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IN THE CROWN COURT OF NORTHERN IRELAND

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THE QUEEN

v

DAMIEN FENNELL

_____

RULING

_____

MILLER J

Introduction

[1] The defendant was indicted on three counts, being:

(a) Encouragement of terrorism, contrary to s. 1(2) of the Terrorism Act 2006

(b) Inviting support for a proscribed organisation, contrary to s. 12(1) of the Terrorism Act 2000; and

(c) Addressing a meeting for the purpose of encouraging support for a proscribed organisation, contrary to s. 12(3) of the Terrorism Act 2000

[2] The trial was heard before me sitting without a jury at Belfast Crown Court on 19 September 2017. Thereafter detailed written submissions were lodged on behalf of the Crown and defence respectively on 25 September and 1 October. I am indebted to Mr Russell for the Crown and Ms Quinlivan QC (with Mr Sayers) for the defence for their comprehensive analysis of both the statutory provisions and the interpretation of the impugned words of the defendant's speech within the context of the relevant legal framework.

[3] Before moving to a consideration of the arguments I intend to briefly set out the background to the case, most of which is not the subject of dispute as between the parties.

[4] On Sunday 5 April 2015 an Easter Commemoration was held by the Irish Republican Prisoner Welfare Association ("I.R.P.W.A.") at St. Coleman's Cemetery in Lurgan. The commemoration was attended by a group including children estimated to number approximately 70 people. The event was video-recorded and subsequently posted on two internet sites, namely YouTube (entitled IRPWA Lurgan Easter Commemoration) and the IRPWA Facebook site. Police obtained copies of this footage on Monday 13 April 2015 by accessing both sites and downloading the content. The court was informed that shortly thereafter the postings were removed from both sites. The downloaded footage was shown in full to the court at the trial.

[5] On the footage a female introduces a male to read the Proclamation; a second male then reads a 'role of honour' of the deceased Republicans in the cemetery for whom the commemoration is held with the third and main speaker being introduced as Dee Fennell from Ardoyne.

[6] The defendant can be observed delivering his speech from paper which he holds in his hands and appears to have with him from the beginning of the footage. Damien Fennell speaks for approximately 8 minutes and 22 seconds. A transcript of these proceedings including Fennell's speech was prepared and attached to the court papers as Exhibit 2. For ease of reference a copy is also attached to this ruling.

[7] A search was conducted of the defendant's known address at 24 Duneden Park, Belfast on the morning of 20 April 2015. During the search one handwritten page of the speech was found behind the microwave in the kitchen. The page has number 5 written on it, but no other pages were recovered. It is apparent from the video that Fennell had a number of pages in front of him from which he read though the precise number cannot be definitively ascertained. Amongst other items seized during this search were some Easter Commemoration invitations, a matter to which Ms Quinlivan QC draws reference in her written submissions and to which I shall return in due course.

[8] Fennell was arrested pursuant to s. 41 of the Terrorism Act 2000 ("the 2000 Act") in the living room of his home at approximately 10.00am on 20 April. He made no reply after caution. He was then conveyed to Antrim Serious Crime Suite where his detention was authorised. He was interviewed that afternoon first between 4.17pm and 4.31pm, during which his solicitor, Mr Corrigan, read a statement on the defendant's behalf. This was transcribed immediately thereafter and the content was read at the trial and was referred to in the written submissions by both Crown and defence. Three further interviews were conducted that evening commencing at 5.37pm and concluding at 9.00pm. The defendant gave "no comment" responses to each question. He was subsequently released pending charge.

[9] The defendant's statement is as follows:

> "On Sunday 5th April 2015 I gave a speech in Lurgan to commemorate the 1916 Easter Rising and the fallen volunteers of subsequent generations while giving a detailed analysis of the existing political context in Ireland and drawing upon history I gave a personal opinion as to why both armed struggle and the IRA exist. At no stage did I encourage anyone to join any organisation, at no stage did I encourage anyone to engage in violence against anyone. While rightly publicly rebuking Sinn Fein for welcoming a commander in chief of the British Armed Forces to Ireland. I did not encourage violence in stating my legitimate anti-monarchist views in the course of my speech I legitimately encouraged those gathered to become actively involved in republicanism as opposed to simply being supporters of republicanism. I used a historical quote in an analogist way to do so; I did not encourage anyone to join any armed organisation. In the course of republican/loyalist and state commemorations and re-enactments quotations are used legitimately. I believed my arrest is politically motivated and is a prime example of the PSNI being driven by the agenda put forward by unionist elected members representatives and loyalist paramilitaries."

