BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No.21 of 2005

BETWEEN:

JERRY BURNHAM Appellant

AND

THE QUEEN Respondent

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. John Connell, Justice of Appeal, and the Hon. Justice Sherman Moore, Justice of Appeal

2006: 16 November
2007: 20 March; 13 April

Mr. Marlon Gordon for the appellant
Mr. Charles Leacock Q.C., Director of Public Prosecutions, and Mr. Elwood Watts for the respondent

REASONS FOR DECISION

Introduction

SIMMONS CJ: On 20 March 2007 we dismissed the appellant's appeal against sentence and promised to give our reasons later. We now do so. Between April 2002 and May 2003 the appellant embarked on a sophisticated and calculated campaign of detonating home-made bombs in public places causing injury to innocent members of the public. In the context of Barbados these were quite abnormal crimes. He pleaded Guilty to 9 counts of conduct endangering life or safety, contrary to s.19 of the Offences Against the Person Act, Cap.141, (the Act). Chandler J sentenced him to 18 years' imprisonment on 8 counts and 20 years' imprisonment on 1 count; the sentences run concurrently from 9 June 2005. The sole issue on appeal was whether those sentences were excessive.

The Facts

[2] The first offence occurred on 9 April 2002. About 10.00 p.m. Damian Carmichael, Noel DePeiza and Oscar Webster were sitting on a bench in Suttle Street near to the Ma Dear Bar. They were having a few drinks before going home. Unknown to them, about 11.30 a.m., the appellant had placed a home-made bomb containing nails under the bench. He had installed a timing device in the bomb and set it to explode at 10.02 p.m. It exploded as it was timed to do. Two of the men were seriously injured. In the hours between the setting and explosion of the bomb, the appellant caught a flight to Toronto. After arriving in Toronto someone told him that there had been an explosion in Bridgetown.

[3] The appellant returned to Barbados and resumed his callous and wicked behaviour in 2003. On 11 April 2003, Merlene Fredericks and Katrina Brathwaite were passengers in a minivan on Rockley Road, Christ Church. The appellant boarded the minivan and paid a fare. Then he disembarked a little further along the way. But he left an explosive device in the minivan. This bomb went off. The two ladies were injured. The appellant's explanation for his conduct was that he wanted to prove to himself that he "could not be caught by citizen or police and it proved to be right". He said he meant no harm to anyone.

[4] On 9 May 2003, he went to Nursery Drive in the City. There is a public telephone booth there. The appellant put another bomb with a timing device in a plastic bag and rested it next to the telephone booth. In addition to the timing device, he installed "tamper switches in case anyone moved it". According to his written confessional statement, if anyone moved the bomb, it would still explode. Matthew Gittens went to use the telephone. He saw the plastic bag. Believing that someone may have forgotten a parcel, he took up the bag and examined its contents. The bomb exploded and Gittens was injured. In answer to the charge for this offence, the appellant said that he knew that many people passed the area and it was "not intended to be moved by anyone".

[5] His final act of terror was on 22 May 2003. James Sealy, Glenville Young and Peter Leslie were in the Fairchild Street Bus Terminal waiting for buses to take them home. They sat on a bench. About 9.00 p.m. there was a loud explosion under the bench. A bomb containing nails had exploded. The men were seriously injured. When charged for this offence, the appellant said:

"Sometime early this year a man keep threatening me and I know he hang out by a bench in Fairchild Street, so I decided to make a bomb to blow up this man, 'cause I don't really deal with guns. I made a timer that can be set to any time and use one stick of dynamite cut in half placed side by side in the box packed with nails and a cap" - - that is a percussion cap. The bomb contained a clock and four size AA batteries. I pack the bomb with nails with the intent to injure this man who sits on the bench but did not intend to kill him. When I saw the man on the bench, I placed the bomb on the bench, sat on the bench and I had a scarf and dark shades on to hide my face from him. He did not realize it was me. I touch the side switch to arm the bomb and soon got up and walk away and went by the phone booth at the taxi stand, and watch with the hope that this man do not move before it go off. I had bomb set for 9.50 p.m. and I left the phone booth at around 9.30 hoping that this guy only got injured, but the wrong person got injured because the man I wanted must have moved and another person got hurt."

