IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN GLENNON

FRANCIS MAHER

JOHN KENNAWAY

DAMIEN JUSTIN MORGAN

MacDERMOTT LJ

On 6 October 1993 these 4 appellants were each convicted at Belfast Crown Court by Pringle J on the following counts:

1. Conspiracy to murder Lawrence Allan Kennedy.

2. Possession of a Ruger revolver and 5 rounds of ammunition with intent to endanger life contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

3. Carrying a Ruger revolver and an imitation firearm with intent to commit an indictable offence, namely, false imprisonment contrary to Article 19(1) of the said Order.

4. False imprisonment of Sarah Louise Kennedy.

5. False imprisonment of Christopher McAlnea Kennedy.

6. False imprisonment of Jonathan Kennedy.

7. False imprisonment of Adam Christopher Hunniford.

Each was sentenced to an effective sentence of 25 years' imprisonment. Each has appealed against his conviction on counts 1, 2 and 3 and against all his sentences - the sentence in respect of each of the false imprisonment counts was one of 10 years.

All the counts arise out of an incident which occurred on Wednesday 27 November 1991. At that time Dr Lawrence Allan Kennedy lived with his wife Sarah Louise Kennedy and their 2 young children, Christopher and Jonathan, at 3 My Lady's Mile, Holywood, County Down. As can be seen from the photographs it is a substantial house sitting in its own grounds. Just before 5.00 pm Mrs Kennedy was in the house with Christopher (aged 10), Jonathan (aged 6) and the former's friend Adam. Dr Kennedy was not in the house - he usually returned home each evening between 5.30 and 6.00 pm but on this day he was at a medical meeting in London and due to return on the 8.30 pm flight from Heathrow. There was a knock on the front door and she went to answer it. She was confronted by a gunman who pulled a mask over his face and pushed his way into the hall. This was the appellant Maher and he was followed by 3 other men all masked and wearing gloves. At least 1 other handgun was produced. What was then said was a matter of dispute at the trial but they were all bundled up the stairs into the bathroom of the Kennedy's bedroom. The telephone rang and accompanied by Maher she went in to the bedroom to answer it. Beside the telephone on the headboard was a small portable battery operated alarm linked to central police control. With great presence of mind she managed to activate the alarm, unseen by her captors, while answering the phone. She was taken back to the bathroom where she found the children being bound and gagged by brown sticky tape such as is used for securing parcels. She was similarly bound and was about to be gagged when a light flashed in the bathroom window and one of the men said "I think it is the fucking cops".

In fact what had happened was that the activation of the alarm had resulted in a police car containing Constables Finlay, Ashenhurst and Wilson arriving at the Kennedy house, where they found a Renault estate car sitting with its side-lights on. The response of the men within the house was to take off their masks and gloves and Maher went to the toilet, put his arm down it and flushed it twice. Subsequently 5 live rounds of ammunition were found in the U bend and waste pipe of the toilet. These rounds were subsequently test fired in a Ruger revolver which had been found together with a realistic imitation pistol in the children's bedroom. At the behest of the men, of whom Maher was the leader, Mrs Kennedy spoke out of the window to the police and thereafter there appears to have been a certain amount of communication between the police and those in the house both directly and by phone. Eventually Father Cleere arrived and at about 6.10 pm the 4 men emerged and were arrested.

They were taken to Castlereagh police office and cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988. None of the appellants gave their interviewers any explanation for their presence in the Kennedy's house and each refused to answer questions. Each was cautioned under Articles 5 and 6 of the 1988 Order but apart from Kennaway no replies were made. To each of these cautions

Kennaway said "We were going to rob the place". When finally charged Glennon and Morgan made no replies: Maher said "not guilty to each charge": Kennaway in reply to the first charge said "I didn't try to murder anyone" and made no reply to the others.

The Crown case was that there was a carefully planned conspiracy by these 4 appellants who set out from West Belfast, where they lived, and drove together to Holywood for the purpose of killing Dr Kennedy who was then active in politics in the Conservative cause. The case raised by and on behalf of the defendants, of whom only Maher gave evidence, was that they never intended to attack Dr Kennedy, being concerned only to carry out a robbery.

The learned trial judge found that the robbery claim was a cover-up fiction and that the common purpose of the 4 appellants was to take over the house and, having secured the occupants, await the return of Dr Kennedy and then kill him. This plan was, of course, frustrated by the presence of mind and resolution of Mrs Kennedy in activating the alarm.

