Neutral Citation no. [2007] NICA 23

Ref: **HIGF5829**

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

Delivered: **28/6/07**

IN THE COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ABBAS BOUTRAB
also known as YOCEF DJAFARI,
also known as ABBAS FAWWAZ,
also known as BRAHMIN ABAOU

Before: Kerr LCJ, Campbell LJ and Higgins LJ

HIGGINS LJ

[1] At Belfast Crown Court before Weatherup J, sitting without a jury, Abbas Boutrab, also known variously as Yocef Djafari, Abbas Fawwaz and Brahmin Abaou, (the appellant) was convicted of Counts 1, 2 and 5 on Bill of Indictment 572/04. He was acquitted by direction of the Learned Trial Judge of Counts 3 and 4.

[2] Count 1 alleged possession of articles for a purpose connected with terrorism, contrary to Section 57(1) of the Terrorism Act 2000. The particulars of offence were that

> Abbas Boutrab (AKA Yocef Djafari, AKA Abbas Fawwaz, AKA Brahmin Abaoui), on 14 April 2003 in the County Court Division of Belfast had certain articles, namely 25 computer discs which contained text, photographs and diagrams in his possession in circumstances giving rise to a reasonable suspicion that the said items were in his possession for a purpose connected with the commission, preparation or instigation of an act of terrorism.

[3] Count 2 alleged collecting information likely to be useful to terrorists contrary to Section 58(1)(a) of the Terrorism Act 2000. The particulars of offence were that

> Abbas Boutrab (AKA Yocef Djafari, AKA Abbas Fawwaz, AKA Brahmin Abaoui), on a date unknown between the 7th day of October 2002 and 15th day of April 2003, in the County Court Division of Belfast, collected or made a record of information namely 25 computer discs of a kind likely to be useful to a person committing or preparing an act of terrorism.

[4] On Count 5 he was charged with having custody or control of a false passport in the name of Fabio Parenti contrary to Section 5(2) of the Forgery and Counterfeiting Act 1981. The appellant does not appeal against his conviction on Count 5, but appeals against his conviction on Counts 1 and 2 on grounds which will be referred to later in this judgment.

[5] On 8 April 2003 members of the Police Service of Northern Ireland attached to the Foreign National Unit visited a flat at Whitehouse Court, Newtownabbey, County Antrim. They spoke to the occupier of Flat 2E, the appellant, who identified himself as Abbas Boutrab, an Algerian national who was seeking asylum in the United Kingdom. Police were suspicious of the identity of the appellant and further enquiries led them to believe that he was wanted by Garda in the Republic of Ireland under the name of Yocef Djafari, an Algerian national who had applied for asylum in the Republic of Ireland. A search warrant was obtained under the Immigration Act 1971 and on 14 April 2003 the same members of the Foreign National Unit together with Immigration Officers and other police conducted a search of the flat 2E. Twenty floppy discs and 5 compact discs (the subject of Counts 1 and 2) were found in a chest of drawers beside the bed. Other items including a mobile phone, the false passport in the name of Fabio Parenti, an identification card that included a photograph, an Italian cash card and Inland Revenue documents were seized. Also seized were a Belfast City library card in the name of Abbas Boutrab, two notebooks and various handwritten notes, a London underground ticket and three passport sized photographs. The appellant was arrested under Section 24 of the Immigration Act 1971 as he was suspected of being in the United Kingdom illegally and was taken to Antrim Road Police Station. On 11 June 2003 a further search was undertaken at the appellant's flat. Further items were seized. These included a vehicle and engine manual in English, a Jiujitsu combat manual in English, various handwritten notes, a personal cassette player and various items of tools and equipment. On 3 November 2003 at HMP Maghaberry the appellant was arrested under Section 41 of the Terrorism Act 2000. From 3 November 2003 to 9 November 2003 he was interviewed in the presence of his solicitor and an

interpreter. On 9 November 2003 he was charged with various offences to which he replied "I am not guilty".

[6] The substance of the case relied on by the prosecution on Counts 1 and 2 was that the contents of the floppy discs had been downloaded by the appellant from a computer in the Belfast Central library and that they contained information in connection with the making and use of explosives for attacks on aircraft and the manufacture of silencers for firearms. The prosecution alleged that in all the circumstances this indicated a terrorist purpose. Examination of the 20 floppy discs and the 5 compact discs revealed a number of document files written in Arabic one of which was password protected. These files, identified as MAS2 to MAS8, were extracted and compiled on a compact disc and translated into English. The English versions were identified as MA2 to MA8 and were summarised. The findings of the Learned Trial Judge relating to these files were set out at paragraph 9 of his judgment. He said –

> "The translator's summary of MAS2 stated that it consisted of a document on how to make improvised detonators which can be admitted undetected on to an aircraft with the intention to blow it up. The English text in MA2 bears the title "In the Name of God the Merciful the Compassionate" and under the heading "Making Detonators" sets out a number of photographs with related instructions. The first photograph appears to show the inner parts of a camera, with a component known as a capacitor removed from its housing. As the evidence was to establish, a capacitor is an electrical component that stores energy. The text refers to the capacitor as an item found within the flash circuit of photographic cameras. The text states that such an instrument, which can be utilised to make an electric blasting detonator, can be accessed on to aircraft without suspicion. There then follows photographs and text which describe the removal of the capacitor from the circuit using a soldering iron, the removal of the paper filling from the capacitor, the filling of the capacitor with three substances required to make a detonator (booster – initiator – igniter) and the resealing of the capacitator. There then follows detailed notes and instructions relating to a team of people carrying items on to an aircraft, with the items to be assembled and detonated by one of their number in the toilet of the aircraft. The document concludes "This operation is to be carried out in

> African airports or poor countries who do not care or where there are no modern explosive detectors and it is God who grants success."

[7] The summary of MAS3 stated that it consisted of a document showing a diagram of a silencer with details on how it operated. The English text in MA3 contains an explanatory figure for the internal components of a silencer involving an outer tube, an inner tube, the use of freeze plugs fixed by screws and rubber pieces obtained from rubber door stoppers.