The Medical Evidence

[6] Given the unusual nature of the offences, it is hardly surprising that the appellant was medically examined. Dr. Ermine Belle, senior consultant psychiatrist at the Psychiatric Hospital, had prepared a medical report on the appellant on 8 May 2005. This report was considered by Chandler J at the trial. We too, paid careful attention to the report in the light of the strong submissions of Mr. Gordon on the appeal. It was his

contention that the trial judge did not give enough weight to “the mental disorder” of the appellant.
[7] Dr. Belle’s report records that in January 1990, the appellant referred himself to the Maurice Byer Polyclinic. He was diagnosed as having a paranoid disorder; he had low impulse control. He was treated over a six-month period and encouraged to seek admission to the Psychiatric Hospital. He was indeed admitted to that Hospital as a voluntary patient on 28 July 1990. He remained there until 20 August 1990. During this period of hospitalisation, the following main features of his personality were identified: (i) paranoia and persecution; (ii) prone to depression and expression of suicidal ideas; (iii) impulsive tendencies. He was treated for his paranoid disorder and sent home on trial leave. He defaulted. He never again presented to the Mental Hospital authorities until August 2003 as a result of a court order.
[8] This hospitalisation came after he had been charged for the various bombings. Dr. Belle’s report which contains an excerpt from a report of a Psychologist who assessed the appellant continues as follows:
“Mr. Burnham was diagnosed as suffering from a Paranoid Psychosis. Mr. Burnham spoke openly about the charge being brought against him. He expressed remorse and stated emphatically that he would not repeat the actions he was accused of.

Mr. Burnham admitted to lack of consequential thought. His actions were however not impulsive but thought through. On this admission there were no overt paranoid features, exhibited by this patient.

Mr. Burnham was referred to the Psychologist during this admission and the Psychological Assessment substantiated the previous diagnosis of Paranoid Disorder. Mr. Burnham’s assessment indicated that “he demonstrates a severe impairment of his reality testing abilities. This would be likely to lead him to making erroneous conclusions which could lead to ill-advised actions and faulty judgment.

It was indicated that persons with the degree of impaired reality testing demonstrated in his test results would have difficulty managing basic psychological aspects of everyday living without assistance or supervision.”

Mr. Burnham was readmitted to the Psychiatric Hospital in February 2004 for a short stay and since returning to Her Majesty’s Prison has been seen regularly in the Prison Clinic. Mr. Burnham’s prognosis is not considered good as he will need to submit to long term psychotherapeutic treatment as well as chemotherapy, to achieve improvement.

It is hoped that this can be achieved to remove the possibility of Mr. Burnham being a threat to himself or to others.”

[9] Mr. Gordon’s submission was that the appellant should be detained at the court’s pleasure at the Psychiatric Hospital. His contention was that the trial judge did not pay sufficient attention to the medical evidence. He cited s.38 of the Penal System Reform Act Cap. 139 which requires that where an offender is or appears to be mentally disordered, the court shall obtain and consider a medical report in addition to a pre-sentencing report before passing a custodial sentence. It should be noted, however, that failure to obtain and consider a medical report does not invalidate a custodial sentence – s.38(4). Counsel’s submission is unsustainable. The trial judge did consider Dr. Belle’s report as well as a most comprehensive social inquiry report prepared by Ms. Phyllis Beckles, Senior Probation Officer – see pp.24 and 25 of the record.
[10] On the other hand, the Director of Public Prosecutions did not see the appellant as a candidate for indeterminate custody. In his view, the planning, preparation and execution of the acts of terror, revealed a sane mind at work. At the close of the arguments, the appellant sought our permission to make a statement. We heard him. He expressed his remorse for the offences and the injuries to the innocent victims. Inter alia, he told us that, at the time of the offences, he knew what he was doing. He said that he was capable of working; is a responsible person; and was willing and able to contribute to society. On an assessment of all the facts this was a case fit for imprisonment rather than detention at the court’s pleasure. The only substantial issue was the length of the term of imprisonment. We consider this matter next.
Were the Sentences Excessive?
[11] In discussing an appropriate sentence in this case the correct starting point is the Act. The maximum sentence for the offences with which the appellant was charged is life imprisonment – s.19. Plainly, Parliament intended to mark down its abhorrence to these types of offence by legislating a very severe penalty. Detonation of bombs in public places is an evil of immense proportions. It is a phenomenon of the contemporary world disorder that engenders great fear among people, creates societal disequilibrium and puts innocent people at risk of serious injury or death. A sentence for such crimes of terror must necessarily be heavy. In England, conspiracies to commit similar offences attract sentences in the range of 20 to 35 years. See, for example, McGonagle and Heffernan [1996] Cr.App.R.(S) 90 and Martin [1999] 1 Cr.App.R.(S) 477. In Martin, Lord Bingham CJ cited a number of cases illustrative of the range.
[12] In R. v. McDonald [2002] 2 Cr.App.R.(S) 31, the facts were somewhat similar to those in the instant appeal save that there was only one offence and no one was injured as a result of the defendant’s conduct. McDonald prepared a sophisticated bomb packed with screws; it was capable of detonation by remote control. He placed the bomb under the driver’s seat of his intended victim’s van. The driver suspected that something was amiss and left the van. Nevertheless, McDonald still blew it up. He was sentenced to 10 years’ imprisonment.
[13] In our judgment, a sentence for the offences before the court must reflect the penal objectives of deterrence, incapacitation and protection of the public. These were cases where the appellant’s primary purpose was to cause serious injury to members of the public. His actions were a direct threat to human life and limb. They showed a high degree of recklessness as to the number of people who might be injured. They were deliberate, carefully planned and executed. Unlike the case of McDonald, this was not a single event. These were four offences committed over the course of a year with intent to injure.
[14] Lord Bingham CJ in Martin (supra) identified some of the factors relevant to these types of case at p.483:
“The appropriate sentence for any given offence will plainly depend on a large number of factors, which will include the likely result of any explosion or the target of any conspiracy, the role of the individual defendant, the nature, size and likely effect of any explosive device, the motivation of the defendant and, where death, injury or damage has been caused, the nature and extent of the death, injury and damage in question.”

