Neutral Citation no. [2012] NICC 22 | *Ref:*

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/03/12**

IN THE CROWN COURT IN NORTHERN IRELAND

11/58076

QUEEN

-v-

FRANCIS PAUL McNALLY

HIS HONOUR JUDGE BURGESS

[1] The defendant has pleaded guilty to the offence of possession of an improvised explosive device with intent to endanger life or cause serious injury to property.

[2] The offence is a specified offence for the purposes of the Criminal Justice (Northern Ireland) Order 2008 and the court is therefore required to consider whether or not the defendant satisfies the criteria of "dangerousness" as defined by Article 15 of the 2008 Order – namely that he poses a significant risk of serious harm to other members of the public in the future by commission of specified offences.

[3] In the early hours of the morning of 21 June 2010 an explosive device was left on the window sill of the house of Ms Mary Kelly. Part of the device exploded. This woke Ms Kelly who, on getting out of bed, saw flames at the front of her house. When she opened the front door those flames drove her back into the house.

[4] Ms Kelly had been the subject of a previous attack the relevance of which is that CCTV had been installed. I make it clear that the defendant is not before the court today in relation to that previous incident. However the CCTV footage confirmed the perpetrator was the defendant. Despite that evidence,

during interview he made no comment. However he has now accepted his responsibilities by his plea. It has repeatedly been made clear by the courts that the maximum amount of discount is afforded to those who meet their responsibilities at the earliest possible time. In this case credit for his plea will be given but it will be less than would have been the case if he had met his responsibilities from the outset.

[5] The forensic evidence as to the nature of the devices shows that it was lethal. It had an inner container with broken up Stanley knife blades and pieces of broken mirror; and an outer container, a metal can, packed with firework composition, match heads and firelighter material. If this had gone off in proximity to anyone the consequences would have been lethal, potentially life threatening.

[6] Counsel for the defendant made the point in his plea in mitigation that it was a relatively amateurish device, evidenced by the fact that only half of it had gone off. However half of it did go off and the consequences were that a fire ensued which could well have caused both injury and further damage. Just as relevant however in the context of the consideration by the court of the issue of dangerousness, is that it was the intention of the defendant in the construction of this weapon in the manner as I have described to endanger life. While his abilities may not have been the best in terms of construction, his intentions were clear.

[7] Without more, for anyone intentionally to construct such a weapon and to leave it on a window sill, thereby endangering anyone behind that window or anyone in the street, shows himself more than capable of acting in a manner which totally disregards the safety and personal wellbeing of ordinary members of the public.

[8] When the police searched his home paraphernalia was found including a UVF flag and a flag of the Young Citizens Volunteers. The defendant is not before the court charged with being a member of an unlawful organisation. But in the pre-sentence report and in the plea of mitigation it is clear that the defendant took umbrage at the fact that his proposed victim, Ms Kelly, was someone who had devoted time and energy to cross-community work. The defendant felt aggrieved at her involvement in such work, a grievance fuelled by the exhortations and encouragement of other malign people. As I said during the course of the plea in mitigation the people of this Province have resolved to put such violence behind them, violence which has caused

extreme misery for decades. Those minded to resort to it, as this defendant did on this occasion, will have to understand that condign punishment will be imposed, and that sentences will be informed by those passed at a time whenever such activity was rife.

[9] The court regards the willingness of the defendant to address his grievances by turning to violence and the use of such a lethal weapon, as a further consideration to be taken into account in determining both the sentence and the question as to "dangerousness".

[10] Following the guidance given by our Court of Appeal in *Owens*, which adopted the approach in *Lang*, I have also addressed the record of the defendant. This contains matters of concern. There are some 50 previous convictions, some involving road traffic offences, criminal damage and dishonesty. However the court has taken into account three specific convictions in making its assessment under Article 14 of the 2008 Order.

