IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MARK GERARD HANNIGAN and THOMAS GERARD BROGAN

CARSWELL LJ

In this appeal the appellants Mark Gerard Hannigan and Thomas Gerard Brogan appealed against their conviction of a number of scheduled offences on 7 February 1995 by Hutton LCJ ("the trial judge") sitting at Belfast Crown Court without a jury and against the sentences which he then imposed. At the hearing before us Hannigan did not pursue his appeal against sentence.

The incidents out of which the charges arose may be divided into 2 episodes which took place in Strabane on 12 August 1992:

(a) In the first a house at 6 Melvin View, Strabane was taken over, the occupants were held prisoner and their Ford Sierra car was hijacked. Some little time later shots were fired from a firing point in 42 Bridge Street at an Army patrol as it passed along the opposite side of the street. The gunmen made good their escape in a Ford Sierra car. Arising out of this episode both appellants were charged with attempted murder and possession of 2 AKM rifles with intent, and Hannigan was also charged with false imprisonment and hijacking.

(b) In the second episode, which followed closely upon the first, the occupants of the Ford Sierra, as it was being driven along Melmount Road, Strabane, fired upon another Army patrol, which returned fire. The car was driven into Ballycolman industrial estate and there abandoned, while the occupants escaped on foot. As they did so they fired shots at an RAF helicopter which was flying low over them. Arising out of this episode Brogan was charged on 2 counts of attempted murder and 2 of possession of 2 AKM rifles with intent.

The trial judge convicted the appellants on all counts and imposed the following sentences:

Hannigan:

Attempted murder, 18 years' imprisonment.

Possession of firearms with intent, 14 years.

False imprisonment, 10 years on each count.

Hijacking, 8 years.

Brogan:

Attempted murder, 30 years on each count.

Possession of firearms with intent, 22 years on each count.

All sentences were concurrent. In addition, the trial judge ordered, pursuant to section 15 of the Northern Ireland (Emergency Provisions) Act 1991, that Brogan be returned to prison to serve the unexpired remainder of a 20-year term due to expire on 13 November 1999, in respect of which he had been on licence on 12 August 1992. The sentences imposed in respect of the offences of which he convicted Brogan were therefore to commence in November 1999.

Hannigan's appeal

Hannigan's counsel did not attempt to challenge the finding of the trial judge that Hannigan was guilty of the false imprisonment of Joseph and Roisin Doherty in 6 Melvin View and the hijacking of Mr Doherty's car. The appeal turned upon the issue whether he was fixed with sufficient knowledge or contemplation of the planned operation for him to be found guilty as an accessory of attempted murder and possession of firearms. The trial judge held that he was satisfied that Hannigan was part of the joint venture, since

(a) on the facts of the case it had been established that he had sufficient knowledge of what had been planned;

(b) he contemplated that 1 of the offences which were likely to be committed by his confederates was the attempted murder of members of the security forces, and this was sufficient to make him guilty under the principle contained in R v Maxwell [1978] NI 42;

(c) if necessary, he would have drawn strong inferences against him under Articles 4, 5 and 6 of the Criminal Evidence (NI) Order 1988.

Mr Philip Mooney QC for Hannigan challenged the correctness of each of these grounds.

The facts found by the trial judge in relation to Hannigan's part were as follows:

"In relation to this incident on the evidence adduced by the Crown I am satisfied beyond a reasonable doubt (and hereafter in this judgment when I say that I am satisfied, I mean that I am satisfied beyond a reasonable doubt) that the following events occurred at 6 Melvin View, Strabane on Wednesday 12 August 1992. 6 Melvin View is a bungalow about 275 yards away from 42 Bridge Street, Strabane, as the crow flies, and is shown (inter alia) in photograph 17 in the album of photographs Exhibits 19, 22 and 23. On 12 August 1992 the householder of 6 Melvin View was Mr Joseph Doherty who lived there with his wife and his daughter Roisin, who was aged 16. On that date he owned a blue Ford Sierra car, Registration No. IJI 5967.

