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

IN THE COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

GARY JONES

Before: Higgins LJ, Girvan LJ and Weatherup J

HIGGINS LJ

[1] The appellant was tried by Morgan J at Belfast Crown Court sitting without a jury on Bill of Indictment 54/2006 which contained three counts. They were as follows –

"FIRST COUNT

STATEMENT OF OFFENCE

Attempted murder, contrary to Article 3 (1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common Law.

PARTICULARS OF OFFENCE

Gary Jones, on the 21st day of July 1998, in the County Court Division of Armagh and South Down, attempted to murder a member or members of the security forces.

SECOND COUNT

STATEMENT OF OFFENCE

Causing an explosion, contrary to section 2 of the Explosive Substances Act 1883.

PARTICULARS OF OFFENCE

Gary Jones, on the 21st day of July 1998, in the County Court Division of Armagh and South Down, unlawfully and maliciously caused by a certain explosive substance, namely an improvised mortar system an explosion of a nature likely to endanger life or to cause serious injury to property.

THIRD COUNT

STATEMENT OF OFFENCE

Possession of an explosive substance with intent to endanger life, contrary to section 3(1) (b) of the Explosive Substances Act 1883.

PARTICULARS OF OFFENCE

Gary Jones, on the 21st day of July 1998, in the County Court Division of Armagh and South Down, unlawfully and maliciously had in his possession or under his control a certain explosive substance, namely an improvised mortar system, with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom, or to enable some other person so to do."

[2] On 27 October 2006 the appellant was acquitted on Count 1 and convicted on Count 2. The learned trial judge, having convicted the appellant on Count 2, stated that he did not need to consider Count 3. On count 2 the appellant was sentenced to 14 years imprisonment.

[3] The Grounds of Appeal are –

"1. The learned trial judge erred in rejecting the Appellant's application that there was no case to answer on the count of causing an explosion the nature of which was likely to endanger life or to cause serious injury, contrary to Section 2 of the Explosive Substances Act 1883, by reason of there having been no evidence capable of establishing a prima facie case that an explosion had been caused.

2. Without prejudice to 1 above, the learned trial judge erred in rejecting the Appellant's application that there was no case to answer on the said count, by reason of there having been no evidence capable of establishing a prima facie case that an explosion, the nature of which was likely to endanger life or to cause serious injury to property, had been caused.

3. Further and without prejudice to the foregoing, the learned trial judge erred in rejecting the Appellant's application that there was no case to answer on the said count, by reason of there having been no evidence capable of establishing a prima facie case that the Appellant had caused an explosion, the nature of which was likely to endanger life or to cause serious injury to property.

Entirely without prejudice to the foregoing:

4. There was no, or no sufficiency of evidence, upon which the learned trial judge could properly have concluded beyond a reasonable doubt that an explosion had been caused, as required under Section 2 of the Explosive Substances Act 1883.

5. Without prejudice to 4 above, there was no, or no sufficiency of evidence, upon which the learned trial judge could properly have concluded beyond a reasonable doubt that an explosion, the nature of which was likely to

endanger life or to cause serious injury to property, had been caused.

6. Further, and without prejudice to the foregoing, there was no, or no sufficiency of evidence, upon which the learned trial judge could properly have concluded beyond a reasonable doubt that the Appellant had caused an explosion the nature of which was likely to endanger life or to cause serious injury to property.

7. The learned trial judge erred in concluding that the necessary *sine qua non* "fact" required under Article 3(1) of the Criminal Evidence (Northern Ireland) Order 1988 to permit the proper drawing of inferences under Paragraph (2) thereof was, in the circumstances existing at the time, a fact which the Appellant could reasonably then have been expected to mention when questioned.

8. The learned trial judge erred in adjudging the inferences, and each of them, drawn by him pursuant to Article 3(2) of the said Order as set out at paragraph [27] of his judgment, to be properly deducible, and further erred in concluding that both were or either was proper in the circumstances.

9. The learned trial judge wrongly exercised his power under the said Article 3(2) in that the said inferred findings were, and each was, unsustainable, contrary to logic, unwarranted and overreaching.

10. The learned trial judge further erred in integrating the above referred to unwarranted inferences into the circumstantial matrix referred to at paragraph [28] of his judgment, and further and without prejudice to this point, erred, in any event, in arriving at the conclusions which he did, as to use, ownership and wearing of the jumper therein referred to

on the afternoon of 21 July 1998, in that the said conclusions were in and of themselves unwarranted and overreaching.

