Neutral Citation no. (2000) 2094

Ref: CARC3185

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

Delivered: 05/06/00

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

THOMAS ROBERT GARFIELD GILMOUR

CARSWELL LCJ

On 12 July 1998 in the early hours of the morning a large petrol bomb was thrown through the living room window of a house in Carnany Park, Ballymoney, in which six people were in bed asleep. A fierce fire quickly developed, and thick smoke filled the house, following which flames burst out of the ground floor windows. The three adults in the house escaped, not without difficulty and injury, but three young boys, children of Christine Quinn, were trapped by the fire and died from the effects of carbon monoxide poisoning, notwithstanding strenuous efforts by fire officers to rescue them.

The appellant was charged with the murder of the three boys, the attempted murder of the three adults and arson of the dwelling house. Following a trial at Belfast Crown court before McCollum LJ, sitting without a jury, he was convicted on the three charges of murder. On the charges of attempted murder of Christine Quinn and Christina Archibald the judge found the appellant not guilty of attempted murder but guilty of attempting to cause them grievous bodily harm, and on the charge of attempted murder of Raymond Frank Craig he found him not guilty of that charge but guilty of causing him grievous bodily harm. The count

of arson was ordered to lie on the file. On the three counts of murder the judge sentenced the appellant to imprisonment for life and on each of the three other counts on which he returned a verdict he sentenced him to twelve years imprisonment, to run concurrently. The appellant appealed to this court against conviction and sentence on a number of grounds. The issue on which the appeal turned was the intention to be attributed to the appellant and whether the judge's conclusion that he realised that the petrol bomb was to be used in order to cause grievous bodily harm to the persons in the house could be sustained.

The learned judge found that the fire was started when a 1¾ litre whiskey bottle containing petrol was thrown through a ground floor window of the house, which would have resulted in the precipitation of a considerable quantity of petrol over a wide area and the rapid spread of fire. The boys had been sleeping in a front bedroom, and the judge concluded from the evidence that they had wakened after the outbreak of the fire and made their way into the back bedrooms. Their mother attempted to find them, but the smoke was so bad that she missed them and became trapped in the front bedroom. She and the other adults Christina Archibald and Raymond Craig had to make their escape from the burning house. The firefighters, who arrived very quickly, entered the house with great difficulty because of the smoke and heat and found the bodies of the boys in the rear bedrooms.

Christine Quinn had moved into 41 Carnany Park with three of her four sons the previous Monday 6 July 1998, and hoped to take over the tenancy held by her sister Collette Quinn. She had lived at a number of addresses in the Carnany estate in the previous few years. There were a number of Catholic families in the estate, but it appears that they were in a minority in that estate and there was some evidence of sectarian hostility and crude attempts at intimidation. On the night of the fire Christine Quinn's boyfriend Raymond Craig was staying in the house, as was Christina Archibald, a close friend of hers.

There was evidence that there was bad feeling between Christine Quinn's brother Colm Quinn and the appellant and his associates Johnny McKay and Ivan Parke. Colm Quinn had been threatened by them and on previous occasions pursued by McKay and others. He

had an extensive criminal record and was accused by McKay and the appellant of supplying drugs. McKay had attacked him on one occasion and told him to leave the estate. Quinn's house 69 Carnany Drive was attacked and boarded up, though he continued to visit it from time to time. He had stayed at 41 Carnany Park with his sister Christine on a couple of nights between 6 and 11 July 1998.

The appellant was seen earlier on the night of 11-12 July driving his Vauxhall Astra car in the estate in the vicinity of 41 Carnany Park, and he was again seen driving his car with other persons in it at the rear of that house a few minutes after the fire broke out. When he commenced to make admissions in the course of his police interviews the appellant admitted that he had driven McKay and Raymond Parke past the back of 41 Carnany Park before the fire, when McKay pointed out the house to Parke. The following questions and answers are then recorded:

"Q Tell the truth did you throw the petrol bomb at Quinns house.

A No I've never handled a petrol bomb.