About 11.30 am on 12 August Mr Doherty was in the kitchen when a masked man armed with a rifle entered the kitchen and said that he was IRA and "we want your car". Mr Doherty told him that he was not getting his car and there was an argument about this, and the man cocked the rifle and put it to Mr Doherty's head. Mr Doherty still refused to give him the car and the gunman threatened that he would blow his legs off. Mr Doherty still refused to give him the car and the man went out and returned with 2 other men. One of the men then pointed the rifle at Mr Doherty's daughter Roisin and told him to think of his daughter. Under this threat to his daughter Mr Doherty then gave him the keys of the car and 1 of the men said that they were leaving 1 man with Mr Doherty and his daughter, that he was armed but that he was not to produce the gun in front of the daughter. 2 of the men then left the house with the keys of Mr Doherty's car, and a third man, who was masked, remained in the kitchen with Mr Doherty and his daughter and did not leave them.

About an hour and a half after the 2 men had left with the keys of Mr Doherty's car the masked man who had remained with Mr Doherty and his daughter said 'was that shooting?'. Then there was a second burst of firing and the masked man said "they will be back soon with the car". Then Mr Doherty heard a vehicle coming up the driveway of the bungalow and the masked man said 'that's them back'.

However the vehicle which came up the driveway was not Mr Doherty's car carrying gunmen but a police landrover. Police officers entered the bungalow through the front and back doors and the masked man ran from the kitchen into the hallway and into the bathroom where he was detained by the police. This man was the accused Mark Gerard Hannigan. He was unarmed. Lying beside him in the bathroom were a pair of gloves and a black mask and Hannigan was wearing black stockings over his shoes."

Hannigan was arrested and cautioned under Article 6 of the 1988 Order, then under Article 5, and again under each of these provisions in Castlereagh Police Office. He made no reply to the cautions on any of these occasions.

The trial judge's finding in relation to the firing of shots at the soldiers in Bridge Street was in the following terms:

"In relation to this incident I am satisfied that in the early afternoon on 12 August 1992 Corporal Stubbs was in command of a 4 man patrol of the Royal Green Jackets Regiment in Strabane. About 1.00 pm he was leading the patrol and had just crossed the bridge over the river from the northern side and was proceeding along Bridge Street on the right hand side pavement. When he was level with the lamp post on the pavement at the corner of the garden wall of 1A Bridge Street (the lamp post being shown in photographs 1-4 in Exhibit 20) he was fired at and felt a thud on the right of his body and heard gunfire. Corporal Stubbs could not tell where the firing came from, but he thought it came from the other side of the river behind him, and he fired 5 shots towards the Waterside wall and at the windows in the high building in Market Street across the river.

Photographs 3 and 4 in Exhibit 20 show where a bullet struck the lamp post when Corporal Stubbs was beside it.

42 Bridge Street is a house on the opposite side of the street to the side on which Corporal Stubbs was walking when the bullet struck the lamp post beside him, and 42 Bridge Street is approximately 75 yards away from that lamp post. There is a clear view from the front bedroom windows of 42 Bridge Street of the lamp post and the pavement beside it, as is shown in photographs 16 and 17 of Exhibit 20.

After the firing at Corporal Stubbs police officers searched 42 Bridge Street. They found that the 2 windows in the front bedroom which gave a clear view of the lamp post and the pavement beside it had been held open with candlesticks, and in that bedroom they found 3 spent 7.62 mm cartridge cases. The evidence adduced by the Crown proved that 1 of the spent cases had been ejected after firing from 1 of the AKM rifles and 2 of the spent cases had been ejected after firing from the second of the AKM rifles found by the police in the Ballycolman estate in Strabane later on the afternoon of 12 August."

He was satisfied that the gunmen had attempted to kill Corporal Stubbs. Although Mr Mooney submitted at trial that the gunman's intention to kill had not been proved beyond reasonable doubt, he did not advance that contention before us on appeal. For our part we are fully satisfied that the trial judge's conclusion on this issue was correct.

Mr Mooney suggested that it was the normal practice of terrorists on a murder mission to dump a hijacked car and burn it, rather than come back to the place from which they took it, and that this pointed to the possibility that the crime contemplated by Hannigan was of a less serious nature. We do not consider that this argument carries any weight, when set against the fact that 1 of his confederates was carrying an AKM rifle and the other had something in a bin bag which clearly was another rifle. One cannot realistically suppose that an operation in which the participants carry assault rifles involves anything short of shooting with lethal intent at someone. When 1 adds to this Hannigan's reaction to the sound of the shots, the trial judge was in our judgment fully entitled to conclude that he knew very well that they were on a murder mission.

