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

Delivered: **24/10/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GARETH MARCUS

_____

Before: Higgins LJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

[1] This is an appeal by Gareth Edward Marcus ("the appellant") by leave of the single judge on one ground and an application on other grounds for leave to appeal against his conviction on two counts arising out of an incident which occurred in the early hours of 13 July 2010 when a device was put through the window pane of a door of a house in Broadway, Belfast. The applicant was convicted on 18 December 2012 on:

(a) Count 1 (possession of explosives with intent to endanger life or cause serious injury to property contrary to Section 3(1)(b) of the Explosive Substances Act 1883).

(b) Count 2 (causing an explosion likely to endanger life or to cause serious injury to property contrary to Section 2 of the Explosive Substances Act 1883).

The particulars in the bill of indictment alleged that the explosive substance was an improvised explosive device.

[2] When the appellant first stood trial on 13 December 2011, following a defence application the trial judge ruled on 16 December 2011 that there was no case to answer in respect of count 2. The prosecution appealed that ruling. On 19 June 2012 the Court of Appeal reversed the ruling that there was no case to answer.

[3] At the second trial, which commenced on 13 December 2012 before His Honour Judge Kerr QC ("the trial judge"), the defence again applied for a ruling that there was no case to answer in respect of count 2. The trial judge rejected that application and the appellant was convicted on both counts. He was sentenced to four years' imprisonment suspended for three years concurrent on each count.

[4] Mr McCrudden QC appeared with Mr Campbell on behalf of the appellant. Ms Walsh appeared on behalf of the Crown. The court is grateful to counsel for their submissions in relation to the matter.

Factual content

[5] Mr Noel Cosgrove ("the householder") was in his house in the Donegal Road area at about 1.50 am on 13 July 2010 when he heard a smashing of glass and a number of bangs. He thought at first that these were gunshots but then realised that a device had been thrown into the hallway. The device was fizzing at the time. After it had stopped smoking it exploded in the hallway while the householder was taking shelter in the kitchen. Afterwards he went to the front of house and saw two males walking along towards Broadway roundabout turning left in the direction of the Royal Victoria Hospital.

[6] Examination of the house later showed that a window in the front door had been broken and a device thrown in. Crime scene investigators examining the scene found blood on the broken window. The device itself was found to have contained a firework rocket body in a glass jar with 32 nails taped around the jar.

[7] The appellant was stopped by the police on the morning of the incident. He had a bleeding cut to his hand and later DNA testing showed that his blood was found on the house at the area of the broken glass. The appellant denied that he was involved at the house. In interview he said his blood may have been at the scene as he may have handled some of the nails which were later used without his knowledge by another person in creating the device.

[8] The appellant persisted in denying his involvement through the first trial which ended at direction stage with a ruling of no case to answer which, as noted, the Court of Appeal overturned on appeal. The defendant then changed his account after a similar application was refused by the trial judge in the second trial and he elected to give evidence. On his account he was asked to help by a person, whom he did not name, to put a firework in a "taig's house". He said he was very drunk and agreed to do so. He stated that at the house he refused to light the firework but did break the window to allow the firework to be thrown in. He claimed to have no knowledge of the exact nature of the device; that this was a one off incident out of character; that he was not and never had been sectarian; and that his girlfriend was a Catholic.

Grounds of appeal

[9] Grounds of appeal were lodged in relation to counts 1 and 2. The grounds as drafted are somewhat disparate in their range and it is convenient to consider them in relation to the separate counts.

Count 2

[10] In his initial grounds of appeal in ground 1 the appellant alleged that the judge erred in refusing the application for a direction on count 2, since the prosecution evidence at its height was such that a properly directed jury could not properly have convicted on that evidence. The appellant argues that the evidence indicated very little damage was done to the property and the marks found on the wall in the hall area could not be definitely identified as strike or scorch marks. In a separate ground of appeal relating to count 2 the appellant alleged that the trial judge misdirected the jury in respect of what must be established on the count. It is alleged that he effectively instructed the jury that the jury could convict if they were satisfied that there was a mere danger to property as opposed to the explosion being of a nature likely to cause serious injury to property. On another ground of appeal the appellant asserted that the conviction was against the weight of the evidence. On another ground it was alleged that the evidence did not establish that the explosion was of a nature likely to endanger life or cause serious injury to property and was therefore unsafe.