[8] The summary of MAS4 stated that it consisted of Part I of a document on how to make improvised firearm silencers illustrated by a diagram. The English text in MA4 is headed "The Manufacturer of Silencers Part I" and sets out in photographs and text an aluminium tube fixed to a vice, the measuring and marking and drilling of holes in the tube and the use of freeze plugs and rubber parts from doorstoppers.

[9] The summary of MAS5 stated that it consisted of Part II of a document on how to make improvised firearm silencers illustrated by diagrams. The English text in MA5 has the heading "This is Part II of the Manufacture of Silencers, which is Supplementary to Part I" and shows the fitting of the rubber pieces from the doorstoppers and the use of the freeze plugs. This includes the advice that, as plugs must be bored carefully in the middle and this can only be done with a lathe to determine the middle of the plug, three plugs should be taken to a turner with the excuse that the user had a data press that was being repaired. Further, it was advised that a number of turners should be visited so as not to arouse suspicion and that lying was permissible as there was a state of war. The comment is added that those who do not like what the author is saying should be hit over the head with the silencer to wake them up, and as Colin Powell had called the army invading Iraq the occupying army "what are you waiting for."

[10] The summary of MAS6 stated that it consisted of a document on how to make improvised silencers for MI6 and Kalashnikov rifles illustrated by diagrams. The English text in MA6 contains diagrams and text illustrating the fitting of a silencer to an M16 or a Kalashnikov.

[11] The summary of MAS7 stated that it consisted of a document containing a continuation on how to make improvised silencers. The English text in MA7 contains further directions on the use of freeze plugs in the making of a silencer.

[12] The summary of MAS8 stated that it consisted of a document containing what seemed to be a course or manual on the manufacture of explosives, which included mercury fulminate, lead azide, silver azide, petric acid, tetryl, cyclonite, RDX, TNT, C4, C5, hexolite, TNT plus tetryl, a plastic

explosive, a number of explosive mixtures, fuses and electric and non-electric detonators. The English text in MA8 states that it contains "A Course in the Manufacture of Explosives. For the Fighter Group Champions of Truth. Until the Will of God be Done. Prepared by Ibnul-Islam Seeking God's Forgiveness". The cover sheet states "In the name of the God the Merciful the Compassionate. May blessing and peace be upon the leader of Mujahideen. The Islamic Information Centre presents Equipment Of Those Longing For The Lord of the Worlds". The text sets out methods of preparation for initiating substances and boosting substances and explosive substances and notes on fuses and detonators.

[13] A Principal Scientific Officer at Forensic Science Northern Ireland examined the documents MA2 to MA8 and concluded that the information contained within them was clear, understandable, easy to follow and viable. At paragraph 31 of his judgment the Learned Trial Judge referred to the evidence of the Principal Scientific Officer that –

> Using the information a range of explosives could be produced from relatively readily available materials and some of the more sensitive explosives could be used in the construction of improvised detonators.

[14] Tests were carried out to verify the viability of the information contained in the files. These established that an explosive device could be created and that a workable silencer could be manufactured by following the instructions contained in the files. The Learned Trial Judge expressed himself as 'satisfied as to the viability of the information contained in the documents produced from the discs'.

[15] The documents relating to the silencer were examined by a Senior Scientific Officer at Forensic Science Northern Ireland. He stated that, in general, the instructions were capable of being followed without difficulty, except for slight changes in the methodology and materials, the meaning of which had probably been corrupted in translation. Using the documents a home-made silencer was produced at the laboratory. This was tested using a Colt M16 and resulted in significant sound reduction.

[16] The tools and equipment found in the appellant's flat included a drill, an oil can, ear defenders, a stethoscope, a magnet and magnetic holders, circlip pliers, a tyre pressure gauge, a circuit tester pen, a tool roll of small files, a plastic holder containing screwdriver heads and dies, a bench vice, an adjustable jubilee clip, a clutch plate puller and an adjustable bolt. Comparisons were made between the tools found and items referred to in the documents extracted from the floppy discs. The cassette player was examined for association between the cassette player and some of the tools and equipment, but none was found.

[17] The cassette player, which was damaged, was examined by a Senior Scientific Officer at Forensic Science Northern Ireland. It was found to have been opened and the back plastic casing separated from the front plastic casing and the electronic circuit board removed. The electronic circuit board was broken into four pieces and four components had been removed from the circuit board, namely radial type capacitors which were probably electrolyte capacitors. The capacitors were cylindrical and approximately 5 to 15 millimetres in length and 4 to 10 millimetres diameter with two leads protruding from the base and had values of 220 micro-farads, 100 micro-farads and 47 micro-farads. They were described as being the same type of capacitor as those referred to in MA2.

[18] The defendant did not give evidence, but challenged several aspects of the prosecution case, in particular, the provenance of various items in the documents extracted from the computer discs. However the Learned Trial Judge was satisfied that the items produced came from the appellant's flat and that the documents produced originated in the computer discs. The Learned Trial Judge then analysed the ingredients of the offences alleged in Sections 57(1) and 58(1)(a). He commenced his conclusions at paragraph 85 and said –

> "[85] For the purposes of the two offences under the Terrorism Act I am satisfied that the discs produced to the Court were those recovered from the defendant's flat and the contents of the discs produced to the Court represented the contents at the time the discs were recovered from the defendant's flat.
>
> [86] For the purposes of the charge under section 57 I am satisfied on the first issue that the defendant was in possession of the discs. I proceed to consider whether I am satisfied on the second issue that the defendant was in possession for a terrorist purpose. The prosecution rely on the circumstances discussed above to establish the defendant's terrorist purpose, namely the contents of the documents produced from the discs, the viability of the contents, the possession of the tools and equipment, the use of aliases, the contents of the documents recovered from the defendant's flat, the contents of the mobile phones, and the contents of the interviews.
>
> [87] The contents of the documents produced from the discs contained not merely a menu for the

manufacture of explosives or silencers. Counsel for the defendant objected to the contents of the documents being treated as evidence of terrorist purpose. There are passages in the documents that provide a religious and political and terrorist context for the preparation and use of the explosives and the silencers. I am satisfied that the contents of the discs included material that would advance a terrorist purpose, namely the manufacture and use of an explosive device and the construction of a silencer for a firearm. I am satisfied from the contents of the discs that the material on the discs was intended by the authors to be used for terrorist purposes, and that it advocated such terrorism in the name of Islam, although I do not regard the evident purpose of the authors as evidence of the purpose of the reader. I do however regard the contents as evidence of terrorist purpose.