If any doubt could be said to exist, that would in our view be entirely dispelled by the application of the principle contained in R v Maxwell. It is not necessary for us in this judgment to discuss that principle in any detail, for it is well established and has been applied many times. We consider that it is entirely clear that Hannigan must have contemplated that the murder of members of the security forces was 1 of the most obvious possibilities among the crimes which the men who drove off with the rifles in Mr Doherty's car were likely to commit. In lending his assistance to them in the achievement of their purpose he made himself an accessory to their attempt to commit that offence, and is accordingly guilty along with them.

Like the trial judge, we do not find it necessary to invoke the provisions of Articles 4, 5 and 6 of the 1988 Order. If it were necessary to do so, we should regard it as quite justified to draw the inferences which the trial judge drew from Hannigan's failure to respond at the various stages.

For the reasons which we have given, we do not consider that the conviction of the appellant Hannigan on counts 1 to 5 is unsafe or unsatisfactory, and we dismiss his appeal.

Brogan's appeal against conviction

The essence of Brogan's case was that although he was discovered hiding in the Ballycolman estate in highly suspicious circumstances, he had wished to conceal himself because of his involvement in other activities, which he was unwilling to specify. He had nothing to do with the attempted murders and the evidence when properly considered pointed away from his participation in them.

The material findings of the trial judge in relation to the Crown evidence in Brogan's case may be summarised as follows:

1. The 2 gunmen who fired at Corporal Stubbs in Bridge Street were the confederates of Hannigan, who had taken part in the hijacking of Mr Doherty's car. They fired from a firing position in a bedroom of 42 Bridge Street, where spent

cartridge cases were found which had been fired from the 2 AKM rifles subsequently recovered by the police in Ballycolman estate. Only 3 shots were fired, because the soldiers almost immediately returned fire, so the gunmen made a speedy escape.

2. The gunmen got into Mr Doherty's car, which a third man had waiting for their getaway at the rear of 42 Bridge Street. The car emerged from Chestnut Park into Bridge Street, and was driven in a southerly direction along Melmount Road.

3. A vehicle checkpoint was in operation in Beechmount Avenue, near to the junction with Melmount Road, made up of Lcpl Fryer and 3 riflemen of the Royal Green Jackets. When they heard shots and received a contact report by radio, the soldiers ran to the junction of Melmount Road. They saw the gunmen's blue Ford Sierra travelling fast towards them from the direction of the bridge.

4. Shots were fired at the soldiers by 1 or more occupants of the car, who intended to kill their targets. Some of the soldiers thought that the firing had commenced before the car reached them, but there can be no doubt that some at least were fired as the car was driven away from them along Melmount Road. Some 9 spent 7.62 mm calibre cases were found spread along the footpath of Melmount Road on the south side of the soldiers' position. One spent round of the same calibre was found in an ashtray in the car and another in the footwell in front of the rear passenger seat on the driver's side. 3 soldiers fired a total of at least 39 shots at the car, which sustained fairly considerable damage in consequence.

5. The car was then driven into Ballycolman Road, being under observation from an RAF helicopter, whose pilot brought the machine down to a height of 100 feet to obtain a better view. The car turned off Ballycolman Road into Ballycolman industrial estate, where it stopped in an open area. 3 men jumped out of the car and ran in a northerly direction past the training centre. At least 1 of these men fired a rifle at the helicopter, but did not register any hits. The pilot forthwith climbed to a height of 1500 feet.

6. The observer in the helicopter F/O Roberts saw 3 men jump out of the Ford Sierra car and run past the training centre. They were faced by a palisade type fence, which ran between the industrial estate and the housing estate. His view was adversely affected by the fact that the helicopter was climbing quickly, but he observed 2 of them on the far or northern side of the fence, which they must have negotiated. They were running towards houses in Iona Villas, which they entered. They remained in those houses and did not leave them during the next half hour before he left the area.

7. Police officers who came to the scene found a blue boiler suit inside a portacabin close to the fence, with a blue/black balaclava mask underneath it. On the northern side of the fence officers found 1 AKM rifle lying in the grass, with its magazine lying close by, containing 14 rounds. One black glove was lying close to

the rifle, and its match was on top of the fence. A second AKM rifle was found a few yards away, with an empty magazine attached.

