IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

KEVIN McCANN

HUTTON LCJ

This is an appeal against sentence by Kevin McCann who on 5 May 1994 was convicted by Pringle J at Belfast Crown Court of the attempted murder of Private Paul Kenneth Ogilvie on 8 February 1993.

In brief summary the facts of the case were these. On 7 February 1993 a house, No. 10 Dunville Street, Belfast, was taken over by terrorists who held captive the family who lived there and the family were not permitted to leave the house.

A shotgun was carefully positioned in the downstairs front room resting on a cushion on top of a set of step ladders opposite a window. Next day, 8 February, when an Army patrol was passing outside in the street, a shot was fired at Private Ogilvie from the shotgun. Fortunately the main blast of the shot was taken on Private Ogilvie's helmet and he received only minor injuries.

However this was a quite deliberate and carefully planned and executed attempt to murder a soldier in which the appellant was deeply involved. He was 1 of the terrorists in the house in Dunville Street and he ran away from it after the shot was fired, and a very short time later was seen by an Army patrol running into a house in an adjacent street, No. 5 Lower Clonard Street.

The learned trial judge sentenced both the appellant and his co-accused to 25 years' imprisonment for the attempted murder. In sentencing him the judge said:

"This was a carefully planned attempt to murder Private Ogilvie, as it turned out to be, to murder a soldier. A serious, most serious terrorist offence and unfortunately as time has gone by and terrorism has been with us sentences for this type of offence go up and up and one (cannot) understand why people do not seem to learn that this type of conduct cannot be tolerated. And it is fortunate indeed that death did not ensue in this case.

I don't see any reason to make any distinction between the 2 of you, you were both there, I'm not finding that either of you pulled the trigger of that shotgun I'm just treating you as members of a gang which were intent on murdering this soldier. Your records, as I've said, are not relevant."

Mr Treacy, for the appellant, submitted that the sentence of 25 years was manifestly excessive. We do not accept that submission. This court has emphasised in a considerable number of cases that those who commit serious terrorist offences must receive very severe deterrent sentences, and attempted murder is 1 of the most serious offences which can be committed.

In a number of cases this court has upheld sentences of 25 years or more for attempted murder and has made it clear that such sentences are in no way excessive. In R v Murphy and McKinley (April 1993, unreported) this court dismissed appeals against sentences of 25 years for attempted murder, and Kelly LJ stated:

"Murders and attempted murders of members of the security forces have not abated in this jurisdiction, notwithstanding the length of sentences the courts have been imposing. The security forces continue to be the prime targets of IRA murder. It may be, as Miss McDermott said, that 25 years is the longest sentence yet imposed for attempted murder in this jurisdiction. But this court recently stated in R v Carroll and Carroll (1992, unreported) (in which the first named appellant appealed against a sentence of 22 years for possession of rifles and ammunition with intent contrary to Article 17 of the Firearms (Northern Ireland) Order 1981) the following:

`To date there have been comparatively few Article 17 sentences in excess of 20 years but that does not mean that longer sentences, 25 or 30 years or life imprisonment would be wrong in principle or excessive. Each case depends on its own facts and a factor in sentencing is that if the existing level of sentences for the particular offence is failing to deter then the level of sentencing may well have to rise.'

We dismiss also the appeals against sentence."

In R v Dermot Quinn (September 1993, unreported) this court dismissed an appeal against a sentence of 25 years for attempted murder, and in delivering the judgment of the court Kelly LJ stated:

"These terrorist crimes arose out of carefully planned ambush of 2 police officers in which the appellant was an active participant and in which 2 gunmen armed with rifles fired at point blank range 23 rounds at 2 police officers in their car. Each of them narrowly escaped death but each was left with very serious injuries. A dastardly crime of this nature calls for a long deterrent sentence."

In R v Glen Cunningham (September 1995, unreported), where a sentence of 25 years was imposed by the trial judge for an attempted terrorist murder this court dismissed the appeal against sentence, and in delivering the judgment of the court MacDermott LJ stated:

"Mr McCrudden further argued that the present sentences were manifestly excessive. We do not agree. This was clearly a deliberate attempt to kill Mr Donaghy. Having regard to the fact that gunmen were only a few feet from him when the sub-machine gun jammed his escape from almost certain death was indeed providential. We find no assistance in a consideration of sentences in other cases especially when they were imposed some time ago. We would repeat what was said by this court when reviewing a sentence of 25 years' imprisonment for (conspiracy to murder) in the case of Glennon and others:

`Looking afresh at the sentences of 25 years for conspiracy to murder we do not consider them to be excessive, much less manifestly excessive. This was an audacious and planned operation aimed at killing Dr Kennedy in his own home. Such conduct is totally unacceptable in any civilised country and those who embark upon such enterprise must expect lengthy sentences in excess of 20 years when convicted. If sentences of this order do not deter others from acting likewise then even longer sentences will be imposed.'

Those remarks are equally applicable in the present case. We do not consider the sentence to be in any way excessive, let alone manifestly excessive."

In R v Hannigan and Brogan (November 1995, unreported) the trial judge had imposed on the accused Brogan a sentence of 30 years' imprisonment on each of 3 counts charging terrorist attempts to murder members of security forces within a short span of time, the sentences of 30 years' imprisonment to run concurrently. Brogan had previously been convicted and imprisoned in 1979 for another attempt to murder members of security forces and had been released from prison in December 1989. The Court of Appeal dismissed an appeal against the total sentence of 30 years' imprisonment holding that it was not excessive.