[10] At the hearing of the trial on 19 September evidence was either read by agreement or where witnesses were called they were, with one exception not subject to cross-examination. D/Con Jackson was not asked any questions regarding the central issues arising from the proffered charges but merely with regard to the defendant's record of previous convictions. The defendant did not give evidence on his own behalf, due warning having been given in advance as to the inferences that might be drawn from his failure to do so. No character evidence was called in support of his case.

[11] There are three discrete issues that can be dealt with at this stage before I move to consider the substantive issues in the trial.

(a) Defence counsel at an earlier preliminary hearing argued that the proceedings were a nullity by virtue of a failure to observe the requirement imposed by section 117(2A)(b) of the Terrorism Act 2000 and by section 19(2)(b) of the Terrorism Act 2006 ("the 2006 Act"), each of which requires that if it appears to the Director of Public Prosecutions that the offence has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent may be given only with the permission of the Advocate General for

Northern Ireland. No such permission was obtained in the present case. His Honour Judge Kerr QC delivered a ruling on 8 June 2016 where he rejected this application. The issue was raised again in summary form at the trial and I rejected the argument and endorsed the findings and conclusion of HHJ Kerr. I affirm that decision for the purposes of this ruling.

(b) The second issue relates to whether the defendant is entitled to a modified good character direction. He has convictions for obstructing lawful activity in a public place on 12 July 2010; failing to stop for police on 28 July 2016; and taking part in an un-notified procession on 30 September 2016. Ms Quinlivan QC cited the following passages from Archbold (2017) (para 4-486 citing *R v Hunter* [2015] EWCA 631) that:

> "… where a defendant has previous convictions or cautions which are old, minor and have no relevance to the charge, the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character, by assessing all the known circumstances of the offence(s) and the offender and then deciding what fairness to all dictates, ensuring that only those defendants who merit an 'effective good character' direction are afforded one … if he is to be so treated then the judge must give both limbs of the [Vye] direction."

Having given due consideration to the submissions made in the context of the known facts I am not satisfied that the defendant is entitled to a modified good character direction in this case.

(c) The third and final issue relates to whether the defendant having failed to give evidence, the court is entitled to draw an adverse inference from such failure. The defence submission on this point is succinctly put in the following terms:

> "Here, the primary concern of the court is to identify the meaning to be given to the speech on objective analysis, and the court has access both to the speech and (in so far as relevant) to the defendant's statement to police addressing that speech. In those circumstances, the court is well equipped to undertake the exercise required of it without evidence from the defendant, and no adverse inference is properly to be drawn."

With respect this does not accurately reflect the approach to be taken to the exercise of Article 4 of the Criminal Justice (NI) Order 1988. The defendant by his refusal to give evidence has effectively closed the door to any cross-examination as to his intentions when making the speech or with regard to his

> explanation of his intentions as set out in his statement read at interview. Whilst it is true that the court must examine with care the words spoken within the context of their setting and first determine whether the Crown has established sufficient evidence to call for an answer from him, thereafter there is no basis for concluding that it would be wrong in law to then draw such an adverse inference against him by virtue of his failure to subject himself to such cross-examination.

[12] The right to freedom of expression is enshrined within article 10 of the European Convention and it is common case as between the parties that these rights are engaged within the context of this case. Whilst it is acknowledged on the defendant's behalf that these rights are not absolute it is clear that any limitation placed by statute must be such that is both proportionate and necessary. The material parts of article 10 provide that:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority…
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime…"

In considering whether the restrictions imposed by statute are compatible with article 10 it must be shown that the conditions set out in 10(2) are met in *Sunday Times v United Kingdom* (1979) EHRR 245, the following statement was made by the ECtHR in regard to the effective meaning of *"prescribed by law"*:

> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication, that is adequate in the circumstances, of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be on appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

[14] As for what is, in fact, *"necessary in a Democratic Society"* the ECtHR has construed this to imply *"a pressing social need"* and hence there is a requirement even where the aim of the legislation is to protect a legitimate goal, for the interference to

be proportionate. Thus, any analysis of the defendant's words must be made within the context of the surrounding circumstances, the provisions of the Terrorism legislation and his Convention rights as enshrined in article 10.

