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Judgment: approved by the Court for handing down | *Delivered:* **27/10/06**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

-v-

GARY JONES

_____

[1] The accused is charged on the first count with the attempted murder of members of the security forces on 21st July 1998, on the second count with unlawfully and maliciously causing an explosion of a nature likely to endanger life or to cause serious injury to property on the same day and on the third count in the alternative with possessing an explosive substance with intent by means thereof to endanger life or cause serious injury to property.

[2] The evidence in paragraphs 3 to 14 below was read by agreement.

[3] Finbar Lennon worked in an office in Monaghan Street Newry. Shortly after 4:30 p.m. on 21 July 1998 he heard a crash which sounded like 2 cars making contact with each other. He went outside and saw that a navy blue/black Escort car had been damaged. He looked up the yard/car park adjoining his office and saw a white transit van going across the top of the yard. An elderly gentleman told him that the white van had hit the car. The witness next noticed a man walking down the yard towards Monaghan Street. He approached this person whom he did not recognise. He asked him who he was and what he was doing and whether he had hit the car on the way into the yard. The man kept on walking even when the questions were repeated. Mr Lennon grabbed him by the front of his jacket as the man walked past him. He engaged in a struggle on the footpath on Monaghan Street. In the course of the struggle Mr Lennon was left standing with the man's jacket while the man made off. He became seriously concerned about the van being abandoned in the backyard, cleared his office and phoned the police. The police asked him to check the clothing and he noticed that inside the jacket there was a white jumper with a blue band on it. He also noticed a yellow hard hat which the man had been wearing which was lying near the entrance to the yard. He described this man as approximately 18/20 years, quite young, approximately 5' 6"/8", slim build, wearing glasses with quite heavy glass. The man had a black monkey type hat on and a blue denim jacket. Because of his concerns Mr Lennon then ran into his office and told

everyone to get out. Mr Lennon recalled two young girls saying that they had seen this man get into a car and that they had taken the registration number. I admitted a 999 call made by Mr Lennon at 5.06 pm in which he described the car in the following terms: --

> "What sort of car did he get into? BLZ 1721, there's a couple of wee girls said they thought it was a wee blue Fiat."

[4] Mr Kevin Matthews was talking to Mr Lennon when they both heard the crash. He timed it at approximately 4 20 p.m. He went outside, saw the elderly man and noticed the damage to the Escort car. He looked up into the yard which he described as a car park and noticed a man walking down towards him. He did not see the transit van at any stage. He said that the man walking towards him looked frightened. He was wearing a blue denim jacket, jeans and shoes. He was wearing goggles and some sort of scarf under a hard hat. He saw Mr Lennon tackle him. The man tried to run off but was caught by Mr Lennon. In the brief struggle the man wriggled out of his jacket, got free and ran off past Savages post office. Soon afterwards police cleared the area because of a suspect bomb. Mr Matthews described the man as 5'9" and skinny.

[5] At 5 p.m. Mr Leo O'Neill described walking along Monaghan Street Newry. He saw a van turning into the area that he described as a car park and heard a crunch. He realised that the van had struck the Escort car parked at the side of the road. He saw the van drive up and turn into the right at the top. He then noticed a man wearing a yellow hard hat, jeans and maybe a denim jacket with a light coloured jumper or something underneath come walking down from the back of the car park. He described seeing a big man with a mobile phone but was not sure if that man saw the crash. He told that man that the van had hit the Escort car. He then saw the big man with the phone tackle the man with the yellow hard hat as he came onto the street. He said that the man in the yellow hard hat walked down the yard but as soon as he realised that he may be quizzed about the accident he started to run and as he came onto the street the big man grabbed and caught him. During the struggle the man's jacket and jumper came off and his yellow hat fell off. The man then ran down Monaghan Street past Savages and into Railway Avenue towards the bus depot. During this time two young girls, probably in their late teens, came from the direction of Railway Avenue. They spoke to the big man although Mr O'Neill could not hear what they were saying. The police arrived. Some police went into the car park and suddenly came back waving everyone away from the top of the yard. Mr O'Neill would not recognise the man who ran off and did not notice a small blue Fiat car at any time.