- On 16 May 2006 the defendant committed an aggravated burglary, an incident in a private dwelling house in which the occupants were confronted and an adult male assaulted. The defendant received a sentence of five years imprisonment, four years in custody to be followed by one year post-custodial supervision. He was released on 15 May 2008. A concurrent sentence of eighteen months was imposed in respect of an offence of incitement to commit assault occasioning actual bodily harm. He was on licence in respect of these offences until 15 May 2010, one month prior to the committing of these offences.

- On 25 January 2010 he received a sentence of eight months suspended for two years for possession of an airgun and a knife in a public place – a mere seven months prior to these offences. The court will require to consider the activation of that suspended sentence.

- On 10 June 2010 the defendant involved himself in riotous behaviour. This was a mere twelve days before these offences. He received a period of imprisonment of four months. Further offences were committed by him in and around the time of this offence.

[11] These three convictions evidence someone who is prepared to involve himself in confrontation and violence and to do so no matter what assistance has been offered to him by the courts. They reinforce the view of the court that the defendant is all too willing to turn to violence.

[12] The third area of information available to the court in its assessment of the defendant both as regards the sentence to be passed and the issue of dangerousness is what is known about him from any reports filed. The court has the benefit of a pre-sentence report and the report of Dr Philip Pollock, consultant forensic clinical psychologist. No assessment on the issue of 'dangerousness' is carried out by the Probation Service in line with their policy in cases with a sectarian or terrorist overtone. Dr Pollock however does give his opinion that he does not see Mr McNally as an individual representing a significant risk of serious harm to the public in terms of presenting a high risk of violent conduct in the future.

[13] The court has carefully considered the basis and approach of Dr Pollock as contained in his report, and it was addressed with counsel during the plea in mitigation. While confirming that there is no report of a major mental disorder, he advises there is evidence of drug induced psychological symptoms, anxiety and depression and poor stress intolerance in the context of a dissocial personality. He acknowledges that the defendant has failed to avoid criminal activities since release from prison in 2008, and has failed to learn from experience and to profit from past opportunities to change. At paragraph 6.1 he records that Mr McNally has a chronic, persistent and diverse history of serial offending since his teenage years. He contends that the defendant presents as someone indicating "probability of future criminal conduct", suggesting that he represents a "moderate, but not high risk of violent offending in the future".

[14] However having identified substance misuse and his failure to disassociate himself from criminal influences, at page 15 of his report under the heading '*Capacity for Change*' Dr Pollock's final risk judgment of "moderate risk of violent conduct" is predicated by the provision that this will be attained only "if Mr McNally can successfully address the identified issues as listed below in paragraph 6". In paragraph 6.3 he confirms that opinion – stating that the defendant is an individual who "is capable of change and there is a prospect of positive prognosis **if** (the underlining is mine) Mr McNally makes a conscious decision and shows motivation to modify his thinking, lifestyle and behaviour towards a pro-social lifestyle choice".

[15] Therefore Dr Pollock's assessment of a "moderate risk of turning to violence" is predicated on the defendant both recognising and engaging in substantial work to address what are clearly deep seated issues. Without that engagement that risk is more than moderate - I would determine it as "high".

[16] I also note that in paragraph 6.2 that Dr Pollock addresses what he says is the defendant's "ingrained, sectarian identity that harbours intent towards violent sectarianism and promotes paramilitary activities". He continues:

> "There is evidence to suggest that Mr McNally holds strong affiliations and attitude to culturally-based causes. Risk assessment tools do not exist which can only take into account individual factors and cannot provide estimation of group violence. In this regard, the court will make determination of the risk of group based violence and an opinion will not be inserted here on this aspect of the case".

[17] In his plea in mitigation counsel referred to the defendant's vulnerability to peer pressure, a pressure emanating from that very sectarian based violent background. It lay at the heart of the actions of the defendant on this night, actions that led him to construct this weapon, and deliberately go to this lady's house - a lady who represented all that he objected to in terms of her cross-community work and approach to the issues in our society. That cannot be ignored. I believe Dr Pollock's assessment of the risk of turning to violence as moderate in itself would meet the definition of a significant risk – namely more than merely possible. However that assessment of risk is based on an assumption that the defendant will engage in work to address his dissocial personality. I could not have any confidence at this early stage that he has changed, when the record over the last 3-4 years points to the exact opposite. Finally the assessment of moderate risk of turning to violence in the future is on the basis of having set to one side those inherent and underlying currents of sectarianism which the defendant has exhibited, and which requires to be factored into the court's assessment.