Mr Weir QC (who appeared with Mr Barry McDonald for Glennon) in an argument adopted by counsel for the other appellants accepted that the 4 appellants were the men who were in the Kennedy home and that the real issue in the case was whether or not they were present to kill Dr Kennedy (as the Crown claimed) or to carry out a robbery. On this issue he submitted that the evidence of Mrs Kennedy was of critical importance. He stated that he was not questioning her honesty but challenged her accuracy in a number of respects pointing out that she had been a participant in a particularly traumatic and disturbing incident.

Before turning to the points of criticism of her evidence we would mention an associated point but one of particular significance. In her evidence Mrs Kennedy stated that when Christopher was leaving the bedroom to go out and bring Father Cleere in she heard 1 of the men say to the boy "We'll not be seeing our children for Christmas but I think you have a daddy after all". In the course of his extremely careful judgment the learned trial judge ruled that these words were not admissible in evidence though counsel had not so submitted at the trial. He was clearly right in this conclusion and we readily adopt what he said at pages 22 and 23 of his judgment:

"As regards the words Mrs Kennedy alleged were spoken by 1 of the men before Christopher left to fetch the priest, the position is that the person who said them was not identified and at the time they were spoken the conspiracy whether to rob or to kill was no longer ongoing as the house was surrounded by police and the defendants were well on the way to giving themselves up. The words, if spoken, therefore, were not said in furtherance of the conspiracy and could not constitute an admission admissible as evidence against the other conspirators; see Cross on Evidence, 7th Edition, page 589. I also consider that these words are not admissible

against the defendants as admissions on the basis that the words called for an answer from the other defendants and none was given; for the words to be admissible on this basis I would have to be satisfied beyond reasonable doubt that the words were heard by the other defendants and understood by each of them to bear the inference that the murder of Dr Kennedy had been intended. I could not possibly be so satisfied and accordingly it is not necessary to reach a conclusion as to whether these words or words to a similar effect were spoken at that time or at all. Mrs Kennedy's evidence about these words clearly shows that at that time she believed this was an attempt on her husband's life and this must be borne in mind when assessing her evidence."

Mr Weir readily acknowledged that it was most unfortunate that this point of admissibility was not raised at the trial but nevertheless submitted that the introduction of this inadmissible material injected "an impurity into the stream of justice" - to use the words of Lord Lowry LCJ in R v Foxford [1974] NI 181 at 206 - and so it would be impossible to conclude that it may not have had some adverse effect on the mind of the judge. We have carefully considered this submission but have no doubt that this experienced judge is well aware that cases are decided according to admissible evidence and he will have had no difficulty in omitting this phrase from his mind when asking himself if he was satisfied beyond reasonable doubt of the guilt of each accused.

To return to the criticism of Mrs Kennedy's evidence. Mr Weir drew our attention to several matters claiming that together they so undermined Mrs Kennedy's credibility as a witness that it would be wrong to rely on her evidence when seeking to determine the purpose for which the appellants were in the Kennedy house.

(a) Her evidence as to what she said from an upstairs window to Constable Wallwin who was outside on the front lawn was inconsistent with the evidence of the constable.

The learned trial judge dealt with this point in this way:

"She said that she was able to indicate that there were 4 men and they were armed, but she could not remember whether she stayed at the window all the time. Having regard to Constable Wallwin's evidence it is clear that her recollection as to this conversation is faulty. She apparently had no recollection of at the start twice saying: `Everything is all right' and that she had had 2 conversations with Constable Wallwin who in between had spoken to Francis Maher and had spoken to him again after the second conversation with Mrs Kennedy; moreover she wrongly claimed that she had asked that the police should `phone the house whereas in fact it was Francis Maher who made this request of Constable Wallwin."

(b) Mrs Kennedy said that when everyone was leaving the house the priest and the 3 children left first followed by the 4 men while she stayed in the bedroom for a short time. This was disputed and the learned trial judge concluded:

"From the evidence of Father Cleere and Sergeant McAnirn I am satisfied that Mrs Kennedy is mistaken as to the children leaving first with Father Cleere, and in fact the 4 men left first following Father Cleere in single file."

(c) Mrs Kennedy's claim that her police statement was made at her uninterrupted dictation - the learned trial judge dealt with this contention in this way:

"Mrs Kennedy in cross-examination claimed that her statement was made in a continuous flow of words from her without interruption from Detective Sergeant Grant, but the form of the statement would suggest otherwise and Detective Sergeant Grant's evidence, which I accept, was that she first went through the story she had given other officers, but not in detail, and she then made her statement and the detail emerged in response to questions by him."

Mr Weir also suggested that her insistence on her account was typical of the tenacious manner in which she adhered to portions of her evidence which were under challenge: for example as to the number of guns which were present.