Count 1

[11] On one ground of appeal it was alleged that the trial judge misdirected the jury on the issue of intention by saying that the jury should consider if the applicant had *envisaged* that the device would endanger life thus wrongly substituting *envisaged* outcome with *intended* outcome.

In relation to both counts

[12] On one ground it was alleged that the trial judge failed to direct the jury properly on the issue of credibility by directing them to consider whether they believed his testimony rather than considering whether he might have been telling the truth regarding the issue of whether he knew what the device was.

[13] On another ground of appeal it was submitted the judge in directing the jury should have referred to the need for the prosecution to exclude any explanation consistent with the appellant's innocence of the charge. The trial judge is alleged to have failed to properly direct the jury with regard to circumstantial evidence in that he failed to warn them to guard against distorting the facts to fit a certain

proposition and that any fact proved that was inconsistent with the conclusion of guilt was more important than all the other factors put together.

[14] Deeny J as the single judge granted leave to appeal on the single ground that the use by the trial judge of the word "envisage" might not have been the best word to use when dealing with intent. The appellant applies to renew the application for leave to appeal on the other grounds and sought leave (which was granted) to add grounds 7, 8 and 9.

The refusal of a direction on Count 2

[15] Counsel argued that an obviously essential prerequisite to the establishment of a case to answer in count 2 was that the explosion allegedly caused by the appellant had been of a nature likely to endanger life or cause serious injury to property. Counsel referred to the findings in respect of the debris and effects of the alleged explosives which were described by Ms Johnston, crime scene examiner, and Mr McAuley of the FSNI. Ms Johnston found some damage to the laminate flooring and the skirting board and blackened marks on a wall in the hall consistent with nails having come into contact with the wall. She did not find penetrating damage anywhere. Mr McAuley was unable to say whether the nails had scattered as a result of the glass jar breaking on hitting the floor or whether they were discharged by the initiation of the device itself. He concluded that the device was probably an improvised explosive device incorporating an explosive charge which might be a low explosive charge. Counsel contended that the witness did not give any evidence from which it could have been properly inferred that the explosion caused by the device would have been of a nature likely to endanger life or cause serious injury to property.

[16] The householder gave evidence of hearing banging at the door at 2.00 am. Then he heard banging consisting of four or five bangs. From the kitchen he saw smoke and something giving off orange sparks, the smoke causing the smoke alarm to go off. He approached it but then retreated to the kitchen because he knew it was going to explode. As soon as he went back into the kitchen the device did explode creating what he described as "a big almighty bang". He gave evidence that in the hallway there were scorch marks where nails had bounced off the walls and onto the floor. These marks on the wall were visible in the photographic evidence adduced before the trial court and also furnished to this court. The photograph showed marks on the wall up to the height of several feet. The witness said that these marks had not been on the wall before that day. He found glass from a glass bottle, nails and firework material which he brushed up. He said that the glass, nails and debris were all over the whole hallway.

[17] Under section 2 of the Explosive Substances Act 1883 the Crown must prove:

(a) that an explosion occurred; and

(b) that the explosion was of a nature as to be likely to endanger life or cause serious injury to property.

There was clear *prima facie* evidence that the appellant caused an explosion. The explosive device comprised firework explosive material in a bottle on which a large number of nails (32) had been taped. The jury would have been fully entitled to conclude that the large number of nails on a glass bottle containing a firework designed to explode within the confined space of the glass was intended to cause serious injury to an individual coming in close proximity to it. The placing of nails connected to the device can have had no innocent explanation. As pointed out by the House of Lords in Boyle v SCA Packaging Limited [2009] NI 317 the word "likely" has several different shades of meaning. As Lady Hale at page 337 points out predictions are different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. Assessing whether something is a risk against which sensible precaution should be taken is an exercise which is carried out all the time. The context of the relevant legislation may compel the conclusion that when the word "likely" is used it is in the sense "could well happen" rather than that it was probable or more likely than not. Section 2 of the 1883 Act criminalises the causing of explosions which have the real capacity to endanger life or cause serious injury to property, that is to say could well cause danger to life or cause serious physical damage to property. In this case there was clear evidence at the close of the Crown case more than sufficient to raise a *prima facie* case. This conclusion disposes of grounds 1, 5, 6, 8 and 9.

