IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

LIAM O'REILLY and SEAN JOSEPH MONTGOMERY

HUTTON LCJ

These are appeals by the 2 appellants against sentences of imprisonment imposed upon them at Belfast Crown Court on 16 March 1989 by
His Honour Judge Higgins QC.

On the first count in the indictment the appellant O'Reilly was charged with making property available for terrorism, contrary to section 10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1984. He pleaded guilty on this count and was sentenced to 5 years' imprisonment. On the second count the appellant Montgomery was charged with possession of an explosive substance with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883. He pleaded guilty on this count and was sentenced to 10 years' imprisonment. On the fourth count Montgomery was charged with making property available for terrorism, contrary to section 10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1984. He pleaded guilty on this count and was sentenced to 5 years' imprisonment, the 2 sentences of 10 years and 5 years to run concurrently.

The offences arose in the following way. About midnight on the night of 24/25 June 1988 a mobile patrol of the Royal Ulster Constabulary in the Ardoyne area of Belfast observed a blue Escort van, registration number CXI 4484, parked in an alleyway close to the rear of a house 17 Farringdon Court. A police officer observed a man, who was later discovered to be John McKinney, carrying a heavy plastic bag from the kitchen door of 17 Farringdon Court towards the back entrance which led out to the place where the Escort van was parked. McKinney stopped just inside the back entrance and looked out and saw the police. He threw the plastic bag down and ran back into the house. The police followed him inside and followed him upstairs into a front bedroom. The police immediately entered the front bedroom and inside the bedroom they found McKinney taking off a pair of rubber gloves and also in the room was the appellant Montgomery. A plastic bag containing fertiliser was on the floor of the bedroom and the police found 2 further bags with fertiliser inside a wardrobe in the front bedroom. A further bag of fertiliser was found in the rear

yard where McKinney had dropped it and a fifth bag of fertiliser was found lying on the floor of the downstairs living room. In addition to McKinney and the appellant Montgomery a third man, Michael Collins, was found by the police in the bathroom.

The fertiliser contained in the 5 bags contained ammonium nitrate and is an explosive substance and has been used by terrorists in the manufacture of bombs and other explosive devices, a fuel being added to the ammonium nitrate to make it ready for detonation. It is clear that these bags of fertiliser were being moved out to the van to be transported away from the house at the time when the police arrived on the scene. The van was 1 which the appellant O'Reilly drove in the course of his work and he admitted that he had made it available for use by the IRA.

We consider first the appeal of Montgomery. In his written statement to the police made at 2.20 pm on 26 June 1988 he said:

"About 6 weeks ago I was approached by a man who asked me to use my house and to keep stuff in it. He didn't mention at the time what the stuff was. He said the stuff was for the IRA. I agreed, and he left. The stuff was delivered about a fortnight later and was put in my closet in my front bedroom. I was told it was fertiliser and it could be made into bombs. He left. A day later the police and army searched a house across the street. I was worried cause I had a child in my house and my girlfriend was pregnant and I didn't want to get us into trouble. About 2 days later I seen the man again. I told him. I wanted the stuff to be taken away. He told me that the stuff would be taken, and on Friday night, the stuff was to be taken out. On that night I heard my dog barking out the back. I then assumed that these were the people to take it away. I took my dog and locked her out the front of the house. I went up the stairs and closed the blinds in the front room. I lifted clothes which were covering the bags and put them on the bed. I then went into my daughter's room where she was in her cot. I then heard someone coming up my stairs. I then heard someone going down my stairs. I heard a loud bang and a smash. I heard noises on my stairs. I came out of my child's room. I seen someone with a gun coming up the stairs. I was frightened and went into the front room. At least 3 policemen arrived at the top of the stairs carrying guns. They told me to stand still, and I did. They then told me to get on the floor and put my hands behind my back. The policeman asked me what I was doing there. I told him I lived there. He asked me my name and my date of birth and I told him this. I was then handcuffed and I had paper bags put over my hands. I was asked who owned the child. I told them that I owned the child. He asked me if there was anyone who would come down to the house and mind the child. I told him that my girlfriend was in my mother's house and that she would come and mind the child. He then made kneel and to keep my face towards the ground. About 15 minutes later he told me to get up and that my girlfriend had arrived. He then brought me down the stairs at gunpoint. I was standing at the bottom of the stairs and 2 policemen came forward grabbed me by each arm and told me I was under arrest and I was put into their custody. I was then driven to here."

