IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PETER CUNNINGHAM AND PATRICK SEAN DEVENNEY

Hutton LCJ, Kelly and MacDermott LJ

The first appellant was sentenced to 20 years' imprisonment for conspiracy to murder, 18 years' imprisonment for possession of firearms and ammunition with intent and 7 years' imprisonment for belonging to the IRA. The second appellant was sentenced to 20 years' imprisonment for possession of firearms and ammunition with intent but was acquitted of charges of conspiracy to murder and conspiracy to wound. The first appellant made a full confession and pleaded guilty. The second appellant remained silent throughout his interrogation and pleaded not guilty. The appellants appealed against the sentences which they claimed to be manifestly excessive.

Held, dismissing the appeals, that -

(1) Courts in Northern Ireland in sentencing for actual or inchoate crimes of violence by terrorists should pass sentences which gave effect primarily to the principles of deterrence (of the accused and also of other potential offenders), retribution and prevention. Personal mitigating factors of the offender and considerations of rehabilitation had to give way to the application of these principles although some allowance to a minor degree might be made in respect of them. *R v Al-Mograbi* [1979] 70 Crim App R 24 and *R v Crossan* [1987] NI 355 applied.

(2) The principle that an accused who pleaded guilty was given a reduction in the appropriate sentence while a co-accused who had pleaded not guilty was not given a reduction did not mean that the giving of credit to the 1 constituted the imposition of a penalty on the other.

(3) The offender's determination to continue in terrorist crime was a relevant and proper consideration for a sentencing judge in this jurisdiction as was the need to protect the public from the commission of further offences.

(4) Both appellants had served previous sentences of imprisonment for terrorist offences and had resumed terrorist activity after their release. The sentences imposed were not manifestly excessive.

The following cases are referred to in the judgment:

R v Al-Mograbi [1979] 70 Cr App R

R v Boyd [1980] 2 Cr App R (S) 234

R v Crossan [1987] NI 355; [1987] 2 NIJB 73

R v Greenfield [1973] 1 WLR 1151; [1973] 3 All ER 1050

R v King [1973] 57 Cr App R 696

R v Sargeant [1975] 60 Cr App R 74

APPEAL against sentence by Peter Cunningham and Patrick Sean Devenney. The facts appear sufficiently in the judgment.

H P Kennedy QC and *W Barr* (instructed by *Nurse and Jones*) for the first appellant.

P T Mooney QC and *Miss E M MacDermott* (instructed by *John J Rice & Co*) for the second appellant.

R Appleton QC and *G E J Simpson* (instructed by *the Director of Public Prosecutions*) for the Crown.

Cur adv vult

HUTTON LCJ

These are appeals against sentences. The appellants are Peter Cunningham aged 28 years of 35 Beechfield Street, Belfast and Patrick Sean Devenney aged 26 years of 126 Madrid Street, Belfast. They were sentenced at Belfast Crown Court on 19 January 1988 by Mr Justice McCollum. The learned trial judge sentenced Cunningham to 20 years' imprisonment for conspiracy to murder on count 1, to 18 years' imprisonment for possession of firearms and ammunition with intent under Article 17 of the Firearms (Northern Ireland) Order 1981 on count 3, and to 7 years' imprisonment for belonging to a prescribed organisation, the Irish Republican Army on count 5. He

sentenced Devenney to 20 years' imprisonment for possession of firearms and ammunition with intent under Article 17 on count 3.

The offences arise out of the following facts. On 2 March 1987 about 5.25 pm an RUC mobile patrol travelling in the Ormeau Road area saw Devenney at the corner of Dudley Street and Rugby Avenue. They saw that he observed them and that he appeared to act suspiciously and disappear from their view. They stopped their vehicle and 2 of the patrol pursued him on foot. They came to 80 Rugby Avenue where they saw the shadows of persons behind the inside glass door of that house. They entered and saw Devenney with Cunningham in the hallway. They chased them into the kitchen area where they were apprehended. As the appellants ran towards the kitchen area a semi-automatic pistol fell from 1 of them on to the floor. A second gun, a revolver, was found lying near the rear door of the kitchen.

The appellants were strangers and trespassers in this house. They had dashed past the householder, a lady in her 80s, knocking her down as she stood at the door talking to a neighbour.

