

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DECLAN CROSSAN

LORD LOWRY LCJ

We can deal shortly with 2 of the grounds in the amended Notice of Appeal, namely grounds 1 and 3. The learned trial judge, having announced that he would not make a finding on Count 2 which was an alternative to Count 1, by a slip imposed a sentence of 15 years. This was not entered in the record and should be disregarded. Ground 3 complains that he found the appellant guilty on Count 7 which was an alternative to Count 6, and we consider that he would have done better not to have dealt with Count 7 when he had reached a finding of guilty on Count 6.

Generally speaking, there is no fixed rule. It may be advisable to record a finding and impose a sentence on a lesser charge arising out of the same facts instead of directing the lesser charge to lie on the file where, according to the view of the law or the facts which may be taken by the Court of Appeal, it is possible that an accused may ultimately be adjudged not guilty of the graver charge and guilty of a lesser charge based on the same actual or alleged facts. The problem for the court of trial could be reduced if the Crown were to adopt a policy of not charging the lesser offence in cases where it is obvious that it is not logically open to the court of trial to acquit of the graver and then convict of the lesser offence.

The gravamen of the appeal against conviction is found in grounds 2 and 2a, which can fairly be considered together, since the defence called no evidence and adopted as its final submissions at the trial what had been said in the submission of no case to answer. Passing over for the moment the wording of Count 6 of the indictment, we are satisfied that the learned trial judge had before him ample evidence to find that the occupants of the car, including of course the man firing the rifle, intended at the moment of firing that the constable who was standing in the open should be shot and killed. We would, although we need not, go so far as to say that any other interpretation of the firing which took place would be divorced from reality. The accretion to the incident of the features to which Mr McMahon has drawn attention makes the entire episode rather unusual, but provides no foundation in our opinion for rejecting the obvious conclusion that the man who fired in the direction of the

hump intended to kill, or for this Court to query that conclusion once it was reached by the tribunal of fact, nor do we consider that any of the criticisms of the learned trial judge's mode of giving expression to his conclusions reveal a flaw or gap in his reasoning. The appellant was assigned to play a role in "a shooting", and a shooting, in the sense of a murderous attack, was what took place. It is not primarily the duty of the trial judge to refer to the arguments of the defence, although this is often a convenient way of indicating that the factors pointing, or supposedly pointing, away from conviction have not been overlooked. We adhere to the doctrine that real difficulties or inconsistencies or apparent badges of innocence ought to be noticed and convincingly disposed of in the judgment before a conviction can be regarded as wholly satisfactory. This is because the appellate court is thereby able to be reassured that the trial judge had a sound basis for his finding. But in this case, which can be reduced to quite simple terms, what the learned trial judge said (both clearly and cogently) is quite enough to show that he appreciated clearly the problem which it was his duty to solve and to demonstrate that there was no real obstacle in his way.

Mr McMahon, showing both logic and moderation, did not vehemently seek to dissociate the appellant from the guilty intention of his comrades, provided always that that intention was properly proved in a way which would have led to their just conviction if they had been before the Court. We therefore refrain from going into detail on the question of guilty intent.

Counsel did however submit, and we now come back to the first point, that the form of Count 6 (to which the learned trial judge did not advert at any time) meant that the firer, and likewise the appellant, could not be found, and had not indeed been found, to have the necessary intent (imputed to the firer by implication and to the appellant in express words) of murdering "such members of the Royal Ulster Constabulary as were on duty at the permanent vehicle checkpoint, Lifford Road, Strabane". The finding of the learned trial judge is clear that the firer's intention was to murder the constable who was exposed to view, that is, Constable Black, and we would point out that this intended victim was within the description used in the charge. The intention of the appellant, who was left to guard the occupants of the house, was at all times broad enough to include the firer's intent at the moment of firing. Therefore, since what was found against the appellant and the firer of the shots was attempted murder, and since the intended victim fell within the class of intended victims described in Count 6, there is nothing technically wrong with this conviction on general principles. By finding the facts expressly the learned trial judge reached a clear verdict which a jury could have done, if properly directed, by finding a partial verdict. This judgment is not open to challenge if it is factually sound, as we have already held it to be. It follows from that that no amendment of the indictment was required, but, if one had been required or had been asked for, or suggested by the Court, the defence, as Mr McMahon again quite frankly admits, could not have objected and would not have been prejudiced.