[88] Access to the contents was limited as the defendant did not have a computer in his flat. He stated that he had only skimmed the documents at the time of downloading and there was no evidence of the defendant having access to the documents at other times or of having printed copies of the documents. Further it is the case that the part of the contents of the documents dealing with explosives promotes suicide bombing and the part dealing with the use of silencers involves a means of attack that would contemplate the escape of the perpetrator. Terrorism may take many forms and I do not find it to be a contraindication of terrorist purpose that there is possession of material that includes such different projects. In addition the contents relating to the explosives material give instructions that the attack be carried out in Africa or where there are no modern detectors at airports, but terrorist explosives attacks need not be limited to aircraft.

[89] I am satisfied as to the viability of the information contained in the documents produced from the discs. The tests carried out on the basis of the instructions establish that an explosive device can be created and that a workable silencer can be

manufactured by following the instructions. That there were details not included in the instructions and that the inexperienced operative might not have completed the manufacture of the explosives and the silencer to the standard achieved in the forensic tests does not diminish the viability of the instructions. However viability is not evidence of terrorist purpose.

[90] The tools and equipment acquired by the defendant coincided in some respects with the equipment referred to in the instructions contained in the documents produced from the discs. Many items acquired by the defendant would have had a use for DIY, and some instances of DIY undertaken by the defendant were confirmed, or they would have had a use for a motor mechanic. I am not satisfied that the defendant's possession of the items recovered in itself is evidence of terrorist purpose.

[91] There were many items of equipment and ingredients required by the instructions that had not been acquired by the defendant, and there was no item recovered that demonstrated the completion of the preparatory stages in the construction of an explosive device or a silencer.

[92] The cassette player recovered from the defendant had four capacitors missing. The defendant denied that he had removed those parts and claimed that he had found the broken Walkman and retained it to use other unspecified parts. A capacitor is a key ingredient of the instructions on the manufacture of the explosive device. It is beyond the bounds of credibility that the defendant should have possession of instructions on the manufacture of an explosive device with the use of a capacitor from a camera and also that the defendant should find a cassette player from which capacitors had already been removed. I am satisfied that this cannot be coincidence and that the defendant acquired the cassette player and removed the capacitors.

> [93] The defendant used a number of aliases. I am satisfied that he applied for asylum under different names in Holland and the Republic of Ireland and Northern Ireland. He acquired and made use of false identity documents in Holland and the Republic of Ireland and in Northern Ireland. I am satisfied that the defendant, known as Abbas Boutrab, used the four aliases discussed above. He claimed through his solicitor that he used the false identity documents in order to facilitate a drifter lifestyle. I am not satisfied that he voluntarily lived a drifter lifestyle. He moved from one country to another when he was liable to be detained by the authorities. In those circumstances a new identity would have facilitated his movement from one country to another. I am not satisfied that the use of aliases in itself is evidence of terrorist purpose."

[19] In relation to the count alleging possession of articles for a purpose connected with terrorism contrary to Section 57(1) of the Terrorism Act 2000 (Count 1) the Learned Trial Judge concluded at paragraph 104 –

> "[104] Taking account of the matters discussed above, I am satisfied on the basis of the contents of the documents produced from the discs recovered from the defendant, and of the recovery of the cassette player with the missing capacitors, that the defendant possession of the discs was for a terrorist purpose. I am satisfied that he had acquired a cassette player and removed the capacitors. I reject his explanation for the absence of the capacitors from the cassette player. I am satisfied that his possession of the material was not out of curiosity but was for a terrorist purpose under section 57(1)."

[20] In relation to the count alleging collecting information likely to be useful to terrorists contrary to Section 58(1)(a) of the Terrorism Act 2000 (Count 2) the Learned Trial Judge concluded at paragraph 109 –

> "[109] For the purposes of the charge under section 58(1)(a) I am satisfied that the defendant collected the information on the discs and that it was likely to be useful to a terrorist. As I am satisfied that the defendant had possession of the information for a

terrorist purpose I am satisfied that he had no reasonable excuse for collecting the information for the purposes of section 58(1)(a)."

[21] Accordingly the appellant was found guilty of both Counts 1 and 2 in the indictment.

[22] The grounds of appeal, amended at hearing, were –

"1. That the conviction of the Defendant on the charge of possession of articles, namely 25 computer discs, for a purpose connected with terrorism, contrary to section 57(1) of the Terrorism Act 2000 is unsafe and unsatisfactory for the following reasons:

a) while the Appellant accepts that computer discs were removed from his premises by Police on 14th April 2003, the absence of forensic integrity in relation to the control and movement of the discs thereafter by the Police Service of Northern Ireland was such that the Learned Trial Judge was wrong to conclude (as he did at paragraph 85 of his Judgment) that he was satisfied beyond a reasonable doubt that computer discs presented to the Court by the Crown at trial were the computer discs of the Appellant and that their content as presented in evidence was the content of the discs as found in the Appellant's flat on 14th April 2003.

