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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

GRAHAM RICHARD HARKNESS

Before: KERR LCJ, HIGGINS LJ and COGHLIN LJ

COGHLIN LJ

[1] This is an appeal from a sentence of 7 years imprisonment imposed upon the appellant by Treacy J. sitting alone at Belfast Crown Court on 6 November 2007.

[2] The appellant was jointly charged with James Edward Taylor ("the co-accused") with the murder of Darren Paul Thompson on 1 October 2004. Both accused pleaded not guilty to that charge and their trial commenced before Treacy J. on 6 September 2007. On 25 September 2007 an amended Bill of Indictment had been presented that included, in addition to the charge of murder against both accused, two further specific counts against each individual accused. The co-accused was charged with an additional count of assisting an offender contrary to Section 4 of the Criminal Law Act Northern Ireland 1967 the particulars of which were that:

> "He on 29 September 2004, in the County Court Division of Londonderry, knowing or believing an arrestable offence, namely murder, had been committed without lawful authority or reasonable excuse did an act with intent to impede the apprehension or prosecution of the offender namely assisted in removing evidence from the scene."

Against the appellant a further count was added that alleged possession of an article for purposes of terrorism contrary to Section 57 of the Terrorism Act 2000 the particulars of which were that:

> "He on 29 September 2004, in the County Court Division of Londonderry, had in his possession an article namely a motor vehicle in circumstances which gave rise to a reasonable suspicion that his possession was for a purpose connected to terrorism."

In the event, the Crown applied not to proceed with the murder charge and each accused then pleaded guilty to the specific counts they faced. Each accused then received a sentence of 7 years imprisonment.

[3] Before this court the appellant was represented by Mr John McCrudden QC and Mr Cairns while Mrs O'Kane appeared on behalf of the Public Prosecution Service.

Background Facts

[4] On 29 September 2004 at around 7.30am Darren Paul Thompson, a 22 year old labourer, had just left his home in Woodburn Park, Londonderry to walk to work. Within a few minutes a single gunshot was heard by local residents and, some short time later, Darren Thompson was found lying on the ground unconscious. He died in hospital on 1 October 2004 as a consequence of a single gunshot wound to the head.

[5] At 9.15am on the same date, 29 September, the appellant was driving his silver Citroen Xsara towards the Altnagelvin roundabout when he was stopped by police who arrested him and seized his vehicle. He was released after questioning but re-arrested on 10 November 2004 and charged with the murder of Darren Thompson. During the course of police interviews the appellant stated:

> "I am not involved in any of them shootings or fucking UDA, UFF, UVF nothing. I have never been and never will be and that is all I have to say."

[6] At first, the appellant claimed that he had stayed overnight at the house of a friend on 28 September leaving the house at about 9.00am on the 29th. He said that when his vehicle was stopped his intention had been to return home to collect his bank card. After initially supporting this explanation the appellant's friend subsequently withdrew his corroborative

statement claiming that the appellant had pressurised him into providing an alibi.

[7] Shortly after the shooting of Mr Thompson occurred a partially burnt boiler suit was found in a laneway at the back of Woodburn Park near a path leading to Lincoln Courts. A forensic report indicated that fibres recovered from the front and passenger seats of the appellant's vehicle were indistinguishable from constituent fibres taken from the partially burnt boiler suit and that similar fibres were also present on the appellant's t-shirt and jeans. However, when the case came to trial, counsel on behalf of the PPS accepted that the fibre evidence could no longer be relied on as establishing a direct link between the murder and the vehicle. In the course of his helpful submissions before this court Mr McCrudden explained that both the appellant and his vehicle had been searched by police officers wearing boiler suits of a similar material and that the concession by the PPS had been based upon an accepted risk of contamination.

[8] In the circumstances, as a consequence of an agreement between counsel, the appellant's participation in the section 57 offence was made the subject of a formal written note that was submitted to the learned trial Judge. It was in the following terms:

> "The accused Harkness' plea is accepted on the basis that he owned and was stopped in possession of a vehicle, and at the time he was stopped the circumstances gave rise to a reasonable suspicion that the vehicle had been used for a terrorist purpose. There is no evidence that he knew the exact purpose. The Crown in the acceptance of this accused's plea accepts that in its opinion the fibre evidence could no longer establish a direct link between the murder and the said vehicle."

Sentencing Remarks by the Trial Judge

[9] In the course of his sentencing remarks Treacy J. recorded that it was the Crown case that Mr Thompson had been the victim of a UVF/UDA feud although it was publicly recognised by the PPS that he himself had been "completely innocent". He noted that no evidence of any such feud had been presented to the court although the killing "certainly bore all the hallmarks of a chilling, well-planned and ruthlessly executed paramilitary style murder resulting in the death of a completely innocent young man."