In the kitchen both appellants were seen to have cotton wool in their ears and to have had woollen gloves on their hands. The pistol that fell on the floor when examined was a 9 mm semi-automatic Browning with its hammer cocked with 11 rounds of ammunition in its magazine and 1 in the breech. The revolver, which was found, was a Smith and Wesson and it too was loaded with 6 rounds in the chambers. Both handguns were mechanically sound and functioned correctly when later tested.

At the house neither man spoke when asked by the police about the handguns or why they ran away.

They were taken to Castlereagh police office. Devenney was interviewed by teams of detectives that evening and throughout the following days until the afternoon of 6 March. He remained silent throughout. At his trial he pleaded not guilty to all charges. The learned trial judge at the end of the Crown case acceded to his counsel's application for a direction in respect of the charge of conspiracy to murder (count 1) and the charge of conspiracy to wound (count 2), holding that although he would have left the case to the jury if there had been a jury, he himself would have a reasonable doubt as to the guilt of the accused on the conspiracy counts because there was no evidence as to the person whom he conspired to murder or wound. It is, of course, unnecessary for us to express our opinion on this point but we incline to the view, with respect, that this ruling was unduly favourable to the accused as a conspiracy can be proved without the Crown being able to prove the person or persons against whom it was directed: see *R v Greenfield*[1973] 3 All ER 1050. The trial judge, however, had no doubt that Devenney was in possession of the firearms with the necessary intent under Article 17. He sentenced him to 20 years' imprisonment.

Cunningham, on the other hand, took a different attitude both at Castlereagh and at the trial. Although he refused to respond to any of the detectives' questions during the first interviews, later on the evening of the second day, 3 March, and at subsequent interviews, he confessed to being a member of the IRA and to having been out on a shooting mission for that organisation when he was caught. He admitted the mission was to do a shooting in or around the Ormeau Bridge, and that they were looking for a blue Range Rover in that vicinity, but he maintained he did not know the identity of the target other than that he would be the driver of the Range Rover. He said he had met Devenney following instructions in Botanic Gardens that afternoon and whilst there he kept watch while Devenney got the handguns which had been hidden in a playground in the Gardens and that Devenney had given him 1 of them which he had kept until his capture. He incorporated these verbal admissions with considerably more background and material into a written statement made between 7.50 pm and 9.20 pm on 5 March. At the trial he pleaded guilty to all charges and as stated was sentenced to 20 years' imprisonment for conspiracy to murder, 18 years for possession of the firearms with intent and 7 years for belonging to the IRA. It is apparent therefore that the learned trial judge made a distinction between the appellants in sentencing Devenney to 20 years and Cunningham to 18 years for possession of the firearms with intent.

Mr Kennedy for Cunningham submitted that notwithstanding the gravity of the offences, the sentences imposed on his client were manifestly excessive. In his cogent address he referred us to the unhappy history and personal circumstances of the appellant, to which, he submitted, the trial judge gave insufficient weight. The appellant now aged 28 years, had been sentenced in 1977, when only 17½ years, to a total of 12 years' imprisonment for petrol bomb and malicious damage offences and for belonging to the IRA. He had served more than 7 years of this sentence before being released on licence on 21 June 1985. To add a further term of 20 years' imprisonment now Mr Kennedy submitted, would be to impose upon the appellant, still a young man, an unjust and intolerable length of incarceration.

Mr Kennedy stressed also that Cunningham had co-operated with the police, had pleaded guilty and that Detective Sergeant Houston's evidence at the trial enabled the trial judge to find remorse and regret on his part and express an optimistic view about his future conduct. These were important considerations, Mr Kennedy went on, which again had not been given enough weight by the judge.

It was submitted by Mr Kennedy that the judge did not give sufficient weight to Cunningham's admissions of guilt to the police, his co-operation with the police and his pleas of guilty at the trial. 2 short comments may be made about this submission:

1. The trial judge in fact did give some allowance for this. He said at page 9 of his judgment "I will give him the very fullest allowances for the fact that he has pleaded guilty and that he has shown signs of real remorse and regret for what he was involved in", and later at 10: "I am allowing him considerably for his plea of

guilty". He sentenced Cunningham to 18 years but Devenney to 20 years for the same offence of possession of firearms and ammunition with intent.

