IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

- V -

JAMES FRANCIS O'REILLY

HUTTON LCJ, KELLY LJ AND NICHOLSON J

The appellant was stopped at a police vehicle checkpoint and a search revealed more than 1 ton of explosives concealed in the lorry he was driving. He was subsequently charged and convicted of possession with intent and possession contrary to sections 3(1)(b) and 4(1) of the Explosive Substances Act 1883. The trial judge concluded that the appellant was a "ringleader", he knew that the explosives were in the lorry and that his intention was that they would be used to endanger life or cause serious injury to property. A sentence of 17 years' imprisonment was imposed on the first count and of 12 years on the second count. On appeal against conviction on the first count and against the sentences,

Held, dismissing the appeals that -

(1) There was "intent" within the meaning of section 3(1)(b) of the Explosive Substances Act 1883 if the intent was to endanger life or cause serious injury to property if and when the occasion arose R v Benthem [1973] QB 357 applied.

(2) If, at a time when violent terrorist campaigns were being waged, an accused was found to be in possession of a firearm, it would often be a clear inference from the circumstances that he was in possession in connection with terrorist activities, and when that inference was drawn the further inference would almost inevitably follow that he was in possession with intent. The same reasoning applied to the possession of explosive substances from which terrorist bombs were made. R v Steenson [1986] 17 NIJB 36 distinguished.

(3) The fact that the explosives were inert and would have needed a device such as a detonator to initiate an explosion does not mean that the appellant did not have the necessary intent, because under section 3(1)(b) of the 1883 Act it was sufficient that he or another person would use the explosives on a future occasion.

(4) A judge trying a criminal case without a jury under Northern Ireland (Emergency Provisions) Act 1978 was obliged by section 7(5) to give a judgment "stating the reasons for the conviction" but he was not obliged to set out elementary propositions of law. Thus it was not necessary for the judge to define "intent" when it was clear that he had expressly referred to the issue.

(5) There was nothing improper in a judge preparing a provisional judgment, provided that he considered the submissions of counsel and altered his provisional conclusion in the light of those submissions if he thought that he should do so. Such consideration had been given by the judge and accordingly there was no breach of the requirement of natural justice or of the rule that justice must not only be done but must be seen to be done.

(6) Where a person was convicted of possession of explosives with intent and it was clear that he was actively and willingly involved, in the absence of any exceptional circumstances a heavy deterrent sentence should be passed. In a case such as this involving a large quantity of explosives, a sentence of 20 years and upwards was appropriate and accordingly, a sentence of 17 years was not manifestly excessive. R v Crossan [1987] 2 NIJB 72 applied.

The following cases are referred to in the judgment:

R v Bentham [1973] 1QB 357; [1972] 3 WLR 398; [1972] 3 All ER 271

R v Buckingham [1976] 63 Cr App R 159

R v Crossan [1987] 2 NIJB 72

R v Gillen (unreported)

R v Linden [1973] October NIJB

R v Steenson [1986] 17 NIJB 36

APPEAL by James Francis O'Reilly from his convictions and sentence at Belfast Crown Court on charges relating to explosive substances. The facts appear sufficiently in the judgment of Hutton LCJ.

PT Mooney QC and WRB Gibson (instructed by PJ McGrory & Co) for the appellant.

JI Foote QC and P Magill (instructed by the Director of Public Prosecutions) for the Crown

Cur adv vult

Hutton LCJ

This is an appeal against the conviction of the appellant by His Honour Judge Gibson QC at Belfast Crown Court on 12 February 1988 of the offence of possession of explosive substances with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883.

The evidence called by the Crown established that on the afternoon of 2 May 1987 police officers of the Royal Ulster Constabulary had set up a vehicle checkpoint on the main road between Toomebridge and Antrim about 1 mile from the junction with the M2 motorway leading to Belfast. The police officers at the checkpoint about 4.45pm stopped a large closed lorry which was being driven from Toomebridge towards Belfast by the appellant who was travelling alone. The lorry had been converted into a vehicle for carrying horses and ponies and when stopped a horse was being carried in it.

