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Judgment: approved by the Court for handing down | *Delivered:* **26/02/07**
*(subject to editorial corrections)**

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

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THE QUEEN

-v-

STEPHEN PAUL McFERRAN

and

IAIN REA

_____

GILLEN J

[1] Stephen Paul McFerran you have pleaded guilty to the manslaughter of Robert William Green on 2 January 2003. Iain Rea you have pleaded guilty to a count of possession of firearms and ammunition with intent contrary to Article 17 of the Firearms (Northern Ireland) Order 1981 and to possession of explosive substances with intent contrary to Section 3(1)(b) of the Explosive Substances Act 1883. Finally you have pleaded guilty to possession of an imitation firearm with intent to cause fear or violence contrary to Article 17A of the Firearms (Northern Ireland) Order 1981.

[2] The deceased man Robert William Green was shot dead on 2 January 2003 at 6.40 pm outside the Kimberley Bar, Kimberley Street, Belfast. He was hit by three bullets which were fired at point blank range from a short distance from him. The evidence is that you McFerran had known Green for about fifteen years. On the day of his death it is clear that you were in mobile telephone contact with him. The deceased had called at your flat on that day and subsequently the two of you had been together in the Kimberley Bar. You had been with him when he emerged from the bar when an unknown gunman shot the deceased in the back of the head. After he had fallen to the ground the gunman fired two more shots. The gunman then ran off. He remains unidentified. When interviewed you McFerran denied seeing the gunman or even getting a glimpse of them. It is the Crown case that the deceased had been invited by you McFerran to a rendezvous at the bar that day. By virtue of your plea to manslaughter, the prosecution have accepted that the evidence does not merit a conclusion of complicity in his murder but

rather that you were complicit in the knowledge that some harm was to come to him short of death or serious bodily harm. That is self evidently a less grave matter than had you been complicit in his murder. I intend to sentence you on that basis.

[3] I wish to make it clear that had you been convicted of murder on the basis of complicity in the knowledge that the deceased was to suffer serious bodily harm or death, your sentence would have been far in excess of that which I intend to pass on you.

[4] On 12 June 2003 a police search was carried out of a lock up garage at Drumart Drive, Belvoir Estate, Belfast. A cache of arms and ammunition and a small amount of explosives were found. This included the murder weapon a Smith and Wesson .37 Magnum revolver with two rounds of ammunition, a Derringer starter pistol, a revolver in a black sock, a Valtro pistol, pistol magazine and five rounds of ammunition, a rifle, a boxed rifle, airgun, a revolver and two rounds of ammunition, a quantity of ammunition, a detonator and a rifle magazine. The fingerprints of Rea were found on numerous items in the garage and there are also documents demonstrating a close connection to you.

[5] A search of your home was carried on 18 June 2003 and there was found a handwritten list of guns and ammunition. That list corresponded to some of the weapons and ammunition found in the garage. The handwriting on the list was yours. At interview you denied any knowledge of the garage and its contents and refused to answer any questions about the arms list. You were unable to explain how your fingerprints came to be on any of the items in the garage.

I commence my consideration of the case by dealing with the following preliminary matters:

(i) In this case I have borne in mind the provisions of Articles 19(4) of the Criminal Justice (Northern Ireland) Order 1996 ("the 1996 Order") and I consider that all of the offences before me now are so serious in their content that only a custodial sentence is justified.

(ii) I make it clear that the sentences I am now imposing are less than those I would have imposed had the accused not pleaded guilty at the stage when they did. (See Article 33(2) of the 1996 Order). However I also adopt the comments made recently by Kerr LCJ in Attorney General's Reference (No. 1 of 2006) McDonald and Maternaghan where he said:

> "If a defendant wishes to avail of the maximum discount in respect of a particular offence on account of his guilty plea he should be in a position to

> demonstrate that he pleaded guilty in respect of that offence at the earliest opportunity. It will not exclude a failure to plead guilty to a particular offence if the reason for delay in making the plea was that the defendant was not prepared to plead guilty to a different charge that was subsequently withdrawn or not proceeded with.
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> To benefit from the maximum discount on the penalty appropriate to any specific charge, a defendant must have admitted his guilt of that charge at the earliest opportunity. In this regard the attitude of the offender during interview is relevant. The greatest discount is reserved for those cases where a defendant admits his guilt at the outset."

