Neutral Citation No. [2014] NICA 6

Ref: **COG9119**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **24/01/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ATTORNEY GENERAL'S REFERENCE (NO 17) OF 2013

RYAN McDOWELL

Before: GIRVAN LJ, COGHLIN LJ and DEENY J

COGHLIN LJ (delivering the judgment of the court)

[1] This is a Reference by the Director of the Public Prosecution Service ("the PPS") under Section 36 of the Criminal Justice Act 1988, (as amended by Section 41 of the Justice (Northern Ireland) Act 2002), grounded upon the submission that the sentence of a Combination Probation and Community Service Order comprising 2 years' probation and 100 hours' community service passed upon Ryan McDowell ("the offender") on 25 October 2013 by His Honour Judge McFarland, the Recorder of the City of Belfast, at Belfast Crown Court was unduly lenient. The Reference was conducted by Mr McGrory QC ("the Director"), with whom Ms Walsh appeared, while Mr Laurence McCrudden QC and Mr Stephen Law appeared on behalf of the offender. The court is indebted to both sets of counsel for the assistance that it derived from the industry and clarity with which their written and oral arguments were prepared and delivered.

FACTUAL BACKGROUND

[2] It appears that at some time prior to Christmas 2010 a group of individuals calling itself the Loyalist Action Force materialised in the Mid-Antrim area. It seems that the group sent a statement to a newspaper indicating their intention to take to the streets in response to attacks on Orange halls and the general threat from dissident republicans. The statement claimed that young men were to be trained to target Roman Catholic churches, businesses and GAA clubs. Responsibly, the newspaper did not publish the statement but passed it to the Police Service of Northern Ireland ("PSNI"). This group would appear to be yet another of the

shadowy associations that emerge from both communities within this jurisdiction from time to time seeking to clothe their criminal terrorist activities with some degree of legitimacy by adopting a quasi-military/political title and engaging the media.

[3] Shortly before Christmas, during the Christmas holiday, the offender was asked to attend premises in Ahoghill and to bring some duct tape. When the offender arrived at the premises he encountered three other individuals who were engaged in the construction of Pipe-bomb types of device. One such device had already been constructed and the tape brought by the offender was to be used in the construction of further devices. The devices consisted of copper tubing into which fireworks, colloquially known as "bangers", were to be inserted with the device being secured by tape. The offender told the police that sometime after attending these premises he was in the car park in Ahoghill when he met a couple of people who asked him to do them a favour by taking a plastic bin liner bag containing two of the devices and placing it behind the bottle bank at the community centre on the Cullybackey Road. The offender complied with this request.

[4] On 9 January 2011 devices were placed at the Clooney Community Centre, Ballymena, St Paul's Primary School, Ahoghill and the GAA Club Portglenone. Ammunition Technical Officers were summoned to examine and, if necessary, make safe the devices. The devices comprised pieces of copper pipe containing banger type fireworks and lengths of fuse wrapped in overlapping silver duct tape. The device found at the Clooney Community Centre contained the possible remains of a firework while that found at the Primary School contained two fireworks and that found at the GAA Club contained the empty body of a firework. The offender's DNA was found on the black tape used in the construction of one of the devices and on the empty firework case found in the device placed at the GAA hall. During the course of interviews the police put to the offender that the device left at the GAA hall was a hoax since the contents of the firework had been removed and that the opinion of the Forensic Science Department was that the fireworks in the other two devices would not have had sufficient power to fragment the copper pipe, although there was sufficient force to propel the pipe down the street in which case it might have caused serious injury to anyone in the close vicinity. It was accepted that none of the fuses in the devices had been ignited prior to being placed.

[5] In the course of police interviews the offender accepted that he had appreciated the devices were to be used to "upset people" or "cause tension" in the Catholic community.

[6] At the time of his attendance at the premises in Ahoghill the offender had just turned 18 years of age while the other three individuals were between 3 and 5 years older. He denied that he had ever been a member of the Loyalist Action Force or any other terrorist group but admitted that he had just wanted to "fit in" and wanted something "different" or "exciting". An application for a "No Bill" based

upon submissions that the evidence was inadequate to constitute the devices explosive substances within the meaning of the Explosive Substances Act 1883 ("the 1883 Act") was refused and the offender ultimately pleaded guilty to making pipe-bomb type improvised explosive devices and possessing such devices in suspicious circumstances contrary to Section 4(1) of the 1883 Act.