8. The first rifle appeared to have been struck by a bullet, and the magazine release catch was missing. The catch was found in the front passenger side footwell of the Ford Sierra, and it gave the appearance of having been struck by a bullet. In the front passenger door pocket was found a pivot bar which could have come from that magazine release catch. The trial judge concluded that when the rifle was inside the car in the vicinity of the front passenger seat it was struck in the area of the magazine release catch by a bullet, which probably fragmented.

9. A pair of yellow gloves, with a further pair of black gloves inside them, was found near to the second rifle. A black plastic bag containing 15 rounds of live 7.62 mm ammunition and a pair of black gloves were found at the rear door of a shed belonging to 39 Mount Sion, a house immediately to the north of the palisade fence.

10. The Ballycolman estate was sealed off by a cordon until the afternoon of 14 August 1992. Many houses in the estate were searched while the cordon was in place, some several times. The house in which the McElwee family resided, 330 Ballycolman, was searched twice without result, then at 2.30 pm a thorough search of that house commenced. In a front bedroom Brogan was found concealed inside a divan bed, which had had a hole cut in the base to assist concealment. He was arrested and cautioned.

11. Brogan had some medical strapping on his right wrist, and on subsequent medical examination it was found that he had a fracture akin to a Colles fracture of that wrist. He had a bandage on his left thigh, and on examination was found to have multiple small wounds over his left thigh. On X-ray it was seen that multiple small metallic objects were embedded in the mid and upper left thigh, and another in his left forearm. These were fragments from a shattered bullet or an explosion.

Brogan gave evidence at trial, in the course of which he said that he did not really have any memory of what happened at the time of his arrest, because of the pain which he was suffering. He claimed that he was not involved in any shooting incidents at all. When his counsel asked him if he was able and willing to explain his injuries, he replied:

"Well, I am the same difficulty here as I had in Castlereagh. I got my injuries doing something else that was illegal, so I am in a catch 22 situation here. If I tell what happened or told what happened in Castlereagh I wouldn't be charged with these charges, I would be charged with something else. So I can't here answer and I couldn't in Castlereagh answer the questions."

He went on to say that he sustained his injuries about 11.30 or 11.45 am on 12 August 1992, contemporaneously with the shooting incidents. He refused

steadfastly to tell the court how he sustained them, though he implied that it might have been a small explosion, such as that caused by a detonator. The incident occurred somewhere in the top half of the Ballycolman estate. He said at one stage in his evidence:

"Well, I wasn't actually involved in an operation, I was involved in basically maintenance."

He said to the judge that the injury to his wrist occurred in the same incident as that to his thigh. He took refuge in the McElwee house in order to recuperate enough to arrange his escape across the border. At the conclusion of his evidence the following exchange took place between the trial judge and the appellant:

"SIR B. HUTTON, LCJ: What was your concern. Why did you not want the police to discover you in that house?

THE WITNESS: I didn't want them to discover me at all because they were raiding everywhere so I was sort of looking at the worst and saying they have probably found this other scene.

SIR B. HUTTON, LCJ: Why did you not want the police to discover you?

THE WITNESS: Because if they had arrested me, I think they would have connected me to the other scene and I would be here on equally serious charges -- well, may be not -- well, it would be as serious, so, I couldn't afford to."

The learned Lord Chief Justice rejected the appellant's evidence, which he said he was satisfied was a tissue of lies. He so held on 2 main grounds. The first was a conclusion from various facts that the appellant's story could not be true:

(i) The wounds sustained by the appellant led to the conclusion that he had been involved in the shooting incident in the Ford Sierra car. The wrist fracture was explicable by his rifle having been struck by a bullet or by his falling when making good his escape over the fence or through the estate. That wound was inconsistent with an injury from an explosion.

(ii) The coincidences involved in the appellant's account were unbelievable.

The trial judge also was satisfied from the appellant's demeanour as he gave evidence that he was lying.

