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*(subject to editorial corrections)**

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

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**THE QUEEN**

**-v-**

**WILLIAM WONG**

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**Before: Morgan LCJ, Higgins LJ and Coghlin LJ**

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**MORGAN LCJ**

[1] This is an appeal against an indeterminate custodial sentence with a minimum term of five years imprisonment imposed by His Honour Judge Burgess on 1 July 2011 at Belfast Crown Court in relation to an explosives offence. The core issues are whether the learned trial judge was correct to conclude that the dangerousness provisions of the Criminal Justice (Northern Ireland) Order 2008 applied in the circumstances and if so whether he was correct to impose an indeterminate custodial sentence rather than an extended custodial sentence.

[2] The applicant was arraigned on 17 December 2010 on three counts being:-

(1) Possession or control of a pipe bomb with intention to endanger life or cause serious injury to property, contrary to Section 3(1)(b) of the Explosive Substances Act 1883;

(2) Possession or control of a pipe bomb under such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession or under his control for a lawful object, contrary to Section 4(1) of the Explosive Substances Act 1883;

(3) Possession of a lighter and latex gloves in circumstances that give rise to a reasonable suspicion that possession of the said lighter and latex gloves was for a purpose in connection with the commission, preparation or instigation of an act of terrorism, contrary to Section 57 of the Terrorism Act 2000.

He pleaded not guilty to all three charges. He was subsequently re-arraigned on 11 April 2011 when he pleaded guilty to the first count. Counts 2 and 3 were left on the books. Mr Fitzgerald QC and Mr Devine appeared for the applicant and Mr McCrudden appeared for the prosecution. We are grateful to counsel for their helpful oral and written submissions.

**Background**

[3] On 11 March 2010 at approximately 9.20 pm the applicant and another person were walking along Nialls Crescent, Armagh. The applicant was carrying a white plastic bag. He was approached by police and started to run away. A constable shouted, "Armed police, stand still" after which the applicant came to a halt. As he did so he threw the white plastic bag over his right shoulder into a nearby garden. When he was apprehended it was noted that he was wearing a clear surgical glove on his right hand. The applicant was searched and two pairs of latex gloves were found in the pocket of his fleece. A lighter was found in his left hand trouser pocket.

[4] Police recovered the white plastic bag. In it was discovered a viable pipe bomb device in a state of readiness. It consisted of a length of steel pipe with low order explosive and a fuse which protruded from one end of the device. The lighting of the fuse by a match or lighter would have enabled the device to function. The expert evidence was that this was an anti-personnel weapon which was lethal and had the potential to maim or kill. The applicant was interviewed subsequent to his arrest and at the end of his interviews his solicitor read the following statement on his behalf:

> "On arrival at Antrim I informed the police I had gloves in my pocket. When I was searched inside the gloves were in my pocket. I informed the police of this. The gloves were extra pairs. On Thursday 11 March 2010 I was fixing my girlfriend's brake pads on her car and was using gloves to do this. They were then left in my

> pocket. The lighter is my property and is a present from my girlfriend. It has our initials and a date engraved on it, as well as a Celtic football club logo. I am a smoker and carry the lighter with me at all times. I wish to add that I am not a member of any illegal organisation."

[5] In the course of the plea entered on his behalf the applicant's then senior counsel, Mr McGrory QC, accepted that the applicant had become involved with certain people in Armagh and had undertaken to take the bag with its contents and with knowledge of those contents from one place to another. It was stated on his behalf that it was not his intention to be involved in the actual use of the weapon but that he did know that others were going to use the device that was in the bag to harm others or to damage property. In the course of the plea there was no indication of remorse on the part of the applicant.