b) In the alternative, if the Learned Trial Judge was correct in finding on the issue of possession of the computer discs, the Learned Trial Judge was wrong to conclude that the Appellant had possession of those discs, and their contents, for a purpose connected with terrorism (see paragraph 104 of the Judgment). In particular:

i) the Learned Trial Judge was wrong to conclude that the evidence in relation to the absence of capacitors from a cassette player recovered from the Appellant's premises was reliable;

ii) the Learned Trial Judge was wrong to conclude that the Appellant has removed any capacitors from the cassette player. There was no evidence before the Court that this was so;

iii) even if the findings of the Learned Trial Judge at (i) and (ii) above were appropriate findings of fact, the Learned Trial Judge was wrong to conclude that missing capacitors from a cassette player was evidence of a terrorist purpose of the Appellant;

iv) the finding of the Learned Trial Judge implicit from paragraph 92 of his Judgment, that there was a terrorist significance associated with the removal of the capacitors from a cassette player, was wholly against the weight of the evidence, and in particular the evidence of Ian William Fulton, Forensic Scientist;

c) If the Court is satisfied that the evidence in relation to possession was reliable, the Learned Trial Judge was wrong to conclude that there was other evidence supportive of the Appellant's guilt as set out in paragraphs 105 to 108 of his Judgment. In particular:

i) while it is accepted that a lie may be relied on as evidence supportive of guilt, there was no evidence before the Court from which the Learned Trial Judge could ever have come to the conclusion that the Appellant had lied during his interview with the Police about the circumstances by which he came to have possession of the cassette player or its condition at the time that he took possession of it;

ii) there was no evidence to support the finding of the Court that the Appellant in any way tampered with the cassette player or removed any part thereof;

iii) the Learned Trial Judge was wrong to conclude that the evidence of the Appellant's possession of certain tools and equipment was in any way supportive of the Appellant's guilt under section 57(1) of the Terrorism Act 2000;

iv) the Learned Trial Judge was wrong to conclude that the use of aliases by the Appellant was in any way supportive of the Appellant's guilt under

section 57(1) having regard to the evidence of the Immigration Police witnesses called on behalf of the Crown and Nathalie Caleyron, a witness called on behalf of the Appellant.

v) the Learned Trial Judge was wrong to conclude that any lie told by the Appellant during the course of interview in relation to his use of aliases previously was in any way supportive of the Appellant's guilt under section 57(1).

d) The conviction of the Appellant was against the weight of the evidence.

2. That the Conviction of the Appellant of collecting information likely to be of use to terrorists contrary to section 58(1) of the Terrorism Act 2000 was unsafe and unsatisfactory for the following reasons:

a) the Learned Trial Judge was wrong to conclude that the Appellant had collected information forming the content of the discs and had stored the information on the computer discs presented to the Court by the Crown;

b) In the alternative, if the Learned Trial Judge was correct in holding that the Appellant had collected information and stored same on the discs presented to the Court, the Learned Trial Judge was wrong to conclude that the Crown had established beyond a reasonable doubt that the Appellant had collected the information contained on the discs without reasonable excuse;

c) The Conviction of the Appellant was against the weight of the evidence.

3. The conviction of the Appellant on the offence of being in possession of articles in circumstances giving rise to a reasonable suspicion that the items were in his possession for a purpose connected with the commission, preparation or instigation of an act of terrorism contrary to section 57(1) of the Terrorism Act 2000 is unsafe for the following reasons:

a) given the nature of the criminality alleged in respect of the conviction under Section 57(1) and the nature of the criminality alleged in respect of the conviction under Section 58(1)(a) the Learned Trial Judge should have required to prosecutor to elect between the offences and/ or should not have convicted the Appellant in respect of both offences

b) and in any event given the nature of the criminality alleged the charge under section 58(1)(a) was the more appropriate

4. The conviction of the Appellant on the offence of collecting information likely to be of use to a person committing or preparing an act of terrorism contrary to section 58(1)(a) of the Terrorism Act 2000 is unsafe for the following reason :

a) the Learned Trial Judge erred in deciding the question of whether the information was likely to be of use to terrorists solely by reference to the viability of the information , and in thereby deciding that the information of a kind likely to be of use to any terrorist

b) the Learned Trial Judge erred in determining that the Appellant had a relevant 'terrorist purpose' in that he failed to distinguish between the relevant elements of Section 58 as against Section 57 of the Terrorism Act 2000."

[23] At the commencement of the appeal Mr B Macdonald QC who, with Mr Hutton, appeared on behalf of the appellant, stated that it was not disputed that the appellant was in possession of the articles, the subject of Count 1 contrary to section 57(1), nor was it disputed that he collected the information, the subject of Count 2 contrary to Section 58(1). In this event he acknowledged that paragraphs 1(a) and 2(a) of the Grounds of Appeal were no longer relevant. The grounds on which the appeal was brought were therefore summarised by Mr Macdonald as –

i. that the Learned Trial Judge should have withdrawn the Count alleging an offence contrary to section 57 as an offence contrary to section 58 was the correct charge;
ii. that the Learned Trial Judge adopted the wrong approach to section 58;

iii. that the prosecution failed to prove a terrorist purpose; and

iv. that the prosecution had failed to disprove a reasonable excuse in relation to count 2 and that the Learned Trial Judge wrongly relied on the matters that were or were held to be proved namely that the appellant was in possession of the computer discs for a terrorist purpose as negativing reasonable excuse.

i. Section 57 or Section 58.

