**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ATTORNEY GENERAL'S REFERENCE (NOS 3 AND 4 OF 1992)**

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HUTTON LCJ

These are references by the Attorney General to the Court of Appeal, under section 36 of the Criminal Justice Act 1988, of sentences on 2 offenders which he considers to be unduly lenient.

The references arise in this way. At Belfast Crown Court the 2 offenders Mark McAuley and Darren James McAllister were indicted on a bill of indictment which included the following counts:

" THIRD COUNT

STATEMENT OF OFFENCE

Throwing a petrol bomb, contrary to section 3 of the Protection of the Person and Property Act (Northern Ireland) 1969.

PARTICULARS OF OFFENCE

Mark McAuley on 21 May 1991, in the County Court Division of Belfast, with intent to cause the destruction of or damage to property of another or in which another had an interest or to cause personal property of another or in which another had an interest or to cause personal injury to another or to give another reasonable cause to fear any destruction of property or personal injury or being reckless in regard to causing any such destruction, damage, injury or fear threw an article as is mentioned in section 2 of the Protection of the Person and Property Act (Northern Ireland) 1969, namely a petrol bomb and Darren James McAllister did aid, abet, counsel and procure the said Mark McAuley to commit the said offence.

FOURTH COUNT

STATEMENT OF OFFENCE

Arson, contrary to Article 3(2) and (3) of the Criminal Damage (Northern Ireland) Order 1977.

PARTICULARS OF OFFENCE

Mark McAuley and Darren James McAllister, on 21 May 1991, in the County Court Division of Belfast, without lawful excuse damaged by fire a Citybus Fleet No.2500 belonging to Citybus Limited, intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged and intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered and Darren James McAllister did aid, abet, counsel and procure the said Mark McAuley to commit the said offence.

FIFTH COUNT

STATEMENT OF OFFENCE

Causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

Mark McAuley, on 21 May 1991, in the County Court Division of Belfast, unlawfully caused grievous bodily harm to Samuel Dillon with intent to do him grievous bodily harm".

On 31 January 1992 Mark McAuley pleaded guilty to counts 3, 4 and 5 and Darren James McAllister pleaded guilty to counts 3 and 4. The judge, His Honour Judge Babington QC, then adjourned the case to enable Probation Reports to be prepared, and after having considered those reports he sentenced the 2 offenders on 12 June 1992. On each count against him he placed Mark McAuley on probation for 2 years. A condition of the probation order was that he should attend a 19 day residential course at a centre for young offenders. The learned judge also placed Darren James McAllister on probation for 2 years on each count against him. A condition of the probation order was that he should attend a day centre for 36 days.

The facts relating to the offences were as follows. On the night of Tuesday 21 May 1991 the 2 offenders and 3 or 4 other young men bought some petrol and collected a number of milk bottles in order to make petrol bombs. They went to some waste ground where they lit 2 petrol bombs and threw them on the ground. Then the 2 offenders walked a short distance to the Crumlin Road just above Carlisle Circus.

On that night Mr Samuel Dillon, a driver for Citybus Limited, was driving a single decker bus. He had left Glengormley on the outskirts of Belfast at 10.50 pm on the last run into the city centre which finished at Carlisle Circus. At Carlisle Circus Mr

Dillon left the last 2 passengers off the bus, and he then drove the bus round Carlisle Circus and onto the Crumlin Road.

McAuley was carrying a petrol bomb. He and McAllister saw Mr Dillon's bus approaching from Carlisle Circus. McAllister lit the wick of the petrol bomb with matches which he had with him and McAuley then stepped out from a billboard and threw the petrol bomb at Mr Dillon's approaching bus. The petrol bomb went through the front windscreen of the driver's cab and hit Mr Dillon on the forehead and the petrol bomb burst into flames inside the cab where Mr Dillon was sitting and he received appalling burns and injuries.