In this case neither defendant admitted guilt during interview and indeed each steadfastly asserted their innocence over the period of their interviews. In effect, pleas of guilty were not entered in this case until shortly before this trial was due to commence. Accordingly I have not given in either case the full element of discount which I would have accorded to an earlier plea on their behalf subject to the question of delay which I shall shortly address.

(iii) In the case of Rea I have had the benefit of a probation officer's report and for that purpose the hearing of this plea in mitigation was adjourned. Mr Harvey QC, who appeared on behalf of the accused McFerran, on the date when the plea was entered, expressly asserted that he did not consider it a case where any element of probation would be appropriate and he stated that he did not wish to have a probation report prepared. Mr Harvey accepted his client did not wish to have a probation element in his sentence. I reviewed the position again with him on the date when the plea of mitigation was entered but his attitude remained the same. Under Article 21(2) of the 1996 Order I must state that in my opinion a pre sentence report is unnecessary in McFerran's case and the circumstances leading me to that view are :-

(a) Experienced counsel on behalf of the accused has firmly asserted that the accused does not wish to avail of such a report.

(b) Mr Harvey has indicated that the accused does not wish the court to impose anything other than a custodial sentence i.e. he will not consent to a probation element.

(c) Given the nature of the offence and having reviewed the background facts outlined to me by Mr Harvey in the course of his plea, I do not see any

basis upon which a probation report would contribute to my understanding of the case against the accused or contribute to my assessment of a condign punishment.

I have decided not to impose a custody probation order in either of these cases. Attorney General's Reference (No 1 of 1998) 1998 NI 232 and Attorney General's Reference (No 3 of 2004) Hazlett have provided me with guidance on this matter. Pursuant to Article 24(4) of the 1996 Order I must state why that is my opinion:

(i) In the case of McFerran, I have already adverted to the reasons why I do not feel a custody/probation report was necessary. I find no evidence that this offender would benefit from probation at the conclusion of a period of custody and indeed Mr Harvey has informed me that he intends to leave the jurisdiction. I see no circumstances in which a period of probation would enable him to reintegrate into society or obviate risk that he would otherwise pose. I am satisfied that neither condition arises in his case and such an order should not be made. The fact that he refused to avail of a probation report, indicates quite clearly that he has no interest in pursuing such an order.

(ii) So far as Rea is concerned, the custody probation report gives no indication that any such order would be useful and no express recommendation is made that a probation order be made. A custody/probation order should only be made where it is considered that the offender would benefit from probation at the conclusion of a period of custody and that it is deemed necessary to enable him to reintegrate into society or because of the risk he would otherwise pose. Given the circumstances of the case and the report of the probation officer, I have concluded that neither condition arises in this case.

Mitigating factors in the case of McFerran

(1) I have taken into account the following mitigating features:

(i) The defendant's plea of guilty. However I reiterate that he did not admit to his guilt at the earliest opportunity and did not plead guilty to manslaughter at his arraignment.

(ii) In accordance with present practice I have taken into consideration all the information about the defendant with which I have been provided. In this context I also take into account that Mr Harvey on his behalf has indicated that once he has served his period in prison, he will have to move from the province and take his family with him. The reduction on this ground has been regarded as separate from and additional to the appropriate discount for pleading guilty and for the delay in this matter.