When the police officers stopped the lorry Sergeant McGinley spoke to the appellant and asked to see his driving licence. Sergeant McGinley then told the appellant that the police were carrying out searches of vehicles and that his vehicle would be searched. The appellant told the sergeant that he was carrying a horse in the lorry and asked if he could remove the horse from the lorry and he did this.

Sergeant McGinley and the appellant then stood at the side of the road beside the lorry and had a normal conversation which included reference to the horse. A police constable and a sniffer dog began to carry out a search which involved the dog sniffing around the outside of the lorry. The dog indicated an interest in the front just behind the driver's cab. The constable and the dog then went inside and the dog again indicated an interest in the same part of the lorry which was at the front of the interior just behind the driver's cab. Straw and hay were lying on the floor. The constable, who was the handler of the dog, came out of the lorry and told Sergeant McGinley and the appellant that the dog had given "a positive". The sergeant asked the appellant if he could explain why the dog should give a "reading" and the appellant replied that it was perhaps the horse that was causing the dog to become excited.

After a further indication by the dog that he was interested in the part of the lorry just behind the driver's cab Sergeant McGinley instructed 2 other constables to make a thorough search of the vehicle. The constables then measured the inside and the outside of the lorry and informed the sergeant in the presence of the appellant that the exterior side was 18 inches longer than the interior side. The sergeant asked the appellant if he could explain this discrepancy and he made no reply. The sergeant put further questions to the appellant about the discrepancy but he made no reply.

On the instructions of the sergeant the constables then removed part of the panelling of the front wall of the interior of the lorry immediately behind the driver's cab and this revealed a number of bags packed in behind the panelling.

When these bags were discovered the sergeant asked the appellant what they were and where did he get them and a number of other questions to which the appellant made no reply.

The interior front panelling was then removed and it was found that a secret compartment 18 inches deep and stretching from the floor to the top of the lorry had been skilfully constructed and 48 bags containing explosives of approximately 1230 kilograms or approximately 1¼ tons had been concealed in this secret compartment. Explosives consisting of an ammonium nitrate and fuel oil mixture were contained in 42 bags and explosives consisting of an ammonium nitrate and nitro benzene mixture were contained in 6 bags. Explosives consisting of a mixture of ammonium nitrate and fuel oil are normally used as the main charge in large bombs such as car bombs and land mines. Explosives consisting of a mixture of ammonium nitrate and nitro benzene are either used on their own, in devices such as mortar bombs, or are used as the booster charges in large bombs such as car bombs and land mines. The amounts of explosives contained in an average car bomb is 200 lbs and therefore the lorry being driven by the appellant was carrying a very large quantity of explosives.

In the indictment the appellant was charged on 2 counts as follows:

FIRST COUNT

STATEMENT OF OFFENCE

Possession of explosive substances with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883

PARTICULARS OF OFFENCE

James Francis O'Reilly on the 2 May 1987 in the County Court Division of North Antrim, unlawfully and maliciously had in his possession or under his control certain explosive substances, namely a quantity of crushed ammonium nitrate based fertiliser and fuel oil mixture and a quantity of crushed ammonium nitrate based fertiliser and nitrobenzene mixture with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom or to enable any other person so to do.

SECOND COUNT

STATEMENT OF OFFENCE

Possession of explosive substances, contrary to section 4(1) of the Explosive Substances Act 1883.

PARTICULARS OF OFFENCE

James Francis O'Reilly on the 2 May 1987, in the County Court Division of North Antrim, knowingly had in his possession or under his control certain explosive substances, namely a quantity of crushed ammonium nitrate based fertiliser and fuel oil mixture and a quantity of crushed ammonium nitrate based fertiliser and nitrobenzene mixture, under such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession or under his control for a lawful object.

The appellant was found guilty on both counts by the learned trial judge. The appellant did not appeal against his conviction on the second count but appealed against his conviction on the first count and the grounds of appeal accompanying his notice of appeal (as amended) were as follows:

"1.(a) The learned trial judge was wrong in law and misdirected himself in relation to the meaning of `possession with intent' within the provisions of the Explosive Substances Act 1883.

2. If the learned trial judge was correct in his interpretation of the law at (at 1(a) above) then he misapplied the same.

