Neutral Citation no. (2000) 2158

Ref: CARC3285

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 08/12/00

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

FREDERICK IRVINE DAVID CROTHERS

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CARSWELL LCJ

This appeal is brought by the appellant against his conviction on 14 January 2000 by McCollum LJ, sitting without a jury at Belfast Crown Court, of conspiracy to cause grievous bodily harm. He was charged on the indictment with four charges:

Count 1: possession of an explosive substance with intent;

Count 2: conspiracy to murder members of the RUC;

Count 3: possession of a firearm and ammunition in suspicious circumstances;

Count 12: making explosive substances.

He was charged on the first three counts jointly with his wife Pauline Crothers. He originally pleaded not guilty to all four charges, but on 9 November 1999 he pleaded guilty on re-arraignment to Counts 1, 3 and 12.

His trial proceeded on Count 2, and on 12 November 1999 at the close of the Crown case the learned judge held that the evidence fell short of proof of a conspiracy to murder. He held, in our view correctly in the light of the decision of this court in *R v McPhillips* [1989] NI 360, that to establish a conspiracy to murder it must be proved that the course of conduct agreed upon must necessarily have amounted to or involved the murder of some person. He directed a verdict of not guilty on conspiracy to murder, but held that the evidence was capable of establishing that there was a conspiracy to cause grievous bodily harm. The trial was adjourned and when it resumed on 14 January 2000 the judge first gave a ruling containing his full reasons for directing a verdict of not guilty of conspiracy to murder. No evidence was called on behalf of the appellant, and the judge then held that his actions amounted to a conspiracy to cause grievous bodily harm and found him guilty on Count 2 of that offence.

The appellant was sentenced to fifteen years' imprisonment on Counts 1, 2 and 12 and seven years on Count 3, all sentences being concurrent. He has appealed against sentence as well as against conviction, but at his counsel's request we deferred consideration of the appeal against sentence until after our determination of the appeal against conviction.

The facts of the case were largely established by the admissions of the appellant made in interview, and he did not challenge the Crown evidence. He had become a member of a Loyalist group with paramilitary links, and was involved with the continuing protests at Drumcree. He admitted that another person had brought a quantity of blast bombs and a home-made machine gun and ammunition

for him to keep and that he stored them for a period for him. He armed two of the blast bombs by cutting up shotgun cartridges and pouring the contents into the bombs. He brought these two bombs into Portadown in his car and handed them to two other persons for use, knowing that they would be thrown at police personnel who were dealing with a riotous situation in the town.

The issue on which the appeal turned was whether the judge was entitled, having found the appellant not guilty of conspiracy to murder, to convict him on the same count of conspiracy to cause grievous bodily harm. It was not in dispute that if the indictment had contained a specific count of conspiracy to cause grievous bodily harm, the judge could properly have found him guilty on the evidence before him. The question was raised at trial whether such a count should be added to the indictment, but Crown counsel declined to seek leave to do so, taking the view that Count 2 was sufficient to cover a conspiracy of either type.

It was submitted on behalf of the Crown that the judge had the necessary power under the provisions of section 6(2) of the Criminal Law Act (Northern Ireland) 1967, which reads:

> " (2) Where, on a person's trial on indictment for any offence except treason, capital murder or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

In *Metropolitan Police Commissioner v Wilson* [1984] AC 242 at 258 Lord Roskill pointed out that four possibilities were envisaged by the equivalent subsection in the Criminal Law Act 1967:

> "First, the allegation in the indictment expressly amounts to an allegation of another offence. Secondly, the allegation in the indictment impliedly amounts to an allegation of another offence. Thirdly, the allegation in the indictment expressly includes an allegation of another offence. Fourthly, the allegation in the indictment impliedly includes an allegation of another offence.
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> If any one of these four requirements if fulfilled, then the accused may be found guilty of that other offence."

The Crown case was that since it is a necessary component of conspiracy to murder that the conspirators envisage and intend to accomplish the murder of some person by violent means, the allegations contained in that charge necessarily include, *a fortiori*, their intention to bring about the infliction of grievous bodily harm on that person. The defence argument was that a conspiracy to murder is a different conspiracy, with a different intention, from a conspiracy to cause grievous bodily harm, and that therefore the allegations contained in the charge of conspiracy to murder police officers did not include an allegation that the defendants conspired to inflict grievous bodily harm upon them.