Q Well in whose hand did you see the petrol bomb.

A Johnny's.

Q Johnny McKay's.

A Yes.

Q Did he throw it.

A I didn't see that.

Q Why not.

A I was parked around the corner.

Q What happened.

A I stopped and Johnny and Raymond got out.

Q Where did they go.

A Around the back of the car.

Q Yes and then where.

A Around the corner.

Q Where the Quinns house is.

A Yes."

The interviewers questioned the appellant further about the sequence of events, and he then stated that when McKay and Raymond Parke left the car Ivan Parke stayed with the appellant in his car to make sure that he did not drive off (it appears from later answers that he had been in the car all along, but the appellant's accounts are not consistent). The questions and answers recorded then contain the following passages:

"Q When did you first see the petrol bomb that morning.

A At the back of the house.

Q What was it like.

A Just a glass bottle.

Q When did you hear and see what happened.

A Seconds after I saw it in Johnny's hand I heard glass breaking.

*****

Q Tell us how many petrol bombs did you see.

A Just the glistening of one in Johnny's hand.

Q Did you actually hear the sound of glass breaking.

A Yes and they came running back."

In Interview 14 the appellant described being roused from bed and told by McKay and the Parkes to drive them to the Carnany estate, which he did not do willingly. He knew that they were members of the UVF, but claimed throughout that he was not a member and had

refused to join. He recounted how the two men left the car, at which point they did not have anything in their hands. They disappeared, then when they reappeared he "saw something glistening in Johnny's hand", which looked to him like a bottle. He then heard the sound of breaking glass, "like a window breaking", and the two men sprinted back to the car and told him to get out of the estate.

In Interview 16 the following exchange took place:

"Q Did you hear Johnny, Raymond and Ivan discuss petrol bombing the Quinns house when they were together in Christine's house.

A No I never. They must have done that when me and Christine were upstairs in the bathroom or in the bedroom. I did hear rumours about 2 weeks before that Collie was going to be used as a Guy Fawkes.

Q Where did you hear this from who.

A At Christine's house and Johnny's. They were carrying on about it and laughing.

Q Who was.

A Raymond, Ivan and Johnny were.

Q When did you hear this.

A In the couple of weeks leading up to the 11th night. They kept on laughing and joking about it.

Q Well didn't you twig that that was what they were up to when they wanted you to drive them up to Carnany.

A I didn't know that on the way up to Carnany but I twigged on when Johnny pointed out the house and I saw the bottle in Johnny's hand.

Q What did you think.

A By the looks of the bottle and that, it clicked on me that they were going to petrol bomb the house but I prayed that I was wrong.

Q Did you realise then that it was a UVF operation.

A Aye, because that's what they're all in - except me.

Q Are you scared of Ivan - were you scared of him sitting in your car.

A No not of him but of what he's in - the UVF scare me. It crossed my mind that if I did leave them and drive off they would get me, Christine and the wains.

Q Think back to when you were driving around the town after the petrol bombing was anything said by anyone in the car.

A One of the Parkes said something like `They were warned to get out of the estate'."

The learned trial judge expressed some scepticism whether the appellant had told the whole truth about his involvement in the incident. The appellant did not give evidence and the only inference that the judge drew from that was that he could not deny the correctness of any of his admissions. He accordingly approached the case on the basis that the only evidence of the appellant's part in the incident was that contained in the admissions which we have recorded. He held at page 12 of his judgment, in a conclusion which has not been challenged:

> "I am satisfied on the basis of his admissions which I have set out in extenso and on the evidence of the witnesses called by the prosecution that the accused was aware that the house occupied by some members of the Quinn family was going to be petrol bombed by McKay and Parke and that in that knowledge the accused remained near the scene in his motorcar in order to enable McKay and Raymond Parke to escape after petrol bombing the house."