11. The learned trial judge erred in concluding that the Appellant was guilty in reliance on circumstances the cumulative effect of which did not properly eliminate the reasonable inferable conclusion that the blood trace found had been deposited on the jumper at some unknown earlier occasion, such as during his work at the Orana Centre.

12. The learned trial judge failed to give consideration to, or apply, the principles required to be considered in a circumstantial case.

13. The learned trial judge, in evaluating the circumstantial evidence herein, failed to give any or adequate consideration to the existence of other coexisting circumstances which weakened or destroyed the inference of guilt, namely:

    a. The Lennon description which did not match the Appellant

    b. The absence of any forensic evidence connecting the Appellant to the van, its contents, the hat and other clothing.

    c. The fact that the fingerprints found on the hat did not match the Appellant.

14. The learned trial judge erred, this being a circumstantial case, in failing to give adequate weight to the description given by Mr. Lennon, which description did not match the Appellant, and in concluding, without any evidential foundation (the evidence of Mr. Lennon being agreed) that this evidence was inherently unreliable.

15. The learned trial judge erred in failing to consider the defendant's good character in relation to propensity."

[4] Mr J Larkin QC and Mr Kearney appeared on behalf of the appellant, but not at the trial. Mr Creaney QC led Mr Sefton on behalf of the prosecution both at the trial and on appeal.

[5] The written statements of most of the witnesses on behalf of the prosecution were read by agreement between the prosecution and defence. Some witnesses were cross-examined at the committal proceedings and those cross-examinations were also read by agreement. A small number of witnesses gave evidence before the learned trial judge and were cross-examined. Various statutory provisions permit statements of witnesses to be read in criminal trials, though the criteria for their admission in evidence and the procedure required may vary. It was not evident from the transcript in this case which legislative provisions were employed, though counsel were in agreement as to its use. While the capacity to read statements (whether by agreement or otherwise) can be of assistance in the expedition of criminal trials, the basis upon which they are read and the relevant statutory provisions, should be stated clearly in advance of the statements being read.

[6] The background facts were not in dispute and the issue before the learned trial judge was whether the facts agreed or proved established that the appellant was guilty of any count in the indictment. The facts as found by the learned trial judge are summarised in the succeeding paragraphs.

[7] On 21 July 1998 a white transit van was driven into a yard and disused car park off Monaghan Street Newry, which is adjacent to Corry Square police station. A mortar device, which comprised a large gas cylinder, was launched from the rear of the van. It passed through the roof of the vehicle and landed a short distance in front of the van, but did not explode.

[8] The white van had, before turning into the yard, struck a car which was parked on Monaghan Street. Finbar Lennon who worked in an office in Monaghan Street Newry heard the crash shortly after 4.30pm. On going outside he saw that the car had been damaged and when he looked up the yard which adjoined his office, he saw the white transit van moving across the top end of the yard. A bystander told him that the white van had hit the car. He next noticed a man whom he did not recognise walking towards him down the yard. He described the man as approximately 18-20 years old, 5′ 6″ to 5′ 8″, of slim build. He was wearing glasses with heavy glass, a black monkey type hat and a yellow

hard hat of the type used in the construction industry. He approached him and asked him who he was, what he was doing and whether he had hit the car driving into the yard. The man did not reply to these questions, even when repeated. Mr Lennon took hold of the man's jacket as the man walked past him and a struggled ensued on the footpath in Monaghan Street. In the course of the struggle the man's jacket came off as he ran away. Inside the jacket there was also a white jumper. The yellow hard hat which the man had been wearing had come off and was lying near the entrance to the yard. Mr Lennon became concerned as to the circumstances and phoned the police. Another witness observed this man leaving the yard and described him as wearing a blue denim jacket, jeans and shoes, wearing goggles and some sort of scarf under a hard hat. He saw Mr Lennon tackle the man and struggle with him. He described the man as 5′ 9″ and skinny. Leo O'Neill also observed the van striking the car as it had turned into the yard. He saw it drive into the car park and turn right at the top. He then noticed a man wearing a yellow hard hat, jeans and a denim jacket with a light jumper or something underneath it, walking down from the back of the yard. He also saw the struggle between the man and Mr Lennon in which the man's jacket and jumper came off and his yellow hat fell off. The man ran down Monaghan Street and into Railway Avenue.