In the light of these decisions in this court there was no weight in Mr Treacy's submission that the sentence of 25 years' imprisonment in this case was manifestly excessive. He 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. This court approves and endorses the judgment of the Court of Appeal in England in R v Large 3 Cr App R(S) 80 where part of the headnote reads:

"The appellant pleaded guilty to 2 counts of attempted robbery and 1 of robbery. He had been concerned in 3 robberies in which sawn-off shotguns were used, and in 1 case a serious injury inflicted. Sentenced to a total of 12 years' imprisonment. In the course of the appeal, counsel sought to establish a disparity between the sentence imposed by a different judge on other offenders in connection with other robberies. Held, it is not permissible for counsel inviting the Court of Appeal to consider a particular sentence, to analyse sentences passed by other judges on other occasions for other offences. The question of disparity will be considered when it arises in respect of participants in the same offence who have received different sentences for the part they played in the offence."

Griffiths LJ (as he then was) stated at 82:

"2 arguments have been advanced on the appellant's behalf. It was wished to advance another, but the court has refused to entertain it. We are very grateful to Mr Coonan for the immense amount of work which he has done on the appellant's behalf in analysing the offences committed by the appellant and those committed by a number of other men on different occasions and which were dealt with by a different judge. In the grounds of appeal Mr Coonan sought to submit that this Court should note the disparity between the sentences passed by His Honour Judge Abdela in respect of other armed robberies in which the appellant was not involved and those passed by His Honour Judge Buzzard on the appellant for his offences.

This Court declines to entertain such a submission. By reason of the appeals which constantly come before it the Court is aware of the general level of sentencing throughout the country. If, when individual sentences are being considered, it was permissible for counsel to analyse sentences passed by other judges on other occasions for other offences the work of this Court would come to a standstill. It would occupy the time of the Court to an inordinate extent and would do no more than draw its attention to the sentencing practice of a particular judge on a particular occasion in circumstances quite different from those with which the Court is immediately concerned. We will consider the matter of disparity when it arises in respect of participants in the same offence who have received different sentences for the parts that they played in the offence."

It is also relevant to refer to the judgment of the Court of Appeal in England in R v Sawyer 6 Cr App R(S) 459 where May LJ at 461 referred to R v Large and stated:

"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."

However for the sake of completeness this court has examined the facts of the particular cases referred to by Mr Treacy and this examination shows the soundness of the principle stated by the Court of Appeal in R v Large, because in each case it is clear that the trial judge was influenced by the special facts and circumstances of the case to pass a sentence less than the normal level. The cases are these: in R v Larkin (June 1995) the learned trial judge imposed a sentence of 16 years' imprisonment in respect of attempted murder. In sentencing the learned trial judge said this:

"I have to say that it is part of the tragedy of this case that your young life too has been wrecked like that of many other young men and I think it is particularly unfortunate in that you are a young man who tried to escape from the environment in which offences of this sort were so rife and I am convinced that you did make a serious effort to get away from it and make something out of your life and it is only as a result of this unfortunate accident that you sustained that you came back to live in Northern Ireland and I suppose you were a very obvious target for paramilitary involvement.

....

I think there are many people who have not made much effort and who get themselves involved very readily and willingly but it seems to me that you do not come into that category and that enables me to pass a shorter sentence than the kind of sentence that is now pretty well standard in this kind of case. In all the circumstances of the case I am going to impose on the first and second counts a sentence of 16 years."

Therefore it is clear that the judge recognised that, in passing the sentence of 16 years' imprisonment, he was imposing a shorter sentence than the kind of sentence which was standard for attempted murder.

In R v David Delaney (September 1995, unreported) the learned trial judge was clearly influenced in passing a total sentence of 16 years on counts of attempted murder by the consideration that the accused instructed his counsel that all the facts set out in the committal papers should be admitted without witnesses being called by the Crown to prove those facts.

In his judgment the trial judge stated:

"After the case was opened by Mr Creaney QC, Mr Finnegan QC (who appeared with Mr Treacy for the accused) stated that on the instructions of his client all of the facts contained in the committal papers and in the additional evidence documents could be put in evidence under section 2 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968.

That means that those facts were admitted without witnesses being called as Mr Creaney did not seek to exercise the power under section 2(4) to call witnesses."

and in passing sentence the judge said:

"Well now, Delaney, these are extremely serious charges of which I have convicted you and they require a long custodial sentence. The sentence which I propose of imprisonment is less than I thought that I could properly impose when I first read the papers in the case.

I say that for 2 reasons. I am not satisfied that you fired either weapon but you were present in a joint enterprise in this attempt to kill soldiers. I bear that in mind in your case.

Secondly, you have not sought to brazen the matter out in any way to seek to establish a dishonest defence. You accepted the Crown evidence against you and in the way you have acted you have saved expense.

Having regard to all of the circumstances of the case in my view the proper sentence in your case is a sentence of 16 years' imprisonment which I impose in relation to each of the 4 counts on the indictment. The sentences will be served concurrently."

In R v Sean McGuigan (October 1995, unreported) the trial judge imposed a sentence of 20 years' imprisonment for attempted murder. It is clear that in that case the trial judge was influenced by the consideration that the accused had made no challenge to the evidence adduced by the Crown. In dismissing appeals to this court against the sentence of 20 years' imprisonment MacDermott LJ stated in delivering the judgment of this court:

"The sentence of 20 years in relation to count 25 is in no way excessive for a deliberate attempt to kill with a lethal weapon. It falls very much at the lower end of the appropriate level of sentencing.

A longer sentence could not have been criticised and we are satisfied that the learned trial judge made such allowance as he considered proper to reflect the manner in which the appellant contested the case."

Therefore we consider it to be clear that the normal level of sentence for the attempted murder of a member of the security forces is in the region of 25 years' imprisonment, and in some cases a sentence in excess of 25 years may well be proper. Where lesser sentences have been imposed it has been for special reasons of the nature referred to in the cases set out above. Accordingly the sentence imposed in this case was a proper 1, and was not excessive. The appeal is dismissed.