[6] Subsequent to his detection the applicant was held in custody. He was accommodated in a portion of the prison which housed dissident Republican prisoners. It was indicated on his behalf that he had taken this course because he would be at risk if he were housed in any other portion of the prison and we accept that his concerns in relation to this are reasonable. When his case first came before the Recorder he had declined on two occasions to engage in an interview with the Probation Service for the purpose of preparing a pre-sentence report. We were informed by his counsel that this is an approach taken by prisoners convicted of dissident terrorist crimes. At the request of the applicant's senior counsel he was given a further opportunity to engage and he attended for interview. The pre-sentence report recorded that he was 22 years old and at the time of his arrest was living with his partner/girlfriend with whom he had had a relationship for a number of years. Although he was born in Malaysia he had resided in Armagh since he was two years old. He was employed by a company engaged in the home delivery of newspapers and his only previous conviction was for driving without due care and without insurance. He had a stable background and continued to receive regular visits from his partner and family. The Probation Service indicated that they had not carried out any offence analysis or assessment in respect of the risks of serious harm as there was no validated tool which indicated how such matters might be assessed in respect of terrorist crime.

**The statutory background**

[7] The relevant statutory provisions dealing with dangerousness are set out in articles 13 to 15 of the Criminal Justice (Northern Ireland) Order 2008.

> "13.—(1) This Article applies where—
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> (a) a person is convicted on indictment of a serious offence committed after [15th May 2008]; and
> (b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences.
>
> (2) If—
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> (a) the offence is one in respect of which the offender would apart from this Article be liable to a life sentence, and
> (b) the court is of the opinion that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of such a sentence,
> the court shall impose a life sentence.
>
> (3) If, in a case not falling within paragraph (2), the court considers that an extended custodial sentence would not be adequate for the purpose of protecting the public from serious harm occasioned by the commission by the offender of further specified offences, the court shall—
> (a) impose an indeterminate custodial sentence; and
> (b) specify a period of at least 2 years as the minimum period for the purposes of Article 18, being such period as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it.
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> (4) An indeterminate custodial sentence is—
> (a) where the offender is aged 21 or over, a sentence of imprisonment for an indeterminate period,

(b) where the offender is under the age of 21, a sentence of detention for an indeterminate period at such place and under such conditions as the Department of Justice may direct,
subject (in either case) to the provisions of this Part as to the release of prisoners and duration of licences…

14.—(1) This Article applies where—

(a) a person is convicted on indictment of a specified offence committed after 15 May 2008; and
(b) the court is of the opinion—
(i) that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences; and
(ii) where the specified offence is a serious offence, that the case is not one in which the court is required by Article 13 to impose a life sentence or an indeterminate custodial sentence.

(2) The court shall impose on the offender an extended custodial sentence.

(3) Where the offender is aged 21 or over, an extended custodial sentence is a sentence of imprisonment the term of which is equal to the aggregate of
(a) the appropriate custodial term; and
(b) a further period ("the extension period") for which the offender is to be subject to a licence and which is of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences…

15.—(1) This Article applies where—

(a) a person has been convicted on indictment of a specified offence; an
(b) it falls to a court to assess under Article 13 or 14 whether there is a significant risk to members of the

public of serious harm occasioned by the commission by the offender of further such offences.

(2) The court in making the assessment referred to in paragraph (1)(b)—
(a) shall take into account all such information as is available to it about the nature and circumstances of the offence;
(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part; and
(c) may take into account any information about the offender which is before it."

[8] In R v EB [2010] NICA 40 this court approved the approach of the English Court of Appeal in R v Lang [2005] EWCA Crim 2864 on how the assessment of the risk of serious harm should be made under these provisions.

"(i) The risk identified must be significant. This was a higher threshold than mere possibility of occurrence and could be taken to mean "noteworthy, of considerable amount or importance".
(ii) In assessing the risk of further offences being committed, the sentencer should take into account the nature and circumstances of the current offence; the offender's history of offending including not just the kind of offence but its circumstances and the sentence passed, details of which the prosecution must have available, and, whether the offending demonstrated any pattern; social and economic factors in relation to the offender including accommodation, employability, education, associates, relationships and drug or alcohol abuse; and the offender's thinking, attitude towards offending and supervision and emotional state. Information in relation to these matters would most readily, though not exclusively, come from antecedents and pre-sentence probation and medical reports. The sentencer would be guided, but not bound by, the assessment of risk in such reports. A sentencer who contemplated differing from the assessment in such a

report should give both counsel the opportunity of addressing the point.