(d) There was a difference of recollection between Christopher and his mother as to who went first up the stairs. The learned trial judge made this comment:

"He said that he was in front with his mother behind him as they were pushed up the stairs, whereas his mother said that she was in front; I am satisfied that they were not that far apart and I do not attach significance to this difference, which is the sort of difference of recollection to be expected in the circumstances."

(e) The general tenor of her evidence was that the men were not there for a robbery. But Mr Weir referred us to the learned trial judge's summary of Father Cleere's evidence:

"Father Cleere in his evidence said that the 4 men indicated that they were frightened what might happen to them and in answer to his questions said that they had no guns and that it was a burglary for a few pounds for Christmas."

This claim which in itself contains a lie - having no guns - does not seem to us to undermine the reliability of Mrs Kennedy. There is no doubt that once the police arrived the claim was soon raised that it was a robbery - both to Father Cleere and by phone to Ulster Television but the question remained for the learned trial Judge to decide whether or not that was a true declaration of the intruders' role or a self-

serving cover-up story. Indeed commonsense makes one wonder why if it was only "burglary for a few pounds at Christmas" it was felt necessary or prudent to contact the media. Further, as was suggested in the course of the argument, if the men were robbers they displayed a truly amazing degree of insight to anticipate that Mrs Kennedy and everyone else present might think it was not a robbery and so a call to the media would be a sensible step.

In the light of those criticisms of Mrs Kennedy's evidence Mr Weir challenged the conclusion of the learned trial judge at page 23 where he said:

"I have already made certain points about her evidence but I have no doubts as to her honesty and the accuracy as to her recollection as to the main matters in dispute."

Unlike the learned trial judge we have not had the advantage of seeing and hearing Mrs Kennedy give her evidence. The cold transcript of her evidence however leaves us in no doubt that the substance of her evidence is sound and reliable. We have no doubt that the learned trial judge was fully entitled to assess Mrs Kennedy and her evidence as he did. Thus her evidence establishes that:

1. 4 armed and masked men entered the Kennedy home at about 5.00 pm on a November evening. This would seem to be an unusual background to a robbery - the house was lit and so likely to be occupied, it was a time when absent householders could be expected to return and it was an unlikely time for robbers from West Belfast to choose because to return home after a successful raid would involve travelling through the evening rush hour.

2. The men quickly set about binding and gagging the occupants. If their purpose was a robbery why were all not detained by one armed man in a room while the others looted the premises? And would robbers go out equipped with tape to secure the occupants of the house?

3. The men allowed the telephone to be answered - would ordinary robbers not ignore it and get on with their raid?

4. The men or some of them did not get on with removing articles of value. Instead all became involved in securing the family. Indeed nothing seems to have been touched.

5. There was no mention of money until the police arrived.

6. Sending for a priest and telephoning Ulster Television seem unlikely reactions for men engaged on a robbery.

As we have already indicated the robbers at interview did not say why they were in the premises or in possession of a loaded weapon. Maher did however give evidence describing a random robbery. His evidence as recorded does not have the ring of truth about it. We have no doubt that the judge who did hear him and see him in the witness box was fully entitled to conclude "I am satisfied that his evidence was fabricated so as to fit in as far as possible with the undisputed facts".

At page 20 onwards in his judgment the learned trial judge dealt with Maher's evidence in this way:

"I found the evidence of Francis Maher to be unconvincing and not worthy of belief both in the manner in which it was given and its content; I mention the following improbabilities and inconsistencies which when taken together make his evidence beyond possible belief.

1. He went on this alleged robbery without making any inquiries as to the target, the route to it and the risks involved, although he helped to provide the guns and in the house acted as leader.

2. He threw his knife as well as the tape cuttings out of the car.

3. They chose an apparently occupied house rather than look for an unoccupied house.

4. He said they decided to take the first house in the road but in fact took the second 1 as the first appeared derelict; this is in contradiction to his earlier evidence that John Kennaway said that they would have to tie up the occupants of the house as he knew the house would be occupied - ie, a specific house was intended and had been investigated.

5. There was no reason why the curtains upstairs should not have been drawn and the lights switched on if they wished to search for things to steal.

6. When he and Damien Morgan went downstairs from the bathroom to search the house for things to steal, they did not go to the front room where the television was on and visible from outside and would be a prime target for persons looking for electrical goods.

7. Even if there was a hedge sheltering the house from view, there was no reason for them not drawing the curtains in the downstairs front rooms so that a caller could not see masked men in the house.

8. There was no reason to gag the children in this solidly built house which on the map is well separated from adjoining houses.