[6] Michael Joseph McAnulty is the owner of a dark blue Ford Escort VRM TIB 7149. He stated that around 5 pm he drove it into Monaghan Street

Newry intending to go to the post office. He eventually pulled into a space near the entrance gates into the car park. He went into the post office. He came out to find that his car had been damaged. He noticed damage to the front offside wing and headlight cluster. There were white paint marks on the bodywork. During this time he noted a big man talking on a mobile phone. He also noted a man in a white shirt and an older man. He also saw two young girls about 17 years old. Shortly afterwards 2 police cars arrived. One drove into the car park. The other stopped and a police man got out to talk to the man with the mobile phone. A few seconds later there was a small bang and the police car in the car park came back very quickly and police cleared the area.

[7] Constable McAnespie arrived at approximately 4.55 p.m. on 21 July 1998. He spoke to Mr McAnulty and Mr Lennon. Mr Lennon told him that during a struggle with a man Mr Lennon had removed a yellow builder's helmet, a blue denim jacket and a white jumper. The constable approached the white transit van which he described as parked at the rear of the builders yard facing Corry Square RUC station. He described a loud explosion from the van and then a large mortar launched from the rear of the van which landed unexploded a short distance in front of the van. He and other police immediately began to clear the immediate area. He seized a yellow builder's helmet, a blue denim jacket, a white jumper, a pen which was removed from the denim jacket and a tissue which he removed from the denim jacket.

[8] Constable McAnespie was accompanied by a number of other police officers. Constable Hazlett saw the white van and observed that the back windows were covered in tin-foil. As he observed the van he saw a mortar shoot out of the roof in the direction of Corry Square. He said that the van had been parked with the front facing a wall running adjacent to Corry Square. Constable Cullen heard a sudden explosion and saw the mortar being launched from the van through its roof in the direction of Corry Square police station. The mortar, which was a large gas cylinder, landed a few yards in front of the van and failed to explode. Reserve Constable Rennie observed the van pointing towards Corry Square RUC station. He heard a muffled explosion and the roof of the van then ripped open. Constable Anderson confirmed that there were five police officers working at Corry Square RUC station at the relevant time.

[9] Staff Sgt Saunders of the Royal Logistic Corps was called to deal with the scene of the explosion. On arrival he noted the white transit van in the car park facing towards the police station. He removed the mortar launch tube from the back of the van. He noted the presence of the mortar bomb which was an improvised gas cylinder approximately 3 m in front of the van in the direction of the police station. In the course of his procedures he moved the transit van a distance equivalent to 5 m in a backwards direction. The improvised mortar system was examined by Mr McMillen of the Forensics

Science Agency and comprised a launch frame, mortar bomb with impact type initiation fuse, explosive and booster tube, functioned propellant unit and timing and power unit. It appeared that the propellant charge functioned but the mortar was received as separated components so that the mortar bomb itself did not explode. In his statement he said that the intention was to launch these mortar bombs at a target such as a police station so that they explode on impact inside the perimeter security fence or wall. There was, however, no evidence to indicate the nature of the trajectory that would have been taken by this device if it had functioned as intended. Mr McMillen explained that if the cylinder had exploded it would have produced a crater in the ground which might have been 3 or 4 metres in diameter and fatal injuries might have been received by those within 100 metres of the explosion.

[10] Robert Wilkinson is a Scenes of Crime Officer. He received the items seized by Constable McAnespie on 21 July 1998. He delivered those items to the forensics science laboratory the following day. He attended the scene of the mortar attack on the morning of 22 July 1998. He did not carry out any fingerprint examination of the interior of the van. He is not able to say whether any officer did in fact carry out such an examination.

[11] Forensic examination of the white jumper seized by Constable McAnespie established that there was one small spot of blood on the inside left back of the collar of the jumper. DNA analysis showed that the combination of characteristics observed in the staining on the jumper would be expected to arise in fewer than one in a billion males unrelated to the accused. Margaret Boyce, the forensic scientist, said that the jumper was an absorbent item and that blood would remain on items such as the jumper until some attempt was made to remove it and that this would involve washing the item.

[12] The items seized by Constable McAnespie at the scene were examined for the presence of complete human hairs by Ms Boyce. None were found on the helmet, one short brown hair was found on the denim jacket and nine short brown and one long brown hair on the jumper. In addition to this tests were also carried out on a timing and power unit, a duvet cover and a red baseball cap recovered from inside the white van. No fibres were found which could have come from the blue areas of the jumper. Given that those areas make up a small percentage of the jumper the absence of such fibres neither supports nor refutes the contention that the jumper was in contact with the duvet cover. One dark brown hair was found on the timing and power unit, 12 fine fair hairs were found on the duvet cover and 2 brown hairs on the inside of the baseball cap.