(iii) If the foreseen specified offence was serious, there would clearly be some cases, though not by any means all, in which there might be a significant risk of serious harm. For example, robbery was a serious offence. But it could be committed in a wide variety of ways, many of which did not give rise to a significant risk of serious harm. Sentencers must therefore guard against assuming there was a significant risk of serious harm merely because the foreseen specified offence was serious. A pre-sentence report should usually be obtained before any sentence was passed which was based on significant risk of serious harm. In a small number of cases, where the circumstances of the current offence or the history of the offender suggested mental abnormality on his part, a medical report might be necessary before risk can properly be assessed.

(iv) If the foreseen specified offence was not serious, there would be comparatively few cases in which a risk of serious harm would properly be regarded as significant. Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to significant risk of serious harm."

**The applicant's submissions**

[9] The applicant laid emphasis on the application of these principles in R v Xhelollari [2007] EWCA Crim 2052. That appellant had been convicted of one count of rape after a trial. The circumstances were that he tricked the victim into his flat and then threatened to harm her unless she allowed him to have intercourse. He contended that the intercourse was consensual. The pre-sentence report noted the vulnerability of the victim and the continued denial of the appellant and concluded that he posed a high risk of serious harm to female members of the public. He had no previous convictions and there was no relevant pattern of offending. The judge at trial imposed an indeterminate custodial sentence with a minimum term of four and a

half years. On appeal the court accepted a submission that the only factors supporting the finding of dangerousness were the vulnerability of the victim and the denial of responsibility of the appellant. The court concluded that to infer that there was a risk of serious harm in the future on that basis was speculative and did not reach the threshold set in Lang.

[10] R v Nouri and Ibrahim [2012] EWCA Crim 1379 was a similar case. Neither appellant had previous convictions. They met the victim as she was walking alone in Preston at about 4am. She was quite drunk and had taken cocaine. They brought her back to a flat where they each raped her in a particularly degrading manner. The trial judge concluded that the facts and circumstances of the offence established that the applicants were out of control and he sentenced each to imprisonment for public protection with a minimum period of six years. The Court of Appeal agreed that the offences demonstrated a callous abuse of a vulnerable victim but did not accept that this provided sufficient evidence of a significant risk of further offending of this type.

[11] R v Pedley and others [2009] EWCA Crim 840 was another case where the court gave guidance at paragraphs 15 to 17 on the application of the equivalent statutory provisions in England and Wales when considering a sentence of imprisonment for public protection (IPP).

> "15 We agree with Mr Fitzgerald that the nature of an IPP sentence must be kept in mind when assessing whether the risk for the future is significant. This is an indeterminate sentence. Its justification is, by the statute, grounded in the necessity to protect the public not simply from reoffending, which sadly is often a fact of life, but from *serious* harm being caused by the defendant in the future. The requirement that there must be a significant risk not only of reoffending, but of harm that can properly be called serious, must not be watered down. That emerges very clearly from the practical advice to sentencers contained in para 17 of R v Lang [2006] 1 WLR 2509, all of which we re-endorse.
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> 16 The question whether the risk of serious harm is, in any individual case, significant so as to justify an IPP sentence, is highly fact-sensitive. It must remain a decision for the careful assessment of the judge before

> whom the case comes. He will need to consider all the information he has about the defendant: see section 229 and R v Considine [2008] 1 WLR 414 . The focus is, as explained in R v Johnson (Practice Note) [2007] 1 WLR 585, not principally upon the facts of the instant case but upon future risk.
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> 17 All the parties before us agreed that in addressing the question whether the risk of serious harm is significant the judge is entitled to balance the probability of harm against the nature of it if it occurs. The harm under consideration must of course be serious harm before the question even arises. But we agree that within the concept of significant risk there is built in a degree of flexibility which enables a judge to conclude that a somewhat lower probability of particularly grave harm may be significant and conversely that a somewhat greater probability of less grave harm may not be."