[9] Constable McInespie arrived at 4.55pm and spoke to Mr Lennon and the owner of the car which had been struck. As the constable approached the white transit van parked at the rear of the yard he heard a loud explosion from the van. Then a large mortar launched from the rear of the van and landed a few yards in front of it. It did not explode. He and other police immediately began to clear the area. He seized the yellow builder's hat, blue denim jacket and white jumper which had come off during the struggle with Mr Lennon, as well as a pen and a tissue from the denim jacket. Other police officers had attended the scene. Constable Hazlett saw the white van and noted that the back windows were covered in tin foil. He observed the roof of the van blow off and a mortar bomb shoot out in the direction of Corry Square. Constable Cullen described a sudden explosion and observed a mortar launch from the van through its roof in the direction of the police station. The mortar landed a few yards in front of the van and failed to explode. Another Reserve Constable heard a muffled explosion and the roof of the van being ripped open.

[10] Staff Sergeant Saunders of the Explosive Ordnance Disposal (EOD) Squadron of the Royal Logistic Corp arrived at the scene. He removed the mortar launch tube from the back of the van. He noted the presence of the mortar bomb, which was an improvised gas cylinder, lying approximately 3 metres in front of the van in the direction of the police station. He carried out normal EOD action. The separated components of the device were handed over to a Scenes of Crime Officer and later delivered to the Forensic Science Agency. The items were

examined by a Principal Scientific Officer supported by other members of staff. They were found to consist of the components of an improvised mortar system comprising a launch frame, mortar bomb with impact type initiation fuse, explosive and booster tube, functioned propellant unit and a timing and power unit. The mortar bomb was a modified gas cylinder with an initiating fuse assembly fitted to it. The fuse assembly included a striker and a rim fire cartridge. To fire the device the gas cylinder mortar is placed in the launch tube which contains a propellant unit connected to a timer power unit (TPU). The TPU provides a time delay before the circuit is complete, whereupon the propellant is detonated. When the mortar is launched by the propellant unit a split pin is withdrawn from the initiating fuse thus arming the mortar. When launched from the rear of a van the mortar passes through the roof towards its target. Provided there is sufficient impact on landing, the striker will initiate the rim fire cartridge and the mortar will explode. The roof is usually cut on several sides so that it will give way on contact with the launched mortar. The range of the device can be affected by the nature of the propellant charge, how tightly the mortar fits into the launching tube and the contact made with the cutaway section of the roof of the van. On this occasion it appeared that the propellant charge had functioned thus launching the mortar but the mortar device itself had not exploded. It was the evidence of the scientific officer that if the mortar had exploded it would have produced a crater in the ground 3-4 metres in diameter and fatal injuries might have been received by those within 100 metres of the explosion.

[11] Forensic examination of the white jumper which had come off the man fleeing the scene, established that there was one small spot of blood on the inside left collar. DNA extracted from the blood stain matched that of the appellant. The combination of DNA characteristics observed in the blood spot would be expected to arise in fewer than one in a billion males unrelated to the appellant. (For ease of reference this is referred to as the appellant's DNA). One short brown hair was found on the denim jacket and 9 short brown and one long brown hair on the jumper. Tests were also carried out on a duvet cover and red baseball cap recovered from inside the van and the timing and power unit. Twelve fine fair hairs were found in the duvet cover and 2 brown hairs in the inside of the baseball cap. There was no fingerprint examination of the interior of the van. The yellow hard hat was checked for fingerprints and 5 were found none of which matched the appellant. There was no fingerprint evidence linking the appellant to the scene of the crime. In respect of the hairs recovered, a partial DNA profile was obtained from one hair found on the jumper which did match the profile of the accused but the combination of DNA bands would be expected to occur in approximately one in 7 of the UK population. This latter finding provided limited support for the assertion that the hair originated from the appellant rather than someone other than and unrelated to him. There was no

trace of explosives on the jumper and no other forensic evidence to link the appellant with the scene.

[12] The appellant was interviewed by the police about the mortar device on 22 February 2005. In the course of the interviews he was informed that blood found on the jumper recovered at the scene matched his DNA profile. The jumper was produced to him and he was asked if it was his. He was asked to give an account of how the jumper was at the scene. He was asked if he was wearing it when he planted the mortar. He made no reply to any questions during interviews.

[13] The learned trial judge found that the appellant was 31 years of age at the time of the incident and that he was 5′ 10″ tall. He stated that the appellant had a completely clear record and had consented to the DNA sample being taken. He rejected an application that the evidence adduced on behalf of the prosecution disclosed there was no case to answer.

[14] The appellant did not give evidence. The only witness called by the defence was Sister Susan McClory BA (theology), PhD (philosophy), MBE. From 1980 until 1998 she was the manager of Orana House Child and Family Centre in Newry. The Centre has an association with the Southern Health and Social Services Board. New and used clothing was received from local people at the Centre and sorted, stored and then distributed to charity shops in the local area. Sister McClory gave evidence that the appellant had been employed at the centre from 1990 until August 1998. He worked part-time one day a week and his duties included bagging or boxing clothing for distribution to the charity shops.

