IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

HUGH DAVID CECIL McCOLLUM PAYNE,

JAMES McCULLOUGH AND THOMAS AIKEN

HUTTON LCJ

At Belfast Crown Court in October 1988 the 3 appellants were charged on the first count of the indictment with possession of firearms and ammunition with intent, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981 and on the third count with possession of explosive substances with intent, contrary to section 3(1)(b) of the Explosive Substances Act 1883. The appellants Payne and McCullough pleaded guilty to the first and third counts. The appellant Aiken pleaded not guilty and was convicted on both counts after a trial by Nicholson J. The indictment contained 2 other counts charging the 3 appellants with possession of the firearms and ammunition and possession of the explosive substances in suspicious circumstances, but these were alternative charges to the charges of possession with intent and the learned trial judge returned no verdicts upon them.

In these appeals the appellant Aiken appeals against his convictions on the first and third counts and also against the sentences imposed upon him by Nicholson J and the appellants Payne and McCullough appeal against the sentences imposed upon them by Nicholson J.

At the trial of Aiken the evidence called by the Crown established the following facts. On Thursday 7 January 1988 Aiken and McCullough hired 2 Ford Granada cars from a hire car company in Belfast and whilst they were filling in the appropriate documents relating to the hire Payne came into the office of the hire car company and spoke to them. Next day, 8 January 1988, at about midday Payne drove an Austin Maestro car from Tandragee in the direction of Portadown closely followed by the 2 Ford Granada cars which had been hired the previous day, 1 of the cars being driven by Aiken and the other car being driven by McCullough. The 3 cars were stopped by the police at a vehicle check-point on the Mahon Road between Tandragee and Portadown in County Armagh. The 2 Ford Granada cars were carrying a very large quantity of self-loading rifles, semi-automatic pistols,

ammunition and grenades. In the 2 cars there were in total 61 rifles, 124 magazines, 30 pistols, 11,520 rounds of rifle ammunition, 150 hand grenades and 150 fuses.

In Aiken's Notice of Appeal his grounds of appeal against conviction were stated as follows:

"1. There was no, or insufficient, evidence upon which the Court could be satisfied beyond a reasonable doubt that the accused had the requisite knowledge and control to possess the weapons and explosives.

2. The Court misdirected itself as to the meaning and effect of the forensic evidence.

3. The Court failed to direct itself as to the law relating to 'intention' and insofar as it did give directions, it misdirected itself.

4. There were no circumstances from which the Court could reasonably have inferred, to the proper standard, that the Accused had the requisite intention as required under Counts 1 and 3.

5. The Court wrongly rejected the accused's defence of duress in:

(a) holding, against the weight of the evidence, that he was not acting under duress, and

(b) deciding that, even if he was, he forfeited the right to such a defence because of his membership of Oldpark UDA".

However, at the commencement of the hearing of Aiken's appeal his senior counsel, Mr Donaldson QC, informed the Court that the only ground upon which he intended to proceed was ground 5(b).

In his judgment convicting Aiken the learned trial judge stated at page 8:

"You sought at interview and during the course of this case to claim that you acted under duress. You said in interview that you were frightened of Payne and the police appear to accept that you were frightened. You had been kneecapped by the UDA for anti-social activities apparently".

Later in his judgment at page 11 Nicholson J stated:

"Mr Donaldson QC further submitted that the Court cannot be sure that you did not act under duress. Having regard to the evidence of the police I cannot rule out as a possibility that you acted under compulsion, although it is highly probable

that you were a trusted associate in this huge enterprise. The question arises as to whether the defence of duress is open to you. I consider that I am bound by the principles stated by the Court of Appeal in The Queen against Fitzpatrick 1977, Northern Ireland page 20, to hold that the defence of duress is not open to you. At the time of your arrest you were a member of the UDA and associating with a ruthless leading member, according to the evidence in your case. I take judicial notice of the fact that the UDA is an organisation which has been engaged in acts of terrorism for the past 15 to 17 years. I have also had evidence to this effect by Detective Chief Superintendent Scott. If I had not been entitled to take judicial notice of this fact I would have acted on his evidence to the same effect. I am sure, Aiken, that you joined the UDA willingly and that you must have known at the time you joined of their terrorist activities and that sooner or later you might be ordered to take part in such activities".

