IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BRIAN JOSEPH ARTHURS

HUTTON LCJ

This is an appeal against sentence by Brian Joseph Arthurs who on 19 May 1995 was convicted by Campbell J at Belfast Crown Court on the 2 counts contained in the indictment against him. The first count charged a conspiracy on 10 July 1993 to cause an explosion, contrary to section 3(1)(a) of the Explosive Substances Act 1883. The particulars of the offence were that on 10 July 1993 the appellant unlawfully and maliciously conspired with a person or persons not before the court to cause by an explosive substance, namely an improvised mortar bomb, an explosion of a nature likely to endanger life or cause serious injury to property. The second count charged the offence of possession on 10 July 1993 of explosive substances with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883. The particulars of the offence were that on 10 July 1993 the appellant had in his possession explosive substances, namely 2 improvised mortar bombs, with intent by means thereof to endanger life or cause serious injury to property. On each count the appellant was sentenced to a term of imprisonment for 25 years, the sentences to run concurrently.

The background facts were these. At 11.55 pm on the night of Saturday 10 July 1993, the police in Omagh Police Station received a report that an explosion had occurred in the Broughderg area near Cookstown. The police then caused checkpoints to be set up on all roads leading from the Broughderg area.

About 1.30 am on the morning of 11 July 1993 soldiers stopped a taxi at a vehicle checkpoint outside Newtownstewart. Police officers approached the taxi and in addition to the driver they saw a man lying along the rear seat with a half empty bottle of brandy clasped between his hands, but no smell of alcohol was detected from him. The police observed that he had quite serious injuries to his face and that his eyes appeared to bulge. An ambulance was summoned and the man, who was the appellant, was conveyed to the general hospital. He was examined in the hospital where the doctor found severe burn marks on his face and also found that his eyelids were swollen, that there was dust in his eyes and bleeding into the interior chamber of the left eye. There was dust on his face, but when the doctor

tried to clean the face it was very difficult to get anything off, which suggested to the doctor that the appellant's face had already been cleaned. The doctor also noticed swelling of the left elbow and bruising to the inner part of that elbow and when x-rays were taken it was found that there were fractures in the area of the left elbow. In the hospital the appellant refused to give his name or to say how his injuries had occurred. Another doctor who examined the appellant in the hospital in the early hours of the morning formed the opinion that the appellant's injuries were consistent with his being involved in an explosion.

On the late afternoon of 10 July 1993 a Nissan Cabstar Box van with the registration number HJI 5357 had been taken from the McGurk family who lived at Dunmore Road some 10 miles east of Cookstown, and a number of armed men held the family captive in their home for a number of hours.

The next day, 11 July, about 1.10 pm a mobile patrol of the RUC found the Nissan Cabstar van, registration number HJI 5357 in a quarry off Blackrock Road in the Cookstown area. An Army Ammunition Technical Officer examined the scene at 5.42 pm on that afternoon and he found that the roof of the van had been destroyed. He noted damage to the floor, sides and roof of the van and also buckling of the chassis and in his opinion these findings were consistent with a mark 15 mortar round having been fired from the rear of the vehicle and the structure of the van having been unable to take the force when the mortar was fired. In the vehicle there were 2 mortar base plates made of a ¼ inch plate or 1 ½ inch steel and there was a tube attached to 1 of the base plates.

Also on 11 July 1993 about 4.15 pm the police searched a shed on Foster's farm and the area surrounding it in the countryside outside Cookstown where they found a number of items which showed that a mortar had been fired. An Army Ammunition Technical Officer was requested and when he arrived he confirmed that there was a mortar bomb lying in the slurry pit with a quantity of explosives lying behind it. In the adjoining shed he also found power tools, fertiliser sacks, weighing scales and lengths of electrical cable. He saw traces of blood on a fence in the shed and vehicle tracks and he noticed that a section of the roof of the shed was missing and concluded that the mortar had been fired accidentally through the roof and had proceeded on a straight flight path landing in the slurry pit having struck a wall. He inferred that the mortar had been launched from the Nissan Cabstar van which had been found a short time before in the quarry of Blackrock Road.

