainly depend on a large number of factors, which will include the likely result of any explosion or the target of any conspiracy, the role of the individual defendant, the nature, size and likely effect of any explosive device, the motivation of the defendant and, where death, injury or damage has been caused, the nature of extent of the death, injury and damage in question"**
[23] However given the express acknowledgment by the prosecution as to the value of the plea in the special circumstances of this case which thereby avoided the need for sensitive military witnesses (including one who had been denied screening) from having to give evidence and their acceptance that despite its lateness it should still attract "significant" discount I will impose a sentence of 15 years in each case.