The directions of the judge on Count 2

[18] In a seventh ground of appeal the appellant contends that the trial judge misdirected the jury in respect of what must be satisfied in count 2 with regard to the second limb alternative requirement ("the explosive was likely to cause serious injury to property"). Counsel contended that the judge's misstatement of the second limb as requiring mere proof of danger of causing some damage to property had lowered the bar in describing the necessary components of the offence. He referred in particular to the following passage in the trial judge's charge:

> "The prosecution say on count 2 that this is an explosion that took place, the injured party, Mr Cosgrove says there was an explosion. There are signs on the wall that there has been damage caused to the wall and they are saying if someone had been there there would have been a danger to life and there would be danger of damage to property. That is what the prosecution say but they must satisfy you of all those things beyond a reasonable doubt."

[19] The judge earlier in the summing up gave the following direction:

> "The elements are the following: you have to decide that he caused by a certain explosive substance, namely an improvised explosive device, an explosion of a nature likely to endanger life or cause serious injury to property … What you have to decide in this case is whether the explosion that was caused by the explosive device was an explosion of a nature which was likely to endanger life or cause serious injury to property. In that regard it will be a matter for you members of the jury but you will consider the evidence as to whether firstly, was there an explosion and secondly, what was the nature and type of the explosion that was caused and was that nature and type of explosion that was likely to, not that it did but that it was likely to, endanger life or cause serious injury to property. So those are questions in relation to the second count."

Mr McCrudden accepted that that was an entirely correct direction but sought to argue that the later direction appeared to qualify what was said earlier and could have misled the jury as to the relevant questions.

[20] The jury were supplied with a bill of indictment which spells out in count 2 what the elements of the offence are. The portion of the judge's charge which counsel criticises must not be read out of context. The judge was stating the nature of the Crown case having already directed the jury as to the requisite proofs on count 2. On one view that passage might suggest to the jury that the Crown had a heavier onus than in fact it has, in that the jury would have to be satisfied that the explosive device endangered *both* the person *and* property whereas, in fact, the offence is proved if the explosion was likely to endanger life *or* cause serious injury to property.

[21] This was a case in which the real gravamen of the charge was the endangering of human life. Nails in an explosive substance of this kind can cause serious physical injury to individuals and perhaps only superficial damage to property. We are satisfied that the jury must have sufficiently understood the necessary proofs and they were entitled to reach the findings of fact which they must have reached in order to convict on count 2. The verdict has not been shown to be unsafe on that ground of appeal.

The direction on intent in relation to count 1

[22] In the relevant portion of his charge to the jury the judge said the following:

> "The intent has to be to endanger life or cause serious injury to property in the United Kingdom. Now you will recall members of the jury that this count is one of possession with intent so that it is what you intended at the time you were carrying it. At the end of the day the prosecution have to make you sure that he knew or believed that there was an improvised explosive device which was an explosive substance and that he envisaged that it would endanger life or cause serious injury to property and as I say for you to make that decision you might wish to decide whether you are sure or not as to what exactly he believed the device was."

[23] Mr McCrudden submitted that what the trial judge said amounted to a misdirection. He had wrongly substituted *envisaged* outcome for *intended* outcome. A person intending does more than contemplate (see Cunliffe v Goodman [1950] 2 KB 237). The Crown, however, argued that when read in conjunction with other parts of the charge to the jury the jury must have understood that they were considering intent and had to decide whether the appellant intended to endanger life. The issue of the appellant's knowledge of the nature of the components of the device and the issue of his intent were inextricably linked. The envisaging of the consequences of throwing the device was directly relevant to the issue whether the applicant intended to endanger life. The direction criticised should not be viewed in isolation but rather with numerous references to intent and intention.

[24] The criticised quotation from the judge's trial charge is taken from a paragraph that starts:

> "The intent has to be to endanger life or cause serious injury to property in the United Kingdom. Now you will recall members of the jury that this count is one of possession with intent so it is what you intended at the time you were carrying it."

This should also be read in conjunction with what the judge said a little earlier when he stated:

> "Then ask yourself did he have it with intent by means thereof to endanger life or cause serious injury to property."