The court rejected the submission that there should be any redefinition of significant risk of serious harm in terms of numerical probability.

[12] Pedley was 24 when he committed an armed robbery with three others. He had a loaded revolver with which he threatened a security guard and discharged a shot in the air during the robbery while holding the guard. The robbers arrived in a stolen car wearing balaclavas and made off at speed to a second getaway car setting fire to the first car. He had no previous convictions for violence or for any specified offence but had convictions for dangerous driving and burglary by ram raid. He had served periods of imprisonment. The judge passed an IPP with a minimum term of five years. On appeal the court noted that he was an associate of a notorious gang, that the robbery was well planned and professional and that his previous convictions suggested risk taking behaviour and a real risk of further acquisitive crime. The fact that he had not previously been convicted of a specified offence did not make it inappropriate to impose an IPP in that case.

[13] We were referred to a number of terrorist cases in this jurisdiction where the dangerousness provisions were not applied. By way of example in R v Meehan and another (No 2) [2010] NICC 47 the appellant was one of a group of armed men moving around the Bogside area in paramilitary

clothing and wearing masks. They were pursued by local inhabitants as a result of which one of the men discharged a firearm killing Emmett Shiels. The prosecution accepted a plea to manslaughter on the basis that although the appellant knew about the firearm the prosecution could not establish that he realised that it would be used to kill or cause serious bodily injury. The appellant had no previous convictions. He was 18 years old at the time of the commission of the offence. His school principal described his school record as exceptional and this was supported by impressive references. He pleaded guilty at the first opportunity and the pre-sentence report supported the evidence before the judge. Unsurprisingly the learned trial judge concluded that he was not dangerous.

[14] Mr Fitzgerald also took us to a number of English decisions. As R v Barot [2007] EWCA Crim 1119 demonstrates there are many cases involving the commission of terrorist offences where it is plain that the offender will pose a danger to the public for the foreseeable future. In those cases a discretionary life sentence remains appropriate. He relied, however, on R v Tabbakh [2009] EWCA Crim 464 where the appellant was charged with the preparation of terrorist acts. He had compiled a set of bomb-making instructions but had only gone some limited way towards assembling the ingredients. The issue in the appeal against sentence was whether an 8 year sentence was appropriate for someone who was doing his best to make a bomb but as yet had neither a detonator nor the right sort of grade of ingredients. This was therefore a case that did not suggest involvement with any sophisticated organisation and where any possible harmful outcome was a long way off. In our view it was plainly right that this was not a case where there was a significant risk of serious harm.

**Consideration**

[15] What all of these cases demonstrate is that the assessment of whether an offender presents a significant risk of serious harm requires a careful analysis of all of the relevant facts in the particular case. This is required just as much in a case involving convictions for terrorist offences as in other cases. In such cases the matters likely to require consideration will usually include:-

> (i) the nature of the harm to which the offence was directed;
> (ii) the intention or foresight of the offender in relation to that offence;

(iii) the stage at which the offending was detected;
(iv) the sophistication and planning involved in the commission of the offence;
(v) the extent to which the conduct of the offender demonstrates a significant role in the carrying out of the offence;
(vi) the previous conduct of the offender;
(vii) the danger posed by the terrorist organisation in question;
(viii) an assessment of the extent to which the appellant is committed to or influenced by the objectives of that terrorist organisation; and
(ix) where there is a dispute about these matters, a Newton hearing may be appropriate.

In terrorist cases the decisions in Xhelollari and Nouri may well be of limited assistance. In those cases the court was examining the risk posed of a future loss of control in circumstances where the offender took advantage of a vulnerable woman. In terrorist cases the risk is unlikely to depend upon loss of control or the vulnerability of the victim but rather the evidence of the offender's commitment to participation in the activities of the organisation.