The judge went on to hold that the appellant was aware that the intent of McKay and Parke was to cause grievous bodily harm to the persons in the house. He stated his reasons for this conclusion at pages 12-13 of his judgment:

> "The attack was so timed that people would be expected to be asleep in bed and having regard to the fact that it was after the `11th night', local people would be expected to have consumed more than their normal intake of alcohol. I am satisfied that the

> accused from his visits to the estate knew that there were young children in the house. Anyone sleeping upstairs in a house in which a petrol bomb has been ignited is certain to suffer some inhalation of smoke, runs the considerable danger of suffering burns and may suffer injuries in a hasty escape. Failure to warn the occupants shows that they were intended to awake in a burning house and the circumstances of this case clearly show that serious injury was intended. Having regard to the previous discussions about the Quinn family, I am satisfied that when the accused became aware that McKay had a petrol bomb in his possession he would have realised instantly that its use was intended to cause grievous bodily harm to the occupants of the house, especially since he recognised that the attack was a UVF attack with the clear inference that its motive was sectarian."

He went so far as to hold that the persons who made and threw the petrol bomb had an actual intent to kill, having regard to the nature of the bottle from which the bomb was constituted. He did not, however, attribute such an intention to the appellant, stating at page 13:

> "However, this accused has not made any admission that he was able to observe fully the bottle which McKay had in his possession and whatever my suspicions may be about his state of knowledge I am not satisfied beyond a reasonable doubt that he did recognise that the intent was to kill. However, I have no doubt whatever that he recognised the fact that McKay intended to cause really serious injury to persons in the house and I determine the case on that basis."

Mr Harvey QC for the appellant attacked the judge's conclusion concerning the intention of the principals. He questioned in particular his findings that the occupants of the house could have been expected to have consumed more alcohol than normal and that the appellant would have known from his visits to the estate that there were young boys living in the house. We recognise that these may be open to question, but the learned judge did not misdirect himself or misapprehend any of the primary facts, and we consider that he was entitled to form the conclusion which he did concerning the intention of the principals. Mr Harvey submitted that the case should have been approached by the judge in accordance with the principles contained in *R v Woollin* [1999] 1 AC 82 and that he should have applied the

test whether it was a virtual certainty that the consequence of throwing the petrol bomb into the house would be the death of or grievous bodily harm to one or more occupants. We do not consider, however, that it was appropriate to resort to that test in the present case. It is apposite where the defendant does not desire the consequence of his act which in fact occurred, but it is virtually certain that it will happen: cf *R v Nedrick* [1986] 1 WLR 1025 at 1028, per Lord Lane CJ. Where the intention of the accused can be ascertained by ordinary inference from the facts and surrounding circumstances, it is unnecessary and confusing to bring in the special *Woollin* direction. That direction, as Lord Brige remarked in *R v Moloney* [1985] AC 905 at 929, is required only in rare cases.

There is, however, more substance in the next submission, that the proof is insufficient that the appellant realised that those who threw the petrol bomb intended at least grievous bodily harm to the occupants of the house. Throwing petrol bombs at dwelling houses is regrettably common and always contains an element of potential danger to the occupants. It is right to say, however, that it has fortunately been only a rare consequence that occupants have been injured in such attacks, and the majority of them appear, so far as judicial notice can take us, to cause only minor fires. There is not in our view sufficient evidence to conclude that the appellant was aware that the petrol was contained in an unusually large bottle, which might be expected to cause a larger conflagration and result in greater danger to the occupants. On the evidence he realised at a late stage that a petrol bomb attack was about to take place, and his intention was formed in that short period before he co-operated in driving the principals away from the scene. It would be difficult to attribute to him with any degree of certainty an intention that the attack should result in more than a blaze which might do some damage, put the occupants in fear and intimidate them into moving from the house. The principals and the appellant did have a grudge against Colm Quinn, but there is not sufficient evidence to establish that they expected him to be sleeping in the house that night. Nor do we think that the talk that Colm Quinn was "going to be used as a Guy Fawkes" is enough to establish beyond reasonable doubt that the appellant intended that those who were in occupation should

suffer injuries in the fire. We therefore do not consider that the judge's finding that he appreciated that the principals intended to inflict grievous bodily harm can be supported as a safe conclusion of fact.