[15] Putting aside for the moment the fact that Lord Bingham was dealing with a case of conspiracy, it nevertheless seems to us that some of the factors which he identified are also relevant to this case. The targets of the appellant’s conduct were innocent members of the public going about their daily business. The explosions were large and had the direct consequence of physical injury to several persons. They were not aimed at damaging property.
[16] In passing sentence the trial judge expressly said that he bore in mind the principle of proportionality embedded in the Penal System Reform Act (supra) and the possible reformation of the appellant, an electrician aged 39 years. The trial judge said that he took into account the Guilty plea and Dr. Belle’s report as well as the pre-sentencing report which detailed a man who had a very troubled childhood. These were matters

which went to mitigation. The aggravating features of the appellant's crimes require little elaboration. They were deliberately and carefully planned and executed with the wicked purpose of doing grave injury to innocent members of the public. Packing the bombs with nails and screws was a particularly despicable act. These were heinous offences.

[17] The trial judge was entitled to take a very serious view of the nature and extent of the offences and impose sentences consistent with the intention of the legislation. Damian Carmichael was more seriously injured than the other victims of the appellant's crimes; hence the sentence of 20 years for the offence involving Carmichael. In our view the sentences were neither wrong in principle nor manifestly excessive. For the reasons expressed in paras.[11] to [17], we affirmed the sentences and ordered that they run concurrently from 21 July 2005.

Postscript

[18] One final matter before we leave this case. During the argument, the Director of Public Prosecutions urged us not to vary the sentence of imprisonment to one of detention at the court's pleasure. He expressed concern about the security at the Psychiatric Hospital. He doubted that the public could be adequately protected from harm from the appellant. This was a most alarming and unusual observation. We promised to investigate the matter because of the implications for sentencing in Barbados and out of our own concern for the public interest.

[19] On 30 March 2007 we paid a visit to the Psychiatric Hospital to observe at first hand the arrangements for detention of violent, mentally disordered persons. We are bound to say that the Director's fears and concerns are not supported by a careful examination of the facilities and historical evidence. Persons such as the appellant are placed in the maximum security wing of the hospital. This area is well secured. The physical buildings are sturdy and well-appointed; there are sets of iron gates controlling access to and egress from the area; the area is enclosed within walls 20 feet high; and there is an adequate complement of security personnel. We were reminded by the Hospital Director, Mr. Tennyson Springer, that, in contradistinction to the situation at the former Glendairy Prison, there has not been a single escape from the maximum security area of the hospital in the last 30 years.

[20] In our judgment, there is no reason whatever why the judiciary and magistracy should not continue to order detention at the Psychiatric Hospital in appropriate cases.

Chief Justice

Justice of Appeal Justice of Appeal