[10] The learned trial Judge observed that the basis upon which the co-accused had pleaded guilty to assisting an offender was that he had known

that a terrorist offence had taken place and had been present, close to the scene, to assist in the removal of evidence, namely, the gun. He noted the submission of counsel on behalf of the co-accused that, when he had removed the gun from the scene he had no prior or specific knowledge but observed that:

> "On any showing, however, Mr Taylor played an important role knowing or believing that a murder had been committed he removed the gun from the scene with the intention of impeding the apprehension and prosecution of the offender".

Treacy J. expressed the view that the nature and degree of this assistance placed the co-accused at the "highest end of culpability."

[11] The learned trial Judge referred to the written document setting out the agreed basis upon which the appellant had pleaded guilty and noted that, while the PPS had not sought to do so, he would have to consider whether to distinguish between the accused in terms of the offences. He noted that the appellant, like the co-accused, had pleaded guilty at the earliest opportunity and that he had a record amounting to some 39 offences albeit of a different character. He referred to his stable domestic situation and good work record but noted that the offence to which he had pleaded guilty was extremely serious whether or not he had known the exact terrorist purpose.

[12] At paragraph 11 of his sentencing remarks the learned trial Judge made the following observations:

> "(11) It is clear that terrorist organisations cannot carry out operations which in many cases may result in murder or other grave crimes unless they are persons who provide the kind of assistance contemplated by Section 57 or by Section 4. When a person is convicted or pleads guilty in this terrorist context and it is undisputed that he committed the offence actively and willingly the court which sentences him should pass an appropriate deterrent sentence which as well as punishing the accused is intended to deter others."

He then referred to the decision of this court in R v Quigg [1991] 9 NIJB 38 at pp51-52. Ultimately, the learned trial Judge made no distinction between the accused sentencing each to 7 years imprisonment.

The Grounds of Appeal

[13] Mr McCrudden helpfully focussed his submissions upon two basic grounds of appeal:

(i) That the learned trial Judge had erred in principle by failing to take adequate account of the fundamentally different factual circumstances between the offences to which the co-accused and the appellant had pleaded guilty and the significantly lesser degree of culpability on the part of the appellant.

(ii) That the sentence of 7 years imprisonment was, in itself and quite separately from any comparison with that imposed upon the co-accused, manifestly excessive.

[14] On behalf of the PPS Mrs O'Kane pointed out that, contrary to the emphatic denials and alibi maintained during the course of his police interviews, the appellant had volunteered to the Probation Officer preparing the pre-sentence report that he had been approached by a man whom he knew to have paramilitary associations seeking use of his car and that he accepted this with little disagreement although he claimed to have been unaware that the vehicle was to be used for terrorist activities. She further submitted that it was clear from the content of his sentencing remarks that the learned trial Judge had given consideration to the possibility of distinguishing between the appellant and the co-accused but, having done so, had decided that severe deterrent sentences were required. In her skeleton argument Mrs O'Kane also referred to the increase in the maximum term of imprisonment for an offence contrary to Section 57 of the Terrorism Act 2000 from 10 years to 15 years but we do not consider that this case comes within the ambit of R v McCartney [2007] NICA 41 since the relevant offence predated the commencement of the increase.

Conclusions

[15] Mr McCrudden's primary submission was that, in imposing similar sentences, the learned trial Judge had failed to take into account the distinction between their respective degrees of culpability reflected by the different offences to which they had each pleaded guilty and their respective degrees of participation. He reminded the court of the principle in relation to disparity between sentences referred to by Carswell LCJ in R v Delaney [1994] NIJB 31 in which the Lord Chief Justice said, at page 33:

> "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 is 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).
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> 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."

[16] In this case the learned trial Judge was clearly aware of a distinction between the offences to which the appellant and his co-accused had pleaded guilty and the factual circumstances upon which the pleas were based. He assessed the co-accused's removal of the gun from the scene with the intention of impeding the apprehension and prosecution of the offender when he knew that a terrorist offence had been committed as being located at the highest end of culpability and that is a view which this court would fully endorse.

[17] In its decision in R v Rowe [2007] QB 975 the Court of Appeal in England and Wales noted at paragraph [53] that Section 57 of the Terrorism Act 2000 made provision for a special type of inchoate offence in relation to terrorism which, for good and obvious reasons, made criminal conduct that was merely preparatory to the commission of terrorist acts. In delivering the

judgment of the court Lord Phillips CJ observed that, while such conduct was highly culpable, it was not as culpable as attempting to commit, or actually committing, the terrorist acts in question. However, he went on to say that:

"But the seriousness of the offence consists not merely in the culpability of the offender but the potential of his conduct to cause harm."