[13] These items were also examined for the presence of human hairs by Ruth Griffin. Her figures agree with those of Ms Boyce except that she found approximately 18 hairs on the white jumper. Low copy number DNA

profiling tests were carried out on five of the hairs which were recovered. A partial DNA profile was obtained from an extract tested from a hair found on the jumper. This matched the profile of the accused at the DNA sites successfully examined. This combination of DNA bands would be expected to occur in approximately 1 in seven of the UK population. The result, therefore, provided only limited support for the assertion that the hair had originated from the accused rather than someone other than and unrelated to him.

[14] The accused was interviewed at 2133 on 22 February 2005 and at 1115 on 23 February 2005. He made no reply to any of the questions during the interview. At the first interview he was asked whether he had anything to say in relation to the fact that the DNA profile suggested a one in a billion chance that the jumper was not his. On the second interview he was shown the jumper and made no reply when he was asked if he was wearing it when he planted the mortar. He was asked to give an account of how the jumper was at the scene and made no reply.

[15] Constable Steele said that he was a constable in the RUC photography branch and attended the scene on 22 July 1998. He took photographs under the direction of Detective Inspector Forde. In cross-examination he said that he did not know the time of his arrival but that it was the morning. He did not know if the mapper was there or not. When he was there the white van was facing as shown in photograph number five. It was facing in the direction of an area of waste ground between Caulfield Place and Corry Square. He had not been told that the van had been moved. He did not know if there was an exit at the corner towards which the van was facing in photograph number 11. That photograph showed a break between the blue corrugated fencing and the gable wall.

[16] The investigating officer, Detective Constable McKee, was called. He agreed that there was no evidence that the person with whom there had been a struggle had worn gloves. He said that the hard hat recovered from the scene had been checked for fingerprints and five had been found. None matched the accused. He was asked if any of the fingerprints from the van matched the accused and he said there were none. He agreed that the materials from the van were examined for fibres and hairs and a lot were found. There was nothing to connect the accused other than the speck of blood and the partial DNA match on one hair from the jumper. The jumper was examined for explosives and there was no trace. He agreed that the accused was 31 at the time of the incident. He was 5'10" tall. He had a clear record. He had consented to the obtaining of a DNA sample when told that clothes had been discarded at the scene.

[17] Mr Macdonald QC submitted that the accused had no case to answer. In dealing with the submission I applied the principles set out in Chief Constable v Owens [2006] NICA 3 at paragraph 14:

> "**[14]** The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in Galbraith. The exercise that the judge must engage in is the same, suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict."

[18] I concluded first that there was sufficient evidence to connect the man with whom Mr Lennon struggled and the van. Secondly I concluded that the description given by Mr Lennon that the man was 18/20 years old did not so weaken the evidence against the accused that a guilty verdict could not be supported. Thirdly I concluded that the evidence of seizure by Constable McAnespie together with the evidence of Mr Lennon as to what was discarded was sufficient to enable the inference to be drawn that the items seized by Constable McAnespie were the same as those discarded by the fleeing man. Fourthly I considered the evidence about the position of the van. The police officers on the scene identified the van as facing towards the police station. The van was moved backwards by the army. The angle of the front wheels suggests that the direction of the van was changed by that movement. I then considered the evidence in respect of the blood on the jumper. In his skeleton argument Mr Macdonald QC contended that the possible innocent explanations for the presence of the blood on the jumper were almost endless. He did not, however, particularise any of those explanations. In the absence of particularisation I approached this on the basis that that the defence were not relying on facts identifying circumstances where some innocent explanation for the presence of the blood was put forward. In those circumstances I did not consider that the evidence was so weak as to justify a not guilty verdict. I placed little reliance on the hair evidence and in looking at the case as a whole I took into account the absence of fingerprint, fibre or other forensic evidence to connect the defendant to the van, its contents or clothing. I concluded that there was a case to answer.