It is therefore clear that the appellant Montgomery had possession of a substantial quantity of an explosive substance in his house which he permitted the IRA to store there for a period of about 4 weeks. He said in his statement that he knew that the fertiliser could be made into bombs and he must have known that this was the intention of the IRA. He must also have known, as would anyone in his position, that the bombs would be used to endanger life or to cause serious injury to property, and he must have known that the considerable quantity of explosive substance which he kept in his house for the IRA might well bring death or very grave injuries to a considerable number of innocent people, as has happened time after time in this Province. It is also to be noted that in his written statement the appellant Montgomery made no suggestion that the IRA had threatened him or that he had kept the explosive substance under duress. The Crown accepted that Montgomery did not intend to endanger life himself by means of the explosive substance and he pleaded guilty to the charge of possession of an explosive substance with intent by means thereof to enable some other person to endanger life or cause serious injury to property.

In sentencing the appellant Montgomery the learned trial judge stated:

"The explosives came to be in your house, according to your statement to the police, as a result of you being approached some 6 weeks previously by a man who asked to use your house to keep 'stuff'. He didn't mention what the 'stuff' was but he said it was for the IRA and you agreed and he left. The material was then delivered about a fortnight later and was put in a closet in your front bedroom. That would indicate it had been there for a month. You were told it was fertiliser and you were told it could be made into bombs. You then said that a day later the police and army searched a house across the street and you were worried about that. You said because you had a child in your house and your girlfriend was pregnant you didn't want to get into trouble.

There is another view on that particular matter and that is, that a search of a house close-by would indicate the possibility of a search of your house and the movement of the material was in order to ensure that it wasn't detected. I am inclined towards that view.

But you, nonetheless, wanted 'the stuff' to be taken away and you were told it would be taken. And on the night in question, you were obviously in the house, you heard your dog barking at the back and assumed that these people were there to take it away. You then locked your dog out at the front of the house and you went upstairs and closed the blind in the front room. I assume that the reason for doing that was to facilitate these people in the room to move the material. You then lifted clothes which were covering the bags and you put them on the bed. You say you then went into your daughter's room."

Later in sentencing the appellant Montgomery the learned trial judge stated:

"So far as you are concerned, Sean Joseph Montgomery, terrorist organisations require people to store explosives for them in the areas in which they operate. You quite clearly, in your statement, agreed to keep the quantity of explosives and you became worried when there was the find in the house nearby and you then got the IRA to move it. In my view, there is no other reasonable possibility other than that, that by doing what you did you were facilitating them to move the explosives to another safe place. In your own statement, you uncovered the bags. You said that you then went out to the front of the child's bedroom, but I am not satisfied that the sequence of events as described by you in your statement are correct.

I don't consider you have been as frank as you might have been as to what was actually taking place in your house prior to the arrival of the police. And I say that for the reasons which have been debated earlier during the course of the plea in mitigation made by Mr Finnegan - largely because of the movements of the police officers but also because it's apparent that 2 bags had already been moved from the bedroom where they had been stored - 1 to the back yard and the other to the living room.

I have to consider where your case of possession of explosive substances with intent falls in the scale. I am satisfied that it falls on the second limb rather than on the first. I also take into account the fact that you have pleaded guilty to this offence and I also take account of what your counsel has said, that you have almost a clear record, and I approach you on the basis that you do have a virtually clear record because such record as you have, in my view, is insignificant. I also take into account your age, as you are now 20 years of age but were 19 at the time of the commission of the offence.