[15] The learned trial judge was satisfied beyond reasonable doubt that the person approached by Mr Lennon was a person who had travelled in the white van into the car park. The judge was also satisfied to the same standard that this person was wearing a yellow safety hat, a black monkey hat, glasses or goggles with heavy glass, a blue denim jacket and a white jumper with a blue stripe and that he left the white jumper at the scene in his efforts to escape. The judge considered that the hat and goggles would have made it difficult to judge the age of the man wearing them. In addition he was of the view that estimates of age are inherently unreliable. Accordingly he gave no weight to the description given by Mr Lennon that the man was between 18 and 20 years of age.

At paragraph 24 of his judgment the learned trial judge said –

> "There is no doubt that the white jumper had a small spot of blood in the inside left collar area and the DNA analysis showed that there was a one in a

> billion chance that the blood did not belong to the accused or someone related to him. The accused declined to give any explanation for this in his interviews when he was asked about the blood on the jumper and when invited to give some explanation for the presence of the jumper at the scene he declined to say anything. In his defence evidence was called from Sister McClory to establish that the accused had worked in the Orana Centre on Fridays between 1990 and 1998 and that he had placed new and used clothing in boxes and bags for distribution to charity shops in the course of that work. The accused did not give evidence at the trial."

[16] The learned trial judge then referred to Article 3 of the Criminal Evidence (NI) Order 1988 which permits, in certain circumstances, inferences to be drawn from the failure of an accused to mention particular facts when questioned by the police. He found that the evidence of Sister McClory was put forward by the appellant to raise the possibility that the spot of blood on the collar of the jumper had been caused as a result of him handling the jumper in the course of his work at the centre. At paragraphs 26 and 27 he set out his approach to Article 3 and the evidence of Sister McClory and his conclusions on it –

> "[26] I accept entirely the submissions of Mr Macdonald about the reliability of Sister McClory's evidence. That evidence is put forward by the accused to raise the possibility that the spot of blood on the collar of the jumper was caused as a result of the handling of the jumper by the accused in the course of his work. In support of that possibility the accused also pointed to the evidence of Ms Boyce that the jumper was an absorbent item and that such a spot would remain on the jumper until removed. It is, of course, inherent in that possibility being put forward as the full explanation that the jumper did not belong to the accused and that he had not to his knowledge worn it. When arrested and at the start of each interview the defendant was cautioned and told that the need not say anything and that it was, therefore, his right to remain silent. He was also told that it may harm his defence if he did not mention when questioned something which he later relied on in court. In circumstances where the accused was being

> asked about blood on a jumper that he did not recognise I consider that the accused could reasonably have been expected to mention when questioned that he had carried out work of the sort described by Sister McClory. I have also briefly considered the possibility that the jumper was worn by the accused but that it was donated to the Orana Centre at some stage prior to the mortar incident. In those circumstances the expectation that he would have mentioned his work at the Centre when questioned is, if anything, greater. I find, therefore, that the requirements of article 3(1) of the 1988 Order are satisfied.
>
> [27] By virtue of article 3(2) of the 1988 Order the court "may draw such inferences from the failure as appear proper". That article clearly allows the court to consider not only the inference that the fact upon which the accused relies is not true or the evidence about it unreliable but also permits the court to draw inferences about other matters if it is proper to do so. I recognise that I am not obliged to draw any inference from such a failure but in this case I am satisfied beyond reasonable doubt that the inference that I should draw from the failure of the accused to mention the nature of his work at the Orana Centre is that he knew that the spot of blood on the jumper was not caused by or contributed to by that work and I am further satisfied beyond reasonable doubt that the reason for his having that knowledge was that at all relevant times he was aware of the location of the jumper."

[17] Thus the learned trial judge drew two inferences; firstly that the appellant knew the spot of blood was not attributable to his work at the Orana Centre and secondly that the reason he knew this was that he was aware of the whereabouts of the jumper and that it was not received at the Centre. The judge then concluded that the blood spot and its DNA satisfied him beyond reasonable doubt that the appellant was the user of the jumper and the wearer of it on the 21 July 1998 when it was removed from him by Mr Lennon. The learned trial judge expressed himself to be so satisfied in these terms in paragraph 28 -

> "[28] The spot of blood on the jumper was located on its inside collar. That spot was made either on the day in question or at some earlier stage. That satisfies me beyond reasonable doubt that he was connected to the jumper in the sense of using it. That conclusion coupled with my conclusion that he was aware of the location of the jumper at all relevant times leaves me satisfied beyond reasonable doubt that this was his jumper and that he was wearing it on the afternoon of 21 July 1998 before it was removed from him by Mr Lennon. I have taken into account the fact that there was no forensic link between the accused and the interior of the van but I find this of no assistance. A person engaged on a venture such as this is likely to take care not to leave a forensic trail. I find the hair evidence of very little assistance."