[19] The only witness for the defence was Sister Susan McClory. She is a member of the Congregation of the Sisters of Mercy. She has various qualifications including a BA in theology and a PhD in philosophy. She had also been awarded an MBE. She had been the manager of the Orana House Child and Family Centre in Newry from 1980 until 1998. This is a child and family centre which works in conjunction with the Southern Health and Social Services Board. As part of its work the centre receives new and used clothing and footwear from local people. There is more used clothing than new. The clothes are sorted at the centre and placed in the storeroom. They are then distributed to charity shops in the Newry area.

[20] The defendant had been an employee of the centre from 1990 until August 1998. He worked part-time and every Friday he came in to deal with general maintenance. His duties included the bagging and distribution of clothes. He would be asked to bag or place in boxes clothes which he would then deliver to the various charity shops. He had done this work between 1990 and August 1998.

[21] I am satisfied beyond reasonable doubt that the person approached by Mr Lennon at the entrance onto Monaghan Street was a person who had travelled in the white van into the car park/yard. I reach that conclusion firstly because of the short period of time between the entry of the van into the yard and the emergence of the man. Secondly I am satisfied beyond reasonable doubt that as this person walked out of the yard he was approached by Mr Lennon and asked at least once who he was, what he was doing and whether he had hit the car are on the way in. I am further satisfied beyond reasonable doubt that the person walking out deliberately sought to avoid answering those questions. Thirdly I am satisfied beyond reasonable doubt that Mr Lennon engaged in a struggle with this person and that the person made off leaving some of his clothing behind him in an effort to escape. Although I accept the possibility that there is another exit from the yard into Caulfield Place the matters referred to above dispel any reasonable possibility that this man emerged other than from the white van.

[22] I am further satisfied beyond reasonable doubt that as this person walked through the yard he was wearing a yellow construction hat, a black monkey type hat, glasses or goggles with heavy glass, a blue denim jacket and a white jumper with a blue stripe. Although Mr Lennon described this man is being 18/20 years old I consider that by reason of the hat and goggles that the man was wearing it would have been difficult to judge his age. Estimates of matters such as age are inherently unreliable because of the absence of objective criteria against which to make any judgment and accordingly I cannot give any weight to that evidence.

[23] The evidence of Mr Lennon satisfies me beyond reasonable doubt that the fleeing man left behind him at the scene a yellow construction hat, a

denim jacket and a white jumper with a blue band. Those items were described by Mr Lennon to Constable McAnespie. He started a scene log and seized items matching that description shortly after his arrival at the scene. I am satisfied beyond reasonable doubt that the items seized by him are the items discarded by the fleeing man.

[24] There is no doubt that the white jumper had a small spot of blood in the inside left collar area and the DNA analysis showed that there was a one in a billion chance that the blood did not belong to the accused or someone related to him. The accused declined to give any explanation for this in his interviews when he was asked about the blood on the jumper and when invited to give some explanation for the presence of the jumper at the scene he declined to say anything. In his defence evidence was called from Sister McClory to establish that the accused had worked in the Orana Centre on Fridays between 1990 and 1998 and that he had placed new and used clothing in boxes and bags for distribution to charity shops in the course of that work. The accused did not give evidence at the trial.

[25] Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 deals with the circumstances in which inferences may be drawn from the accused's failure to mention particular facts when questioned;

> "**3. —**
>
> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
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> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.
>
> (2) Where this paragraph applies—
>
> (a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

(b) a judge, in deciding whether to grant an application made by the accused under; (i) Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); or

(ii) paragraph 4 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under Article 4 of that Order); and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,

may—

(i) draw such inferences from the failure as appear proper."

Mr Macdonald submitted that the evidence of Sister McClory established the fact that the accused worked on Friday afternoons at the relevant time putting new and used clothes into boxes and bags. At worst it might be said that the accused had failed to mention that fact in the course of the questioning as to the spot of blood on the jumper. Even if that were correct the only inference which arose to be considered under article 3 was whether the evidence of Sister McClory was reliable. Since it was patently clear both because of the terms of her evidence and the lack of any serious challenge to it that she was a reliable witness this provision of the 1988 Order had no application in this case.