(iii) Mr Harvey properly drew to my attention the issue of the accused not having a trial within a reasonable period. He had been arrested on 3 January 2003 when he had denied the incident, rearrested on 19 August 2003, interviewed on 20 August 2003 and returned for trial on 15 March 2005. The Crown accepted that certain intervening matters, not the least involving issues of disclosure, thereafter delayed the hearing of this case. In terms this case essentially commenced in January 2003 and was not listed until May 2006 and he is now being sentenced in February 2007. There has therefore been a delay argued Mr Harvey in the region of 4 years. Mr McCrudden on behalf of the Crown in his response did not contradict the delay and accepted that it was open to the court to exercise its discretion in sentencing by dealing with delay as an element in the case. Mr Harvey drew my attention to two authorities before the European Court of Human Rights namely Dzelili v. Germany (Application No 65745/01) delivered 10 February 2006 and Yetkinsekerci v. United Kingdom (Application No 71841/01) delivered 15 February 2006 where the court in Strasbourg dealt with the question of a trial within a reasonable period. In the former case, at paragraph 85 the court said:

> "As regards the redress the national court afforded for breach of Article 5/3 the court notes that in its judgment of 2 September 2004 the Oldenburg regional court reduced the applicant's sentence from 9 years to 6 years and 6 months imprisonment. . . However, the court, agreeing with the applicant in this respect, finds that the regional court's judgment does not specify to what extent this finding had entailed a measurable reduction of the applicant's sentence. The Federal Court of Justice's decision . . . which affirmed the regional court's judgment does not provide further information on this issue. Therefore, the court concludes that the national courts have not reduced the applicant's sentence in a measurable manner in order to redress the previous breach of Article 5/3".

In the latter case the court said at paragraph 20:

> "The court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria:
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> The complexity of the case, the conduct of the applicant and the relevant authorities."

At paragraph 14 the court stated:

> "In the present case, although it is clear that the Court of Appeal agreed with the applicant that his case had not been considered with due diligence before the Court of Appeal, it cannot be said, even approximately, what proportion of the 2 years' reduction in sentence was related to the fact that the applicant's offence was limited to an attempt, and what proportion was due to the time spent waiting for the appeal to come on. As it is not able with any precision to ascertain to what extent the applicant's sentence was reduced, the court cannot accept the government's contention that the sentence was reduced sufficiently to render the applicant 'no longer a victim'."

In A-G's Ref (No 2 of 2001) the House of Lords held that, where criminal proceedings are not dealt with in a reasonable period, there is necessarily a breach of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, but the remedy to be afforded will depend on all the circumstances of the case. In this particular case, I consider that a reduction of or thereabouts of 8 months on the sentence that I would have imposed on him had there been no delay is merited bearing in mind the length of the delay, the complexity of the case, and the lack of admission by the accused at an early stage which would have speeded matters up.

(iv) I bear in mind that his previous criminal record has little relevance to the present charge. The one conviction of significance which involved a hijacking has occurred now almost 17 years ago.

In the case of Rea I have taken into account the following mitigating features.

(i) The plea of guilty. As in the case of McFerran however, he did not admit his guilt at the earliest opportunity and did not plead guilty at his arraignment.

(ii) I am conscious that he has been a carer to his father who has been in ill health in that the sentence that I impose will have an impact upon the care that his father will now receive.

(iii) I consider that there has also been some measure of delay in his case and it would appear that for a period of approximately 2 years he could bear no responsibility for the delay. I refer to the comments I have made in the case of McFerran on the topic of delay mentioned earlier in this judgment

(iv) I take into account that he has no relevant record in this matter.

Conclusion

(1) The death of Robert William Green bore all the hallmarks of a deliberate and well planned attack with the victim being carefully set up for the events that unfolded. Those who engage in such orchestrated crimes should be aware that if they are apprehended they will be dealt with very severely and I am confident that the search will go on for the killer or killers until they are brought to justice.

(2) The real reasons why this man was killed may never surface. You McFerran have pleaded guilty on the basis that you caused or contributed to his death whilst engaged in an unlawful act but without the knowledge or contemplation of death or serious bodily harm. Nonetheless the tension between a modest level of culpability and calamitous consequences of criminal behaviour is well recognised by these courts not the least being in the different context of causing death by dangerous driving in Attorney General's Reference (Nos. 2-8 of (2003) NICA 28. The consequences of criminal acts must be reflected in the sentence and must weigh heavily in the choice of penalty. As the court said in the Attorney General's Reference, such an outcome has to be accepted as a pragmatic approach which reflects the sense of justice of the general public. By your unlawful acts, you contributed to the death of a young man.