3. The learned trial judge paid no or insufficient regard to the fact that the explosives which are the subject to the charge were inert, totally enclosed and together with nothing which could initiate an explosion.

4. The verdict of the court was against the weight of evidence and in the premises the verdict is unsafe and unsatisfactory."

In addition there was a ground 1(b) to which the court will refer later. Section 3(1) of the Explosive Substances Act 1883 as substituted by section 7(1) of the Criminal Jurisdiction Act 1975 provides:

"A person who in the United Kingdom or a dependency or (being a citizen of the United Kingdom and Colonies) elsewhere unlawfully and maliciously ...

(b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the United Kingdom or the Republic of Ireland, or to enable any other person so to do, shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of

an offence and on conviction on indictment shall be liable to imprisonment for life and the explosive substance shall be forfeited."

At the trial the appellant gave evidence. He said that on 1 May 1987 a man had borrowed the lorry in order to collect a horse and on the next day, 2 May, the man told him that it had broken down in Castledawson so he (the appellant) went to Castledawson where he was able to restart it. He then commenced to drive the lorry back to Belfast and the man who had borrowed it drove away in his own car.

In his judgment the learned trial judge rejected this account as a total fabrication and found as a fact that when he was driving the lorry on 2 May 1987 the appellant knew that the explosives were in the lorry and had unlawful possession of them. The judge stated -

"There remains the question of whether the Crown has proved beyond a reasonable doubt whether the defendant intended by means thereof to endanger life or to cause serious injury to property in the United Kingdom or to enable any other person so to do.

I am satisfied beyond a reasonable doubt that at the very least his intention was to enable some other person or persons to endanger life or cause serious injury to property in the United Kingdom.

I refer generally to all of the facts in the case which I have already considered and specifically to the following matters.

I do not attach any particular significance to the order in which they are set out or to any 1 of them. They are all to my mind of equal importance.

(a) First the amount of the explosives, in excess of 1 ton, indeed 1¼ tons.

(b) The manner in which the explosives were placed in bags with 42 bags of ammonium nitrate mixed with fuel oil and 6 bags of ammonium nitrate mixed with nitro benzene. The first mixture is used very commonly as a main charge in explosive devices in Northern Ireland and especially as Mr McMillan of the forensic science laboratory, stated as the main charge in large devices such as car bombs and land mines. The second mixture is a very common booster charge for the main charge.

I have further concluded that the defendant well knew the nature of these explosives.

(c) The fact that the explosives were to the defendant's knowledge carefully concealed in a concealed compartment in his own lorry and that he was driving that lorry to Belfast.

(d) I refer back to my conclusion that the defendant was although a liar a highly intelligent and determined 1. I further concluded that I certainly was not dealing with someone who was a mere foot soldier, if I might use that term, a person being used by other more sinister men. My firm conclusion having seen the defendant in the witness box and having observed his demeanour and having listened to him give his answers, particularly under cross-examination was that the defendant knew full well what was going on, exactly what the explosives were, what they were to be used for and fully intended that they were to be used to endanger life or cause damage to property.

In essence in my view the defendant is a ring leader and not a mere puppet. I pause here to comment on the point made by Mr Mooney on behalf of the defendant, that the explosive substances were in effect dormant in that, for example, there was nothing found that could have initiated an explosion such as a timer or a detonator.

As a matter of common sense, however, such items could be easily acquired and a bomb or bombs thus finalised. I would also add the comment that it would be a madman who would drive along the road a considerable distance on the way from Draperstown to Belfast with 1¼ tons of explosives primed to go off.

It is also trite law to point out that it is not necessary that the defendant should intend an immediate use of the matter in question or the explosives in question. It is enough that he intended actual use in the future and I hold that his specific intention was to enable other persons to endanger life or to cause serious damage to property in the United Kingdom in the future, that is to say at some time after he reached his destination in Belfast.

I therefore find the defendant guilty beyond any doubt whatsoever on count 1."