We do not accept that the appellant can take refuge in the proposition that to reveal what he actually was doing when he received his wounds might incriminate him, where the evidence points towards his complicity in the offences with which he has

been charged. The evidence against him was circumstantial but compelling, that he was concealed in a house near where the gunmen escaping from the Ford Sierra were last seen, suffering from wounds which were regarded by the judge as consistent with being struck by fragments from a bullet fired at him by the soldiers. These facts, in the view of the trial judge, which we share, gave rise to a prima facie case against him. He cannot in our opinion seek to rebut that case by claiming that he was engaged in some other criminal activity without furnishing a more detailed explanation which the court may be willing to regard as sufficiently possible to give rise to a reasonable doubt about his guilt of the offences with which he is charged. Such explanation may well involve his admitting his commission of some other, perhaps less heinous, offence, but unless he is prepared to put forward that explanation he cannot claim that he has sufficiently set up the alternative explanation upon which he relies.

The main submission advanced by Mr Weir QC on behalf of the appellant Brogan was that the trial judge had failed to resolve satisfactorily a number of inconsistencies, and that in consequence this court could not accept the conviction based on his conclusions as safe and satisfactory. He reminded us of the remarks of Lord Lowry LCJ in R v Crossan [1987] 2 NIJB 72, 74:

"We adhere to the doctrine that real difficulties or inconsistencies or apparent badges of innocence ought to be noticed and convincingly disposed of in the judgment before a conviction can be regarded as wholly satisfactory. This is because the appellate court is thereby able to be reassured that the trial judge had a sound basis for his finding."

He attacked the reasoning of the trial judge on a number of points, which may be marshalled as follows:

1. (a) The Crown case as opened was that the appellant sustained the fractured wrist as a consequence of a bullet striking the rifle held by him in the front passenger seat of the car during the confrontation with Lcpl Fryers' patrol. The evidence given at the trial had discredited this theory.

(b) The appellant could not have scaled the fence with a fractured wrist and a thigh wound.

(c) He was limping when he was arrested, whereas the witnesses in the helicopter made no reference to seeing any of the men limping.

(d) The evidence of the police witness who deposed that he found a gap or hole in the fence was highly suspect.

2. No blood was found in the car or on the fence, whereas the appellant must have lost a lot of blood from his thigh and arm wounds.

3. There was no forensic evidence linking the appellant with the articles found by the police, which 1 would have expected to find if he had been 1 of the escaping gunmen.

4. There was evidence (adduced by consent on the appeal) which tended to show that there may have been an explosion of the nature suggested by the appellant.

We shall deal with these in turn.

1. The appellant's wounds

The appellant had a fracture of the distal end of the right radius and the styloid process of the right ulna, slightly impacted and minimally displaced. Dr McAuley, who was casualty officer at the Ulster Hospital on 14 August 1992, recorded it as a "Colles-type" fracture. With 2 more years of experience by the time of trial, however, he thought that it was more complex than the classic Colles fracture, which is commonly caused by hyperextension of the wrist joint. It could be caused in his opinion either by a fall on the outstretched hand or by a blow to the hand.

The evidence of Mr Wallace the forensic scientist and Dr Press the Deputy State Pathologist indicated that there were difficulties in the way of accepting the original Crown hypothesis that the appellant's wrist fracture, as well as the punctate wounds, had been the result of a bullet striking a rifle held by him while travelling in the Ford Sierra car. The trial judge took the view, however, that it was still a possible mechanism for the cause of the injury, and concluded that that did not point away from the correctness of the Crown case that Brogan was in the car and made his escape into Ballycolman.

He also considered another possibility, that he had sustained the injury by falling on his outstretched right hand while escaping through the estate, either by falling from the fence or in some other manner. This issue ties in with the point made by his counsel that he could not have climbed the fence if he had previously sustained a fractured wrist and a leg wound, and they require consideration together.

The fence, which is shown in several of the photographs, is constructed of substantial metal palisades each topped by a triple point. It was necessary for the men escaping from the Ford Sierra to negotiate this fence in order to obtain access to the Ballycolman housing estate from the industrial estate. The rifles and gloves were found close to the junction of a chain link fence which joined the palisade fence at right angles on the industrial estate side. It seems not unlikely that the men climbed on to the top of this fence and thence over the palisade fence.