2. As the trial judge pointed out Cunningham's confessions, although detailed in relation to his own involvement, gave little useful information to the police in relation to other matters.

It is plain that Cunningham's plea of guilty to conspiracy to murder was an admission of guilt to a very grave criminal offence, and to 1 of the most prevalent terrorist crimes in this jurisdiction. The conspiracy in his case was well advanced and close to murder when 1 sees that he was armed, with his weapon loaded, his hands gloved, with cotton wool in his ears and thus prepared was in the vicinity where the murder victim was expected. It would be a most exceptional course for a court not to impose a very heavy sentence of imprisonment for such a conspiracy. 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. We use the term "retribution" in the sense explained by Lawton LJ in R v Sargeant [1975] 60 Cr App R 74, 77 where he said:

"The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently mentioned: it is that society through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the common scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence".

It is also instructive to observe the approach of the sentencing courts in England in respect of terrorist offences. In R v Khloud Al-Mograbi and Cull [1979] 70 Cr App R 24, the first appellant, a girl of 19, pleaded guilty to conspiracy to murder and was sentenced to 12 years' imprisonment. In relation to her Roskill LJ in the Court of Appeal said at 26:

"The learned trial judge in passing sentence said:

'You have been brought up to a life of violence and that is tragic, but my primary duty is to mark the determination of the Courts of this country to keep terrorist attacks off our streets, to discourage any idea that youth or sex or home

circumstances or the order of superiors will operate to secure lenient sentences if the terrorist is caught ...'

This court agrees with every word the learned judge used. The learned judge said he was going to pass a lighter sentence than he might have passed in other circumstances. This Court has no doubt that he took very much into account the fact that this girl was only 19. Had she been of full adult age, the sentence might very well have been 20 years or more ... We have said on more occasions than 1, and trial judges have also said, that youth cannot be allowed to mitigate sentences in these terrorist cases ... Excuses about age or the possibility that a shorter sentence might achieve the same deterrent effect or ... be more likely to make her see the error of her ways more quickly than a longer sentence, cannot be allowed to militate against a longer sentence being passed".

In relation to the second appellant, Cull, Roskill LJ stated at 26:

"Much of what I have said is equally applicable to the case of Cull. Cull appeared before Swanwick J at Liverpool Crown Court on May 10, last. He was then acquitted of a charge of conspiracy to murder but convicted of conspiracy to cause grievous bodily harm. The learned judge passed upon him, what we all regard as a very lenient sentence, of 10 years' imprisonment. Had this man been convicted of conspiracy to murder, the sentence - this man was 27 and had a record of violence, for in 1972 he was convicted in Belfast of armed robbery and was sentenced to 6 years' imprisonment, a fact of which the jury did not know when they acquitted him of conspiracy to murder - might well have been either life imprisonment or at least 20 years' imprisonment".

In this jurisdiction Lord Lowry LCJ stated in R v Crossan [1987] 2 NIJB 73 in a compelling passage at 77:

"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 consider that the opinions expressed in these passages should govern the approach of courts in this jurisdiction when passing sentences in respect of terrorist crimes.

It follows in this case that the personal circumstances and history of Cunningham can only be minor factors in determining the sentence which he should receive. But, in fact, his past history cannot assist him because the sentences totally 12 years passed on Cunningham in 1977 were for terrorist petrol bomb attacks on a bus station and the burning and destruction of a number of buses when he was acting as a member of the IRA.

Moreover we consider that a most disturbing and serious factor in Cunningham's case was his decision to re-enlist in the IRA within a relatively short time after his release on licence from prison on 21 June 1985 and his willingness to carry out a murder for that terrorist organisation. In November 1986 he made contact to rejoin the IRA and went through a lengthy recruiting process. He was obviously prepared to subject himself again to their philosophy of murder and violence and to help to carry it out. What the appellant himself said in his written statement to the police was:

"Round about November of last year I wanted to get involved again with the IRA. I went to a fella I knew was connected and he told he would get back to me and he did about 2 weeks later".