[15] I turn now to consider the charges and the evidence brought in support of each one.

[16] The first count is that of encouraging terrorism, contrary to s. 1 of the 2000 Act. Mr Russell helpfully sets out the genesis of this measure at Para 20 (b) through to para 23. There can be little doubt that this was a measure passed in some haste in the aftermath of the London bombings of 7 July 2005 and with the aim of enabling the UK to ratify the Council of Europe Convention on the Prevention of Terrorism where as a signatory to the Convention the UK had undertaken to "adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, when committed unlawfully and intentionally, as a criminal offence under its domestic law." As with other measures enacted in circumstances where sufficient time is not taken for full and proper scrutiny, there can be little doubt that aspects of the resulting statute were left somewhat opaque and lacking in clarity.

[17] Three elements must be established by the Crown in order to prove this charge:

(i) The statement must be published;

(ii) It must be likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement to them to commit, prepare or instigate acts of terrorism or a Convention offence; and

(iii) When publishing the statement, or causing it to be published, the defendant must have the necessary state of mind.

[18] Taking these ingredients in turn there can be no doubt that the statement was indeed published when it was posted on YouTube and the IRPWA Facebook page. Nevertheless the Crown expressly disavows any assertion that the defendant was responsible for these postings. This is notwithstanding a reasonable inference that he was fully aware at the time that the events were being recorded by someone who was participating in some capacity in the commemoration event. Nevertheless, Mr Russell argues that the oral delivery of the speech amounts to a "publication" within the purview of the statutory provision.

[19] Turning to the second element the Crown case is that this is a case of direct encouragement – an assertion that violence against the State is legitimate and an enjoinder to join the IRA.

[20] So far as the defendant's state of mind is concerned it is clear from the wording of S.1 that the offence can be committed either intentionally or recklessly.

With regard to this second limb Mr Russell acknowledges that the Crown would "*need to show that the defendant was aware of the risk that an effect of the statement would be to encourage terrorism and in the circumstances known to him it was unreasonable for him to take that risk.*" (Para 15 of Crown submissions).

[21] For reasons that will soon become apparent I do not intend to dwell at length on the second and third elements of the offence at Count 1 though aspects of these will have a bearing on the interpretation of the evidence relating to Counts 2 & 3. Rather, I shall focus on what is meant by publication. s.20(4) of the 2006 Act provides the following definition:

> "(4) In this Part references to a person's publishing a statement are references to—
>
> (a) his publishing it in any manner to the public;
>
> (b) his providing electronically any service by means of which the public have access to the statement; or
>
> (c) his using a service provided to him electronically by another so as to enable or to facilitate access by the public to the statement;

[22] Clearly on the basis of the Crown acceptance that the defendant bears no responsibility for the posting of the video on the electronic social media sites, only s. 20 (4) (a) is applicable to this case This is a broad and in essence all-encapsulating provision, which provides for no close defining limitation. Mr Russell concedes that since the Act passed into law in 2006 there have been no reported prosecutions for an offence of giving a speech. This is, perhaps unsurprising.

[23] S. 20(3) provides as follows:

> "In this Part references to the public—
>
> (a) are references to the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public; and
>
> (b) except in section 9(4), also include references to a meeting or other group of persons which is open to the public (whether unconditionally or on the making of a payment or the satisfaction of other conditions)."

[24] Ms Quinlivan QC submits that s.20(3) (b) expressly excludes from consideration any private meeting being one to which members of the public are not admitted as of right. In this regard reference is made back to the finding during the search of the defendant's home on 20 April 2015, of the invitations to an Easter Commemoration (See para 7 supra). Although the evidence is silent as to whether these related to the event at which the defendant made his speech there is nothing on the papers to suggest that they were not. In these circumstances an essential element of the statutory requirement could not be proven.

[25] Regardless of whether or not the persons addressed by the defendant at the event in St. Coleman's Cemetery fell within the definition of "public" as proscribed by S. 20(3) I have great difficulty in reconciling the oral delivery of a speech with the statutory requirement that it be "published." Such an interpretation, in my view, strains the definition of the word too far. I agree with the reasoning set out in the defence submission that to do so would result in a breach of the defendant's article 10 rights to free speech, which was unforeseeable and thus would not be prescribed by law.