It is clear that there is "intent" within the meaning of section 3(1)(b) if the intent is to endanger life or cause serious injury to property if and when occasion arises. This was decided by the English Court of Appeal in R v Bentham [1973] QB 357 in relation to the possession of firearms and ammunition with intent to endanger life and we consider that the same principle applies to the possession of explosive substances. In Bentham's case at 362G Cairns LJ delivering the judgment of the court stated:

"We cannot accept that the only intent which falls within the section is an intent immediately and unconditionally to endanger life. The intent with which a

man wounds another or detonates an explosive is an intent which accompanies the act, but possession is not an act done at a particular moment; it is a continuing state of things and in our view the intent to endanger life is something which may last as long as the possession lasts. It cannot therefore be limited to an intent to endanger life immediately. Nor do we see any reason why it should be limited to an unconditional intent. It would indeed in most cases be impossible to establish an unconditional intent to endanger life until the moment before a firearm was fired. The mischief at which the section is aimed must be that of a person possessing a firearm ready for use, if and when occasion arises, in a manner which endangers life."

R v Buckingham 63 Cr App R 159 was a similar decision where the headnote reads:

"By section 3 of the Criminal Damage Act 1971, `a person who has anything in his custody or under his control intending without lawful excuse to use it or cause or permit another to use it - (a) to destroy or damage any property belonging to some other person ... shall be guilty of an offence.'

An offence under section 3 of the Criminal Damage Act 1971 may be committed only where the defendant intends to use, or cause to permit another to use, the thing to destroy or damage property. It is not enough that the defendant realises that the going may be so used; he must intend or permit such use. But it is necessary that the defendant should intend an immediate use of the thing; the offence under the section is aimed at prescribing what is essentially a preparatory act and it is therefore enough that the defendant possesses with the necessary intent even though he contemplates actual use of the thing at some future time. It would also seem to be clear that a conditional intent (an intention to use the thing to cause damage should it prove necessary) will suffice."

The principle argument advanced by Mr Mooney on behalf of the appellant was that on the facts found by the learned trial judge it was not open to him to be satisfied beyond all reasonable doubt as a matter of inference that the appellant had possession with intent by means thereof to enable any other person to endanger life or cause serious injury to property in the United Kingdom if and when occasion arose and that accordingly his finding of guilty on the first count was unsafe and unsatisfactory. Mr Mooney submitted that Parliament had drawn a distinction between possession of explosives under suspicious circumstances in section 4 of the 1883 Act and explosives with intent under section 3(1)(b) of that Act and that accordingly there must be some evidence in addition to "mere" possession to permit a court to go beyond a finding of guilt under section 4 and to make a finding of guilt under section 3(1)(b). He submitted that if explosives are already made up into a bomb which was primed and ready for detonation it might well be open to a court to infer intent under section 3(1)(b) but that such inference giving rise to a conclusion beyond all reasonable doubt was not permissible where, as in this case, the explosives were inert and not primed and there was no additional evidence from

which the inference could be drawn in relation to the intent of the appellant. Mr Mooney supported this submission by referring to the facts in other cases where the accused had been convicted of possession of firearms or explosives with intent. Thus he made the points that in R v Bentham the appellants Bentham and Simpson had previously used revolvers to fire at the police car and that the revolvers and pistols which were the subject matter of the charge were loaded when found by the police, that in R v Linden [1973] October NIJB the rifle was loaded with a round in the breech and that in the recent case of R v Gillen (unreported) bombs were already primed. Mr Mooney submitted that these cases exemplified the principle for which he contended, namely that there had to be additional facts beyond "mere" possession to justify a finding by a court of possession with intent.

Mr Mooney also relied on the judgment of Carswell J in R v Steenson [1986] 17 NIJB 36 which was a case where the accused were alleged by the Crown to be members of the IRA and were charged with possession of firearms with intent. In that case the learned judge stated:

"Certain questions also arise in respect of proof of the necessary intent under section 14 and Article 17. The wording of these provisions is not identical, but the definition of the requisite intent is, namely

`with intent by means thereof to endanger life or cause serious injury to property or to enable any other person by means thereof to endanger life or cause serious injury to property'

whether any injury to person or property has been caused or not. In all of the incidents which I shall discuss the intent concerned is to endanger life or to enable any other person to endanger life by means of the firearm. For convenience, I shall refer throughout this judgment to possession by any defendant with such intent simply as `possession with intent'. In R v Bentham [1973] QB 357 it was held that this was not limited to an intention immediately and unconditionally to endanger life. Cairns LJ said at page 363:

`The intention with which a man wounds another or detonates an explosive is an intention which accompanies the act; but possession is not an act done at a particular moment, it is a continuing state of things, and in our view the intention to endanger life is something which may last as long as the possession lasts. It cannot therefore be limited to an intention to endanger life immediately. Nor do we see any reason why it should be limited to an unconditional intention. It would indeed in most cases be impossible to establish an unconditional intention to endanger life until the moment before a firearm was fired. The mischief at which the section is aimed must be that of a person possessing a firearm ready for use, if and when occasion arises, in a manner which endangers life.'

It is a question of fact in any given case whether an accused person in the circumstances of the case intended to endanger life or enable another person to do so. I do not consider, however, that such an intention should be readily inferred. The legislature regards this offence and the use of a firearm to resist an arrest as the 2 most serious offences involving firearms, and has provided that they may be punished by life imprisonment.

All firearms are by inherent capacity capable of endangering life, so the intention that they should be used for such purpose cannot be presumed from mere possession. It is in my view necessary for the Crown to prove, by direct evidence or sufficient inference, that the possessor had at the time of possession the intention, if and when occasion should arise, that the firearm should be used, by himself or another or others or for the purpose of endangering life.

In some cases, it may be perfectly clear that this was the intention, where, for example, an attempted murder is proved and the accused had the firearm in his possession for the purpose of shooting the victim. In the case of especially lethal weapons such as a sub-machine gun, the inference of the intention that it should be used to endanger life may be quite readily drawn, since it is usually difficult to conceive of any reason for the clandestine possession of such a weapon by a member of a terrorist organisation other than to use it or have it available for the use of others for the purpose of endangering life.

In other cases the possessor's immediate purposes established may not extend as far as the use of the firearm at all, or not for causing a serious wound. In cases falling between these classes it may be necessary to consider the facts to determine whether the possessor of the weapon was ready to shoot at other persons in any of the circumstances envisaged as part of the venture in which he was concerned. It is possible that in respect of any 1 incident the intention of the different possessors of the same weapon may vary and that the requisite intent under section 14 or Article 17 may be established against 1 but not against another. Each case has to be taken upon its own facts in order to decide the presence of the necessary intent and further generalisation would be of limited usefulness."

Mr Mooney relied in particular on the 2 passages in the judgment where Carswell LJ stated:

"It is a question of fact in any given case whether an accused person in the circumstances of the case intended to endanger life or to enable another person to do so. I do not consider, however, that such an intention should be readily inferred ...

All firearms are by inherent capacity capable of endangering life, so the intention that they should be used for such purpose cannot be presumed from mere possession."

The reasoning stated by Carswell J in these 2 passages had previously been adopted by other judges at first instance and in applying this reasoning Carswell J was following earlier decisions at first instance. But having considered the point this court is of opinion that this reasoning should not be followed as a statement of general principle. The reasoning of the learned judge is, in essence, that all firearms are inherently capable of endangering life, but as Parliament has distinguished between possession of a firearm in suspicious circumstances and possession of a firearm with intent to endanger life it therefore follows that intent to endanger life cannot be presumed from mere possession. This view would have had some validity in peaceful times when violent terrorist campaigns were not being waged by terrorist groups, particularly in relation to certain firearms such as shotguns and air guns. But if, during a time when violent terrorist campaigns are being waged, an accused is found to be in possession of a firearm it will often be a clear inference from the circumstances of the case that he is in possession of that firearm in connection with terrorist activities and when that inference is drawn the further inference will follow almost inevitably that he is in possession with intent.

In a later passage in his judgment Carswell J stated:

"In the case of especially lethal weapons such as a sub-machine gun, the inference of the intention that it should be used to endanger life may be quite readily drawn since it is usually difficult to conceive of any reason for the clandestine possession of such a weapon by a member of a terrorist organisation other than to use it or have it available for the use of others for the purpose of endangering life."