He then referred to Section 143 of the Criminal Justice Act 2003 which provides that:

> "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and *any harm which the offence caused*, was intended to cause or might foreseeably have caused." [emphasis added}

[18] Lord Phillips CJ gave further consideration to Section 57 in the case of R v Zafar & Ors [2008] EWCA Crim 184. He referred to the report delivered by Lord Lloyd of Berwick on 4 September 1996 recommending the incorporation into legislation of Section 57 and made the following observations at paragraph [29]:

> "[29] We have concluded that if Section 57 is to have the certainty of meaning that the law requires, it must be interpreted in a way that requires direct connection between the object possessed and the act of terrorism. The section should be interpreted as if it reads:
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> > `A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that he intends it to be used for the purpose of the commission, preparation or instigation of an act of terrorism."

[19] The appellant, in pleading guilty must be taken to have accepted that the circumstances in which the vehicle was to be used gave rise to a reasonable suspicion that he intended it to be used for a purpose connected with the commission of an act or acts of terrorism. In such circumstances it is important to bear in mind the wording of the document upon which this plea was based. At paragraph 1(b)(*i)* of his skeleton argument Mr McCrudden referred to the appellant being charged with suspicious possession of the vehicle at the time when he was apprehended by the police some two hours after the murder. However, we do not consider that the relevant

circumstances should be so restricted. As noted above, the agreed basis of the plea was that at the time when he was stopped the circumstances gave rise to a reasonable suspicion that the vehicle had been used for a terrorist purpose. Such possession was quite consistent with the admission by the appellant to the Probation Officer that he had been approached by a man whom he knew to have paramilitary associations who told him that he would be using his car for a few hours. This admission cannot be disavowed by the appellant nor ignored in the sentencing exercise. In effect, the appellant gave open-ended permission for his car to be used for an unspecified purpose. In light of his account to the probation officer, he must have anticipated that this would be a terrorist purpose. His action in permitting the car to be used which facilitated the murder or the avoidance of detection of those responsible for it cannot be divorced from the fact that a murder was committed. The fact that a young man was killed in the incident in which the appellant's car played some part cannot be left out of account in the selection of the sentence that should be imposed on him. As Lord Phillips has said the potential or actual harm caused plays an important part in determining the seriousness of any offence.

[20] Ultimately, both the appellant and the co-accused entered pleas on the basis that neither knew the specific nature of the offence that had occurred. In our view the fact that an accused does not know the exact terrorist purpose or plan, whether as a result of genuine or self induced ignorance, is of little moment in terms of culpability when he willingly makes an article in his possession available for use in circumstances giving rise to a reasonable suspicion that the purpose of such use is the furtherance of paramilitary/terrorist activity. The trial judge was entitled to take into account the seriousness of the offence that had been actually committed. In the circumstances, we consider that the decision not to make any distinction from the sentence imposed upon the co-accused was well within the discretion of the trial judge and did not constitute either a gross or marked disparity in the penalty appropriate to each offence.

[21] In the course of advancing his second main submission Mr McCrudden drew our attention to the sentence of 7½ years imprisonment imposed in Rowe in respect of manuscript notes including instructions on how to assemble and operate a mortar and a substitution code detailing the type of venue susceptible to terrorist bombings contrary to Section 57. He also referred to the sentence of 6 years imprisonment imposed by Weatherup J for possession of computer discs containing a menu for the manufacture of explosives and silencers in a political and terrorist context in R v Abbas Boutrab [2005] NICC 36. In both Rowe and Boutrab the respective sentences were passed after a contest.

[22] As the learned trial Judge emphasised in his carefully constructed sentencing remarks, terrorist organisations cannot carry out operations which in many cases may result in murder or other grave crimes unless there are

persons who provide the kind of assistance contemplated by Section 57 or Section 4 and participation in such activities generally warrant the imposition of severe deterrent sentences. Once again we fully endorse those remarks and, in particular, the important part that the actual harm caused is likely to play in the selection of such sentences. In neither of the cases to which reference has been made earlier in this judgment had there been actual harm caused by the terrorist offences of which the offenders had been convicted. After giving the matter careful consideration we have reached the conclusion that the respective degrees of culpability reflected by the differing activities of the appellant and his co-accused did not warrant any degree of distinction in terms of sentencing. Accordingly, the appeal will be dismissed.