THE SENTENCING EXERCISE

[7] The learned Recorder observed that the relevant devices were "very crude" and that it had been, to some extent, debatable if they were actually devices that fell within the terms of the 1883 Act. He noted that there was no explosive material as such within the devices and that, essentially, they were fireworks wrapped in a pipe. They were not devices which could have caused death or serious injury which led him to conclude that there was no intention to kill or cause serious injury on the part of the offender. However, given the fact that the devices were deployed at three locations associated with the Catholic community, the Recorder had no difficulty in reaching the view that the offences were sectarian in nature and carried out for the purpose of causing disruption, fear and annoyance. In that context, he noted the subsequent telephone call purporting to come from the Loyalist Action Force indicating that they were responsible. He also noted the reference made in that telephone call to the devices being deployed in retaliation for similar actions or damage being caused to local Orange halls but observed that such "tit for tat" action did nothing to enhance the status of the offender's community and only fostered greater community disharmony.

[8] The Recorder took into account the offender's youth, the fact that the others involved had been older, the absence of any criminal record, his good family background, his steady record of employment since leaving school and the overall context of the offences. Having done so, he did not consider that the offender was dangerous or that there was a significant risk of serious harm caused by any further offending. He also took into account the offender's remorse and noted that he had written to the local Parish Priest and the Headmistress of St Paul's School expressing his sincere apology. With their agreement the offender subsequently met the Parish Priest and a representative of the staff of the school, who had been the person who had originally found and lifted up the device at the school, in order to personally express remorse and contrition. The Recorder subsequently received letters from the Parish Priest and the Headmistress of the School. The Investigating Officer received a letter from the Chairperson of the Clooney Rural Development Association. All of that correspondence was taken into account by the learned Recorder.

[9] It is clear that the learned Recorder carried out a careful and conscientious balancing of the relevant factors before reaching his decision that the offences did not warrant the imposition of an immediate custodial sentence. He then considered the imposition of a custodial sentence that might be suspended and noted that it was "a fine balance" between such an outcome and some degree of community order.

He accepted that, given the nature of the offending, it was essential that there should be some degree of supervision of the offender over the next 2 years and, in order to achieve that purpose, he decided to impose a Combination Probation and Community Service Order. In doing so, he specifically reminded the offender that, while it was not technically a suspended sentence, if any further offence was committed within the 2 years of the currency of the Probation Order the matter could be referred back to the Court, the order revoked and the offender re-sentenced. In addition to the Probation Order he directed that the offender should carry out 100 hours of community service indicating both a wish and recommendation that, in particular if available, the offender should engage in cross-community projects.

THE REFERENCE

[10] The Director submitted that, as a consequence of the sectarian context of the offences, namely, placing the devices at locations associated with the Catholic community with the intention of causing disruption, fear and annoyance the sentence passed was unduly lenient. He argued that in respect of offences of this nature custodial sentences should be passed save in the most exceptional circumstances. In essence, the Director argued that the learned trial Judge had placed insufficient weight on the sectarian context and afforded too much weight to the fact that the relevant devices were of a crude nature and limited capacity. In advancing his submissions the Director relied, in particular, upon R v Lloyd [2001] 2 Cr App R(S) and R v Riding [2010] 1 Cr App R(S) 7.

[11] On behalf of the offender Mr McCrudden candidly conceded that the sentence passed by the Recorder had been lenient and, indeed, might be described by some as "very lenient". However, he emphasised the importance of the flexibility and discretion available to the trial judge in dealing with the particular circumstances of the offence and the offender together with the need to exclude any temptation on his part to resort to a reflexive determination of the outcome based on a particular factor or factors.

DISCUSSION

[12] In our view the decisions in Riding and Lloyd are not of particular assistance in resolving this Reference. Both cases were decisions of the Court of Appeal of England and Wales and, as such, were not concerned with the type of sectarianism that is sadly still so prevalent in this jurisdiction. In one case the device was constructed and kept at home by an individual with an "unhealthy" interest in weaponry and in the other the individual in question had a longstanding hobby interest in fireworks and explosives and had made the device simply to demonstrate his skill.

[13] In two recent cases this court has underlined the requirement for deterrent custodial sentences in cases of sectarian violence in the absence of exceptional circumstances. DPP Reference (Nos 13, 14 and 15 of 2013) [2013] NICA 63 concerned widespread violent inter-communal rioting involving the throwing of bricks, rubble and petrol bombs, while DPP Reference (No 1 of 2013) [2013] NICA 73 concerned an individual who had assisted in an attack at night upon premises occupied by a Catholic family by breaking a pane in the front door so that a nail bomb, which subsequently exploded, could be thrown into the hallway. Such decisions of this court constitute an important form of guidance for sentencers but such guidance should not be seen as in any way relieving the sentencer of the fundamental duty to ensure that all relevant aspects of the specific offence and offender are properly and effectively taken into account and weighed in the balance. In some cases the serious nature, circumstances and/or prevalence of the offence may require that the public interest in deterrence of others by way of custodial sentences should take priority over the personal details of the offender. However, rehabilitation, rather than incarceration, may in particular cases be the most effective means of achieving lasting personal deterrence, a result that is also very much in the public interest. One of the most difficult and demanding tasks for the sentencing judge in cases of this nature is to arrive at a solution that is just and fair to all in the circumstances of the particular case. The observations of Lord Lane CJ in Attorney General's Reference (No 4 of 1989), adopted by Hutton LCJ in Attorney General's Reference (No 1 of 1989) [1989] NI 245, setting out the correct approach to Section 36 references of this nature remain apposite:

> "The first thing to be observed was that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient.
>
> It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gave rise to – merely because in the opinion of this court the sentence was less than this court would have imposed.
>
> A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.
>
> In that connection, regard must of course be had to reported cases and in particular to the guidance given by this court from time to time in the so-called guideline cases.