We conclude accordingly that the appellant's conviction for murder cannot be sustained. Nor can his conviction on counts 4, 5 and 6, each of which involves an intention to commit grievous bodily harm. The issue then is whether he can be found guilty of manslaughter on the first three counts, on the basis that if the principals had thrown the petrol bomb into the house without the intention of killing or inflicting grievous bodily harm on any person they would have properly been convicted of that offence. It was argued on behalf of the appellant that if he did not share the intention of the principals he should not be found guilty of either murder or manslaughter, in the same way as if the principals go outside the contemplated acts involved in the joint enterprise the accessory cannot be convicted of either offence: see our recent decision in *R v Crooks* [1999] NI 226, following the principles laid down in *R v Powell* [1999] AC 1.

The issue is discussed in Blackstone's *Criminal Practice,* 2000 ed, para A5.5 at page 75, in which the example is posed where the principal and accessory agree that the principal will post an incendiary device to the victim, the accessory contemplating only superficial injuries but the principal foreseeing and hoping that the injuries will be serious or fatal. The principal will be guilty of murder and the accessory will not. The editors conclude that the accessory should in such a case be convicted of manslaughter, because the act done by the principal is precisely what was envisaged.

In our opinion this is the correct principle to apply in the present case. The appellant foresaw that the principals would carry out the act of throwing a petrol bomb into the house, but did not realise that in so doing they intended to kill or do grievous bodily harm to the occupants. To establish that a person charged as an accessory to a crime of specific intent is guilty as an accessory it is necessary to prove that he realised the principal's intention: see *R v Hyde* [1991] QB 134 at 139, per Lord Lane CJ, approved by Lord Hutton in *R v Powell*

[1999] AC 1 at 27-8. The line of authority represented by such cases as *R v Anderson and Morris* [1966] 2 QB 110, approved in *R v Powell*, deals with situations where the principal departs from the contemplated joint enterprise and perpetrates a more serious act of a different kind unforeseen by the accessory. In such cases it is established that the accessory is not liable at all for such unforeseen acts. It does not follow that the same result should follow where the principal carries out the very act contemplated by the accessory, though the latter does not realise that the principal intends a more serious consequence from the act.

We do not consider that we are obliged by authority to hold that the accessory in such a case must be acquitted of manslaughter as well as murder. The cases in which an accessory has been found not guilty both of murder and manslaughter all concern a departure by the principal from the actus reus contemplated by the accessory, not a difference between the parties in respect of the mens rea of each. In such cases the view has prevailed that it would be wrong to hold the accessory liable when the principal committed an act which the accessory did not contemplate or authorise. We do not, however, see any convincing policy reason why a person acting as an accessory to a principal who carries out the very deed contemplated by both should not be guilty of the degree of offence appropriate to the intent with which he so acted. It is of course conceivable, as is suggested in Blackstone, *loc cit*, that in some cases the nature of the principal's mens rea may change the nature of the act committed by him and take it outside the type of act contemplated by the accessory, but it does not seem to us that the existence of such a possibility affects the validity of the basic principle which we have propounded. A verdict of guilty of manslaughter on this basis was upheld by the Court of Appeal in *R v Stewart and Schofield* [1995] 3 All ER 159. The judgment has been strongly criticised by Sir John Smith in [1995] Crim LR 296 and [1995] Crim LR 422 and in Smith & Hogan, *Criminal Law*, 9th ed, p 145. Even if there may be ground for criticism of some of the propositions enunciated in the court's judgment, the principle accepted as its basis is in our view sustainable.

We accordingly allow the appeal, substitute a verdict of not guilty of murder but guilty

of manslaughter on counts 1 to 3 and set aside the verdicts of guilty on counts 4 to 6.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

THOMAS ROBERT GARFIELD GILMOUR

JUDGMENT

OF

CARSWELL LCJ