[26] My conclusion on this issue means that the defendant is entitled to be acquitted on Count 1.

[27] I turn now to consider the remaining two counts on the Bill of Indictment respectively drawn pursuant to the provisions of s. 12 (1) & (3) of the 2000 Act.

Inviting support for a proscribed organisation - Section 12(1) of the 2000 Act:

> *"A person commits an offence if—*
>
> *(a) he invites support for a proscribed organisation, and*
>
> *(b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15)."*

[28] Addressing a meeting for the purpose of encouraging support for a proscribed organisation - Section 12(3) of the 2000 Act:

> *"A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities."*

[29] With regard to these offences the specified organisation is the IRA and no issue is taken regarding the inclusion of this body in the list of organisations proscribed pursuant to the Act.

[30] Both Crown and defence accept that these offences involve an interference with the article 10 right to free speech. It was accepted on the defendant's behalf

that these particular offences have a basis in domestic law and also "*they are formulated in a manner consistent with the requirement that they are foreseeable within the meaning of article 10.*" (defence submission at para 23). Moreover no issue is taken with the proposition that prosecution of a defendant who "*invites support for a proscribed organisation*" is in pursuit of a legitimate aim, namely maintaining national security and for the prevention of disorder. The question remains, however, whether in the given circumstances this defendant's words fulfil the requirements of the section and whether the interference with his right to freedom of speech is necessary and proportionate.

[31] The leading and most recent authority on the offences created by s. 12 is that of *R v Choudary (Anjem)* [2016] EWCA Crim. 61; [2017] 3 All ER 459. Lady Justice Sharp, in delivering the judgement of the court observed (at para 34):

> "As can be seen, section 12 creates three offences: (i) inviting support for a proscribed organisation; (ii) arranging, et cetera, a meeting which is to support a proscribed organisation; and (iii) addressing a meeting of which the purpose is the encouraging of support for a proscribed organisation."

[32] Her Ladyship then continued:

> "It is however important to note what the section does not prohibit. It is common ground as we have said, that it does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation; or the expression of those opinions or beliefs (though … depending on the circumstances the expression of opinions or beliefs might in principle, constitute an offence under section 11 of professing membership)."

[33] In relation to the elements of the section 12(1) offence in particular, it was noted that:

> "The prosecution must therefore make the jury sure (i) that the organisation was a proscribed organisation within the meaning of the 2000 Act; (ii) that the defendant used words which in fact invited support for that proscribed organisation, and (iii) that the defendant knew at the time he did so that he was inviting support for that organisation.

[34] As the judge was also careful to emphasise, there must be proof of an invitation of support for the proscribed organisation. This is to be distinguished from the (mere)

expression of personal beliefs, or an invitation to someone else to share an opinion or belief, conduct that does not fall within the ambit of the section 12(1)(a) offence" [Paras 48 & 49].

[35] At para 74 of the ruling Lady Justice Sharp cited a passage from the decision of the Grand Chamber in *Zana v Turkey* 27 EHRR 667 (1997) where the court set out the fundamental principles relating to article 10. These are as follows:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.
>
> (ii) The adjective "necessary", within the meaning of Article 10(2) implies the existence of a "pressing social need." The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) In exercising its supervisory jurisdiction, the court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In doing so, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts."

[36] It is against this interpretive background that this court must now consider the impugned speech. I accept the proposition put forward by the defence that in so doing the court must read it as a piece rather than focus on isolated passages. I also agree that where the sense of the piece allows, it should be read dispassionately but this should not preclude the court from drawing common sense inferences as to what the defendant meant and what he intended his audience to take from the words he used.

[37] Both Crown and defence in their respective written arguments have parsed the contents of the speech in some considerable detail and I mean no disservice to either side when I observe that I have noted the points each has made rather than embark on a further detailed analysis.