[24] The twenty five computer discs represented the subject matter of both Count 1 contrary to Section 57(1) and Count 2 contrary to Section 58(1). It was submitted by Mr Macdonald QC that an offence is committed under Section 57(1) where a person has in his possession articles in circumstances which give rise to a reasonable suspicion etc., whereas a person commits an offence under Section 58(1) where he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism. Thus, he submitted, Section 57 is concerned with articles and Section 58 with information. The twenty five computer discs contained information and it was the nature of the information stored in them that, allegedly, gave them a sinister nature, not their description as computer discs. Thus the appropriate charge related to the information contained in them and not their character as computer discs and therefore the appropriate charge was an offence contrary to Section 58(1) and not Section 57(1). It was submitted the Learned Trial Judge should have required the prosecution to elect which of the two charges to pursue. Such an approach was endorsed in *R. v M, Z, I, R, and B* 2007 EWCA 218. In that case the defendants had been charged with offences contrary to section 58(1). Following submissions made at committal proceedings the prosecution added offences contrary to Section 57(1) in respect of the same subject matter. At their trial preliminary rulings were sought from the Recorder of London that the assumed facts did not constitute an offence against Section 57(1). The Recorder ruled against that submission but gave leave to appeal before the trial commenced. The question for the Court of Appeal was – 'Is data electronically stored on compact discs or computer hard drives capable of being an 'article' for the purposes of Section 57'. Mr Macdonald relied on paragraph 36 of the judgment of the Court where Hooper LJ said: –

> "It is apparent from the wording of the two sections and their juxtaposition that Parliament has laid down a different regime for documents and records and intended so to do. For the purposes of section 58 possession of a document of a kind likely to be useful to a person "instigating" an act of terrorism is not enough (unless, of course,

> the document is also of a kind likely to be useful to a person "committing or preparing" an act of terrorism"). Parliament has not chosen to use the "diffusely drawn terms" of section 57 (to adopt the words of Mr Edis in describing section 57) when the making or possession of documents or records is in issue. Mr Edis rightly submitted that legislation can and often does create overlapping offences. But Parliament could not have intended that the regime for documents and records in section 58 could be sidestepped by using section 57 and describing them as articles. Section 58 is not redundant."

[25] Mr Macdonald QC also relied on the linguistic canon of construction *generalibus specialia derogant* as explained in Bennion on Statutory Interpretation 4th Edition at page 998. The learned author states –

> Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision. …It is presumed that the general words are intended to give way to the particular.

[26] Mr Kerr QC, who with Mr Magill appeared on behalf of the Crown, submitted that the literal and plain interpretation of Section 57 should be applied. He submitted that if the subject matter was an article (within Section 57) and if it could be shown that possession of it was in suspicious circumstances and for a purpose connected with the commission, preparation or instigation of an act of terrorism, then the offence was made out. He noted the concession made by prosecuting counsel in *R. v M and Others* that section 57 had never been used to ground a charge for the making or possession of documents. He submitted that this was not the experience in this jurisdiction and referred to *R. v O'Hagan* [2004] NICC 17, in which the defendant was found guilty of an offence contrary to Section 57 where the article was a computer which had been accessed for information from the hard drive and where the information recovered from the hard drive was the essence of the charge.

[27] Section 57 of the Terrorism Act 200 provides –

> "57. - (1) A person commits an offence if he possesses an article in circumstances which give rise to a

reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(3) In proceedings for an offence under this section, if it is proved that an article-

(a) was on any premises at the same time as the accused, or

(b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,

the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it."

[28] Section 58 of the Terrorism Act 2000 provides -

"58. - (1) A person commits an offence if-

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or

(b) he possesses a document or record containing information of that kind.

(2) In this section "record" includes a photographic or electronic record.

(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession."

[29] Sections 57 and 58 of the Terrorism Act create different offences covering acts preparatory to the commission of an act of terrorism. Section 57 is concerned with possession in circumstances that give rise to a reasonable

suspicion that it is for a purpose connected with the commission, preparation or instigation of an act of terrorism. Section 58 creates several offences relating to information. These include collecting information, making a record of information, and possessing a document or record containing information. In each instance the information must be of a kind likely to be useful to a person committing or preparing an act of terrorism. A person may collect information but not necessarily record it. A Section 57 offence involves possession by a person in suspicious circumstances where his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. A person possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism may not possess it in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. There is no reason to suppose that in creating this distinction Parliament intended that a person possessing an electronic record containing information likely to be useful to a terrorist could only be charged under section 58 or, if charged under section 57, could not also be charged under section 58. Therefore there was no reason for the Learned Trial Judge to require the prosecution to select the charge on which to proceed. Nor was there any reason that the judge was required to convict on one only but not both.

[30] Following the hearing of this appeal counsel brought to the attention of the court a decision of the Court of Appeal in England and Wales in *R.v Rowe 2007 EWCA Crim 635* and leave was granted for further submissions to be made. This was an appeal against two convictions for possession of articles contrary to section 57 of the Terrorism Act 2000. The article the possession of which was the subject of the first count was a W.H. Smith notebook containing manuscript notes that included instructions on how to assemble and operate a mortar. The article the possession of which was the subject of the second count was a substitution code, found in a video case. This code set out a list that included articles or places, each bearing a code that consisted of a particular model of mobile phone. The articles included components of explosives. The places included the type of venue susceptible to terrorist bombing, such as 'airport' and 'army bases'. The list also included 'Target 1, Target 2, Target 3. There was a second list of countries, 'Bosnia, Poland, Romania, Bulgaria, Albania, Czechoslovakia, Hungary and Yugoslavia', against each of which was an English county, by way of code. The appellant accepted that he was in possession of each item and the notes in the notebook were in his handwriting, as were the codes. The prosecution case was that each item was held for a terrorist purpose. The appellant gave innocent explanations for the possession of each. It was submitted that the appellant should have been prosecuted under section 58 as the mortar notes and substitution codes were not articles for the purposes of section 57. This led to a consideration of the decision in *R. v M & others*. In giving the judgment of the Court the LCJ referred to the House of Lords decision in *R. v Kebeline 2000*

AC 326 in which charges under section 16A of the Prevention of Terrorism Act were under consideration (possession of articles for a purpose connected with the commission, preparation or instigation of acts of terrorism). The charges related to possession of a quantity of documents, cards, money and books for terrorism purposes. Reference was also made to section 16B which related to collecting or recording information or possession of records or documents of a nature likely to be useful to terrorists in planning or carrying out acts of terrorism. At page 336 paragraph 31 Lord Bingham said this about section 16A and 16B –

> "Both sections, it is clear, have grown as a response to Irish terrorism, although the application of those sections has now been extended. They are directed not to unlawful possession of explosives or firearms, both of which may be the subject of prosecution without resort to these sections, but to the possession of articles and items of information innocent in themselves but capable of forming part of the paraphernalia or operational intelligence of the terrorist."