Nicholson J then cited passages from the judgment of Lord Lowry LCJ in R v Fitzpatrick [1977] N.I.20 and from the judgments of the Court of Appeal in England in R v Sharp85 CAR 207 and R v Shepard 86 CAR 47 and held, pursuant to the principle stated in R v Fitzpatrick, that Aiken was not entitled to rely on the defence of duress because he had voluntarily joined the UDA which was an organisation which had been engaged in acts of terrorism for the past 15 to 17 years. In the course of his judgment Nicholson J stated at page 14:

"I am sure that you, Aiken, knew when you voluntarily joined the UDA that pressure might be brought to bear on you to commit crimes of terrorism on behalf of the UDA. You were an active member of the UDA on Friday 8 January 1988. You had just taken part on Thursday in the hiring out of 2 Ford Granada cars for the UDA and you must have known that Payne might require you to do more than that. You knew or believed that Payne was ruthless and would kill, if need be, anyone who stood in his way. Self-serving statements out of court and from the dock that you were only involved in welfare work I ignore.

Mr Donaldson QC submitted that a member of the UDA might not necessarily support everything done by the UDA. That may be. But a member cannot claim ignorance of their activities. He joins the gang and knows that the gang may involve him in their activities whether he likes it or not. Mr Donaldson further submitted that there was no evidence that the Oldpark branch of the UDA was engaged in criminal activities. In my view it is not necessary for the Crown to prove that a particular section of or branch of the UDA which the accused joined engaged in particular or general criminal activity. I have taken judicial notice and the Crown has proved beyond a reasonable doubt that the activities of the UDA involve acts of terrorism such as the possession of arms, explosives and ammunition, to say nothing of murder and extortion.

Mr Donaldson also submitted that there was no evidence of active membership by you. I am sure that you, Aiken, were an active member. A clear

indication of your activity is your action on the Thursday and the fact that you were chosen for this major criminal enterprise on the Friday. I do not consider that it is essential to prove this ingredient of 'active membership'".

In R v Fitzpatrick [1977] N.I.20 the head note reads:

"If a person by joining an illegal organisation or a similar group of men with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid".

In that case it was held that the appellant was not entitled to rely upon the defence of duress because he had joined the IRA which was a proscribed organisation. But in delivering the judgment of the Court of Appeal Lord Lowry LCJ stated at 33A:

"This Court is satisfied that there are circumstances in which persons who associate with violent criminals and voluntarily expose themselves to the risk of compulsion to commit criminal acts cannot according to the common law avail themselves of the defence of duress. We are further satisfied that, wherever the line should be drawn, this appellant falls on the side of it where that defence is not available to him.

The learned trial judge summarised at page 6 of his judgment the facts to which he applied the principle of non-availability of duress. While adopting his reasoning, we guard ourselves against the use of any expression which might tend to confine the application of that principle to illegal, in the narrow sense of proscribed, organisations. A person may become associated with a sinister group of men with criminal objectives and coercive methods of ensuring that their lawless enterprises are carried out and thereby voluntarily expose himself to illegal compulsion, whether or not the group is or becomes a proscribed organisation".

The UDA has not been proscribed by law but there is no doubt that many murders and other acts of terrorist violence have been carried out on its behalf by its members. In R v Calderwood and Moore [1983] N.I.361 it was held, following the principle stated by Lord Lowry in R v Fitzpatrick, that an accused who had joined the UDA could not rely on the defence of duress because the UDA was "a sinister group of men with criminal objectives and coercive methods of insuring that their lawless enterprises are carried out".

Mr Donaldson QC advanced 3 main submissions in support of his argument that the learned trial judge had erred in holding that the appellant Aiken was not entitled to rely on the defence of duress.

The first submission was that the appellant may have joined the UDA many years ago in the 1970s when it may not have been a sinister group with criminal objectives and coercive methods and that the Crown had failed to disprove this. We reject that submission. In the course of being interviewed by police officers after his arrest on 8 January 1988 the appellant told the officers interviewing him "I am a member of the Oldpark UDA". Whatever may have been the objectives of the UDA when it was first formed it has been apparent to all for many years that its objectives and methods had been criminal, and having chosen to remain a member of such an organisation the defendant cannot be permitted to raise the defence of duress. As Lord Morris of Borth-y-Gest stated in Lynch v DPP for Northern Ireland [1975] A.C.653 at 670:

"... duress must never be allowed to be the easy answer ... of those who readily could have avoided the dominance of threats".