We now come to the question of sentence. The appellant's real attack is on the sentence of 20 years for conspiracy to murder in respect of the incident on 23 February 1985 at Fountain Street, Strabane, where the intention was to ambush a police jeep, fire grenades at it and shoot the occupants when they dismounted. The offence of attempted murder must expressly involve a murderous act and also an intention to kill, which even the crime of murder sometimes does not involve. It is usually a worse crime than conspiracy. But this is not always so. In this particular case the learned trial judge imposed a sentence of 15 years for the attempted murder and 20 years for the conspiracy to murder. The role of the appellant in the attempted murder has already been described, in detail, although not in this judgment. The conspiracy here was the nearest possible thing to a very ruthless multiple killing. 5 men of the security forces were the intended victims, sophisticated deadly weapons consisting of 3 rifles and 2 grenade launchers were to be employed, there was a thought-out plan, in the sense that fire was to be opened with the grenade launchers and then the murder squad were to shoot the occupants of the vehicle when they got out. Not only that, but everything was laid on the ground. The murder squad was assembled. They even waited till 3.00 am and only dispersed when it was decided that it would not be practicable to carry out the attack, and, lastly, the appellant himself had direct participation in the events which we have described and he had been allotted the role of a killer, with a rifle which he was to take up at the appropriate moment. When 1 contrasts that conspiracy (which was all that could properly be charged) with the kind of conspiracy, sometimes of a rather vague nature in a room in a house, which leads to nothing, 1 can see the very wide range of criminality within which the offence of conspiracy can be committed.

Now the learned trial judge in imposing sentence commented on a number of points which were favourable to the appellant but also on others which were not. He concluded:

"I may say with regret that I have to deal with you according to the seriousness and severity of your crimes".

We have 1 further comment. This community has now for many years been undergoing what amounts to a state of siege, and crimes of the sort we have dealt with this morning have been a common occurrence. 30 years ago, and also 51 years ago, there were outbreaks of violence committed by organisations and involving a number of explosions and shootings, attacks on the community and on the security forces, but these attacks were of nothing like the same extent and were carried on for nothing like the same length of time as the current crop of violence. In those days the kind of sentences we are dealing with here would have been regarded as absolutely commonplace, because the enormity of the crimes committed made a full impact on society and on the courts. This, to some extent, is not true now, because the sensitivity of everyone has been dulled by repetition, but in reality we have to remember that the crimes are even more prevalent than during the periods we have recalled and the attacks on the security forces have certainly not abated in any degree; indeed, they have in some respects increased. They pose a grave danger to

the whole community, the perpetrators are difficult to bring to justice and the crimes in themselves are very wicked crimes indeed meriting severely deterrent and exemplary punishment. Those are reflections which cause us to say that this sentence of 20 years and the other sentences imposed, which are graded in proportion, are not manifestly excessive or wrong in principle. We have, however, 1 observation to make, though it may be thought somewhat academic, with regard to the sentence of 10 years for membership on Count 12. The maximum for this offence was once life imprisonment. In 1973 that was reduced to 5 years; then, that was thought insufficient to embrace the range of gravity of the offence of membership, and the maximum was raised to 10 years. Now, while most people would have qualified for a sentence of 5 years, when that was the maximum, the same could certainly not be said if the maximum term were life imprisonment, and should not in our opinion be said when the maximum is 10 years. This man, indeed, participated in 2 very serious and, as it was hoped and intended, deadly offences, but he has been sentenced in respect of those offences and he is not shown to be a longstanding or important member of the IRA or a person in authority. We consider, therefore, that, on principle, the sentence of this particular man for membership of this organisation ought to be 7 years, and we substitute that term for the sentence of 10 years.