I weigh all these matters in the balance. But I have to say this, that possession of explosives in such quantities as were evident in this case is a very serious offence and I have a public duty to protect not just the public but property and also to deter other people from possessing explosives. I have to weigh against that what I know about each of you and your circumstances and in doing that I take into consideration everything that your counsel has placed before the court for my consideration. But I do take the view that this is a serious case as far as both of you are concerned for the reasons that I have stated.

... So far as you, Sean Joseph Montgomery, are concerned, despite your age I must sentence you also to a term of imprisonment which is 1 of 10 years' imprisonment."

In R v James Francis O'Reilly [1988] this court recently 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."

Circumstances in relation to the precise nature of the offence and circumstance in relation to the background and record of the accused may differ somewhat in individual cases of possession of explosives with intent and these differences may lead to some variations in the sentences imposed, but an accused guilty of possession for a terrorist organisation of explosives with intent will always be guilty of a very serious offence and, save in the most exceptional circumstances, a heavy deterrent sentence should always be imposed upon him.

Therefore the court considers that the learned trial judge adopted the correct general approach when he stated that "possession of explosives in such quantities as were evident in this case is a very serious offence and I have a public duty to protect not just the public but property and also to deter other people from possessing explosives ... I do take the view that this is a serious case as far as both of you are concerned for the reasons that I have stated."

The further question which arises on this appeal is whether there are any factors special to the case which would lead to the conclusion that the sentence of 10 years was either wrong in principle or manifestly excessive. The appellant Montgomery's notice of appeal set out 6 grounds in support of the proposition that the sentence was wrong in principle and manifestly excessive and we consider these grounds in turn.

The first ground of appeal was that:

"The learned trial judge failed to attach sufficient importance or have sufficient regard to the evidence of Detective Sergeant Duffy who gave evidence to the court in the course of the plea in mitigation."

Detective Constable Duffy (he was a detective constable and not a detective sergeant) was the detective officer in charge of the case after the appellant had been arrested. When called to give evidence after the appellant Montgomery had pleaded guilty he was cross-examined by Mr Finnegan QC on behalf of the appellant and he stated that in the course of interviews at Castlereagh Police Office Montgomery spoke freely and was quite open with the police. The detective constable also stated that some members of the Montgomery family had been involved in Republican

paramilitary activity but that he was satisfied that the appellant was not a member of the IRA. The detective constable's evidence upon which Mr Finnegan particularly relied in this court was as follows:

"Q. Now, without me putting words in your mouth, I did speak to you earlier today when you were - although you're off duty at the moment, you were called to come to court, was it your feeling, having spoken to him and made some assessment, that he was under some pressure in regard to his activity in this incident? A. I think he was, your Honour. He hasn't recently moved into the area for any length of time. He originally lived in the Ligoniel area. I think it was through a former family member that he was approached by these other sinister persons.

Q. Now, in relation to his own family background, would it be correct to say that certainly his mother is quite strong in her condemnation of paramilitary activity and this sort of activity in the area? A. She is, to my knowledge, your Honour, yes. She is an active community worker as far as I am concerned.

Q. But one that wouldn't be a fellow traveller, in any sense, with the paramilitaries? A. Certainly not, your Honour."

In our opinion the learned trial judge was not bound by the opinions expressed by Detective Constable Duffy. The trial judge had before him the appellant Montgomery's statement and the statements of the police officers who found the appellant Montgomery in the house with the explosives, and the trial judge was fully entitled to form his own view of the appellant's degree of involvement in the offence and the extent to which he willingly assisted in keeping the explosives and assisted in moving them when the search of a house nearby showed that there was a risk of Montgomery's own house being searched. A trial judge is not bound by the opinion of a police officer in relation to the reasons or motives for the actions of an accused. In R v Maxwell [1978] NI 42 at 51B Lowry LCJ stated:

"Ground 7 was based on the answers given by Detective-Constable Taylor, when cross-examined as to whether he accepted the appellant's claim that he did not know what was afoot. The learned trial judge did not act on the views given by the constable and gave his reasons for adopting that course. In our view the judge was justified in acting as he did and we consider that his reasons cannot be faulted. The issue involved was central to what the learned judge, as the tribunal of fact, had to determine on all the evidence and on the inferences to be drawn from it. We are satisfied that he was not bound to act on the view (which at its highest was only a view) expressed by a witness on this issue."