In his statement to the police Mr Dillon described what happened as follows:

"When I was about level with the end of the railing round the wee park on the left hand side of the Crumlin Road I saw a young lad step out from behind the billboard a few yards further on. I saw him throw something which I thought was a brick. The next thing I knew a bottle hit me on the forehead and the front of the bus burst into flames. My hair and shirt went on fire and I got the bus stopped and tried to put the handbrake on. I put the flames out with my hands and tried to get the doors open. The security door stuck and suddenly the flames flared up again either from another petrol bomb or re-ignition of the petrol. I kicked the doors and got them open but by this time all my clothes at the front were burning. I beat at the flames with my hands and got them out. I remember screaming in agony. Some fellow in his late twenties came over and helped me to the Mater Hospital".

When interviewed by the police McAuley described his part in the offence as follows:

"Q. What brought you over to the Crumlin Road?

A. I don't know, I was just going to throw it across the road at anything.

Q. Did the others know you were taking it to throw?

A. Yes.

Q. Did you carry it to the Crumlin Road?

A. Yes. Darren carried it for a wee while.

Q. Where did you stand at the Crumlin Road?

A. Just at the railings and the waste ground facing the billboard.

Q. Why didn't you throw it then when the road was clear?

A. I don't know, I saw the bus coming round Carlisle Circus and we decided to throw it at the bus.

Q. What did you say to throw it at the bus?

A. Darren said 'here's a bus, throw it at it'. I was going to throw it at the tyre.

Q. Who lit the petrol bomb?

A. Darren.

Q. Were you holding it when it was lit?

A. Yes.

Q. What did Darren light it with?

A. I don't know whether it was a lighter or matches.

Q. What happened when it was lit?

A. I was at the railing and I threw it at the bus over the railings and just in front of the bus and it smashed into the front of the bus.

Q. Did you see the petrol bomb burst into flames at the front of the bus?

A. Yes.

Q. Did you hear the driver screaming?

A. Yes.

At this point Mark McAuley broke down and started to cry uncontrollably, and was comforted again by his mother. Mark McAuley then drew a plan of where he was with Darren McAllister where he threw the petrol bomb, drawn between 3.22 pm and 3.25 pm and marked NK1.

Q. How much petrol was in the milk bottle you threw?

A. A couple of inches.

Q. When the petrol bomb burst and the driver was screaming did you see him try and get out the side door?

A. Yes.

Q. What did you do?

A. I saw the man trying to get out. I was ready to run but I wanted to go back and help the man but I was too scared. I ran over towards Denmark Street then up an entry towards Malvern Street School".

The offender McAllister made a written statement to the police in which he described his part in the offence as follows:

"A piece of my 'T' shirt was stuffed into the neck of the milk bottle to make a wick. This was done by Mark McAuley. I knew then this was a petrol bomb but I didn't know what it was going to be used for. Then me and Mark McAuley went up to the railings at Carlisle Circus/Crumlin Road. Mark was carrying the petrol bomb. From where we stood we saw a bus coming from the Antrim Road into Carlisle Circus. McAuley asked me for a light and I lit the wick of the petrol bomb with matches I had with me. I thought he was going to throw it onto the back of the bus and damage the bus. I never thought he was going to throw it at the driver. As the bus came up level with us, McAuley ran out onto the road in front of the bus and threw the petrol bomb at the driver. I don't know why he did this, for there was no lights on in the inside of the bus which means there was no passengers in it. As soon as McAuley threw this petrol bomb I saw it smash into the front of the bus and burst into flames and I ran away back towards the wood. I ran down Denmark Street and into Sherbrook Terrace and up to Carlisle Circus. When I was running away I heard the bus driver screaming ... I never meant to cause any injury to the bus driver. I have not been able to eat since then, so upset am I".

As we have stated, the bus driver, Mr Dillon, suffered appalling burns and injuries, as are apparent from the photographs of him taken in hospital which are before this court.

The report of the consultant plastic surgeon who treated Mr Dillon is as follows:

"Mr Dillon was admitted to the Royal Victoria Hospital on 22 May 1991 having sustained severe burns allegedly in a petrol bomb attack. He had extensive injury to his face and limbs and chest as well as a smoke inhalation injury. The total body surface area of burn was approximately 55 per cent of which most was full thickness in depth. He required operations on 3 occasions. His operations were designed to remove the burn tissue and apply skin grafts from unburned areas of his body. He had a period of mechanical ventilation in the intensive care unit on

account of his smoke inhalation injury. He now has very extensive scars as a result of this incident".