[16] In this case the applicant's only conviction is for a relatively minor driving offence which does not indicate any risk taking behaviour relevant to the assessment of dangerousness. There is no pattern of offending behaviour. The basis of his plea indicates that he is not a member of a paramilitary organisation. Although he had the means of using this viable device he pleaded on the basis that he was moving the device so as to enable others to use it. The presence of the lighter on his person was not, therefore, in connection with the commission of the offence. These are material points in relation to the assessment all of which were known to and taken into account by the trial judge.

[17] The trial judge also had to take into account that the weapon which the applicant knew he was transporting for others to use was an anti-personnel weapon which could maim or kill. The harm with which the assessment in this case is concerned is therefore grave harm. The preparation of the device and its state of readiness indicates a degree of professionalism in the execution of the offence and a proximity to its eventual deployment if police had not intervened. On the applicant's case the fact that he coincidentally had a lighter in his pocket meant that he could have deployed the device if he had wished to do so. Precisely how and where the device may have been deployed cannot be established

because the applicant has not disclosed where he intended to bring the device or who was to receive it. Although the statement read by the applicant's solicitor at the end of his interviews gave an explanation for the surgical gloves in the applicant's pocket, there was no explanation for the wearing of the surgical glove on his right hand at the time of his detection. At the very least that indicates a degree of forensic awareness on the part of the applicant.

[18] Although he was not a member of an illegal organisation, the applicant's case was that he became involved in this offence as a result of his association with terrorists in the Armagh area. The fact that he voluntarily agreed to transport such a dangerous device which he knew was ready to deliver such harm to others shows a high degree of susceptibility to the influence of others. That influence clearly continued while he was in custody as a result of which he initially refused to be interviewed by a probation officer. For the reasons set out above there is every prospect that the applicant will continue to be housed with other terrorist prisoners during his sentence. That is information relevant to the applicant's motivation which the trial judge was entitled to take into account. It has to be seen in the context of a case where the applicant has expressed no remorse for his admitted conduct.

[19] Although there were criticisms of some of the language used by the trial judge on the basis that his remarks suggested that the possession of the weapon and a refusal to explain where it had come from was sufficient to establish dangerousness, we do not consider that on a fair reading his remarks can be so interpreted. The matters set out in paragraphs 16 to 18 above were all taken into account by him in coming to his determination. This was a well-planned and professional attempt to carry out a crime which could easily have given rise to grave harm. The applicant played an important role at a late stage of its implementation. He was an associate of the terrorist gang and voluntarily assisted them. There was information that he remained susceptible to their influence. These were the factors relied upon by the trial judge and in our view his conclusion was well within the area of judgment available to him.

[20] Having concluded that the applicant was dangerous in the circumstances set out above we consider that there was no material to suggest that an extended custodial sentence would protect the public from the serious harm occasioned by the commission of further specified offences by the offender. In considering the question of proportionality it is

necessary to recognise the grave nature of the risk of harm being assessed, the voluntary participation by the applicant with the terrorist gang at a very late stage of this inchoate crime and the absence of any evidence of remorse at the time of his plea. Against that background an indeterminate custodial sentence was not disproportionate.

[21] We wish to emphasise that in cases involving firearms and explosives, even with a terrorist background, the court should be careful not to make the assumption that the offender is dangerous. The risks posed by those involved in such offences can vary enormously and each case will be heavily fact sensitive.

[22] Finally, the applicant submitted that the minimum period of five years on a guilty plea was unduly severe. We do not agree. As this court has made clear on a number of occasions those who facilitate the commission of terrorist crimes must expect deterrent sentences when apprehended. A minimum period of five years imprisonment for the possession and movement of this viable device was entirely justified.

[23] We conclude, therefore, that the appeal should be dismissed.