[18] The learned trial judge then considered the charges in the indictment. He was satisfied beyond reasonable doubt that the appellant was engaged in the conveying of the improvised mortar device into the car park and by doing so contributed to the functioning of the device. He expressed himself not satisfied beyond a reasonable doubt that the intention of those responsible for the mortar device was to kill police officers. He could not exclude the possibility that the device was intended to terrorise the occupants of the police station but not land within it "whether because of the lack of capacity of the mortar maker or for some other reason." Thus he found the appellant not guilty of Count 1. However he found the appellant guilty of Count 2. He was satisfied that an explosion occurred through the functioning of the propellant charge that launched the device. He was similarly satisfied that the functioning of that charge was likely to endanger life because of the likely consequences resulting from the detonation of the mortar device if it had exploded.

[19] Being satisfied in relation to Count 2 the learned trial judge concluded that Count 3 did not need to be considered.

[20] Mr Larkin QC condensed the grounds of appeal to four issues. These may be stated as –

i. the power of the court under Article 3 of the Criminal Evidence (NI) Order 1988 to draw an inference from the accused's silence at interview was wrongly exercised and/or incorrect inferences were drawn;

ii. that in evaluating the circumstantial evidence, inadequate consideration was given to other co-existing circumstances and/or evidence which weakened or destroyed the evidence of guilt;
iii. there was a failure to consider the appellant's previous good character in relation to propensity;
iv. and there was no or insufficient evidence that any explosion or any explosion likely to endanger life or cause serious injury to property had occurred.

I will deal with each in turn.

i. Article 3 of the Criminal Evidence (NI) Order 1988.

[21] The appellant was interviewed on two occasions. At the beginning of the first interview he was cautioned under Article 3 of the Criminal Evidence (NI) Order 1988 in the following terms –

> "……. I am going to make you aware of your rights. You do not have to say anything but I must caution you that if you do not mention when questioned something which you later rely on I court it may harm your defence. If you do say anything it may be given in evidence."

[22] He was then asked if he understood the caution but made no reply. The police officer then said I will explain that to you and did so in these terms –

> "You've a right not to say anything if you do not want to. Anything you do say can be given in evidence. This means if you go to court the court can be told what you've said. If there is something you do not tell us now when we ask you questions and later you decide to tell the courts then the court may be less willing to believe you."

[23] The appellant was asked if he understood this but made no reply. A similar procedure using similar words took place at the second interview. At both interviews the appellant was accompanied by his solicitor and at his trial was defended by experienced senior and junior counsel instructed by that solicitor.

[24] It was submitted by Mr Larkin that the explanation that was given had the effect of altering the implication of the caution. In other words it implied that

consequences would only result from the court not believing him, rather than not believing a witness called on his behalf and the appellant would have so understood the caution. The learned trial judge accepted the evidence of Sister McClory and consequently, it was submitted, no inference that might flow from her evidence should be drawn against the appellant. It was submitted that to draw an inference from her evidence was inappropriate and in breach of the appellant's right to a fair trial guaranteed in Article 6 of the European Convention on Human Rights.

[25] The learned trial judge found that the evidence of Sister McClory was put forward to raise the possibility that the spot of blood on the collar of the jumper was caused as a result of the handling of the jumper by the accused in the course of his work at the Orana Centre. He concluded that the appellant could reasonably have been expected to mention that he had carried out work of the type described by Sister McClory when questioned by the police. It was submitted by Mr Larkin that this was not a fact of the type envisaged by Article 3. Rather it was a means of opening up possibilities as to how the appellant was associated with the jumper. He argued that the inference drawn by the learned trial judge was contrived. Referring to Murray v UK 1996 22 EHRR 29 and Caudron v UK 2001 31 EHRR 1, he submitted that inferences should be drawn only after appropriate warnings and where the strength of the case justifies them. If inferences are to be to drawn they must be commonsense inferences arising from the circumstances of the case. In this case the appellant was being questioned about a jumper six years after the incident in question and it was not a matter that he could reasonably have been expected to mention at that time.

[26] Article 3 of the Criminal Evidence (NI) Order 1998 as amended provides –

> "3(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies—

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

(b) a judge, in deciding whether to grant an application made by the accused under;

(i) Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); or

(ii) paragraph 4 of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under Article 4 of that Order); and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,

may—

(i) draw such inferences from the failure as appear proper."