We were informed by Crown Counsel that the present position is that Mr Dillon had still been undergoing skin grafts until last month. His breathing has been badly affected by smoke inhalation at the time of the attack. His hands remain in the claw position shown in the photographs. Therefore, in addition to the horror of the attack and the pain and suffering following it, Mr Dillon has suffered grave permanent injuries and disabilities and he will never be able to work again as a driver. Such injuries are in our experience an example of the very grave type of injury which everyone knows may occur when a petrol bomb (which becomes flaming petrol) is thrown at a person. Anyone throwing a petrol bomb at or near a person is bound to realise that there is a risk of causing very serious personal injury.

In a number of cases this court has made it clear that the throwing of petrol bombs at houses, which are or may be occupied, or at vehicles, which are or may be carrying passengers, is a very grave offence which must be severely punished because of the deaths or appalling injuries which petrol bombs may cause. In R v Shaw and Houston[1989] 8 NIJB 60 2 young men aged 18 and 17 had thrown 2 petrol bombs, each bomb being thrown at the house of a police officer. This court stated at p.64:

"The Court was informed by counsel that there has been a considerable variation in the sentences imposed by the Crown Courts for the offences of throwing petrol bombs at dwelling houses and of causing arson to dwelling houses by the throwing of petrol bombs, and that in some cases only a suspended sentence or a recorded sentence has been imposed. This Court states that such an approach to sentencing should now be regarded as being too lenient. Some years ago when dealing with young offenders with clear records or virtually clear records the giving of a non-custodial sentence for such offences could be regarded as justifiable as being in accordance with the general approach taken by the courts that, save where the particular gravity of the crime prevented it, a young person before a criminal court for the first time should be given a chance to keep out of trouble in the future and should not be given a custodial sentence. But this Court considers that the throwing of a petrol bomb into a dwelling house which is known or believed to be occupied is a serious offence which has become much too prevalent in this jurisdiction and should now, save in exceptional circumstances, be met by a custodial sentence which is intended to be a deterrent irrespective of the age or record of the offender.

This Court also makes it clear that the fact that a petrol bomb is thrown at a time of sectarian tension or when passions are inflamed constitutes no mitigating factor and no reason for a reduction in sentence. The Courts should make it clear by stiff and deterrent sentences that those who give vent to inflamed feelings at a time of tension and commit crimes of violence will be severely dealt with so that the number of such crimes may be kept in check.

Therefore we reject the submissions on behalf of the appellants that because of their youth and clear, or virtually clear records, the appropriate sentences which the learned trial judge should have imposed on them were suspended sentences. We are satisfied, for the reasons which we have stated, that the judge was entirely right to impose custodial sentences".

In R v Blaney and Others [1989] 11 NIJB 87 this court stated that the approach to sentencing stated in R v Shaw and Houston also applied to the petrol bombing of vehicles and said at 94:

"That case (Shaw's case) was concerned with petrol bomb attacks on 2 houses which happened to be the homes of police officers. But the principle stated in it applies equally to organised burnings of vehicles travelling on the public roads; people are entitled to move freely about our roads without fear or hindrance".

The same principle that those who use or plan to use petrol bombs must receive severe deterrent sentences has also been applied by the Court of Appeal in England. In R v Gerald [1981] 3 CAR (S) 162 the headnote reads:

"6 years' imprisonment reduced to 3 in the case of 4 young men convicted of conspiracy to cause grievous bodily harm on evidence that they were in possession of a number of bottles filled with petrol and made up for use as petrol bombs.

The appellants, aged 18 and 19, were convicted of conspiracy to cause grievous bodily harm. They had been found in a car in possession of 5 bottles containing petrol, and made up for use as petrol bombs, on an evening on which a disturbance was anticipated following a National Front march. Sentenced to 6 years' imprisonment. Held, society cannot tolerate the carrying of weapons such as petrol bombs with a view to aggression; it was the duty of courts to discourage vendettas and prevent people from wreaking vengeance on others. Punishment, deterrence and example were all necessary in the particular case, and immediate imprisonment was essential, but in the case of young men of this age 3 years was a sufficient term".