[31] In *R.v Rowe* the LCJ commented on this stating -

> 32. We would make a number of points:
> i) This was an example of a predecessor to section 57 of the 2000 Act being used in relation to the possession of documents and records. We would add that apart from the present case there are a number of other instances of prosecutions being brought under section 57 in relation to documents or records.
> ii) It did not occur to anyone in Kebilene that a charge under section 16A could not be brought in respect of documents.
> iii) In re-enacting equivalent provisions in the 2000 Act Parliament can be assumed to have intended that the sections should have the scope that their predecessors had been accepted to have.

He concluded that important assumptions had been made in *R. v M & Others* which were wrong and that the court was not bound by that decision. In relation to sections 57 and 58 he said –

34. There is undoubtedly an overlap between section 57 and 58 , but it is not correct to suggest that if documents and records constitute articles for the purpose of section 57, 58 is almost superfluous. Collecting information, which falls within section 58 alone, may well not involve making a record of the information. Equally a person who possesses information likely to be useful to a person committing or preparing an act of terrorism may well not be in possession of it for a purpose connected with the commission, preparation or instigation of an act of terrorism.

35. Sections 57 and 58 are indeed dealing with different aspects of activities relating to terrorism. Section 57 is dealing with possessing articles for the purpose of terrorist acts. Section 58 is dealing with collecting or holding information that is of a kind likely to be useful to those involved in acts of terrorism. Section 57 includes a specific intention, section 58 does not.

36 These differences between the two sections are rational features of a statute whose aims include the prohibition of different types of support for and involvement, both direct and indirect, in terrorism. There is no basis for the conclusion that Parliament intended to have a completely separate regime for documents and records from that which applies to other articles.
37 For these reasons we have concluded that the decision in *R v M,Z,I,R & B* was based on false assumptions and false analysis and that it was wrong. Does the guidance to be derived from Simpson indicate that we should not follow it?

38 There is an important difference between this case and Simpson . The court has certified a point of law of general public importance. We, if asked, would do the same. If we felt compelled to follow *R v M,Z,I,R & B* we would also, if asked, give permission to appeal to the House of Lords. We have considered whether this is the appropriate course. We have decided that it is not. This is not a case, such as Simpson , where the predominant reason for not following a previous decision was that it was manifestly unsound. In this case the unsatisfactory features of the procedure that we have described above have had the result, not merely that the court reached a decision that is manifestly unsound, but that it did so in circumstances that were truly 'per incuriam'.

39 If we follow *R v M,Z,I,R &B* the result will be that both that case and a number of other prosecutions under section 57 will be dealt with on what we believe will ultimately be

demonstrated to be a false footing. We do not consider that this would be acceptable. Accordingly we propose to treat the decision as wrongly reached per incuriam and to reject the new ground of appeal, which has in the event effectively not been pursued.

[32] The submissions made on behalf of the appellant were -

1. The ratio in *R v M & others* is to be preferred

2. It is not a principled basis on which to decide a point of statutory construction to rely on the fact that there may have been previous prosecutions on a particular provision, applied in a particular way, when the point raised was neither considered nor argued.

3. The Court of Appeal in *R v Rowe* (at para 32) is attempting to apply the Barras principle (see Bennion, page 512) in an inappropriate manner – this is not a situation where Parliament could be intended to have known that the meaning of the word 'article' had been pronounced upon or settled by the courts.

4. The Court of Appeal in *Rowe* in any event states that the reasoning in R v M & others is not manifestly unsound

5. Neither authority deals expressly with the doctrine of generalibus specialia derogant. The Appellant points again to Bennion, page 998-9, where it is stated as follows :

> "Generalibus specialia derogant – Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision. This is expressed in the maxim generalibus specialia derogant (special provisions override general ones). Acts very often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation; it is presumed that the general words are intended to give way to the particular. This is because the more detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it."

Neither Court either in *Rowe* or *M* proceeded upon the basis of such presumption, however it is submitted that this Honourable Court should so proceed. Acting upon such a presumption the Court should only find that presumption displaced or rebutted if there are sufficient features within the Act that point away from the presumption – it is submitted that there are no such features.

[33] The Court of Appeal in *R. v Rowe* was entitled to approach the decision in *R. v M & Others* in this way. It accords with the submissions of Mr Kerr to which we have referred and with the experience in this jurisdiction in previous cases. There is no basis upon which the decision in *R. v, M & Others* should be preferred.

ii. The Learned Trial Judge adopted the wrong approach to section 58.

[34] It was submitted by Mr Macdonald QC that the conditions that must be met before an offence under section 58 could be established are stricter in that the intent required for the offence under section 58 is more specific. He described the intent required for an offence contrary to section 57 as 'looser'. Whereas for an offence contrary to section 57 the purpose need only be connected with the commission, preparation and instigation of an act of terrorism, an offence contrary to section 58 is only committed where the information is of a kind likely to be useful to a person actually committing or preparing an act of terrorism. He submitted that the court had to decide what was the sinister purpose for which the information was collected, recorded or possessed in a document or record and whether it was within the wording of section 58. The test was not simply an objective one - whether the information was of a kind likely to be useful to a person committing or preparing an act of terrorism. There must be evidence of sinister purpose or intent. It was submitted the Learned Trial Judge had failed to find a sinister or criminal purpose or intent, although it was acknowledged that he could have done so. In support of this approach to section 58 he relied on two paragraphs in *R. v O'Hagan*, supra, in which Morgan J stated –

> "[32] There has been some controversy about the proper interpretation of this provision. The prosecution say that it is sufficient to prove collection and/or possession and that the information is likely to be useful to any terrorist. The defence contend that it is necessary to prove that the information is to be made available to a person contemplating the commission or preparation of an act of terrorism since other wise

> there is no likelihood of the information being useful to such a person.
>
> [33] The prosecution approach can be supported by a literal interpretation of the section but I am not inclined to accept it. A burglar who holds the plans of a house in contemplation of stealing from it does not commit an offence under s.58 of the 2000 Act. If the owner of the house happens to be the chief of police for the area he still does not in my view commit that offence whether he knows that fact or not. The same information held by another person may readily give rise to the inference that an offence under s.58 has been committed. In each case one has to look to all the surrounding circumstances to examine the purpose to which the information is to be put. That is the mischief at which the section is aimed."