[27] There was no evidence that the appellant understood the caution only to apply to evidence that he might give. Quite apart from that the caution that was given was clear; if you fail to mention something you later rely on in court then it might harm your defence and the court might not believe you. The critical words of Article 3 were used. It was to assist the appellant that the officer explained the

caution in more general terms. There is no reason to believe that the appellant was in any way misled or failed to understand the import of the caution.

[28] It is clear that the evidence of Sister McClory was put forward to provide an explanation for the presence of the appellant's DNA on the jumper and that this was a fact relied on by the defence. The appellant failed to mention this when questioned. The learned trial judge was well aware of the passage of time between the incident and the date of the interviews but considered the appellant had ample time to reflect on possible innocent explanations for the presence of his DNA. Where an accused fails to mention a fact he later relies on, the court may draw such inferences as appear proper. The inference drawn by the learned trial judge in this instance was a commonsense and proper one, namely that he did not mention his work at the Orana Centre as this was not the manner in which his DNA came to be on the jumper. Equally the further inference that the reason he knew that was because he was aware of the location of the jumper and that it was not received at the Orana Centre was also a proper inference to draw in the circumstances. The submission that these inferences were a contrivance was without foundation and unsustainable.

[29] Whether an inference is drawn or not is a matter for the discretion of the trial judge or a jury. There is no reason to suppose that the exercise of the discretion in this instance was anything other than one which was proper and justified on the facts of the case.

ii. that in evaluating the circumstantial evidence, inadequate consideration was given to other co-existing circumstances and/or evidence which weakened or destroyed the evidence of guilt.

[30] Mr Larkin submitted that there were only two circumstances relied on by the learned trial judge in order to convict the appellant. These were the blood spot on the jumper and the inferences drawn from his failure to mention in interview his work at the Orana Centre as a possible innocent explanation of the blood spot. It was submitted that this evidence was insufficient to ground a conviction and eliminate other innocent possibilities of how the blood spot came to be there. This was a case of circumstantial evidence. As such the learned trial judge should have directed himself in accordance with the principles applicable to such evidence. Mr Larkin QC relied on the words of Lord Normand in Teper v The Queen 1952 AC 480 where in relation to circumstantial evidence he said at page 489 –

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined,

> if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest', and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

[31] It was submitted that the learned trial judge in this case failed to make sure that other co-existing circumstances did not destroy or weaken the inference of guilt. Reliance was placed on the following circumstances –

i. the fact there was no supportive fingerprint or DNA evidence connecting the appellant to the van, the contents of the van, the jacket, the helmet or the items found in the jacket;
ii. the fact that the description given by Mr Lennon did not match that of the appellant.

[32] The learned trial judge found he could give no weight to the description given by Mr Lennon. He reasoned that it would be difficult to judge the age of a man wearing a hat and goggles and that matters such as age are inherently unreliable because of the absence of objective criteria against which to make a judgment. That is a perfectly rational and reasonable approach which the learned trial judge was entitled to take. Furthermore it is clear he was alert to the absence of other supportive forensic evidence such as the matters referred to by Mr Larkin.

[33] Circumstantial evidence can be very compelling. It requires to be approached with care. Not only must a jury or judge be satisfied that the circumstances are consistent with guilt but they must also be satisfied that they are inconsistent with any other rational conclusion than that the accused is guilty. Thus a fact or circumstance which is proved in the evidence and which is inconsistent with a conclusion of guilt is more important than all the other circumstances, because it undermines the proposition that the accused is guilty. In a case that depends on circumstantial evidence a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must

remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together.

[34] The description given by Mr Lennon apart, the matters relied on by Mr Larkin 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 evidence in this case comprised the blood found on the jumper and the inferences drawn by the learned trial judge. Having noted the matters relied on by the defence the learned trial judge was satisfied that the jumper belonged to the appellant and that he was the wearer of it when confronted by Mr Lennon and that he was the man who exited from the van left in the car park. Those were conclusions he was entitled to reach on the evidence presented.

iii. the alleged failure to consider the appellant's previous good character in relation to propensity.

[35] It was submitted that the trial judge erred in failing to consider the appellant's good character. At the time of the trial the appellant was 31 years of age and had never been convicted of a criminal offence. In addition Sister McClory gave evidence of his good character and of the nature of the work he engaged in at the Orana Centre. It was submitted by Mr Larkin QC that, following the guidelines given in R v Vye 1993 1 WL.R. 471, the appellant was entitled to have this evidence taken into account by the trial judge when evaluating the case generally and in relation to the circumstantial evidence and the inferences which were drawn and specifically on the issue of propensity. The Crown argued that it was a matter for the discretion of the learned trial judge, relying on a passage from the opinion of Lord Steyn in R v Aziz 1996 1 A.C. 41. Mr Larkin QC submitted that the Crown's interpretation of this passage was mistaken and that the discretion only arose in certain circumstances.