That was a case where the petrol bombs were not used and no injuries were suffered.

At page 164 Lord Lane CJ stated:

"But we wish to make it quite clear that this society cannot tolerate the carrying of weapons such as petrol bombs, weapons of terrorism with a view to aggression and that is the offence of which the jury convicted these young men. Part of the duty of criminal courts in this country, indeed a substantial part of the reason for the existence of criminal courts, is to discourage vendettas, and to prevent people from wreaking their own form of vengeance upon others, because vengeance breeds vengeance and it must be stopped at the earliest moment possible. It is in the interests of every single group in society that this should be so. These were

potentially terrible weapons. It is not difficult to imagine the consequences had they been used. Mercifully for these appellants, and mercifully for others at the scene, they were not used ... Punishment, deterrence and example were all necessary in this particular case. Imprisonment is regrettably essential, and immediate imprisonment is essential".

The question before this court is whether, having regard to the cases to which we have referred above, the judge acted with undue leniency in putting the 2 offenders on probation instead of giving them custodial sentences.

In Attorney General's Reference (No.1 of 1989) this court respectfully agreed with the approach stated by Lord Lane CJ in Attorney General's Reference (No.4 of 1989) in England:

"A sentence was unduly lenient, their Lordships would hold, where it fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard had of course to be had to reported cases and in particular to the guidance given by the Court of Appeal from time to time in the so-called 'guideline' cases.

However, it is always to be remembered that sentencing was an art rather than a science; that the trial judge was particularly well placed to assess the weight to be given to various competing considerations; and that leniency was not in itself a vice. That mercy should season justice was a proposition as soundly based in law as it was in literature".

Mr Philip Mooney QC, for McAuley, submitted that, notwithstanding the appalling injuries suffered by Mr Dillon, the course taken by the judge was not unduly lenient.

Mr Mooney advanced 3 main submissions. First, he submitted that R v Shaw and Houston and R v Blaney and Others were cases which had a terrorist background and that the principle stated in them should not be applied to the present case where McAuley was not a member of a terrorist organisation and was not acting on behalf of, or under the influence of, a terrorist organisation. We do not accept that submission. A petrol bomb is a frightful weapon which can cause appalling injuries, as this case shows, whether it is used on behalf of a terrorist organisation or not. The wickedness which must be severely punished and the act which must be deterred is the use of the petrol bomb itself.

Secondly, Mr Mooney submitted that, although McAuley had pleaded guilty to unlawfully causing grievous bodily harm to Samuel Dillon with intent to do him grievous bodily harm, he had not actually desired to cause him serious harm. Viewed in the light of commonsense, we regard that to be a submission of no weight. McAuley threw the ignited petrol bomb through the windscreen of the driver's cab, which was a fairly small target in comparison with the large expanse of

the rest of the bus, and McAuley threw it with sufficient force to break the windscreen. Whatever may have been his motive or his desire, commonsense dictates that he intended to injure the driver, and he admitted this intent in his plea of guilty.

Thirdly, Mr Mooney submitted that because of the excellent record of McAuley, who is a young man born on 27 March 1975 and who had never appeared before a court before, and having regard to the contents of the very full and detailed Probation Report, the judge was entitled to take a more lenient course in this case than would normally be taken. Mr Mooney further submitted, which we accept, that McAuley feels the deepest remorse for his offence and Mr Mooney made the point that the judge took this into account in sentencing him.

McAuley's background is summarised in the Probation Report as follows:

"Educated at local primary and Forthbridge Secondary Schools, Mark left in May 1991 and immediately gained employment with the Shankill Community Projects. On reading Mark McAuley's school reports it is apparent that his attendance and timekeeping were of a high standard. Subjects Mark was most interested in were Home Economics, History, and Craft, Design and Technology (CDT). Mark relates that he enjoyed school and this was reflected in his responsible attitude and behaviour.