We were informed by counsel that Constable RJ Cupples stated in the course of his evidence that a hole or gap had been found in the fence, although no reference is made to this in his statement. We did not have a transcript available of his evidence. There was 1 furnished of the evidence of Constable BI Hanna, who had also made no mention of such a gap in his statement. In his evidence in chief this witness stated that he climbed over the chain link fence where it joined the palisade fence. He said that he was able to make his way through a gap in the main metal fence into the area where the weapons were, because, as he said, "a local boy pointed out to a gap further down on the base in the metal fence." In cross-examination he said that although he was able to get through this gap his bulkier colleagues were unable to do so. He was attacked by counsel for the appellant on the ground that he had not mentioned this gap in his statement, but his answer was that at the time of making it he saw no relevance in it. Mr Weir criticised this evidence at the hearing of the appeal, suggesting that it was a deliberate addition to the Crown case, designed to deal with the difficulty which had become apparent in explaining how the appellant scaled the fence with a broken wrist.

The trial judge concluded that he was not satisfied beyond reasonable doubt that Constable Hanna's evidence about the gap was true, but thought that it probably was. He expressed the view, however, that desperation could have enabled a determined terrorist eager to avoid capture to climb the steel fence and run away, especially if his comrade helped him climb the fence. He also thought that it was a possibility that the appellant sustained his broken wrist in getting over the fence. We consider that this reasoning makes perfectly good sense. It is possible that if Brogan already had a broken wrist, he got through the gap underneath the palisade fence. For our part we think it perhaps more likely that he would have been helped over the palisade fence by his confederates at the point where the rifles and gloves were found. It seems equally possible that he in fact sustained his wrist fracture in the course of scaling the fence or after he had done so. Between the various possibilities there are several ways in which his having got over the fence into the Ballycolman housing estate is explicable, and accordingly we do not consider that that is sufficiently inconsistent with the Crown case that he was 1 of the gunmen to raise a reasonable doubt about the correctness of that case. We entirely agree with the conclusion of the trial judge that the 1 possibility which seems least acceptable is that which the appellant put forward, that he sustained it in some way at the same time as his punctate wounds caused by some kind of explosion. It could not have been caused by the explosion itself, for there were no metallic fragments in the vicinity of the fracture. One would have to suppose that the appellant was knocked or blown off balance by the explosion and fell, so sustaining the fracture. Since he has declined to describe the occurrence, we do not feel called upon to speculate about such a possibility. The facts accordingly remain in our judgment consistent with the main Crown case.

2. The absence of blood

No bloodstains from the appellant were found in the car. It was submitted that since he must have bled considerably from his wounds that tended to show that he was not in the car. As Miss Knowles the forensic scientist deposed, there was superficial bloodstaining on his shoes, though not enough for grouping, and on the trousers which he was wearing when apprehended. Constable Lewers the SOCO also referred to finding a bloodstained sheet in 330 Ballycolman.

The trial judge took the view that there was no indication of copious bleeding and that it could have been soaked up by the appellant's trousers without getting on to the car seats. Moreover, as Mr Foote pointed out in argument, if he was also wearing a boiler suit and the wound was to the front of his leg, it would not be particularly surprising if blood did not penetrate through to the car seats.

3. Lack of connecting forensic evidence

The appellant's counsel pointed out that nothing had been found to link him with the car. Mr Weir made the further point on the hearing of the appeal that not only were there no fibres from any of the masks found in Brogan's hair -- which could have been removed by careful washing or the passage of time -- but there was no evidence that any head hairs similar to his were found in any of the masks. The trial judge had not adverted to this in considering the issue, but it was in his submission a significant feature.

The trial judge, in our view correctly, declined to conclude that the absence of forensic evidence to connect Brogan with the car or the masks was a contrary factor sufficient to raise a doubt, and quoted a passage from this court's judgment in R v Meehan [1991] 6 NIJB 1, 38 which bears repetition:

"It is the individual experience of each member of this Court that cases occur where the guilt of an accused is established beyond any doubt by the clearest evidence, but physical traces or signs which we might have expected to be found linking him with the crime were not discovered in forensic examination."