When interviewed by the police on 13 July 1993 the appellant handed to the interviewing officers a written statement in which he said that on the night of Saturday 10 July 1993 he had gone to see a girl at the Greenvale Hotel in Cookstown. As he was walking up the driveway about 11.30 pm a number of men jumped on him and told him they were from the INLA and that he was being put out of the country. They then put him onto the ground and threw a heavy piece of concrete at him which hit him on the left arm. They then moved back and just as he

was about to get up something landed on the ground in front of him. Just then there was an explosion and his next memory was of waking up in hospital. The learned trial judge found that this was a completely untruthful statement.

In his judgment the learned trial judge found the following facts (inter alia):

"1. The Nissan Cabstar van found in the quarry off Blackrock Road on 11 July 1993 was the van taken from the McGurk's house by armed and masked men on 10 July 1993.

2. The mortar bomb found in the slurry pit at Foster's out-farm had been fired from 1 of the 2 tubes in the rear compartment of the Nissan Cabstar van.

3. The mortar bomb was fired from the van when it was parked inside the shed with the cattle crush at Foster's farm.

4. The mortar bomb was fired accidentally while being loaded into the tube.

5. At least 2 people would have been required to load the mortar bomb into the tube and blood from 2 different blood groupings was found in the shed.

6. Once the propellant, which was black powder, was ignited it would have burned so as to cause an explosion and anyone in the vicinity of the tube would have been burned black."

At the conclusion of the Crown case the appellant was called upon to give evidence pursuant to Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 but he declined to do so.

At the end of his judgment, having reviewed all the evidence the learned trial judge stated:

"In the result I am therefore satisfied that Arthurs suffered the injuries which have been described when he was close to the bomb which exploded accidentally at Foster's farm on Saturday 10 July 1993 as it was being loaded into a mortar tube.

On the first count, conspiracy to cause an explosion, the court is asked to infer that Arthurs had agreed with another to cause an explosion of a nature likely to endanger life or cause serious injury to property. 4 men were involved in the hi-jacking of the Nissan Cabstar van and at least 2 were needed to place the bomb in the tube. He was in close proximity to the tube when the bomb was being loaded as is shown by the presence of black dust on his face. I infer from this that he had agreed with at least 1 other person that an explosion would be caused by means of

the mortar bomb with the intention that the crime would be committed. If the agreed course had been followed and the mortar bomb had been launched, as intended, it would have been likely to endanger life or cause serious injury to property in the United Kingdom. I find him guilty on this count.

I also find him guilty on the second count of having in his possession or under his control 2 improvised mortar bombs with intent to endanger life or cause serious injury to property in the United Kingdom at the time that the explosion occurred."

In passing sentence the learned trial judge stated:

"It is most likely that these improvised mortars were to be used against buildings to penetrate them and then to cause death or serious injury to people inside those buildings, and indeed to people in the general vicinity from the shrapnel that would have occurred when the bombs exploded. Now, while I've referred to these as improvised the expert witness evidence makes it quite clear that they were sophisticated in that there was a delay mechanism which would allow the person sitting in the driving seat of the van to initiate the firing system and then to make good his escape before the firing took place. They were designed as deadly weapons and they could be used against innocent people, whether in barracks, police stations or other public buildings or elsewhere. And those people were to be shown no mercy. Fortunately there was an error in the construction, as we've heard, which led to this bomb being fired accidentally when you were loading it and you and your fellow conspirators were indeed the victims of your own device. It's true that you come before this court as a relatively young man without any relevant record but as has been said very many times in terrorist cases, personal mitigating circumstances come secondary to the application of the principles of deterrence, retribution and prevention. Terrorism is an evil which has to be severely punished and the fact that there is a reduction in the level of terrorism in this jurisdiction at the present time is irrelevant. Others have to be deterred from resorting to terrorism to promote their particular cause.

I am quite sure that when you embarked on this conspiracy you must have appreciated the enormity of what you were doing and that you would have to face a very long term of imprisonment if you were caught and tried and convicted."

Before considering the specific submissions advanced on behalf of the appellant it is relevant to observe that the mortar bomb which the appellant was conspiring to explode and the 2 mortar bombs in his possession were most deadly weapons. Such a bomb is designed and intended to kill and maim a large number of people and has frequently done so in the past. It is common knowledge that such a bomb is often fired at a police station or a military base and can cause appalling loss of life. A mortar attack on Newry Police Station in 1985 caused 9 deaths. The weapon which the appellant was loading is a merciless weapon of great destructiveness. That is the

background against which the appellant claims that the sentence of 25 years imposed upon him was manifestly excessive.