[35] Mr Macdonald argued that this approach was to be preferred to that adopted by the Court of Appeal in *R v Lorenc* 1988 NI 96 and on which the Crown relied. For the prosecution Mr Kerr submitted that section 58 should be interpreted literally and that the test was an objective one. 'Was the accused in possession of a document or record containing information and was that information of a kind likely to be useful to a person committing or preparing an act of terrorism?' It was submitted that this approach was reinforced by the existence of the defence of reasonable excuse.

[36] In *R v Lorenc* the appellant was convicted of the unlawful possession of three army manuals contrary to section 22(1)(c) of the Northern Ireland (Emergency Provisions) Act 1978. Section 22 provided –

> "S.22. (1) No person shall, without lawful authority or reasonable excuse (the proof of which lies on him):
>
> (a) collect, record, publish, communicate or attempt to elicit any information with respect to any person to whom this paragraph applies which is of such a nature as is likely to be useful to terrorists;
>
> (b) collect or record any information which is of such a nature as is likely to be useful to terrorists in planning or carrying out any act of violence; or
>
> (c) have in his possession any record of or document containing any such information as is mentioned in paragraph (a) or (b) above."

[37] Section 22 is similar in its terms to section 58 of the Terrorism Act 2000. In *R v Lorenc* the manuals contained details relating to the use of rifles, booby traps and incendiaries and it was alleged they contained information which was of such a nature as was likely to be useful to terrorists in planning or carrying out any acts of terrorism. The defendant appealed on the ground, inter alia, that the manuals did not contain "information" within the meaning of section 22(1)(c) of the 1978 Act. It was submitted that "information" in this context was the same as "intelligence" and connoted something likely or intended to be used in planning or carrying out an act of violence. In rejecting that submission Lord Lowry LCJ said -

> "Subsection 1(c) forbids a person to "have in his possession any record of or document containing" the same kind of information, that is, information "of such a nature as is likely to be useful to terrorists in planning or carrying out any act of violence." We have no doubt that the contents of the army manuals were of such a nature as to be likely to be useful to terrorists in planning or carrying out acts of violence."

[38] It is clear that Lord Lowry LCJ did not consider that any evidence of criminal or sinister purpose was necessary, subject always to the statutory defence. That the statutory defence was then a legal one and now an evidential one is of no significance for the purposes of this appeal. To require the prosecution to prove some fact beyond collection, recording or possession of information and that such information is likely to be useful to terrorists, is to require more that the wording of the section requires. The approach endorsed in *R v Lorenc* is clearly correct and should be followed. It would appear that Morgan J was not referred to *R v Lorenc*.

iii. <u>The prosecution failed to prove 'terrorist purpose' as required by section 57.</u>

[39] A person commits an offence contrary to section 57 where he has in his possession an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. Section 57 (2) provides that it is a defence for a person charged with an offence under section 57 to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism. Section 57(2) is to be read in conjunction with section 118, the relevant paragraphs of which provide –

> "118. - (1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.

> (2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

[40] The Learned Trial Judge found that the defence had raised an issue with respect to non terrorist purpose and that the appellant had discharged the evidential burden. The legal burden then passed to the prosecution to prove beyond reasonable doubt that the appellant's possession of the computer discs was for a terrorist purpose. The Learned Trial Judge then considered the various circumstances relied upon by the prosecution to establish the appellant's terrorist purpose. He rejected a number of them on the basis that they were not evidence of terrorist purpose – for example, the contents of the documents recovered from the appellant's flat and the use of aliases. However he regarded the contents of the documents produced from the computer discs as evidence of terrorist purpose, although he did not regard 'the evident purpose of the authors as evidence of the purpose of the reader' (see paragraph 87). He then considered the cassette player recovered from the appellant's flat with the four capacitors missing. He expressed his views on this at paragraph 92 in these terms –

> "[92] The cassette player recovered from the defendant had four capacitors missing. The defendant denied that he had removed those parts and claimed that he had found the broken Walkman and retained it to use other unspecified parts. A capacitor is a key ingredient of the instructions on the manufacture of the explosive device. It is beyond the bounds of credibility that the defendant should have possession of instructions on the manufacture of an explosive device with the use of a capacitor from a camera and also that the defendant should find a cassette player from which capacitors had already been removed. I am satisfied that this cannot be coincidence and that the defendant acquired the cassette player and removed the capacitors."

[41] At paragraph 104 he set out his conclusion on this aspect of the charge contrary to section 57 –

> "[104] Taking account of the matters discussed above, I am satisfied on the basis of the contents of the documents produced from the discs recovered from the defendant, and of the recovery of the cassette

> player with the missing capacitors, that the defendant possession of the discs was for a terrorist purpose. I am satisfied that he had acquired a cassette player and removed the capacitors. I reject his explanation for the absence of the capacitors from the cassette player. I am satisfied that his possession of the material was not out of curiosity but was for a terrorist purpose under section 57(1)."

[42] Having concluded that the appellant was in possession of the computer discs for a terrorist purpose the Learned Trial Judge then considered in paragraphs 105 to 108 other evidence supportive of the appellant's guilt.