9. To allow Mrs Kennedy to answer the telephone was taking a very big and unnecessary risk for robbers who intended to leave as soon as possible unless the identity of a possible caller was of interest to them. His evidence that John Kennaway in the car unloaded the revolver and put the bullets in his pocket and later put the bullets down the toilet was at variance with the evidence of Mrs Kennedy that Francis Maher put the bullets down the toilet which evidence was not attacked in cross-examination.

10. The 3 layers of clothing worn by Damien Morgan on his lower body were not in keeping with a robbery for which there had been very little planning.

11. His reason for being silent at the interviews was his fear and if so it is incredible that he told no one, including his solicitor and counsel, of being called a murdering bastard at the start of his first interview."

As we have already stated the other appellants did not give evidence. They are entitled to take that course but it means that the rest of the evidence against them is unchallenged. In our judgment this was a powerful Crown case and we have no doubt that there is no reasonable possibility that it was a robbery which brought the appellants to the Kennedy's house. We are satisfied that the convictions on counts 1,2 and 3 were in no way unsafe or unsatisfactory.

2 further points should be mentioned. Firstly the learned trial judge saw fit to draw adverse inferences against each appellant under Article 3 and against the appellants other than Maher under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988. We intend no disrespect to the arguments of Mr Weir, Mr McDonald and Miss McDermott when we deal shortly with the point. This is a case where the facts amply sustain the convictions without recourse to the provisions of the 1988 Order. In our view it is not a sufficient compliance with Article 3 simply to state - "it was a robbery" or words to that effect. That is not a sufficient "mentioning" of the facts which are intended to be relied on see - R v Massey - unreported February 1995.

In relation to Article 4 the other appellants did not cross-examine Maher and appear to have accepted his evidence - see Mr Weir's submission at pages 887-888 of the transcript. That does not mean that the appellants can thus side-step the provisions of Article 4 - the judge in circumstances such as the present remains entitled to draw such inferences as he considers proper.

Secondly the learned trial judge towards the end of his judgment (page 26) said:

"Another method of approaching the matter would be to hold that having regard to their failure to cross-examine Francis Maher they should be treated as if each of them had given the same evidence he did which I have found to be fabricated and worthless and therefore each of the 4 defendants would be in the same position of having given worthless and fabricated evidence from which the

inference could be drawn that each of them had no answer to the charges which could stand examination and that this would go towards proving his guilt in respect of each of the charges."

For our part we doubt if a failure to cross-examine a co-accused justifies their being treated as having given the same evidence and so being open to criticism for giving fabricated evidence.

The appeals of each appellant against his convictions are dismissed.

Appeals against sentence

Counsel for the appellants directed their submissions to the sentence of 25 years' imprisonment imposed on count 1 - conspiracy to murder Dr Kennedy. This in the circumstances was a perfectly understandable course to adopt but we would take this opportunity to state that we consider that a sentence of 10 years' imprisonment for the false imprisonment of the occupants of the house was entirely appropriate.

There were 2 main aspects of the submissions that 25 years were manifestly excessive. Firstly, a sentence of 25 years allowing for remission at current levels (1/3) means a period in custody of 16 2/3 years. This, it was argued, was manifestly excessive because most mandatory life prisoners (having been convicted of murder) are in practice released after serving 12-16 years.

It has long been an axiomatic principle of sentencing policy that the court should decide the appropriate sentence in each case without reference to questions of remission or parole.

The release of life prisoners is a matter of executive discretion and is related to the particular circumstances of each particular case and the overall policy developed over a period of time in relation to the release of life sentence prisoners. If it is incorrect to consider the remission possibilities in such a case it is quite irrational to consider the consequences of remission in other cases. In all cases it is the duty of the sentencing court to impose the sentence which it considers to be appropriate or which it is required to impose by statute.

Secondly, counsel referred us to cases heard during the past decade where sentences of less than 20 years were imposed. We do not find such comparisons at all helpful especially as over that period the courts in Northern Ireland have considered it proper and necessary to impose and affirm increasingly longer sentences in order to deter offenders and reflect the public's abhorrence at ongoing and escalating terrorist violence. We would repeat what was said in this court in R v Carroll and another in relation to terrorist crime:

"We have no doubt that in this area it is very difficult to draw comparisons with other cases. Further it must be realised that as terrorist activity continues it is a proper discharge of the judicial function to recognise that fact and to review existing sentencing levels and properly to raise the level of sentencing so that deterrence may in fact occur."

We would also adopt the words of Griffiths LJ (as he then was) in R v Large [1981] 3 CAR(S) 80 - a robbery case -

"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."

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.

The appeals against sentence are dismissed.