Additionally he stated:

> "You have to decide what he knew because that may be determinative of what you believe was intended."

He also said:

> "You may feel that the real issue in this case relates to his intent on the first charge."

And later he said:

> "If you believe he knew what was going through that window what does that say to you in terms of count 1 and his intent."

[25] The trial judge directed the jury that the Crown had to prove that the appellant *envisaged* that the device *would* endanger life. It was not a direction that if the defendant *contemplated* that the device *might* endanger life. The dictionary definition of "envisage" includes as synonyms "predict, foresee, foretell, anticipate, expect, think likely, appreciate, apprehend, see in one's mind's eye." The New Oxford Thesaurus also indicates that it conveys the sense of intending and proposing. It is highly unlikely that the wording in the judge's charge would have diverted the jury away from determining the question whether they were satisfied beyond reasonable doubt the defendant intended to endanger life.

[26] We do not consider that the verdict is unsafe on this ground of appeal.

Credibility

[27] Mr McCrudden argued that the trial judge in directing the jury to consider whether they believed the appellant's testimony should have directed them to consider whether he might have been telling the truth regarding whether he knew what the device was.

[28] The judge correctly said to the jury:

> "If you think he is telling the truth you act upon it. If you think he is lying to you, act upon it and draw conclusions as you think proper from whether or not you have decided he is telling you the truth or whether you think he is telling you lies. As an accused he is entitled to have the case proved against him beyond reasonable doubt but as a witness you treat him just the same as any other witness."

[29] We see no substance in Mr McCrudden's criticism of the judge's charge in this regard. The overall content of the charge was fair in explaining the standard of proof to be met.

Circumstantial evidence

[30] In this case, as in the vast majority of criminal cases, the evidence included both direct and circumstantial evidence. Circumstantial evidence may be usefully defined as "any fact from the existence of which the judge or jury may infer the existence of a fact in issue". That was a definition that was explicitly approved of by Gleeson CJ in the High Court of Australia in Festa v R [2001] 208 CLR 593. By way of example, the appellant himself provided direct evidence by admitting that he accompanied a person to the injured party's house who said he was going to put a firework through the door and, at that destination, he broke the glass panel in the door. In order to prove the offences on the indictment the prosecution sought to persuade the jury to infer the necessary knowledge and intent of the accused from the circumstances of the construction of the device and the nature of the explosion. In the course of his directions to the jury the trial judge explained the distinction between direct and circumstantial evidence and, with regard to the latter, employed the well-known rope analogy set out in the Crown Court Bench Book. It is to be noted that the 'Circumstantial Evidence' draft direction in which that analogy occurs commences "The prosecution case depends (to a great extent) on circumstantial evidence rather than direct evidence…."

[31] The appellant argues that, having elected to address the jury on the topic of circumstantial evidence, the trial judge wrongly directed them that they should not convict if there remained an alternative *innocent* explanation. He submits that, since it was never in contention in the trial that the accused was, at the material time, at least behaving unlawfully and/or maliciously, the learned trial judge should have directed the jury to consider whether there was any evidence consistent with the accused's innocence *of the charges*. In leaving the jury with a choice to make between guilt of the offences on the indictment and complete innocence the trial judge failed to properly direct the jury as to the reasonable possibility that, while the appellant may have been engaged in some form of enterprise to intimidate, threaten or harass the householder, the evidence was not sufficient to convict him beyond a reasonable doubt of the counts on the indictment.

[32] While the trial judge was undoubtedly correct in his explanation to the jury of the distinction between direct evidence and circumstantial evidence, the real issue is whether, having regard to the facts of this particular case, he was required to give the classic direction appropriate to cases that are essentially dependent upon circumstantial evidence. Provided that the fundamental requirements as to the burden and standard of proof are effectively dealt with, ultimately, the particular form of the directions to the jury always remains a matter for the trial judge, to be crafted in accordance with the specific circumstances and facts of each case. If potential problems are foreseen in many cases a pre-charge discussion with counsel will prove to be of benefit.