This court agrees with this reasoning, but it observes, with respect, that in Northern Ireland the same reasoning applies with equal or almost equal force to the possession of a rifle or an automatic pistol or a revolver in connection with the activities of a terrorist organisation. This court also considers that the same reasoning applies to the possession of explosive substances from which terrorist bombs are made.

There may, of course, be cases where mere possession would not entitle a court to infer possession with intent, for example, possession of an ordinary shotgun in a farmhouse and there may also be cases where, if the accused gives evidence and even if he does not the court may consider that it is a reasonable possibility that the accused did not intend that the firearm or explosives would be used in the future to endanger life. But where it is clear that the firearm or explosives are possessed in connection with terrorist activities, even though there is no evidence that the accused is a member of a terrorist organisation, this court considers that there will normally be a very strong inference that the intent was to endanger life, or to enable another to endanger life although, of course, the decision of the court of trial whether there should be a conviction or an acquittal on the count charging intent will always depend upon the particular facts of the case.

In the present case where it was proved that the appellant was driving towards Belfast with knowledge that a very large quantity of explosives was concealed in a skilfully constructed secret compartment and where, on being stopped and his lorry being searched by the police, he did not inform the police of the presence of the explosives but tried to explain away the interest of the sniffer dog in the hidden explosives by saying that the dog was becoming excited because of the horse being carried, we consider that the trial judge was fully entitled to infer and to be satisfied beyond all reasonable doubt that the appellant was in possession of the explosives with intent to enable another person or persons to endanger life or to cause serious injury to property. The only intent, other than the intent specified in section 3(1)(b) which this court can conceive might have been in the appellant's mind as he was driving the lorry towards Belfast would have been an intent to surrender the explosives to the security forces or to dump them where they would cause no harm to persons or property (and Mr Mooney was unable to suggest any other conceivable intent) these intents in the circumstances are so fanciful as to fall well beyond the range of reasonable possibilities.

It is clear that the fact that the explosives were inert and would have needed a device such as a detonator to initiate an explosion does not mean that the appellant did not have the necessary intent, because under section 3(1)(b) the intent may be that he or another person will use the explosives on a future occasion. 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 1 case all that is required is a detonator, in the other all that is required is a bullet, and both are readily available to terrorists in Northern Ireland.

Mr Mooney advanced a further submission that the learned trial judge in his judgment had failed to define the meaning of "intent" in section 3(1)(b) and had therefore not directed his mind to the proper issues. The court rejects that submission. A judge trying a criminal case without a jury under the Northern Ireland (Emergency Provisions) Act 1978 is obliged by section 7(5), if he convicts, to give a judgment "stating the reasons for the conviction", but he is not obliged to set out elementary propositions of law in his judgment. In this case the learned trial judge delivered a detailed and very careful judgment and whilst he did not seek to define "intent" within the meaning of section 3(1)(b), at an early stage in his judgment he expressly referred to the issue of intent and stated:

"In addition, in relation to count 1 the Crown must prove beyond any reasonable doubt that at the material time the defendant had an intent to endanger life or cause serious damage to property in the United Kingdom or to enable some other person so to do."

Later in his judgment at page 33 the judge stated:

"There remains the question of whether the Crown has proved beyond a reasonable doubt whether the defendant intended by means thereof to endanger life or to cause serious injury to property in the United Kingdom or to enable any other person so to do."

Then from pages 34 to 37 of his judgment the judge set out the matters which led him to conclude beyond a reasonable doubt that the appellant had the necessary intent.

In his judgment the trial judge stated at 36 that "in my view the defendant is a ring leader and not a mere puppet." Mr Mooney submitted that the trial judge was not justified in finding that the appellant was a "ring-leader". The finding that the appellant was a "ring-leader" means that the appellant was the leader of the gang which was responsible for leading and transporting the explosives. The court agrees that there was no evidence which justified the learned trial judge in finding that the appellant was a "ring leader," although we are satisfied that on the evidence the judge was entitled to find that the appellant was not a mere puppet being used by others but was actively and willingly involved in the possession and movement of the explosives. But the court considers that this finding that the appellant was a "ring leader" in no way vitiates the learned trial judge's conclusion that the appellant had the necessary intent under section 3(1)(b) or renders the conviction unsafe or unsatisfactory.