The second submission was that the appellant had only admitted to being a member of the Oldpark UDA and that the Crown had failed to prove that the Oldpark branch of the UDA was a criminal organisation. We also reject that submission. We consider that any branch of the UDA must be regarded as being an integral part of the whole organisation and tainted with the criminality of the objectives and methods of the whole organisation.

The third submission relied on a passage in the judgment of Lord Lane LCJ in the Court of Appeal in England in R v Sharp 85 CAR 207. In that case after citing passages from the judgments in Lynch v DPP for Northern Ireland and the judgment in R v Fitzpatrick Lord Lane stated at 214:

"In other words, in our judgment, where a person has voluntarily, and with knowledge of its nature, joined a criminal organisation or gang which he knew might bring pressure on him to commit an offence and was an active member when he was put under such pressure, he cannot avail himself of the defence of duress".

Mr Donaldson relied on the word "active" which we have underlined in that passage and submitted that the Crown had failed to prove that Aiken was an "active" member of the UDA before he became involved in the plan to move the firearms and explosives. We consider that once the Crown had proved that the appellant was a member of a paramilitary organisation in Northern Ireland it did not have to go on to prove that he was an "active" member in order to prevent him from relying on the defence of duress. As Lord Lowry pointed out in Fitzpatrick's case at 33A the reason why an accused is not permitted by the common law to avail himself of the defence of duress is because he has voluntarily exposed himself to the risk of compulsion to commit criminal acts, and not because he is an active member of the organisation or group with which he has associated. The Courts in Northern Ireland know very well from their experience that not infrequently the leaders of a paramilitary organisation choose a member to carry out some criminal act who has not previously

been involved in the commission of a crime, but such a person has voluntarily exposed himself to the risk of compulsion in the same way as another member who has previously committed a crime on behalf of the organisation. In R v Sharp Lord Lane was considering the case of a person who joined a gang of robbers in England who can be termed "ordinary criminals" and we respectfully consider that Lord Lane may have used the adjective "active" to emphasise that the defence of duress should only be denied to an accused who was an actual member of the gang. But in Northern Ireland it is clear that a person can be a member of a paramilitary organisation like the UDA and exposed to the risk of compulsion even if he has not been active in carrying out criminal acts on its behalf. Therefore we also reject the third submission on behalf of the appellant.

Mr Donaldson also referred to the decision of the Court of Appeal in England in R v Shepherd 86 CAR 47, but that decision is of no assistance to the appellant Aiken because it related to a case where a person joined a gang or group which he had no reason to think would threaten or use violence.

Accordingly the Court is satisfied that the learned trial judge was correct to rule that because he was a member of the UDA the appellant Aiken was not entitled to raise the defence of duress and his appeal against conviction is dismissed.

The 3 appellants appeal against the sentences imposed upon them. On the first and third counts Payne was sentenced to 19 years' imprisonment, the sentences to run concurrently. On the first and third counts McCullough was sentenced to 14 years' imprisonment, the sentences to run concurrently. On the first and third counts Aiken was sentenced to 14 years' imprisonment, the sentences to run concurrently.

In sentencing the 3 appellants the learned trial judge said this:

"The gravity of the offences must be measured by the huge quantity of weapons which were captured, and I am told that this is 1 of the largest hauls made by the police. The weapons were all brand new or as good as new and were deadly. They were, I am satisfied beyond all reasonable doubt, for use by some Protestant organisation of terrorists and that Protestant organisation of terrorists was the UDA".

In sentencing Payne the trial judge said:

"You, Payne, are 40 years of age. I have taken into account your plea of guilty, points made in your favour by counsel, and documents handed in to the Court on your behalf and medical evidence made available to me ...

I accept that you have done some good in the community over the past 14 years, as testified by your references. Unfortunately, only too often persons with these good sides of character, as displayed by these references, have another side to

their character and in your case you willingly organised movement of an arsenal of weapons which can only have been intended by you for murderous attacks on others in this community.

It appears that you have concealed this side of your character from those who gave you references.