Since 27 May 1991 Mark McAuley has been employed in the joinery section with the Shankill Community Projects Scheme. Mark anticipates obtaining his City and Guilds qualification in joinery in the near future. As outlined in the attached reference, prepared by Mr Rodgers, Manager, Mark has proven to be 'an excellent trainee' in the joinery section, where he is able to apply himself to tasks required. This performance, coupled with his successful placement at Top Shop Stores, highlights that this young man is very capable and if the court allows him the opportunity, his future career prospects look optimistic".

In sentencing McAuley and McAllister the judge said:

"Well Mark McAuley and Darren James McAllister, you young men have presented me with a very difficult problem in regard to how you should be dealt with. It emerges quite clearly from the reports that I have before me about you, and from what I have heard from your counsel that you are both decent and well behaved young men and yet you pleaded guilty to a number of very serious criminal charges, 2 of which carry a maximum sentence of life imprisonment. You caused harm of catastrophic magnitude to the bus driver and possibly have ruined his life. I know that you have shown remorse for your actions and I know that probably for the rest of your lives you will hear his screams of agony. But that is part of your punishment as is the period you have been awaiting sentence by this court, now over 1 year. The reports I have urge me to put you on probation but I may say that

when I came into court having read the papers in the case I was determined to send you to prison for a substantial period. However, having listened to your counsel I decided that it is more in the public interest and yours that I should accept the advice that I have been given".

The judge then put both offenders on probation.

Mr Mooney submitted that the judge had clearly given careful thought to the problem of sentencing these 2 young men and, whilst fully appreciating the gravity of their offences and the force of the considerations pointing to a custodial sentence, he decided that it was more in the public interest and theirs not to pass a custodial sentence but to put them on probation. Mr Mooney submitted that in all the circumstances of the case this was a decision which was not unduly lenient.

Mr Brady QC, on behalf of McAllister, adopted Mr Mooney's submissions and advanced additional submissions. McAllister is a young man born on 21 October 1973 who also had an excellent record and had never been before a court before. His father left his mother about 1987 and his mother died in 1989. The Probation Report states in respect of him:

"Mr McAllister is now an 18 year old single man who lives with his 17 year old brother. He describes a happy childhood and adolescence although the family were beset by relationship problems. He recalls his parents' separation although this is sadly overshadowed by his mother's sudden death in 1989. Mr McAllister has struggled to come to terms with this and still manifests grief and anger in discussion. Although 18 years old Mr McAllister impresses as a youth younger in years. Some responses are childlike in manner and he has difficulty comprehending ideas. In a practical sense he has found managing a home and limited income difficult. As a result his lifestyle has been somewhat unstructured".

The report of a psychologist on McAllister was also before the judge and it states:

"Darren McAllister is an intellectually limited young man - his Full Scale IQ is on the borderline of learning difficulties. Despite an unsettled family background he presents with a relatively stable personality profile. On personality testing however he tended to minimise his faults which may in part be a reflection of his low ability.

My impression would be that Darren would be capable of minimising his role in the offence. On the other hand his account of his actions and lack of planning or evaluation of the potential dangers are consistent with his low intellectual level. It is probable that he followed the crown motivated purely by some 'thrill-seeking' and did not question the plans or intentions of other group members. Darren presents as an immature young man whom I would view more as a follower than a leader".

Mr Brady relied on the psychologist's report that McAllister was an immature and intellectually limited young man. Mr Brady also made the point that McAllister was not charged with causing grievous bodily harm, but that he had pleaded guilty to the offence of aiding and abetting McAuley to throw a petrol bomb and to the offence of aiding and abetting McAuley to damage by fire a bus intending or being reckless as to whether the life of another would be thereby endangered. Mr Brady submitted that in McAllister's case there was substance in the argument that he had not intended that the driver would be harmed, but had just thought that the petrol bomb would be thrown at the inanimate target of the bus.