[36] Generally speaking good character evidence is relevant to two issues – whether an accused is to be believed in his assertions, either in court or out of court, and whether he is the type of person likely to commit the offence with which he is charged (known as the first and second limbs). Where, as in this case, the accused did not make any replies at interview with the police and did not give evidence, the first issue (or limb) does not arise. However, good character is always relevant to propensity, that is, the likelihood of the accused having committed the offence with which he has been charged. The authorities noted above and the guidance given relate to the trial judge's obligation to direct a jury

as to the meaning and significance of good character in a criminal trial and how and in what circumstances it should be taken into account. An experienced judge hearing a criminal trial without a jury will be well aware of the significance of good character and how it is relevant to the issues he has to decide. Provided the trial judge is made aware of the accused's good character and it is apparent that he is so aware, it is not incumbent on him or her to recite the type of direction he might give a jury in similar circumstances. In this case the learned trial judge referred to the fact that the appellant had no criminal convictions at paragraph 16 of his judgment and to the evidence of Sister McClory about his work at the Orana Centre at paragraphs 19 and 20. A judge giving judgment in a criminal trial without a jury does not have to recite every applicable legal issue or mention every matter on which he might, in other circumstances, give a jury specific directions. In R v Thompson 1977 NI 74 Sir Robert Lowry LCJ, when giving the judgment of the Court of Appeal, provided guidance on the duties of a judge giving judgment in a criminal trial heard without a jury. At page 83 he said -

> "While on the subject I might say a word on the duty of the judge when giving judgment in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts."

[37] In R v Walsh (unreported) the learned trial judge did not give himself a reminder of the fact that the accused was of good character nor a specific direction similar to what he would have given to a jury. It was argued on appeal that he should have done so. In giving the judgment of the Court of Appeal, reported at 2002 NICA 1 Sir Robert Carswell LCJ said it was not incumbent on a judge hearing a criminal trial without a jury to do so. At page 12 he stated –

> "We have said many times in this court that a trial judge in a non-jury trial is not bound to spell out in his judgment every legal proposition or review every fact or argument (see, eg, *R v Thompson* [1977] NI 74 at

> 83). We cannot suppose that an experienced trial judge would be unaware of the need to bear in mind that a defendant is entitled to have his good character taken into account when determining the likelihood that his evidence is truthful. We see no evidence that the judge overlooked such an elementary point (which was drawn to his attention by defence counsel in his closing speech) and we are not prepared to conclude that he did: cf our remarks in *R v Rules and Sheals* (1997, unreported)."

[38] In the instant case the learned trial judge mentioned the fact the appellant had no previous convictions and the nature of his work at the Orana Centre. The only reason for mentioning the appellant's clear record would have been to acknowledge the significance of that fact in this case. It was not incumbent on the learned trial judge to go further and record the type of direction he would have given a jury. He did not err in not recording in his judgment a good character direction.

<u>iv. there was no or insufficient evidence that any explosion or any explosion likely to endanger life or cause serious injury to property had occurred.</u>

[39] The submissions made on behalf of the appellant may be summarised as threefold. Firstly, that there was no or insufficient evidence that the mortar device contained explosives; secondly, that the mortar device, for whatever reason, was incapable of endangering life or causing serious injury to property; and thirdly, that if an explosion did occur it was not of a nature likely to endanger life or cause serious injury to property.

[40] In relation to the first submission it is evident from the statements of the Bomb Disposal Officer and the Forensic Scientist that there was sufficient evidence to conclude that the mortar device contained 79 kgs of a home made explosive. While the Forensic Scientist and the Bomb Disposal Officer could have been more explicit, the combination of their statements was sufficient to establish that the mortar device contained explosives along with an impact initiation component, designed to explode on sufficient impact. The reason the mortar device did not explode was not clear. The fact that the device only travelled a few feet beyond the van but could have been due to the nature of the propellant used, the effect of knocking out the roof on launch or the tightness of the fit in the launch tube.