I propose to deal with you not as a leader of the UDA nor as a ruthless person prepared to kill, as stated in evidence out of your hearing, but as a person who is a member of the UDA, who, on your own admission, associates with top ranking members of the UDA and who willingly took a major part in organising the movement of weapons of war for this terrorist organisation. In a contested case in which terrorists are caught with a haul of weapons of this kind a person playing a significant role in the enterprise must expect a sentence of at least 25 years of imprisonment. Had I been satisfied, on admissible evidence, that you were a leader of the UDA I would have sentenced you to life imprisonment, but there is not admissible evidence of this kind. In your case I have taken into account such redeeming features as I can and I have indicated your pleas of guilty, your work in the community, the state of your health and such of your evidence as I can give credence to. But as I have indicated, I have rejected your version of events insofar as they seek to give you a lowly part, insofar as they seek to suggest that you were under orders to load the weapons, insofar as you suggest that you were not a willing party to the movement of these weapons. You obviously organised McCullough and Aiken to move these weapons on your own admission and, as I have indicated, these weapons were being moved in order to enable the UDA to kill, if they could, other members of this community. But I, of course, am sentencing you only on the basis of the charge to which you have pleaded guilty, namely that your intention was to enable others to endanger life. Your sentence is 19 years' imprisonment on Count 1 and 19 years' imprisonment on Count 3 to run concurrently".

In sentencing McCullough the trial judge said:

"McCullough, you are 56 years of age. I have taken into account everything said on your behalf. I have indicated I cannot accept the basis of your plea of guilty. You were more deeply involved than you are prepared to admit. I am told on your behalf there are no traces to associate you with the UDA. You have had your own problems in life your accident, for example, and your bad health. Payne has said that you were 'cannon fodder' but you yourself resolutely denied your involvement to the police at interview, notwithstanding the evidence which was bound to convict you. You were more deeply involved than Payne or you are prepared to admit. However, you were not as deeply involved as Payne and you are 56 years of age and I have given careful consideration to your age. Age is a factor which works both ways, those of your age who get involved in terrorist crimes must expect severe punishment, but at the same time 1 has to take into account the length of time which you are liable to spend in prison. Your sentence is 14 years' imprisonment".

In sentencing Aiken the trial judge said:

"You, Aiken, are 31 years of age. It is to be noted that all 3 of you are mature men, you being 31, McCullough 56, and Payne 40. Very often young men who are readily influenced are charged with these crimes and indeed, terrorist organisations take advantage frequently of the leniency of the courts with young people to make use of these young people. I have taken into account, Aiken, all that has been said on your behalf. You pleaded not guilty. I do not hold that plea against you. I also take into account and give credit for the real possibility that you acted in fear of Payne whom you have said you were afraid of. I do not agree with your counsel that you were not very bright or subtle. Nor do I think that your answers to the police show any less subtlety than Payne and McCullough who refused to make any admissions. Indeed they argue for a degree of greater subtlety and cunning than was shown by the other 2. However, I accept that you did try to find the farm premises where the weaponry was loaded into the cars since the police say that you did try. I note also that Payne said of you that you were 'cannon fodder'. Again I have to say that your involvement was greater than you or Payne are prepared to admit. You have been shot by the UDA in the past, presumably for some antisocial activity and your involvement with the UDA has apparently been very peripheral. I have read the references for you and note your community work. You do not get the same credit as McCullough in respect of his plea of guilty but there are other matters which stand to your credit. In consequence you will also serve a sentence of 14 years' imprisonment".

Mr Cinnamond QC, on behalf of Payne, advanced the argument that the total sentence of 19 years imposed on Payne was manifestly excessive and submitted that the trial judge had not given Payne sufficient credit for his plea of guilty and that the judge had erred when he stated:-

"In a contested case in which terrorists are caught with a haul of weapons of this kind a person playing a significant role in the enterprise must expect a sentence of at least 25 years' imprisonment".

Mr Cinnamond also submitted that there was unfair disparity between the sentence of 19 years imposed on Payne and the sentences of 14 years imposed on McCullough and Aiken, particularly as Aiken had pleaded not guilty.

In our opinion the sentence imposed on Payne was clearly not manifestly excessive. He was in possession of a very large arsenal of deadly weapons and explosives for use by a paramilitary organisation with the intent to enable members of that organisation to endanger life. If the weapons and explosives had been used in the province the extent of the loss of life could have been enormous. Therefore this was an offence of the utmost gravity and this Court is of the opinion that a sentence in the region of 25 years would not be excessive for an accused in a contested case who

played a significant role in the possession of such a large and deadly load of firearms and explosives. In R v O'Reilly [not yet reported] this Court stated at page 24:-

"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".