A further ground which was 1(b) was stated as follows in the grounds of appeal:

"There was a material irregularity in the trial, in that the trial judge had decided upon the guilt of the accused prior to the conclusions of the trial in that he had prepared a written judgment prior to the final submission of counsel on law and fact after conclusion of the evidence."

The trial commenced on 26 January 1988 and continued on 27 January and 28 January. At the conclusion of the evidence on 28 January 1988 Mr Mooney applied for an adjournment because he wished to have the opportunity to consider the judgment recently delivered in the case of R v Gillen before making his final submissions and the trial judge acceded to this application.

The court sat again on 12 February 1988 when the trial judge heard detailed submissions from Crown Counsel and from Mr Mooney on behalf of the appellant and in the course of hearing those submissions the trial judge put a number of questions to both Crown Counsel and to Mr Mooney.

At the conclusion of the submissions the learned trial judge immediately delivered his judgment and it appears to be clear that, apart perhaps from the first 2 paragraphs, the judgment had been written before the judge sat to hear the final submissions of counsel. At the commencement of the judgment the judge said:-

"I have had the opportunity over some 2 weeks to consider the evidence in this case and also the points of law which I considered relevant and which I felt may be raised in the submissions to be made by counsel and which have been made, very ably I must say, this morning.

In the event I have by chance or otherwise anticipated all of the points made in the submission and I have already considered all of them both factual and legal in considerable detail. My preliminary conclusions have, therefore, in no degree been upset or affected and I therefore intend to give judgment at this particular stage."

After these first 2 paragraphs the judge then said "The defendants is charged with 2 offences" and proceeded to give his reasons for finding the appellant guilty on both counts in the indictment.

In support of ground 1(b) the following written skeleton argument was furnished to the court prior to the hearing of the appeal:

(i) A material irregularity arises when there is a failure to follow what has become a well established practice.

It will arise when a tribunal of fact arrives at a decision before material steps in the trial are concluded.

To prepare a written and considered judgment containing conclusions regarding the guilt of an accused prior to Counsel's closing submissions and to act upon such a judgment without any material amendments is such a material irregularity in a trial.

(ii) Such an irregularity is in breach of the maxim `audi altleram partem' and consequently is in breach of the rules of natural justice.

(iii) Further it breaches the rule that justice must not only be done it must be seen to be done and will therefore diminish and undermine public confidence in the administration of justice through the courts."

In relation to this ground of appeal Mr Mooney submitted that it was a material irregularity if the trial judge made up his mind on the guilt of the accused before he had heard the final submissions of counsel.

The court can deal shortly with this ground of appeal. It is the opinion of the court that this point is totally devoid of substance. Mr Mooney's submission was that the trial judge had made up his mind on the guilt of the appellant before he had heard Mr Mooney's final submissions. But it is clear that this was not so as the trial judge expressly stated:

"In the event I have by chance or otherwise anticipated all of the points made in the submissions and I have already considered all of them, both factual and legal, in considerable detail. *My preliminary conclusions have therefore, in no degree been upset or affected* and I therefore intended to give judgment at this particular stage."

(The emphasis is ours)

There is nothing irregular in a judge marshalling his thoughts on the points in a case in his own mind or on paper or in writing a provisional judgment before he has heard the final submissions of counsel, provided that he duly weighs and considers the submissions which counsel make to him and alters his provisional conclusion in the light of those submissions if he considers that he should do so. If the submissions of counsel do not cause him to alter his provisional conclusion, then there is nothing improper in the judge delivering as his final judgment the judgment which he has provisionally prepared and Mr Mooney conceded that he was unable to cite any authority to the contrary.

In this case where there was a period of 2 weeks between the close of the evidence and the final submissions of counsel and where the judge had heard legal submissions advanced by Mr Mooney for the accused on an application for a direction in respect of the first count at the end of the Crown case, it would have been surprising if an experienced judge as this trial judge was, had not been reflecting on the points which he considered were relevant. If the final submissions of counsel did not cause him to alter the provisional views which he had come to then there was no need for him to enact the fiction of rising to consider the case and to give judgment next day when he already knew that the submissions of counsel had not altered (and indeed might have confirmed) the conclusion to which he had provisionally come. The learned trial judge intervened on numerous occasions during the course of the final submissions. This reinforces the view, if reinforcement were needed, that the learned trial judge was ready to alter his provisional opinion in the light of the final submissions and we have no doubt that if those submissions had caused the judge to change his mind as to the guilt of the appellant or as to his reasons for convicting him the judge would have reserved his judgment and amended what he had already written.