[26] I accept entirely the submissions of Mr Macdonald about the reliability of Sister McClory's evidence. That evidence is put forward by the accused to raise the possibility that the spot of blood on the collar of the jumper was caused as a result of the handling of the jumper by the accused in the course of his work. In support of that possibility the accused also pointed to the evidence of Ms Boyce that the jumper was an absorbent item and that such a spot would remain on the jumper until removed. It is, of course, inherent in that possibility being put forward as the full explanation that the jumper did not belong to the accused and that he had not to his knowledge worn it. When arrested and at the start of each interview the defendant was cautioned and told that he need not say anything and that it was, therefore, his right to remain silent . He was also told that it may harm his defence if he did not mention when questioned something which he later relied on in court. In

circumstances where the accused was being asked about blood on a jumper that he did not recognise I consider that the accused could reasonably have been expected to mention when questioned that he had carried out work of the sort described by Sister McClory. Although the interviews occurred more than 6 years after the incident they took place on consecutive days so there would have been ample opportunity for the accused to reflect on possible innocent explanations. I have also briefly considered the possibility that the jumper was worn by the accused but that it was donated to the Orana Centre at some stage prior to the mortar incident. In those circumstances the expectation that he would have mentioned his work at the Centre when questioned is, if anything, greater. I find, therefore, that the requirements of article 3(1) of the 1988 Order are satisfied.

[27] By virtue of article 3(2) of the 1988 Order the court "may draw such inferences from the failure as appear proper". That article clearly allows the court to consider not only the inference that the fact upon which the accused relies is not true or the evidence about it unreliable but also permits the court to draw inferences about other matters if it is proper to do so. I recognise that I am not obliged to draw any inference from such a failure but in this case I consider that the inference that I should draw from the failure of the accused to mention the nature of his work at the Orana Centre is that he knew that the spot of blood on the jumper was not caused by or contributed to by that work and I further infer that the reason for his having that knowledge was because at all relevant times he was aware of the location of the jumper and the fact that it had not been received by the Orana Centre.

[28] The spot of blood on the jumper was located on its inside collar. That spot was made either on the day in question or at some earlier stage. That together with the DNA evidence satisfies me beyond reasonable doubt that the accused was the user of the jumper. Taking all of these matters into account I am satisfied beyond reasonable doubt that this was his jumper and that he was wearing it on the afternoon of 21 July 1998 before it was removed from him by Mr Lennon. I have taken into account the fact that there is no forensic link between the accused and the interior of the van but I find this of no assistance. A person engaged on a venture such as this is likely to take care not to leave a forensic trail. I find the hair evidence of very little assistance.

[29] I now turn to look at the counts on which he is charged. It is convenient to begin with count 2 being the causing of an explosion contrary to section 2 of the Explosive Substances Act 1883. For the reasons set out above I am satisfied beyond reasonable doubt that the defendant was engaged in the conveying of the improvised mortar device described by Mr McMillen and Staff Sergeant Saunders. I am further satisfied beyond reasonable doubt that the propellant charge functioned but that the impact type initiation fuse did not operate because the mortar was received as separated components. I am satisfied beyond reasonable doubt that the mortar would otherwise have

exploded on impact causing a crater of 3 to 4 metres on the ground and potentially causing fatal injuries within an area of 100 metres. As a matter of fact I am satisfied beyond reasonable doubt that the accused contributed to the functioning of the propellant charge in the yard/car park by conveying the van into the yard/ car park and that the functioning of that charge was likely to endanger life because of the likelihood of the devastating consequences on impact of the mortar in this urban setting. The fact that those consequences were fortuitously avoided because the mortar was received as separated components does not affect that conclusion. For those reasons I find the defendant guilty on count 2. I do not have to consider count 3.

[30] On count 1 the accused is charged that he attempted to murder a member or members of the security forces on 21 July 1998. This count relates to the prosecution case that the accused was taking part in a mortar attack on Corry Square police station. That was a station in which officers were working on the day in question. The van was parked so that the mortar was facing towards the police station from the car park. There was no warning of the launch of the mortar.

[31] In order to establish the charge of attempted murder it is necessary to establish an actual intent to kill. There was no evidence before me as to the range or trajectory of the improvised device if it had functioned as expected. I know that it landed some 3 metres in front of the van within the car park. I do not know whether it would have achieved a further distance if it had functioned as intended. The only evidence supporting the view that this was an attack upon the police station was the evidence relating to the positioning of the van. In my view I cannot exclude the possibility that this device was intended to terrorise the occupants of the police station but not intended to land within it whether because of lack of capacity of the mortar maker or for some other reason. It may well be that the intent was to kill police officers but in my view on the evidence adduced I cannot be so satisfied beyond a reasonable doubt. Accordingly I find the defendant not guilty on count 1.