We consider that in principle the Crown argument is correct. The conspirators were all agreed on the same course of conduct, that blast bombs should be thrown at police officers. There was no direct evidence of their intention in respect of the consequences of that action, and it had to be inferred from the nature of the act envisaged and from any admissions made by them. The judge declined to infer that they intended the death of the police officers, but found that they intended

to inflict grievous bodily harm on them. It seems to us clear that the allegation that they intended to murder the officers included an allegation that they intended to inflict the lesser harm of grievous bodily harm upon them. We also consider that the same conclusion would follow if the tribunal of fact found that one defendant intended that the officers should be killed, while another intended merely to inflict grievous bodily harm on them. This would constitute a conspiracy to cause grievous bodily harm but not a conspiracy to murder: cf Smith & Hogan, *Criminal Law*, 9th ed, p 282. In such a case both could in our view be convicted of conspiracy to cause grievous bodily harm on a count charging them with conspiracy to murder.

We turn then to see whether there is any authority in the decided cases which would throw doubt on the correctness of the conclusion which we have reached on principle. Mr Finnegan QC for the appellant relied on the decision of the Court of Appeal in England in *R v Barnard* (1979) 70 Cr App R 28. In that case the appellant's case was that he had taken part in a discussion with accomplices about committing a theft at a jeweller's shop by breaking in through the ceiling, his customary *modus operandi*. He claimed that he abandoned the idea because the jeweller removed his more valuable pieces from the premises at night, when the contemplated burglary would have taken place. His confederates went ahead, however, with a more direct frontal attack and carried out a robbery of the jeweller, armed with an iron bar. The appellant was originally charged with conspiracy to rob the jeweller. After some discussion on the question whether he could be convicted of conspiracy to commit theft on that count, counsel for the prosecution, with the leave of the court, added a count to the indictment charging conspiracy to

commit theft. The appellant was convicted on that count. The issue on appeal was whether certain evidence concerning the robbery, which tended to lead to an inference that the appellant's plan to burgle the shop had not been abandoned, should have been admitted against him. The Court of Appeal held that it should not have been admitted, because evidence of the overt acts pursuant to the conspiracy to rob had no relevance to the conspiracy to steal, since they showed an intention by those who carried out the agreement to rob to do something other than follow the intentions of those who had started by agreeing to steal. The reasoning of the court was founded on drawing a definite distinction between a conspiracy to rob and a conspiracy to steal. Lawton LJ in giving the judgment of the court rejected the submission that an agreement to rob is merely an aggravated form of a conspiracy to steal, which involves accepting that a conspiracy to steal is a lesser form of a conspiracy to rob. He said that there has to be another agreement if a conspiracy to steal becomes a conspiracy to rob, and expressed the view that section 6 of the 1967 Act had no application.

We respectfully agree with the proposition approved by Lawton LJ in *R v Barnard* at page 33 that an agreement to steal does not necessarily involve a course of conduct ending in robbery and the conspirators do not intend that it should. This was the reason why the court held that it was incorrect to admit against the appellant the evidence of the overt acts done in pursuance of the conspiracy to rob. The appellant had not joined in the conspiracy to rob, and evidence relevant to that conspiracy was not admissible against him.

It does not, however, follow that the converse proposition is correct, that if the appellant had been charged only with conspiracy to rob he could not have been convicted on that count of conspiracy to steal. A conspiracy to steal may not be merely a lesser form of a conspiracy to rob, for to constitute the latter there has to be added an extra ingredient, the intention to use force or the threat of force, which may be quite outside the contemplation of some of the conspirators. But, as Professor JC Smith pointed out in his note on *R v Barnard* in [1980] Crim LR 235, just as an allegation of robbery necessarily includes an allegation of theft, so an allegation of conspiracy to rob includes an allegation of conspiracy to steal. He went on to say:

> "Every agreement to rob is a conspiracy to steal as well as a conspiracy to rob under section 1(1) of the Criminal Law Act and, indeed, at common law. If, on a charge of conspiracy to rob, the prosecution proved all the elements of alleged agreement except the intent to use force or the threat of force, it is submitted that the jury would be entitled to convict the defendants of conspiracy to steal."

A similar view is expressed in Archbold, 2000 ed, para 21-96.

We consider that this view is correct, and in so far as any contrary opinion is expressed in *R v Barnard* we are unable to agree. We conclude that the learned judge was entitled in the present case to convict the appellant on Count 2 of conspiracy to cause grievous bodily harm, since the allegations in that count included an allegation of such a conspiracy. We therefore dismiss the appeal against conviction.

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JUDGMENT

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