As this court is satisfied that the learned trial judge did give careful consideration to the final submissions advanced by Mr Mooney there is no substance in the argument that the trial judge was in breach of the requirement of natural justice to hear the other party. Nor is there any substance in the argument that the trial judge was in breach of the rule that justice must not only be done but be seen to be done. The full transcript of the trial has been before the court and it is satisfied that anyone (including the appellant) observing the trial and noting the careful and painstaking way in which it was conducted by the trial judge would know what justice was being done.

Accordingly the appeal against conviction on the first count is dismissed. The appellant also appealed against the sentences imposed upon him. The trial judge imposed a sentence of 17 years' imprisonment on the first count and a sentence of 12 years' imprisonment on the second count, the sentences to be concurrent.

In imposing sentence the learned trial judge stated at page 39 of his judgment:

"The defendant was caught red-handed at a police check point in the course of transporting a formidable quantity of explosives some 1¼ tons in all to Belfast. He intended that these would be used by others to endanger life or property or both. The devastating effect of an explosion of this magnitude whether as 1 explosion or as a number of explosions does not require description. The consequences could well have been horrific. I have outlined the circumstances in which the explosives were found. The sophisticated hiding place that had been constructed in the defendant's lorry and my impression of the defendant as a cold, determined but intelligent man who was a leader and not as I termed it a foot soldier.

Furthermore, I draw attention to the manner in which the defendant denied his guilt and his obvious guilt in my view and brazened matters out to the very end with a concoction of lies."

Later in his judgment the trial judge stated at page 42:

"You quite deliberately and with full intention believed that the explosives would be used to endanger life or damage property and were driving 1¼ tons of explosives to Belfast. I do not think that I need say anything more.

I have never encountered a case where the quantity has been such. It is clear as has been indicated by me that you are a determined man, determined to cause by whatever means as much mayhem and destruction in Northern Ireland as you possibly can. That is by driving these explosives to others with the intention that they would be used by others. When caught such people can only expect heavy sentences of imprisonment to free the public from their activities, at least for a considerable time and also in the hope that the degree of punishment may deter others from similar activities".

The appellant appealed against both sentences although the appeal was principally against the sentence of 17 years' imprisonment. The grounds of appeal against the sentence of 17 years were that the sentence was manifestly excessive in that:

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

in that he

(a) wrongly inferred that the defendant was a "ring-leader" and not a mere puppet;

(b) wrongly inferred that the defendant knew full well what was going on;

(c) wrongly inferred that the defendant knew exactly what the explosives were;

(d) wrongly inferred that the defendant knew what the explosives were to be used for."

The court considers that the trial judge was entitled to infer the matters referred to in (b), (c) and (d). As already stated, it considers that the trial judge was not entitled to infer that the appellant was a "ring-leader" but it is satisfied that the appellant was not a mere puppet being used by others but was actively and willingly involved in the possession and movement of this very large quantity of explosives which he was driving towards Belfast.

In upholding a sentence of 15 years' imprisonment for attempted murder and 20 years' imprisonment for conspiracy to murder in R v Crossan [1987] 2 NIJB [1987] 2 NIB 72 Lord Lowry LCJ in delivering the judgment of this court, stated 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 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".

These observations are also relevant to the offence of possession of explosives with intent. It is self-evidence 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 quantify of explosives the court considers that a sentence of 20 years and upwards would be appropriate. Accordingly, it is of the opinion that the sentence of 17 years was clearly not manifestly excessive.

The sentence of 12 years' imprisonment imposed on the second count which, in reality, was an alternative count and charged the offence of possession of the explosives in suspicious circumstances was also not manifestly excessive. Accordingly, the appeal against the sentences imposed is also dismissed.