We are satisfied that the making of probation orders in respect of these 2 offenders did fall outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

The petrol bomb is a fearful weapon which can, and in this case did, cause appalling injuries and we consider that there are 2 principles which operate in this case to require that the offenders should serve custodial sentences. First, Mr Dillon, himself, and society are entitled to expect that these offenders should be punished for the injuries and suffering which they inflicted on Mr Dillon, who was a member of a group of public servants working in public transport who are too often exposed to violence in this city. In R v Sargeant 60 Cr App R 74 at 77 Lawton LJ stated:

"The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence. The weapons which the courts have at their disposal for doing so are few. We are satisfied that in most cases fines are not sufficient punishment for senseless violence. The time has come in the opinion of this court, when those who indulge in the kind of violence with which we are concerned in this case must expect custodial sentences".

Secondly, in a case of this nature the court must pass sentences intended to deter others from throwing petrol bombs at vehicles or houses carrying or occupied by other people. It must be brought home to young men and others that in using petrol bombs they are playing with fire in more senses than one, and that anyone who is convicted of throwing a petrol bomb at a house or a vehicle giving rise to the risk of injury will go to prison or into detention. The need to punish and deter petrol bomb offenders must override the good record and personal circumstances of the offenders.

This need for deterrence in certain types of cases, irrespective of the age and record of the offenders, was emphasised by the Court of Appeal in England in the case of R v Storey 6 Cr App R(S) 104 where school boys had set fire to their school and pleaded guilty to arson. Mustill J (as he then was) stated at 107:

"Against such background what are the appropriate principles in the light of which the court should approach the question of sentence? The first to our mind is that, that deterrent sentences were called for in this case. Offences by school boys taking the shape of incendiary activities at their schools are by no means entirely out of the ordinary, and sentences must be passed, even in respect of first offenders, to make it plain to all school boys that arson is a very serious offence, capable of having grave consequences, and that it will be dealt with very severely by the courts".

We have borne in mind the various mitigating factors urged upon us by Mr Mooney and Mr Brady on behalf of each respective offender. Also we have reminded ourselves that these 2 offenders have been the victims of so called punishment shootings, but fortunately their injuries were not of a permanent or very serious nature. That fact does not justify an unduly lenient sentence though it is a matter which a sentencer will bear in mind.

If McAuley had been aged over 21 we consider that on his plea of guilty he should have been sentenced to imprisonment for a term in excess of 5 years. However McAuley is now aged 17 and therefore we consider that he should be detained in the Young Offenders Centre. The maximum period of detention in that Centre permitted by Parliament is 4 years. If McAuley were being sentenced now for the first time we would have sentenced him to 4 years' detention in the Young Offenders Centre. However we think it right to take account of the considerations that a considerable period has elapsed since he was first charged and that this is the second time that he faces the prospect of a term of imprisonment, and we also take account of the consideration that he has already taken part in the residential course which was a condition of the probation order. The first and second of these considerations were applied by the Court of Appeal in England in the Attorney General's Reference (No.5 of 1989) 90 Cr App R 358 at 362 where Lord Lane CJ stated:

"We think that the delay, and the fact that, having been placed on probation, he now faces for the second time the prospect of a term of imprisonment, enables us to reduce what we would otherwise pass by way of sentence".

Therefore we quash the probation order made by the Crown Court Judge and substitute a custodial sentence of 3 years' detention in the Young Offenders Centre in respect of McAuley.

Where 2 persons commit a crime together, 1 person carrying out the criminal act and the other person aiding and abetting him, there is often no reason to distinguish between them in passing sentence, because the guilt of the aider and abettor is often

as great as that of the principal and his assistance is often as essential to the commission of the crime as the act of the principal. But we consider that in this case there are 2 valid reasons for passing a lesser sentence on McAllister than on McAuley. First, it is clear that McAllister was an immature and intellectually limited young man. Secondly, although throwing a petrol bomb at any part of bus is a very dangerous action which has potential for causing severe injuries, McAllister may not have realised that McAuley was intending to throw the petrol bomb at the driver's cab. Therefore in respect of McAllister we quash the probation order made by the Crown Court Judge and substitute the sentence of 2 years' detention in the Young Offenders Centre.