A further point which arises in relation to the evidence given by Detective Constable Duffy in reply to a question from the appellant's counsel is this. The accused had not pleaded not guilty on the ground that he had acted under

duress (and, indeed, as we have already observed, there is no suggestion in his written statement that he acted under duress), but it appears to us that in his question to Detective Constable Duffy counsel for the appellant was seeking to rely on pressure on the appellant (falling below duress in law) from members of the IRA as a mitigating factor which should operate to reduce the sentence imposed.
In DPP v Lynch [1975] AC 653 at 670D Lord Morris of Borth-y-Gest stated in relation to duress as a defence to a criminal charge:

"In posing the case where someone is 'really' threatened I use the word 'really' in order to emphasise that duress must never be allowed to be the easy answer of those who can devise no other explanation of their conduct nor of those who readily could have avoided the dominance of threats nor of those who allow themselves to be at the disposal and under the sway of some gangster-tyrant. Where duress becomes an issue courts and juries will surely consider the facts with care and discernment."

We consider that Lord Morris' warning that duress must never be allowed to be the easy answer of those whom he describes applies with equal force to those who plead guilty and then seek to reduce the sentence to be imposed upon them by suggesting that they acted "under some pressure".

That a person guilty of a terrorist offence acted "under pressure" or was the tool of "sinister persons in the background" are pleas commonly put forward in this jurisdiction by way of mitigation. They are easy to put forward and more often than not impossible to refute. The plea may sometimes be based on nothing more than reliance on the fact that the accused lives in a part of the Province where terrorist organisations are active. If this is the basis of the plea it will have little or no weight. But there may be cases where on the evidence (either contained in witness statements or written confessions or given in the witness-box) the judge forms the opinion that the accused was subjected to definite pressure from a terrorist organisation in respect of the particular crime committed. In such cases it would be just and right to take account of that pressure in deciding on the sentence, whilst at the same time taking account of Lord Morris' warning.

In this case, we consider that having regard to all the facts, and particularly to what the police found when they entered the house, to the contents of the appellant's statement, and to the trial judge's view of the appellant's lack of frankness, that the trial judge was not in error in taking the view, as he clearly did, that the appellant was not subjected to pressure which should operate to reduce the sentence which should be imposed upon him.

The second ground of appeal was that:

"The learned trial judge failed to attach sufficient weight to the oral evidence of Mrs Milnes (the appellant's mother) who gave evidence in the course of the plea in mitigation."

In essence, the evidence of the appellant's mother was that her first husband, the appellant's father, had been involved in Republican paramilitary activities, but that she was opposed to it and that in consequence there was hostility towards her when she re-married. In addition it was, we think, implicit in her evidence that she had tried to influence the appellant against becoming involved in Republican activities and that she had succeeded in this up until the present offence. However we consider that this evidence furnished no reason why the learned trial judge should have imposed a lesser sentence than the sentence which he did.

The third ground of appeal was that:

"The learned trial judge, in determining sentence, took account of matters not in evidence when he was not entitled to do so."

This ground of appeal was directed to the criticism that the learned trial judge was not entitled to take into account in sentencing the point which he stated as follows:

"I don't consider you have been as frank as you might have been as to what was actually taking place in your house prior to the arrival of the police. And I say that for the reasons which have been debated earlier during the course of the plea in mitigation made by Mr Finnegan - largely because of the movements of the police officers but also because it's apparent that 2 bags had already been moved from the bedroom where they had been stored - 1 to the back yard and the other to the living room."