Mr James Gallagher advanced 4 main submissions on behalf of the appellant which we shall now consider in turn.

1. The trial judge made insufficient allowance for the previous record of the appellant, which consisted only of minor motoring offences and of minor public order offences which consisted of disorderly behaviour, assault on the police and obstructing the police, all of which were dealt with by a small fine.

We do not accept that this is a valid criticism of the sentence. This court has constantly made it clear that a grave terrorist offence must be punished with a very severe and deterrent sentence even if the accused is a person with a previous clear record. In R v Cummingham and Devenney this court stated:

"This leads us to emphasise that courts in Northern Ireland in sentencing for actual or inchoate crimes of violence by terrorists should, as a general rule, while the present campaign of terrorism continues, pass sentences to give effect primarily to the principles of deterrence (of the accused and also of other potential offenders), retribution and prevention. Personal mitigating circumstances of the offender and considerations of rehabilitation must necessarily give way to the application of these principles though some allowance to a minor degree may be made in respect of them."

2. The trial judge should have made a reduction in the sentence of 25 years to make allowance for the severe and permanent injury which the appellant had sustained to his left arm (the injuries to his face and eyes having healed satisfactorily).

We consider that the trial judge did not err in principle in not reducing the sentence because of the injury to the appellant's arm caused by the explosion of the mortar bomb. The appellant has, unfortunately, been left with a considerable disability in his left arm by reason of the fractures which he sustained, but we consider that this disability will not substantially increase the hardship of his imprisonment and that, having regard also to the gravity of the offence which he committed, the disability is not a reason why the judge should have reduced the sentence.

3. It was submitted that the sentence of 25 years did not fit easily into the range of sentences for comparable offences.

We do not accept this submission. As we have already observed, because of the killing capacity of this mortar bomb, this was a very grave terrorist offence. The Crown Court and this court in recent years have frequently passed very heavy

sentences for very serious terrorist offences and have repeatedly stated that it is correct to pass severe sentences both to punish offenders and also to act as a deterrent to other possible offenders. In R v James Francis O'Reilly the accused was stopped when he was driving a van carrying a large load of explosives in a secret compartment. Unlike the present case, the explosives had not been converted into a deadly bomb which was being loaded into a mortar ready to be fired. In relation to the appropriate sentence for the storing or moving of explosives with intent this court stated:

"It is self-evident that terrorist organisations cannot carry out explosions which in many cases cause deaths and grave injuries unless there are persons who store or move explosives for them. Parliament has provided that the maximum sentence for the offence of possession of explosives with intent is imprisonment for life. Where a person is convicted of possession of explosives with intent and it is clear, as in this case, that he has committed the offence actively and willingly, then the court which convicts him, unless there are very exceptional circumstances, should pass a very heavy deterrent sentence which as well as punishing the accused is intended to deter others. And in a case, such as the present 1, when the accused was in possession of such a large quantity of explosives, the Court considers that a sentence of 20 years and upwards would be appropriate."

Therefore in the light of that judgment the sentence of 25 years in this case cannot be regarded as excessive.

Mr Gallagher referred to a number of cases where sentences of less than 25 years had been imposed for conspiracy to cause an explosion. Of course the facts of each individual case differ from the facts in other cases. For example in the case of R v Adams and Others where a sentence of 24 years was imposed for conspiracy to cause an explosion, the explosive device in that case was a coffee jar bomb which would cause many less deaths than a mortar bomb. Mr Gallagher referred, in particular, to the case of R v Brennan and Marron where the trial judge imposed a total sentence of 16 years where mortars had actually been fired at an army post and had failed to cause any damage or injury. However that was a case where the accused, although they did not plead guilty, did not in any way seek to actively defend the case, and this clearly influenced the trial judge to pass a relatively lenient sentence upon them. MacDermott LJ, the trial judge, stated in the course of passing sentence:

"The case took a very short time as we know because you agreed to the adoption of a statutory formula that takes all the facts as admitted. When a person pleads guilty it is possible and proper to give a discretion (sic). I have a feeling that in this case there may have been a clash of advice. It may well be that your family were anxious for you to plead guilty and that you were anxious to plead guilty but others in the background prevented you from adopting that course, so I think there

is significance in the manner in which you approached this case and I bear that in mind."