[43] It was submitted that the Learned Trial Judge's reliance on these two matters (the documents recovered and the finding of the recorder with the capacitors missing) was erroneous and against the weight of the evidence. Several matters were highlighted. There was no direct evidence that the appellant had removed any capacitors from the cassette recorder or that any capacitors missing from the recorder could be used in any explosive device. In addition there was no evidence that the capacitors missing from the recorder were the relevant type or size or were capable of being used in any explosive device. Many of the items identified in the computer documents as required for assembling an explosive device were not found in his flat. Furthermore no computer was found in the appellant's flat nor was there any forensic evidence to indicate the presence of explosives or weapons there. Generally speaking what was found was so limited that it provided an insufficient basis upon which to be satisfied that it was no coincidence that the appellant was in possession of instructions on the manufacture of an explosive device with the use of a capacitor from a camera and a cassette player from which capacitors had already been removed. It was submitted that the conviction on count 1 was thereby unsafe. Mr Kerr countered this submission with the claim that the contents of the documents and the absence of the capacitors in the cassette provided sufficient evidence for the ultimate finding by the Learned Trial Judge.

[44] In a case of circumstantial evidence it is important to concentrate on the matters which are proved. The matters relied on by Mr Macdonald QC are not facts proved as such which point in a particular direction. They reflect the absence of evidence and may be characterised as neutral factors. They should be considered but in a case that depends on circumstantial evidence a judge or jury must concentrate on the facts that are proved and determine whether those facts point beyond a reasonable doubt to one conclusion only. The Learned Trial Judge concluded that the evidence in this case, namely the contents of the documents (to which reference will be made later) and the absence of the capacitors from the cassette proved the elements of the offence

under section 57. That was a conclusion he was entitled to reach on the evidence presented.

iv. that the prosecution had failed to disprove a reasonable excuse in relation to count 2 and that the Learned Trial Judge wrongly relied on the matters that were or were held to be proved namely that the appellant was in possession of the computer discs for a terrorist purpose as negativing reasonable excuse.

[45] In relation to count 2 contrary to section 58 the Learned Trial Judge said at paragraph 83 –

> "[83] The defendant is charged under section 58(1)(a) which comprises two parts, namely, that he (for the purposes of the present case) "collects" information and further that the information is of a kind likely to be useful to a person committing or preparing an act of terrorism, which I shall abbreviate to describe as a terrorist. I have found that the discs produced in Court were those found on the defendant's premises, and the contents appearing in the documents produced in Court were present on the discs when they were seized in the defendant's flat. Counsel for the defendant accepted that in that event the defendant collected the information and further that it was of a kind likely to be useful to a terrorist. I am satisfied that the defendant collected the information. For information to be of a kind likely to be useful to a terrorist it must be viable, in that it is capable of being used to advance an act of terrorism. I am satisfied that the information was likely to be useful to a terrorist."

[46] He then said that the appellant in his interviews with the police had raised the issue of reasonable excuse. He then turned to Count 2 contrary to section 58 and said at paragraph 109 –

> "[109] For the purposes of the charge under section 58(1)(a) I am satisfied that the defendant collected the information on the discs and that it was likely to be useful to a terrorist. As I am satisfied that the defendant had possession of the information for a

> terrorist purpose I am satisfied that he had no reasonable excuse for collecting the information for the purposes of section 58(1)(a)."

[47] It was the appellant's case that as there was insufficient evidence to prove a terrorist purpose for Count 1 contrary to section 57, there was no basis for the Learned Trial Judge's finding that he had no reasonable excuse for collecting the information, the subject of Count 2 contrary to section 58. In addition it was submitted that the finding that the material was likely to be of use to 'any' terrorist was insufficient. The Learned Trial Judge should have considered the specific use to which the material would be put. Furthermore he had failed to find expressly that the information would be likely to be useful to a person committing or preparing, rather than simply instigating, an act of terrorism. Therefore it was submitted the conviction on Count 2 was unsafe.

[48] It was submitted by Mr Kerr QC on behalf of the prosecution that, for the purposes of section 57, it must be proved that a person was in possession of the relevant article for a purpose connected with the commission, preparation or instigation of an act of terrorism, not that he was the person who would commit the act. The Learned Trial Judge had carefully considered all the evidence and his analysis of the facts found could not be criticised and he was entitled to arrive at the conclusions he made. There was sufficient evidence for the Judge to conclude that the appellant was in possession of the computer discs for a 'terrorist purpose' and that he had no reasonable excuse for collecting or recording the information contained in them. It was submitted that the Learned Trial Judge did not have to consider the specific use to which the material could be put and in regard to the bomb and the silencer this was self evident as were the details that would assist in the preparation of a terrorist act. He referred to various relevant documentary exhibits taken from the computer discs. These included -

> Exhibit 65 - relating to the making of detonators using a capacitor found in photographic cameras that can be taken onto aeroplanes without arousing suspicion and used to construct an explosive device.
>
> Exhibit 67 - which is a scale drawing of the internal components of a silencer.
>
> Exhibits 69 and 71 - which explain how silencers are manufactured. On page 2 of Exhibit 71 there are instructions on how not to rouse suspicion and on page 7 instructions on the type of tubing to use for continuous firing.
>
> Exhibit 77 - a written course on making explosives taken from the 'largest Salafist Jihad encyclopaedia on CD'.

Conclusions

[49] In a very careful and well reasoned judgment the Learned Trial Judge correctly approached the charges contrary to sections 57 and 58 of the Terrorism Act 2000. Offences contrary to both sections can be committed in a variety of ways and the sections do overlap. The computer discs are clearly articles within section 57 and there was more than sufficient evidence for the judge's finding that the appellant had them in his possession in circumstances which gave rise to a reasonable suspicion that his possession was for a purpose connected with the commission preparation or instigation of an act of terrorism. Equally the appellant collected or made a record on 25 computer discs of information of a kind likely to be useful to a person committing or preparing an act of terrorism. The nature of the information was self evidently of such a kind and the judge's conclusions cannot be faulted. There is no basis upon which to conclude that the verdicts are unsafe and the appeal against conviction is dismissed.