

# The fight to save Seán Allen

By Marcus Bourke

On 28 February, 1921 Sean Allen of Bank Place in Tipperary town, a captain in the Third Tipperary Brigade, was executed by a firing squad in Cork jail. His ostensible crime was possession of a firearm; he also had on him an official IRA booklet entitled *Night Fighting*. He had been stopped on 19 January by a party of British soldiers outside Tipperary on the Galbally road, searched and arrested. His family had a shoe-repair business in St. Michael's Street.

From December 1920 Co. Tipperary, like most of Munster, was under martial law, proclaimed by the Lord Lieutenant, Lord French – he whom Dan Breen had narrowly missed assassinating near the Phoenix Park in Dublin in December 1919! Allen was taken to Victoria Barracks in Cork. There on 2 February he was tried by four military officers, found guilty and sentenced to death, his execution being fixed for 15 February, a week after the verdict.

Just as the family of Wolfe Tone had done back in 1798, that of Allen decided to contest the sentence in the courts. In the King's Bench Division of the High Court in Dublin his lawyers applied for an order to quash the decision of the military court. So anxious was Dublin Castle to uphold the law (if law it was, for which read on), that a distinguished five-person divisional bench was assembled to hear Allen's case. Led by the Lord Chief Justice of Ireland, Sir Thomas Molony, it also comprised Lord Justices Gibson, Gordon, Moore and and Samuels. The Government sent in the Attorney General of Ireland, Denis Henry KC, to lead for the Crown; with him was Henry Hanna, destined to become a High Court judge in the Irish Free State.

Allen's solicitor was the Sinn Fein activist and Jewish solicitor, Michael Noyk. He briefed a distinguished pair to appear for Allen – Tim Healy KC and Patrick Lynch KC. The latter, a supporter of John Redmond, had been defeated by de Valera in the famous Clare election of 1917. Healy had led the anti-Parnellite majority in the 1891 Split, and even in 1921 could have hardly guessed that he would soon become the first Governor-General of a partly independent



*A studio portrait of Seán Allen, loaned by his family in Tipperary. – Copyright Anne Allen, Tipperary.*



Irish State. In a memorable article in 1960 Conor Cruise O'Brien argued that Healy's campaign had "speeded the rot of parliamentarianism ... clearing the ground for a ... better Ireland" – but one that young Allen was not destined to see.<sup>1</sup>

For the Crown (in reality, the British forces) the case was straightforward. A state of war existed in Tipperary, and under martial law anybody caught waging war could be dealt with summarily by a military court, whose decision was not open to question in a civil court. In support of this case Gen. Sir Nevil Macready, Commander-in-Chief, swore that from July 1920 a state of open rebellion existed in Tipperary, amounting to guerrilla warfare.

In a remarkable tribute to his enemy in the field, Macready swore that the Irish Volunteers force was "a disciplined military force modelled on the British army and divided into brigades, battalions and companies". Since July 1920, he continued, in the martial law area of Munster (four counties and two cities) 6 British officers had been killed, 16 wounded, 5 missing, with (of other ranks) 24 dead, 81 wounded and one missing. The RIC had lost 62 dead and 30 wounded, making a total of 204 casualties (92 fatal) inflicted on Crown forces in seven months.

For Allen Tim Healy pulled out all the legal stops. His client was not, according to English law, a soldier; yet he had been tried under a military code, and this after 19 days in custody before any charge was brought. There was no proof that he was a member of the IRA, the body the Crown claimed was responsible for the guerrilla war. As to executing Allen by firing squad (the order of the court), a military court could only shoot persons found in "the heat of affray" in an insurrection. But Allen had not been engaged in war when arrested; his father's house had been burned down by Crown forces and Allen himself hounded out of his native town by the local police, to defend himself against whom he carried a gun for his own protection.

After a three-day hearing the court reserved judgement, which it gave 12 days later on 24 February. In an unanimous 13-page judgement Chief Justice Molony made four findings. First, a state of war *did* exist when and where Allen was arrested. Secondly, in such circumstances the High Court had no power to question anything done by the military authorities. Thirdly (and vitally for Allen) the military court was entitled to act despite the fact that ordinary courts were also still operating. This had been established in a case in 1902 brought by a man named Marais, arising out of the Boer War.<sup>2</sup>

Fourthly, Molony made a remarkable finding. The court that had tried Allen was not a court at all, but in reality merely a committee formed to carry out powers assumed by the Government in wartime. It derived its authority from the very existence of armed rebellion. It had a duty to quell the rebellion, and could do whatever it regarded as necessary in the circumstances. His case lost, Allen was executed by firing squad four days later.