The fourth ground of appeal was that:

"The learned trial judge inferred that the defendant knew full well what was going on."

We consider that the learned trial judge was fully entitled to infer from the statements of the police officers who went into the house that the appellant had not been as frank as he might have been as to what had actually been taking place in the house, and that the appellant knew perfectly well what was going on.

The fifth ground of appeal was that:

"The learned trial judge failed to have sufficient regard to the defendant's plea, to all charges in the indictment."

We consider that there was no substance in this ground. It was clear from his judgment that the learned trial judge did take account of the appellant's pleas of guilty, and if the appellant had pleaded not guilty and had been convicted the trial judge would have been fully entitled to have imposed a sentence in excess of 10 years on the second count.

The sixth ground of appeal was that:

"The learned trial judge in determining sentence did not attach sufficient importance to the defendant's virtually clear record, his age or his personal circumstances."

Because of the gravity of the offence of possessing explosives with intent and because of the need to impose a deterrent sentence, we consider that it was proper for the learned trial judge to impose a substantial sentence notwithstanding the age and personal circumstances and virtually clear record of the appellant.

In the course of his submissions Mr Finnegan relied on the decision of this court in May 1989 in the case of R v Patrick Bradley which was an unreserved decision by the court composed of 2 judges. In that case the appellant pleaded guilty to the possession with intent of an explosive substance. He had permitted a large quantity of fertiliser to be stored in his house by the IRA. He pleaded guilty at his trial and was sentenced to 8 years' imprisonment, and on appeal the sentence was reduced to 4 years' imprisonment. In delivering the judgment of the court O'Donnell LJ stated:

"The learned trial judge unquestionably took into account all the circumstances which had been urged upon him by Mr Cinnamond and urged again before us today. He said that he was satisfied that Bradley was approached by a member of the IRA and that he initially refused and he was satisfied that he was pestered to a certain extent to the point that he gave in. While there was no legal duress, the learned trial judge found that he was persuaded albeit reluctantly and went along with it, and he had found, as was quite proper in this case, that the appellant was a decent young man who had no previous convictions, but as he said they were unfortunately the sort of people who were made use of and who would have to pay the penalty for the offence which had been committed.

Again, the sentence of 8 years' imprisonment imposed could not be described as manifestly excessive in normal circumstances where a person willingly accepts and keeps over a period of time weapons and explosives. However in this case the amount of explosives, while being very considerable, was not in a state which would have made it easy to convert into an explosive substance. Although a considerable amount of work still remained to be done to convert, the court considers once again that some element of deterrence is required. It is not enough to say this is a decent young man who has been pressurised, that is the position about everyone who is in fact persuaded to store weapons, and as my learned colleague pointed out it is

altogether too easy for members of unlawful organisations to say, 'well the worst that can happen to you is that the court will give you a very short sentence'. That cannot be allowed to go forth, the element of deterrence must be present and for that reason it is not possible to give effect to the plea of Mr Cinnamond that non-custodial sentences should be considered. The court takes the view that it will be extremely rare for such sentences to be imposed in this type of case.

However, we feel that the sentence of 8 years' imprisonment, while intended as a deterrent, is excessive and that the element of deterrence can be maintained by reducing the sentence and that is what we propose to do.

We propose to reduce the sentence to 1 of 4 respect of which the appeal has been brought."

This court having reserved its decision, has had the opportunity to consider a number of authorities which were not brought to the attention of the court in R v Bradley; in particular the court was not referred to the judgment in R v James Francis O'Reilly. Having considered those authorities and for the reasons which we have already stated, we consider that the sentence of 4 years substituted in Bradley's case fell far below the range of sentences which should be imposed and which normally is imposed in this jurisdiction for a crime of this nature. It cannot be reconciled with the range of sentencing which this court stated was appropriate in O'Reilly, even making generous allowance for all mitigating factors. A sentence of 4 years' imprisonment for an offence of this gravity is a quite inadequate deterrent. As we have said, applying Lord Morris' warning about duress as an easy answer, "pressure" cannot be allowed to become an easy excuse for those who store explosives.