[38] The speech is relatively short lasting less than 8½ minutes. It is full of the hyperbole and rhetoric often to be found in orations of this type. In content it is unashamedly partisan with florid and somewhat archaic references such as to *"our martyred dead"* being a throwback to the language of the likes of Patrick Pearce more than a century ago. There can be little doubt that much of what the defendant says may be regarded by many outside of the very small group gathered in the graveyard that day to listen to him, as deeply objectionable. In particular, the oblique reference to the murder of Lord Mountbatten and members of his family and others off Sligo in August 1979 would be regarded by most right-minded persons as grossly offensive. It should, however, be remembered that s. 12 (1) & (3) of the 2000 Act does not criminalise *"expressions of views or opinions, no matter how offensive, but only the knowing invitation of support from others for the proscribed organisation"* (Choudary at para 70). Moreover, the statute neither prohibits the holding of views supportive of a proscribed organisation nor expressions of intellectual or moral support for such an organisation.

[39] Mr Russell places particular emphasis on two key parts of the speech where, he submits, the defendant invites his audience to support the IRA. The first is what might be described as the "armed struggle" section of the speech where he confirms his view this remained as much a legitimate part of the republican campaign in 2015 as it had since before the 1916 Easter Rising. He goes on:

> "The use of armed struggle to oppose this [occupation] is our right this is a fundamental principle that cannot and will not be abandoned by activists involved in our struggle. This, in my opinion must be matched by a commitment by those involved in armed struggle, to engage in a focused way that advances strategic republican objectives. The decisive thing is not the military confrontation but the politics at stake in the confrontation. The IRA's demonstrated their increasing military capacity and sophistication in recent years. For other republican activists these actions provide

> opportunities to articulate our position while highlighting that the core conditions of that that created conflict in our country still remain. In short, while these undemocratic, unjust conditions exist, so will the Irish Republican Army."

[40] The second passage relied upon by Mr Russell and which he directly links to the first is the following:

> "It is republican, it is genuine republicans such as those gathered here today that carry on the radical revolutionary Irish freedom struggle in North Armagh…it was Maire Drumm who stated 'it isn't enough to shout, "Up the IRA", the important thing is to join the IRA." As you leave here today ask yourself is it enough to support republicanism or could you be or could you be a more active republican, are you willing to assist in building a movement that will bring us freedom."

[41] These passages provide, Mr Russell submits, the clearest possible evidence of the defendant inviting and or encouraging support for the IRA with that explicit intention.

[42] Ms Quinlivan QC counters by drawing attention to the context in which these selected passages appear, namely a call to action in support of the republican cause rather than a call to arms. As is apparent from the first extract (quoted at para 39 supra) the defendant draws a distinction between those engaged in the armed struggle and those *"other republican activists"* such as he for whom that struggle *"provide opportunities to articulate our position."* That position is one of activism dedicated to building a republican movement. The quotation from Maire Drumm is, it is claimed, a historic one used at a commemorative event and is a device to exhort action but one which should be seen in the context of the speech as a whole and in its closing lines quoted at para 40 above.

Conclusion

[43] It is for the Crown to satisfy the court to the requisite criminal standard that by his words addressing the commemorative meeting at St. Coleman's graveyard on Sunday 5 April 2015, the defendant intentionally invited and or encouraged support for the IRA. He has chosen not to give evidence on his behalf and instead relies upon the ipsa dicta of the speech as recorded and the prepared statement read at his police interview by his solicitor. I have been invited by the prosecution to draw an inference under the provisions of Article 4 of the Criminal Evidence (NI) Order 1988. I have been referred to the case of *R v Thomas Ashe Mellon* [2015] NICC 14 wherein the Recorder HHJ McFarland quoted from earlier authorities from our Court of

Appeal (*R v Davison & Others* [2008] NICC 28 and *R v McLernon* [1992] NI 168) which in turn quoted with approval from an unnamed Australian case where the judge observed:

> "It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and is confirmatory of any inferences which may be drawn against him but it does not authorise the court to substitute suspicion for inference or reverse the burden of proof or use intuition instead of ratiocination."

[44] I have previously indicated that I see no ground for not applying the normal rule and drawing such inferences as I consider appropriate in light of the defendant's refusal to give evidence. Nevertheless, standing back and mindful of the admonition contained within the quoted extract that a court should not replace inference with suspicion I have concluded that any inferences that could be drawn on the facts of this case would not add to the strength of the Crown case.

[45] In short I have concluded that however offensive the words used by the defendant might be in the ears of many right thinking members of society they were expressions of personal opinion, which did not invite or encourage support for the IRA. In these circumstances he is entitled to be acquitted on Counts 2 & 3.