As in the case of Rea I do not accept that the need for deterrent sentences has passed despite the change in the level of terrorist violence in this community. It remains the duty of the courts to impose severe punishment for very grave crimes and to impose sentences which give effect to the requirements of retribution and deterrence (see R v Cunningham (1995), unreported and R v Hannigan and Thomas Gerard Brogan (unreported NICA).

Had you contested this matter and been found guilty I would have likely sentenced you to a period of 8/9 years imprisonment for manslaughter. I have made some reduction for the plea of guilty, the delay in this case and the matters set out in paragraph (ii) of the mitigation factors I have already mentioned. Accordingly I sentence you to 5 years imprisonment on the charge of manslaughter.

Rea

I respectively adopt the approach to your offence outlined by Hutton LCJ (as he then was) in R v O'Reilly and Montgomery where he said:

> "In a case where a person is guilty with intent of storing or moving a large quantity of an explosive substance for a terrorist organisation a court in sentencing must always bear in mind that the explosion or explosions intended to be caused by that explosive substance will probably kill or cause appalling injuries to one person or a number of persons, and that the person who stores or moves the explosive substance knows this, even though he may use the euphemistic term 'stuff' to describe the explosive substance. In sentencing such a person the overriding duty of the court is to protect innocent members of the public and to deter others who may be asked to store or move explosives, and accordingly the court should impose a substantial sentence."

I believe that these comments apply equally to those who store quantities of firearms. This case is a classic example of where the storing of a firearm facilitated its use in the murder of this man. Whilst I recognise that you, as in the case of McFadden have not been convicted of murder, nonetheless the killing of this man with a weapon found in this store, illustrates the profound threat to our society that the storing of such weapons produces. Circumstances in relation to the precise nature of the offence and the background and record of an accused may differ somewhat in individual cases of possession of explosives with intent and firearms with intent and these differences may lead to some variations in the sentences imposed. Counsel on your behalf has been generous with the authorities which have been presented to me and I have read them all. The thread running through them however is that an accused person guilty of such possession with intent will always be guilty of a very serious offence and, save in the most exceptional circumstances, a heavy deterrent sentence should always be imposed upon him.

At a time in this community when real efforts are being made on all sides to restore normality, with some considerable success, the continuing storing of arms and explosives by certain groups constitutes a serious threat to the stability and safety of people in Northern Ireland. I share the views expressed by Hutton LCJ in Cunningham's case (noted with approval by the Court of Appeal in Northern Ireland in R v Hannigan and Brogan) where he said:

> "Everyone in Northern Ireland is conscious of the immense benefits which have come and will continue to come to this community from the cessation of terrorist violence but it remains the duty of the courts to impose severe punishments for very grave crimes

> and to impose sentences which give effect to the requirements of retribution and deterrence."

Your case is easily distinguishable from a number of the other cases which have been put before me and which are fact sensitive. In particular you have denied involvement until your plea of guilty, you have not assisted the police in any way with reference to these items, you did not keep these materials on the spur of the moment and you have never made a case that you were ever under any pressure or fear in committing these offences. On the contrary, all the evidence would suggest that you were actively and willingly involved in the retention of these munitions.

In all the circumstances had you been convicted after a contested case I would likely have sentenced you to eleven/twelve years' imprisonment on Count 2. In the event I give you some credit for pleading guilty at this stage. I take in to account the delay in process and the other matters I have mentioned by way of mitigation. On count 2 I sentence you to 8 years imprisonment, on count 4 I sentence you to 6 years imprisonment and on Count 6 I sentence you to three years' imprisonment, all sentences to be concurrent so that you will serve 8 years imprisonment.