[41] The abandonment of the van in the car park led to the police being called to the scene. While they were clearing the area and investigating the presence of

the van several of them heard an explosion and saw the mortar device exit from the van through the roof. It came to rest on the ground in the car park several metres from the van. It is clear the device did not detonate as intended. The target was believed to be the police station adjacent to the car park. In opening the case prosecuting counsel made the case that this was an attempt to murder police officers at the station as alleged in Count 1. In relation to Count 2 he stated –

> "….that he caused a certain explosive substance, namely, an improvised mortar system to explode and clearly something did explode in order to launch it from the vehicle. So there was an explosion caused. The intent of that was that it was likely to endanger life because of the make up. Your lordship has seen the evidence about the make up of the device and the weight of explosives it was carrying and therefore the intent was to endanger life or cause damage to property and that that explosion it itself, we say, ground Count 2. The intent was there and the act took place. The fact that it was a damp squib, we say, is neither here nor there."

Thus Count 2 was alleged to be the explosion that launched the mortar device from the rear of the van and through the roof. This was achieved through a propellant which was contained in the launching tube and according to the forensic scientist it functioned. There was no evidence as to the nature of the propellant, but when it functioned it did cause an explosion and it did propel the mortar device from the van, which did not explode on impact.

[42] The learned trial judge dealt with Count 2 in paragraph 29 of his judgment. He stated –

> "[29] I now turn to look at the counts on which he is charged. It is convenient to begin with count 2 being the causing of an explosion contrary to section 2 of the Explosive Substances Act 1883. For the reasons set out above I am satisfied beyond reasonable doubt that the defendant was engaged in the conveying of the improvised mortar device described by Mr McMillen and Staff Sergeant Saunders. I am further satisfied beyond reasonable doubt that the propellant charge functioned but that the impact type initiation fuse did not operate because the mortar was received as

> separated components. I am satisfied beyond reasonable doubt that the mortar would otherwise have exploded on impact causing a crater of 3 to 4 metres on the ground and potentially causing fatal injuries within an area of 100 metres. As a matter of fact I am satisfied beyond reasonable doubt that the accused contributed to the functioning of the propellant charge in the yard/car park by conveying the van into the yard/ car park and that the functioning of that charge was likely to endanger life because of the likelihood of the devastating consequences on impact of the mortar in this urban setting. The fact that those consequences were fortuitously avoided because the mortar was received as separated components does not affect that conclusion. For those reasons I find the defendant guilty on count 2. I do not have to consider count 3."

[43] The mortar device when received in the laboratory was as separated components. The device did not explode on impact and the consequences, if it had, were fortuitously avoided, but this was not as a result of the mortar being received as separated components. The learned trial judge was in error in so finding, though the sentence reflects what is contained in the statement of the forensic scientist which was read by agreement. If the scientist had been called as a witness, rather than his statement read, this might have been clarified.

[44] It is an offence contrary to section 2 of the Explosive Substances Act 1883 to cause an explosion of a nature likely to endanger life or cause serious injury to property. The explosion caused in this instance was the propellant which launched the mortar device. There is no evidence that this explosion was of a nature likely to endanger life or cause serious injury to property. The mortar device itself failed to explode. If a mortar device containing 79 kgs of explosives had exploded it would have had the consequences which the learned trial judge stated. The intention with which the device was launched, which was opened by prosecuting counsel in relation to Count 2, is not the essential ingredient of an offence contrary to Section 2. The essential ingredient is that the explosion caused is of a nature likely to endanger life or cause serious injury to property. The fact that the mortar device would have had the consequences stated, if it had exploded, does not render the explosion by which it was propelled, one likely to endanger life or cause serious injury to property. It was submitted by the Crown on the hearing of the appeal, though not at trial, that the device might have hit someone nearby and, without exploding, thereby endangered their life. There was no evidence to support this hypothesis and it provides no basis for a finding

that the explosion caused was of a nature likely to endanger life or cause serious injury to property. In the absence of clear evidence that the explosion caused by the propellant was of a nature likely to endanger life or cause serious injury to property, the conviction on Count 2 is unsafe and cannot stand.

[45] Under Section 3 of the Criminal Appeal (NI) Act 1980 the Court of Appeal has power to substitute a conviction of an alternative offence, where it appears that the jury (or judge) must have been satisfied of facts which proved the appellant guilty of that other offence. The learned trial was satisfied that the appellant was in possession of the van and the device and that he contributed towards its functioning. Count 3 charges the appellant with possession of an explosive substance with intent to endanger life or cause serious injury to property. It would be open to this court to substitute a finding on Count 3 if it was evident the learned trial judge must have been satisfied as to the intent necessary for that offence. The learned trial judge did not consider Count 3 and made no finding in relation to the intent necessary to establish that offence, though he made findings in relation to the intent necessary for Attempted Murder in Count 1. In the absence of such a finding a consideration of the power available under Section 3 does not arise.

[46] The conviction on Count 2 of the indictment is quashed.