He was under no pressure from any quarter to rejoin. On the contrary his mother and eldest brother, to their credit, asked him not to, and he had a girlfriend at this time whom he had planned to marry in 1988. None of this nor his years in prison nor the fear of the revocation of his release on licence from prison were sufficient to deter him from going back to the terrorist organisation.

For the reasons which we have stated we consider that the sentences imposed on Cunningham was not manifestly excessive but were proper sentences. His appeal is therefore dismissed.

We turn now to the appeal of Patrick Devenney who was acquitted of the charge of conspiracy to murder, but was convicted of possession of firearms and ammunition with intent contrary to Article 17 of the Firearms (Northern Ireland) Order 1981. His grounds of appeal which appear in his notice of appeal together with a fifth ground added with the leave of the court read as follows:

"1. It is wrong in principle that the learned Trial Judge, the accused Cunningham having pleaded guilty to Counts 1 and 2 and the Appellant Devenney have been acquitted of the said Counts failed to draw any or a proper distinction between the effective sentences that he thought it appropriate they should each share.

2. That the learned Trial Judge, contrary to law, having acquitted the Appellant on Counts 1 and 2 took into account and failed to disregard, in sentencing the Appellant a suspicion that he was guilty on the said Counts.

3. That there was no admissible evidence upon which the learned Trial Judge was entitled to find that the accused Cunningham was a 'junior partner' or played 'a minor role' in the offences but that the learned Trial Judge did so find and further found, by implication, despite the absence of admissible evidence and contrary to law, that the appellant was the senior partner and played a major role and sentenced him accordingly.

4. That although the learned Trial Judge was entitled to give the accused Cunningham credit for pleading guilty to Counts 1-3 he was wrong in law in penalising the appellant for pleading not guilty.

5. The learned Trial Judge was wrong in principle to take into account in respect of the appellant his future conduct".

Mr Terence Mooney and Miss McDermott who followed him, compressed these grounds into submissions based on a critical survey of what the trial judge said in sentencing Devenney at pages 10 and 11 of the transcript. This was a short passage as follows:

"In your case, Patrick Devenney, although in dealing with Cunningham I must treat him as a junior partner, there is no evidence against you that would indicate that your roles were basically different. I am allowing him considerably for his plea of guilty which you did not adopt. I think that you are more unrepentant than he is and that has shown through in the nature of your defence and the fact that you did not plead guilty. I think that you have to be treated as a person who may well have more determination to continue if permitted in this kind of activity than Cunningham. I think that this has got to be taken into account in your case".

Mr Mooney submitted that the trial judge, in the first place, penalised Devenney for pleading not guilty and secondly, punished him on the basis that in future he would continue to commit terrorist crime if permitted to do so. The words which counsel emphasised to make his first point were "I am allowing him considerably for his plea of guilty which you did not adopt". But it is almost inevitable that a sentencing judge will make an observation of this nature when allowing 1 accused credit for having pleaded guilty where his co-accused has pleaded not guilty. It is fallacious in

these circumstances to infer that the giving of credit to the 1, constitutes the imposing of a penalty on the other. All that it amounts to is a recognition of the principle that an accused who pleads guilty is generally given a reduction in the appropriate sentence for the crime while a co-accused, who has pleaded not guilty, is not given a reduction.

This principle is well established and sensibly founded. A plea of guilty, it is recognized, often indicates remorse, it will save time and expense in a trial (see *R v Boyd*below). Archbold (43rd ed 1988 vol 1 par 5160) states the principle thus:

"As a general principle, an offender who pleads guilty to an indictment may expect some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted by the jury on a plea of not guilty. The policy of the courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long 1, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty (per Cumming-Bruce LJ in *Boyd* [1980] 2 Cr App R (S) 234 ... One effect of the practice of granting a discount to recognize a plea of guilty is that where 2 defendants are sentenced for the same offence, 1 having pleaded guilty and the other having been convicted by the jury, the offender who has pleaded guilty should normally receive a shorter sentence on that account, other things being equal ...".