The fact that work had to be done on the fertiliser in Bradley's case to make it ready for detonation does not detract from the fact that it was an explosive substance which was intended to endanger life or cause serious injury to property once additional material had been added to it. As the court stated in R v James Francis O'Reilly at p 15:

"A person can be in possession of inert explosives with intent in the same way as a person can be in possession with intent of an unloaded firearm. In the one case all that is required is a detonator (or, we would now add, in Bradley's case or in this case fuel oil and a detonator), in the other all that is required is a bullet, and (all) are readily available to terrorists in Northern Ireland."

In a case where a person is guilty with intent of storing or moving a large quantity of an explosive substance for a terrorist organisation a court in sentencing must always bear in mind that the explosion or explosions intended to be caused by that explosive substance will probably kill or cause appalling injuries to 1 person or a number of persons, and that the person who stores or moves the explosive substance

knows this, even though he may use the euphemistic term "stuff" to describe the explosive substance. In sentencing such a person the overriding duty of the court is to protect innocent members of the public and to deter others who may be asked to store or move explosives, and accordingly the court should impose a substantial sentence as the learned trial judge did in this case. We consider that the fact that Bradley received a light sentence in a different case is not a reason for reducing what was a proper sentence in this case. Accordingly we dismiss Montgomery's appeal against the sentence of 10 years on the first count which we consider to be in no way excessive.

On the first count the appellant O'Reilly pleaded guilty to making available for terrorism contrary to section 10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1984 the Ford Escort van which the police found outside 17 Farringdon Court. At the Crown Court on 16 March 1989 the learned trial judge was told by counsel for the Crown and counsel for O'Reilly that the maximum sentence for an offence under section 10(2) of the 1984 Act was 10 years. Unfortunately this was incorrect. Under section 10(3)(b) the maximum sentence for an offence under section 10(2) was 5 years. The Prevention of Terrorism (Temporary Provisions) Act 1984 was repealed by the Prevention of Terrorism (Temporary Provisions) Act 1989 which came into force on 22 March 1989. Section 10(2) of the 1989 Act makes it an offence to make property available for the benefit of a proscribed organisation, and under section 13 of the 1989 Act the maximum sentence for an offence under section 10(2) is 14 years.

Therefore, the appellant O'Reilly having pleaded guilty, the learned trial judge in the mistaken belief that the maximum sentence was 10 years imposed a sentence on the appellant of 5 years which was, in fact, the maximum sentence in respect of that offence. In accordance with the well established principle the appellant was entitled to a reduction in sentence because of his plea of guilty and we have no doubt that the trial judge would have imposed a lesser sentence if he had been aware that the maximum sentence was 5 years. Accordingly the sentence of 5 years was excessive and we substitute for it the sentence of 3 years' imprisonment.

The appellant Montgomery also pleaded guilty on the fourth count to the offence of making his house available for terrorism contrary to section 10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1984. The trial judge imposed a sentence of 5 years under the same mistaken belief that the maximum sentence was 10 years. Montgomery was entitled to a reduction in his sentence which would result in a sentence below the maximum because of his plea of guilty. He did not appeal against the sentence of 5 years, but we give him leave to appeal against that sentence and substitute the sentence of 3 years' imprisonment for the sentence of 5 years' imprisonment on the fourth count.

The decision of the court to reduce the maximum sentence of 5 years to 3 years in respect of the pleas of guilty of the 2 appellants to the offences charged under section

10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1984 is of course no indication whatever as to what should be the proper level of sentence in respect of an offence under section 10(2) of the Prevention of Terrorism (Temporary Provisions) Act 1989 where Parliament has increased the maximum sentence to 14 years.