[18] The court therefore concludes that the defendant does represent a significant risk of serious harm to members of the public in the future by reason of the committing of specified offences.

[19] However the court does acknowledge that Dr Pollock's report, and to a lesser extent the pre-sentence report, has identified a number of issues which, if

addressed by the defendant could have a reasonable prospect over time to reduce that risk of serious harm to others in the future. I indicated to counsel that court would impose an extended sentence rather than an indeterminate sentence - an extended sentence being the required disposal unless there were grounds to impose an indeterminate sentence.

[20] I have taken a considerable amount of time dealing with the background to the actions of the defendant and in my assessment of him. Of course at the heart of this case is the victim, Ms Kelly. I have had the benefit of a Victim Impact Report. She comes over as a lady of great resilience and of the highest principles, with the drive and determination to rid our society of those malign influences which have devastated so many lives. She is the exact opposite to everything that those people who the defendant sought to ally himself with are. She is brave. Despite the previous attack on her home she continued to stay there until this attack. But this attack has had a profound impact on her. There was the initial shock, fright and upset. There has been continuing adverse impacts, as one would expect, of fear and anxiety when a lady, on her own, is attacked in her own home. She has nightmares and disturbed sleep on a number of nights each week. She is having to take security precautions when she is in her home on her own fearing for her own safety and that of her family. Worst of all she has had to move out of the home she loved. Whatever penalty is imposed by this court the consequences of the defendant's actions have had a devastating effect on this lady's life, an effect that those will go on long after he serves the sentence that I am going to impose on him today. That sentence must therefore not only punish the defendant and act as a deterrent to him against any such actions in the future. It must also act as a deterrent to others who are minded to turn to violence in any guise and in any circumstances.

[21] Turning to the sentence to be imposed I have considered a series of guideline cases of general application handed down by our Court of Appeal during a time whenever violence was rife. I believe that it is right for me to consider these for the reasons that I have stated, namely that those who cannot put violence behind them should receive sentences which the courts have regarded as appropriate for those who choose that particular route. I have considered the cases of *Breslin and Forbes [1990] NI 23* and the cases of *Crossan [1987] NI 355* and *Cunningham and another [1989] 9 NIJB 12*, both which are referred to in the judgment of the Court of Appeal in *Breslin and Forbes*. I acknowledge that this is not a case in which the defendant is a member of a terrorist organisation and that such membership did inform the level of sentences past in these cases. However the court also placed inevitably weight on the fact that the offence to which the defendants were convicted in that case was possession of a drogue bomb with intent **themselves** to

endanger life or to cause serious injury to property. They went on to state that when a drogue bomb is thrown at "…the security forces with intent to endanger life it is a matter of mere chance whether members of the security forces are injured or killed".

[22] Given the nature of this weapon and where it was placed and to a plea of intent to endanger life or to cause injury to property, this case falls all square with the guidance given by the court.

[23] While this defendant did not carry out this offence for a terrorist cause, nevertheless it had as its intent an equally sinister objective: that based on sectarianism - an attack against a member of the public who was doing all in her power to combat that malign force. That force still exists and there are those who turn to violence in carrying out their evil intent. Just as in the case of those who commit offences for a terrorist cause, so those involved in sectarianism should receive very heavy deterrent sentences. In such circumstances factors of personal mitigation and considerations of rehabilitation must necessarily give way to the application of the principle of deterrence, although clearly some allowance has to be made in respect of them.

[24] I have determined that an extended sentence should be imposed. The appropriate custodial term is 11 years and the term of extended licence will be one of 5 years.