[33] In a case such as the instant appeal in which the Crown relied upon a mixture of direct and circumstantial evidence, a full and fair direction as to the burden and standard of proof, closely related to the particular circumstances, with the appropriate emphasis laid upon the importance of establishing guilt beyond a reasonable doubt should be perfectly adequate. In our view to separately classify pieces of evidence in such a case and deliver a specific additional direction designed for cases which depend entirely, or to a great extent, upon circumstantial evidence risks over complicating matters for the jury.

[34] Such a concern is consistent with authority which has long reflected the undesirability of laying down a rule of law in criminal cases that a warning in some specific form or in some partly defined terms must be given. In Arthurs v Attorney General for Northern Ireland [1971] NI 40 Lord Morris of Borth-y-Gest concluded his speech in the House of Lords by observing, at page 66:

> "A summing-up does not follow a stereotyped pattern. It need contain no set form of words. Each case has its own features and a summing-up must be related to those features and to the problems of the particular case. A judge will invite the jury to give due consideration to the special issues which are presented by the evidence. He will be guided by his duty as well as by his desire to ensure, so far as he can ensure, that no innocent man is convicted. But the effectiveness of the guidance which in his summing-up he may give to the jury will not be enhanced if he is under the compulsion of having to incorporate some particular formula. An incantation of certain words will be a poor substitute for, or a useless addition to, the discerning guidance which the features of a particular case may require."

[35] Lord Morris also gave the leading judgment in the House of Lords in McGreevy v DPP [1972] NI 125, an appeal from this jurisdiction in which the Crown case was based solely on circumstantial evidence, there being no direct evidence linking the appellant with the murders. After reviewing the authorities Lord Morris said, at page 150:

> "In my view, it would be undesirable to lay down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case, must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt … To introduce a rule as suggested by learned

> counsel for the appellant would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I can see no advantage in seeking for the purposes of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing up with a special requirement. The suggested rule is only to apply if the case depends 'entirely' on such evidence. If the rule is desirable why should it be so limited? And how is the judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply, not only when the prosecution case depends entirely on circumstantial evidence, but also if 'any essential ingredient' of the case so depends, there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance."

[36] In R v Anderson (Northern Ireland Court of Appeal – unreported 1995), a case that was based solely on circumstantial evidence and in which there was no direct evidence linking the appellant with the murders, this court considered that the summing up by the learned trial judge failed to give the jury proper guidance in that it did not specifically remind the jury of the circumstances that could be viewed as inconsistent with guilt. However, in delivering the judgment of the court, the Lord Chief Justice recognised that it was not necessary for a judge in a case based on circumstantial evidence to use any particular formula. In R v O'Neill [1997] 9 BNIL 16 Nicholson LJ made the following observations:

> "In R v McGreevy [1972] NI 125 it was held that where circumstantial evidence is the basis of the prosecution's case there is no obligation on the judge to direct a jury in some special form, provided that it is made clear to the jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt. We did not intend to cast any shadow on this decision in R v Anderson (unreported: 1995). Cases in which the evidence is solely circumstantial are few and far between and it is not for the judge to advance

> some hypothesis which might be inconsistent with guilt but for which there is no basis in the evidence presented to him. What is important in a case of circumstantial evidence is that McGreevy's case should be cited to the learned trial judge so that he may decide how he should direct a jury."

[37] In our view Mr McCrudden's criticism of the direction by the trial judge with regard to circumstantial evidence tends to exemplify the type of difficulty that is likely to arise if a trial judge is required to follow a pre-determined formula relating to circumstantial evidence in the course of directions to the jury in a case in which both types of evidence are relied upon. This was not a case in which there was any suggestion that evidence might have been fabricated. It might have been better to have avoided reference to the detailed "rope" analogy and to have concentrated upon the burden and standard of proof. It is clear that the trial judge did properly direct the jury on the burden and quantum of proof. When dealing with the dangers of prejudice he gave them a warning at the commencement of his charge not to permit the reprehensible conduct, which the appellant admitted, to cloud their concentration upon the specific evidential ingredients of the charges alleged in the indictment and when dealing with knowledge, intent and the nature of the explosion. Reading the trial judge's charge to the jury as a whole, we are not persuaded that this verdict is unsafe on this ground.

Disposal of the appeal and the application for leave

[38] For the reasons given we dismiss the appeal on the ground for which leave was granted and we refuse leave to appeal on the other grounds.