Thomas, *Principles of Sentencing* (2nd ed 1979) setting out the principle at 50, also gives the reminder that the co-accused who has pleaded not guilty should not be penalised for that plea:

"The principles governing the extent to which a sentencer may take into account the offender's behaviour during the course of the proceedings against him are well settled. A plea of guilty may properly be treated as a mitigating factor, indicating remorse, and will justify a reduction in the sentence below the level appropriate to the facts of the offence; but the defendant who contests the case against him, while not entitled to that mitigation, may not be penalised for the manner in which his defence has been conducted by the imposition of a sentence above the ceiling fixed by the gravity of the offence ... Where a sentencer reacts to the manner in which the defence has been conducted by imposing a sentence in excess of what the facts warrant, the Court will normally reduce the sentence".

It cannot be said that the sentence of 20 years' imprisonment imposed on Devenney was in excess of the appropriate level having regard to the facts of the offence and his previous record, which included a conviction in 1984 for possession of explosives with intent to endanger life.

Mr Mooney went on to criticise the passage where the trial judge said that Devenney "may well have more determination to continue if permitted in this kind of activity

than Cunningham. I think that this has got to be taken into account in your case". Those words indicated, counsel submitted, that the trial judge was punishing Devenney on a prediction of future criminal conduct. We consider that the judge's concern that Devenney might continue with terrorist activity was justified. He had heard the evidence of Detective Sergeant Houston who was able to give him some slight prospect of hope in relation to Cunningham's future, whereas he was silent about Devenney in this regard and was not questioned about this by Devenney's counsel. He also had before him Devenney's conviction in August 1984 for possession of explosives with intent to endanger life, his release on licence in April 1986 and his resumption of terrorist crime in the present offence in March 1987.

The risk of an offender's determination to continue in terrorist crime must always be a relevant and proper consideration for a sentencing judge in this jurisdiction. Long sentences, are intended to protect the public from the repetition of crime. That is 1 of the principles upon which the courts act in sentencing dangerous terrorists. In *R v Sargeant* at 77 Lawton LJ stated:

"We come now to the element of prevention. Unfortunately it is 1 of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period".

Mr Mooney relied on the judgment of Lawton LJ in *R v King and Simpkins* [1973] 57 Cr App R 696 in support of his submission that it was wrong for the trial judge to take into account that Devenney might have the determination to continue with terrorist activity, and he submitted that the approach of the trial judge conflicted with the principle stated by Lawton LJ in that case. *R v King and Simpkins*was a case where at the trial counsel for the accused at their request (a request which the Court of Appeal said should not have been compiled with) read a statement which amounted to a political manifesto and which said that the police, police stations and courts and various government bodies were legitimate targets for acts of violence to overthrow the capitalist system. In delivering judgment Lawson LJ stated at 702:

"The learned judge increased the sentences because of the statement read to the Court, and because of his view, for which there was ample evidence, that these young men were enemies of society. But the Court has to bear in mind that in our system of jurisprudence there is no offence known as being an enemy of society. The Court is concerned with the offences charged in the indictment. It may well be that at a trial the evidence establishes that those who have committed the offences charged are dangerous men. When the evidence establishes that the Court has no reason for mitigating the penalties in any way. If the evidence does establish that the accused are dangerous men, then it is no good their saying that they have no previous convictions, or that they are still young men. The evidence cancels out such mitigation as there is. But the fact remains that the correct principle for

sentencing is to sentence for the offences charged and on the facts proved or admitted".

We consider that that passage does not assist the appellant Devenney. What Lawton LJ was stating was that the sentences imposed for offences should not be increased because the views expressed by the accused make it clear that they are enemies of society and that no additional punishment should be imposed because they are enemies of society. But that principle, with which we are in respectful agreement, does not conflict with the long established principle that in assessing the appropriate sentence to be imposed for a dangerous crime of violence the court is fully entitled to take account of the determination of the accused to commit further offences if he became free in the future to do so, and of the need to protect the public against the commission of such further offences.

We further consider that there is no valid basis for the submission that, although the trial judge had acquitted Devenney on the counts of conspiracy to murder and conspiracy to wound, he took into account in sentencing him for possession of firearms and ammunition with intent the suspicion that he was guilty of those conspiracies.

Accordingly our conclusion is that the sentence imposed on the appellant Devenney was neither wrong in principle nor manifestly excessive and his appeal is also dismissed