We further consider that the discount given by the trial judge to make allowance for Payne's plea of guilty was quite adequate, particularly as this was a case where the strength of the Crown case against Payne was overwhelming, and as Lawson LJ stated in R v Davis [1980] 2 CAR (S) 168 at 170:-

"It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused have pleaded guilty. The extent to which it is a mitigating factor must depend on the facts of each case. In this case it cannot be a very powerful mitigating factor because, with the possible exception of George Davis, it is difficult to see how any of them could have run a defence, although it is easy to see that by commenting and giving evidence about the informer, who was alleged to have been with them, they might have wasted a great deal of court time and made some members of a jury think that they had been treated unfairly.

The problem, therefore, arises as to what sort of allowance, if any, should be made for the fact that they all pleaded guilty and the whole case was dealt with within 1 day. This was in marked contrast to what so frequently happens in this class of case. This factor, in our judgment, should be taken into account when deciding what were the right sentences. But for the reasons I have already stated, not very much should be taken off the sentences which were passed".

We further consider that there is no substance in the point that there is an unfair disparity between the sentence passed on Payne and the sentences passed on the other 2 appellants, notwithstanding Aiken's plea of not guilty. It is clear that Payne was much more deeply involved in these offences than were McCullough and Aiken and Payne was responsible for drawing them into the transporting of the firearms and explosives, and Payne's much deeper involvement fully justifies the heavier sentence passed on him. Accordingly we dismiss Payne's appeal against sentence.

Mr Donaldson, on behalf of Aiken, advanced a submission which was the converse of that submitted on behalf of Payne and which was that the trial judge had not made a sufficient reduction in the sentence passed on Aiken in comparison with the sentence passed on Payne.

In support of these submissions Mr Donaldson made the following points. Aiken was the only 1 of the accused who was prepared to talk to the police and to give them information in relation to the offences in the course of the interviews. Aiken was prepared to help the police to try to find the farm where the firearms and explosives had been loaded into the cars. Aiken's involvement in the offences was of a minor degree in comparison to the involvement of Payne because Aiken had only been enlisted into the enterprise in order to drive 1 of the cars and the trial judge accepted in sentencing Aiken that his involvement with the UDA had apparently been very peripheral. Mr Donaldson further submitted that, although the law did not permit Aiken to raise duress as a defence, nevertheless having regard to the evidence of the police the trial judge in convicting Aiken stated that he could not rule out as a possibility that Aiken acted under duress, and therefore some allowance should have been made in sentencing Aiken for the possibility that he was acting under some degree of duress.

We do not accept the submission that the learned trial judge did not sufficiently reduce the sentence imposed on Aiken in comparison with the sentence passed on Payne. We consider that the sentence of 14 years imposed on Aiken was in no way excessive and the difference of 5 years between that sentence and the sentence imposed on Payne properly reflected the differences between the respective roles and blameworthiness of Aiken and Payne. Accordingly we dismiss Aiken's appeal against sentence.

Mr McDonald, on behalf of McCullough, submitted that there were a number of matters which operated in favour of McCullough in comparison with Aiken and that the trial judge had erred in imposing the same sentence on McCullough as he had imposed on Aiken. The points which Mr McDonald relied on were these. McCullough had pleaded guilty, whereas Aiken had pleaded not guilty and the trial judge had not given McCullough sufficient credit for his plea of guilty. Aiken was aged 31 when he was sentenced whereas McCullough was aged 56 when he was sentenced, and a sentence of 14 years' imprisonment on a man aged 56 was disproportionately heavy. McCullough was a man with a completely clear record and there was no evidence that McCullough had ever been a member of the UDA, whereas Aiken admitted that he was a member of the UDA.

However we consider that there were factors in the case of Aiken which acted as counter-balances to the points advanced by Mr McDonald. These were, first, that Aiken may have been under some degree of pressure to which McCullough was not subjected, and, secondly, that Aiken was prepared to give information to the police in the interviews and to try to locate for the police the farm where the firearms and

explosives had been loaded into the cars, whereas McCullough denied any involvement in the offences during his interviews. Having regard to the gravity of the offences the sentence of 14 years passed on McCullough, notwithstanding his age and clear record, was in no way excessive and having regard to the counter-balancing points to which we have referred we consider, to apply the test approved by this Court in R v Bell [1987] 5 NIJB at 84, that no right-thinking members of the public, knowing all the facts and looking at what had happened, would say that something had gone wrong in the administration of justice which had resulted in McCullough being treated unfairly in receiving the same sentence of 14 years as had been imposed on Aiken. Therefore the appeal of McCullough is also dismissed.