Moreover in R v Kevin McCann this court has recently stated that if a sentence falls within the proper and general range of sentence, it is not a valid ground of appeal to point to cases where lesser sentences have been imposed for the same category of offence but in circumstances which inevitably differ from case to case. In R v McCannthis court stated:

"(The appellant's counsel) sought to support this submission by referring to a number of cases where the trial judge had imposed a sentence of less than 25 years for attempted murder. In the absence of special mitigating circumstances in the case this is not a valid method of attacking a sentence when decisions of this court have established the permissible level of sentence for a particular offence."

In McCann's case this court also cited with approval the judgment of the Court of Appeal in England in R v Sawyer 6 Cr App R(S) 459 where May LJ stated at page 461:

"However, as this Court has said within the last 10 days, referring to an earlier decision where the judgment of the Court was given by Griffiths, LJ namely Large, 4 Cr App R(S) p.80, it is not appropriate on these sentence appeals to seek to draw the Court's attention to earlier cases in which this or that sentence has been passed for this or that purpose. Anyone who has anything to do with sentencing knows that it is, first of all, an extremely difficult task; and secondly, that the particular sentence which has to be passed depends wholly upon the particular facts and circumstances of the particular case in front of the sentencing judge, facts and circumstances which may very well not, and probably do not, appear in any report that may have been made of the comments of the court in allowing or dismissing an appeal.

This Court, as Griffiths LJ said in the earlier case, is fully aware from its experience of the general range of sentences for a particular offence. The task of the sentencing judge and of this Court is to determine at what point in that range, having regard to all the particular circumstances of that case, the sentence should be pitched. It is to be hoped that in appeals against sentence, where no matter of principle arises, this Court will not be referred to earlier sentencing reports with a view to seeking to persuade the Court that, just as in X's case, a sentence of 3 years was passed, so in this particular case 3 years would also be appropriate. That, in our view, is not the right way in which to approach this particular problem."

4. It was submitted that, although the trial judge clearly recognised that he was sentencing the appellant for conspiracy to cause an explosion and for possession of explosive substances, nevertheless he subconsciously approached the assessment of

the sentence on the basis that he was sentencing the appellant for the graver offence of conspiracy to murder, although he had not been charged with that offence.

In advancing these submissions Mr Gallagher relied on the judge's remarks in sentencing and, in particular, on the words:

"They were designed as deadly weapons and they could be used against innocent people .... And those people were to be shown no mercy."

We do not think that there is validity in this submission. The learned trial judge was quite entitled to take account of the consideration that the mortar bombs were deadly and merciless weapons, and therefore to impose a very severe sentence because of the nature of the bomb or bombs which the accused possessed and planned to use.

A somewhat similar argument was considered and rejected by this court in R v Breslin and Forbes where the 2 appellants were convicted of possession of a hand grenade with intent to endanger life and possession of a rifle and ammunition with intent to endanger life. They were each sentenced to 18 years' imprisonment. In passing sentence the trial judge said that the accused

"were sent on a mission to murder or injure members of the security forces on the evening of 5 January 1989."

It was argued on behalf of the appellants that the trial judge had wrongly sentenced them on the basis that they were engaged in a conspiracy or attempt to murder and were not merely charged with possession with intent.

This argument was rejected by this court which stated in its judgment:

"The Court does not accept these submissions for 2 reasons which are inter-related. The first reason is that the appellants were properly convicted of possession of the drogue bomb and rifle with intent *themselves* to endanger life or to cause serious injury to property, and it is clear that their primary intent was to endanger life. When a drogue bomb is thrown at, and an AKM rifle is fired 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. We are satisfied that this is all that the learned trial judge meant when he said: `You ... were sent on a mission to murder or injure members of the security forces', and that in sentencing he had no thought of increasing the sentences beyond those which were appropriate for the 2 offences of possession with intent because he considered that the appellants were guilty of the offence of conspiracy to murder or attempt to murder."

The sentence imposed by the learned trial judge was a severe 1, but the offences for which it was imposed were offences of the utmost gravity. Therefore the sentence was entirely proper and, for the reasons which we have given, we dismiss the appeal