In its fourth and crucial finding the Irish High Court followed the English Privy Council decision in the 1902 Marais case. Yet it could have done otherwise, because that decision did not bind it. Indeed, since the Marais decision arose out of the unprecedented situation in South Africa in the Boer War, a strong case existed for not following it here. Furthermore, in another 1902 case a leading Irish judge had stated that he would not have followed Marais: "I cannot accept that if there was rebellion in part of the country the entire country is to be subjected to ... the forces of the Crown".<sup>3</sup>

However, it was Sean Allen's misfortune that one of the judges in his case, Lord Justice Gordon, had actually acted in the Marais case, and it seems likely that he persuaded his colleagues of the similarity with Allen's case. Neither can it have helped Allen that his lawyers mistakenly believed that he had been tried by a proper court-martial rather than by a so-called "military court". The distinction between the two was vital to the case made for Allen by Tim Healy, who seems to have been at fault on this point. The truth is that, once it was decided to



follow the Marais case, Allen was on a loser. As Chief Justice Molony frankly commented, the court that tried Allen was not a court at all. Martial law simply amounted to the old Common Law right of the Government to repeal force by force.

Much more important, it is hard to avoid the conclusion that a political decision had been reached on how to deal with the IRA. As John Kelly pointed out (in the 1984 edition of his monumental work *The Irish Constitution*, the last before he died), a notable feature of the Allen case was that an Act (The Restoration of Order in Ireland Act, 1920) was then in force specifically passed to deal with the conditions of the time. However, it did not allow for the death penalty for Allen's offence, so another way had to be found to "remove" Allen from the war.

General Macready knew full well what he was doing. In his memoirs he admitted that "had that event [the Truce of 1921] not materialised ... it was my intention to use these courts [the so-called military ones] alone for all cases of men taken in arms".<sup>4</sup> It is against this background surely that Molony, with an input from his colleague Gordon who was familiar with the Marais case, took the decision he did.

It remains to make but two further points arising out of Sean Allen's unsuccessful attempt to escape the firing squad. First, it is ironic that, but for Wolfe Tone's apparent (but unproven) suicide in 1798, it is likely that a favourable decision in his case would have been followed in Allen's. It is equally ironic, to use no stronger adjective, that it was the Allen decision in turn that the judiciary of the new Irish Free State followed in 1923 in the case of Erskine Childers. He too was to be shot by a firing squad (in his case, composed of Irish soldiers) before his appeal could be heard, after having been tried (like Allen) in secret by military officers – for having (like Allen) been caught in possession of a firearm, in his case a gift from Michael Collins.<sup>5</sup>

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#### FOOTNOTES

1. O'Brien, C.C., ed.: *The Shaping of Modern Ireland* (London, 1960), chapter entitled "Timothy Michael Healy" at p. 173.
2. Ex parte Marais, 1902 *Appeal Cases*, pp 109-116.
3. Rainsford v. Browne, 2 *New Irish Jurist Reports*, p. 179: see Palles, Chief Baron, at p. 185.
4. Macready, Nevil: *Annals of an Active Life* (London, 1924), Vol. ii, p. 518.
5. Rex (Childers) v. Adjutant General of the Provisional Forces, 1923 *Irish Reports*, Vol. 1, p. 5.

follow the *Morris* case, Allen was on a loser. As Chief Justice Molony frankly commented, the court that tried Allen was not a court at all. *Morris* law simply amounted to the old Common Law right of the Government to repeal force by force.

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General MacCarthy knew full well what he was doing. In his memoirs he admitted that "had that event [the Trial of 1931] not materialised ... it was my intention to use these courts [the so-called military courts] alone for all cases of men taken in arms". It is against this background surely that Molony, with an input from his colleague Gordon who was familiar with the *Morris* case, took the decision he did.

It remains to make but two further points arising out of Sean Allen's unsuccessful attempt to escape the firing squad. First, it is ironic that but for Wolfe Tone's apparent (but unproven) suicide in 1798, it is likely that a favourable decision in his case would have been followed in turn by Allen's. It is equally ironic to use no stronger adjective, that it was the Allen decision in turn that the judiciary of the new Irish Free State followed in 1923 in the case of *Enríque Gilgler*. He was to be shot by a firing squad (in his case, composed of Irish soldiers) before his appeal could be heard, after having been tried (like Allen) in secret by military officers – for having (like Allen) been caught in possession of a firearm, in his case a gift from Michael Collins.

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## FOOTNOTES

1. O'Brien, C.C., ed., *The Story of Michael Morris* (London, 1960), chapter entitled "Timothy Michael Morris" at p. 173.
2. *Ex parte Morris*, 1931 Irish Reports, pp. 109-110.
3. *Ex parte Morris*, 1931 Irish Reports, p. 179; see *Ex parte Morris*, 1931 Irish Reports, p. 179.
4. *Ex parte Morris*, 1931 Irish Reports, Vol. 2, p. 179.
5. *Ex parte Morris*, 1931 Irish Reports, Vol. 2, p. 179.
6. *Ex parte Morris*, 1931 Irish Reports, Vol. 2, p. 179.