4. Evidence of finding command wire

Mr Weir asked the court to admit further evidence, which had not been available to the defence at the time of trial. It was agreed between Crown counsel and himself that a fax sent by the Director of Public Prosecutions to the appellant's solicitors on 12 October 1995 could be so admitted and the court accordingly decided to admit the document as proof of its contents. The material part of the document reads as follows:

"RUC inform me that sometime between 2 pm and 5 pm on 13/8/92 a twinflex command wire was discovered dug into the ground off St Mary's Drive, Ballycolman, Strabane. The state of weeds etc growing above it gave an indication

that it had been in situ for 2-3 weeks or more. There was no firing pack or device attached and there was no indication that there had been an explosion in the area."

It was argued on behalf of the appellant that this tended to give substance to his story, in that it tends to support the proposition that there was another operation in progress at the time. In our opinion it gives no support to any suggestion that the appellant sustained his injuries in some other incident and took no part in the attempted murders the subject of this appeal. In the first place, there was no indication that any explosion had taken place in connection with the command wire itself. Indeed, the command wire was found in open ground, whereas Brogan said in evidence that he sustained his injuries in a house. Secondly, it does not follow that merely because a command wire was located in the vicinity at the time that tended to show that the appellant could be correct in suggesting that he was involved in some act connected with explosives in the course of which he sustained injuries. If the appellant did not choose to give specific evidence in support of the suggestion, he cannot, as we have said, claim that he has set up that case to an extent sufficient to throw doubt on the correctness of the circumstantial Crown case connecting him with the attempted murders.

We have given careful consideration to all the matters put forward by the appellant's counsel in support of their claim that the Crown case has not been sufficiently proved against him, but we remain satisfied that his conviction was safe and satisfactory. In our judgment the trial judge took proper cognisance of any matters which might be regarded as difficulties or inconsistencies in the Crown case and dealt with them satisfactorily. We therefore dismiss the appellant Brogan's appeal against conviction.

Brogan's appeal against sentence

Mr Weir submitted that the sentence of 30 years was the longest ever imposed in our courts for attempted murder and was manifestly excessive. He relied on the fact that no one was hit by any of the shots fired by the gunmen. He submitted that in present circumstances long deterrent sentences were no longer as necessary as before. When one took into account that it would not commence until 1999, when the original sentence would be completed, it was unjustifiably long.

It has to be borne in mind that Brogan was convicted in 1979 for another attempted murder on members of the security forces in Strabane, and that he re-offended within 3 years of his release in December 1989. The trial judge quite rightly described him as a determined and dangerous terrorist, who had demonstrated that he was and remained a menace.

We are unable to accept that the need for deterrent sentences has passed, and fully agree with the observations of the Lord Chief Justice on this point when passing

sentence in the present case, which this court has already quoted with approval in R v Cunningham (1995, unreported):

"Everyone in Northern Ireland is conscious of the immense benefits which have come and will continue to come to this community from the cessation of terrorist violence but it remains the duty of the courts to impose severe punishments for very grave crimes and to impose sentences which give effect to the requirements of retribution and deterrence."

We accordingly are of the view that the sentences passed on Brogan were correct in principle and were not manifestly excessive.

A sentencer dealing with a prisoner who has offended when on licence must observe the requirements of section 15 of the Northern Ireland (Emergency Provisions) Act 1991, and especially section 15(4)(c), which states:

"(4) The period for which a person is ordered under this section to be returned to prison or a young offenders centre -

....

(c) shall be served before, and be followed by, the sentence or term imposed for the scheduled offence and be disregarded in determining the appropriate length of that sentence or term."

In R v O'Neill [1992] 8 NIJB 17, 22 Hutton LCJ considered this provision and said:

"Accordingly the judge who orders the return to prison of a person who commits a scheduled offence whilst on licence is directed that in determining the sentence for the scheduled offence he shall disregard the period which the accused will have to serve in respect of the earlier sentence before the further sentence begins to run.

Therefore, having decided that 12 years' imprisonment was the appropriate sentence for the offence of possession of the rifle with intent, the learned trial judge was under a duty to impose that sentence and would have been acting in breach of section 23(4)(c) if he had decided to reduce the sentence of 12 years because the accused would have to serve the remainder of the 10 years sentence until 4 June 1994 before the 12 year sentence commenced to run."

As we have already indicated, we consider that a 30 year sentence was not excessive in the circumstances of this case. The statutory provision and the passage cited make it clear that it is improper to reduce that figure because Brogan must first serve out his original sentence. We dismiss his appeal against sentence.