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

We would also refer to the words of Carswell LCJ in Attorney General's Reference (Nos 2, 6, 7 and 8) [2004] NI 50 when, after referring to guideline schemes of sentencing, he went on to observe that:

> "We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind, they will in our view be able to maintain a desirable level of consistency between cases, while doing justice to the infinite variety of circumstances with which they have to deal."

[14] We are prepared to accept that this was a lenient sentence and even, as Mr McCrudden conceded, that it could be described as a 'very lenient' sentence. The placing of hoax devices should not be seen as constituting minor offending, given the fear, anxiety and distress that is likely to ensue. However, after giving careful consideration to the detailed and conscientious assessment carried out by the Recorder, we are not persuaded that it was unduly lenient in the sense that there was some error in principle or that it fell outside the range of sentences which a Judge, applying his mind to all the relevant factors, could reasonably consider appropriate in the circumstances. In such circumstances, the Reference must be dismissed.

[15] Before ending this judgment we feel that it may be helpful to add some observations with regard to the letters received by the Court from the Parish Priest, the School and the Clooney Rural Development Association.

[16] The letters from the Parish Priest and the School referred to the correspondence from the offender and the subsequent face to face meeting. They were both generous and humane in content in expressing a hope that the offender would be given an opportunity to pursue a normal life. The letter from the Development Association referred to a meeting of the Association at which the offender's case was discussed, including the claim of responsibility by the Loyalist Action Force. Understandably, and not surprisingly, in view of that group's efforts to gain publicity, the meeting reached the conclusion that the attacks were aimed at the Catholic community and, as such, represented a setback to the strenuous efforts made by that community at improving inter-community relations. In conclusion,

Constable Erskine was informed that the meeting had recommended that the offender should receive a custodial sentence in order to deter his fellow criminals in the Loyalist Action Force from carrying out further attacks on such premises and that a community service disposal would be viewed as a "let off" by the community.

[17] While no doubt some part of the community would subscribe to such a perception, we bear in mind the view of Girvan J recorded in R v Rice and others [1997] NICC (unreported) that a Community Service Order "…should not be regarded as a trivial punishment". Indeed, as the learned judge went on to observe in that case such an Order could be regarded to some extent as affording the offenders an opportunity to redeem themselves in the eyes of the community by which they had been ostracised as a consequence of their offences. We have noted that the offender's contrite attitude in this case has elicited respect and understanding from the clergy and school and that he has successfully performed his community duties to date, some of which have included cross-community work.

[17] In recent years very significant improvements have been achieved in assisting the victims of criminal behaviour and providing opportunities for them to have their voices heard and make known their experiences to the court. In a passage adopted by Gillen J in R v Brown [2009] NICC 11, Lord Steyn said in A-G's Reference No 3 of 1999) [2001] AC 91, at page 118:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

The Victim Impact Statement has now become a regular feature of the papers in most criminal cases.

[18] However, it was not envisaged that any such representations or statements should include a specific recommendation of the type of sentence to be passed upon the offender by the Court. Neither the members of this court nor the Director had ever previously encountered a recommendation from a victim source that a custodial sentence should be passed. In Attorney General's Reference (No 1 of 2001) (Gerard James Rogan) [2001] NICA 31 Carswell LCJ approved the principle articulated by Judge J who, when giving the judgment of the court in R v Nunn [1996] 2 Cr App R(S) 136 said, at 140:

> "… The opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for re-assessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than otherwise would be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways leading to improper and unfair disparity …"

A similar approach was advocated by Lord Bingham CJ in Attorney General's Reference (No 66 of 1996) (Spencer) [1998] 1 Cr App R(S) 16 when he stressed the need for the trial judge and any Appeal Court to judge cases objectively and dispassionately and to do their best to reach the appropriate penalty, taking account of all the relevant circumstances. He cautioned that courts should neither be overborne or intimidated by the understandable outrage of some victims nor allow their admiration for the generosity of spirit shown by others to lead them to give less than proper weight to the public interest in ensuring that a sufficient penalty is imposed upon those who commit crimes. The wisdom of such an approach may be clearly illustrated by the circumstances of this case in which, given the marked conflict of views, the learned Recorder would have faced an impossible task had he attempted to make his sentence fully reflect both the advices tendered by the Parish Priest and the School and those of the Association.