**Neutral Citation no. [2007] NICC 5** | *Ref:* **HARC5755**

***Judgment: approved by the Court for handing down*** | *Delivered:* **23/2/2007**

*(subject to editorial corrections)**

**IN THE CROWN COURT FOR NORTHERN IRELAND**

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**BETWEEN:**

**THE QUEEN**

**-v-**

**JAYBE GAMBOA OFRASIO**

**Bill No 06/38952**

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**HART J**

(1) The defendant has been indicted on a bill containing four counts under the Terrorism Act 2000 and has applied for the entry of a no bill in relation to each count. In the alternative, the defence argue that count 4 should be quashed in that –

(a) the charge is too vague and lacking in particulars sufficient to enable the defendant to know the case against him; or

(b) that the count is bad for duplicity.

(2) As this is an application for a no bill under Section 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969, I approach the application on the basis of the principles which I set out in the Queen v. McCartan and Skinner [2005] NI CC 20 at paragraph [2].

(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty, and in so doing should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in Practice Note (1962) 1 All E R 448.

(3) The defendant is a Filipino national who has lived in Northern Ireland since in or about June 2003, and the items to which the charges refer were all seized, or subsequently discovered, as a result of a search carried out of his home at 22 Hawthorne Street, Belfast on 29th January 2004. In the course of the search a number of items were seized including a computer, a quantity of floppy discs and various other items to which it is unnecessary to refer for the purposes of the present application. In addition to the defendant, the other occupants of the house were his wife Indirah Abdullah and their three children.

(4) The evidence relied upon by the prosecution is complex and voluminous, and I do not propose to refer to all of the evidence referred to by Mr Russell, who appears on behalf of the Crown, in his very helpful and comphrehensive written arguments. A key part of the prosecution case is that the defendant used the alias "Moroblade", and that many of the emails and other material can be shown to have been generated by him.

(5) It is sufficient for present purposes to say that I am satisfied that there is ample evidence to support the allegation that the accused used the name Moroblade. I am also satisfied that there is ample evidence that he used the name Yaqub Abdullah, as well as other aliases in the course of the emails which he sent and which can be traced to various websites and computers used by the defendant.

(6) Counts 1, 2 and 3 allege offences of possession of a record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, contrary to Section 58(1)(b) of the Terrorism Act 2000. Section 58(1) and (2) provide that:-

(1) A person commits an offence if –

(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
(b) he possesses a document or record containing information of that kind.

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

(7) Count 1 alleges that he possessed a floppy disc containing an article entitled "Handling of Sources by US Army". This was found in a yellow floppy disc holder with the name "Jaybe O" on the outside which contained four floppy discs, one of which contained this article. I am satisfied that the writing on the box is sufficient to link this floppy disc to the defendant. The defence argument in relation to the article itself is that it has been freely available for 10 years, having been declassified by the US Army in 1996. The document in question is set out between pages 353 to 495 of the exhibits. It describes in considerable detail the various considerations that should be taken into account by counter intelligence officers when approaching and handling sources of intelligence. Whether a document of this nature can be said to be of value to terrorists may be arguable in that the thrust of the document is to enable counter intelligence officers to plan and execute methods of acquiring intelligence. On the other hand, it may be argued that such information would assist terrorists to plan counter measures.

(8) At this point I should refer to the rival contentions of the prosecution and the defence as to the proper interpretation of Section 58. The prosecution contend for a literal interpretation of Section 58, arguing that it is sufficient to prove the collection and/or possession of the information and that it is likely to be useful to a terrorist. The defence submit that it is necessary to prove that the information should be made available to a person contemplating the commission or preparation of an act of terrorism, because otherwise there is no likelihood of the information being useful to terrorists. In support of this the defence relied on the conclusion of Morgan J in R v John Jude O'Hagan 2004 NICC 17 at [33] where he indicated that he was not inclined to accept the literal interpretation contended for by the prosecution. I do not consider it necessary to resolve this difference at this stage of these proceedings. On either interpretation I am satisfied that there is a prima facie case against the accused on count 1 because the content of this document, when examined in the light of all of the surrounding circumstances, can give rise to the inference that an offence under Section 58 has been committed. I therefore refuse the application for a no bill on count 1.

(9) Counts 2 and 3 allege possession of a record containing information contrary to Section 58(1)(b) of the Act of 2000. Although they relate to different documents the circumstances in respect of both documents are the same and it

is therefore sufficient to set out the particulars of offence in relation to count 2. These allege that the accused, on 3rd January 2004,

> ". . . without reasonable excuse possessed a record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely a download of a web page entitled "SA-7 GRAIL".

(10) This relates to a document contained in pages 136 to 139 of the exhibit section. It contains details of the capabilities of several anti-aircraft missiles of the man-portable, shoulder-launched low-altitude type of the Russian designed and built SA-7 family and various derivatives. This information is of a type plainly of use to terrorists.

(11) The material which is the subject of count 3 is a download of a webpage entitled "How can I train myself for Jihad". I am satisfied that this is also a document of a kind likely to be useful to a person committing or preparing an act of terrorism.

(12) The issue common to the documents which give rise to counts 2 and 3 is that the defence contend that the evidence establishes that someone looked at these files on the computer on the dates identified in the charges, but did not actively download the files because the computer kept a record of the web pages having been viewed in what is described as a Temporary Internet Files directory, and that record had been deleted by the time of the search on 29th January 2004. The defence submission is that the fact that an internet website page has been viewed for an unquantifiable period by one of a number of users of a computer does not establish possession of the document for the purposes of Section 58.

(13) In the present case I am satisfied that there is ample evidence that the computer was used by the defendant, and that there is a prima facie case that it was he, it could legitimately be inferred, who viewed these internet pages. The question is, however, whether viewing a page where there is no, or insufficient, evidence to indicate that the page was downloaded in the sense that there was an intention on the part of the viewer to store the information in the computer, can be said to amount to possession of a record of that information for the purposes of Section 58.

(14) At this point it is necessary to set out in somewhat greater detail the evidence which is relevant to these counts. This is to be found in the deposition of DC Gary Edgeworth. He described these files as being "lost" files, a situation which occurs when the parent directory is no longer known, and that they could only be recovered by the use of forensic software. He stated that -

> "It is correct that in this case it is likely that both the files above were originally present in the temporary internet files directory before being deleted and were most likely to have been created by user of the computer accessing the website from where they originate."

(15) He expressed the view that these two websites had been visited by the user Yaqub Abdullah (and there is evidence to show that this is an alias of the defendant) and continued -

> "From the above information it appears that both files had been originally downloaded to the Temporary Internet Files directory by the browser software, Internet Explorer, a process known as caching. Subsequently the cache has been emptied and its directories had been deleted and over written resulting in the files that it contained becoming lost files."

(16) If that were the full extent of the evidence then there might be a prima facie case that the defendant had stored the information contained on the websites in a form which was sufficiently permanent to constitute a record, depending on how long the files had been stored in the computer. However, he was cross examined by Miss Quinlivan for the defence at the committal proceedings and part of the cross examination was as follows -

> "Q. In relation to the lost files, am I right in understanding that for someone not using forensic software and using the computer, they would not be accessible?
>
> A. That is correct, once they become lost files they are no longer accessible by the operating system.
>
> Q. So for the user of this particular computer, I am talking about a user without forensic software, the only way to access these files would be as with any other computer user, using any other computer, to look up the internet?
>
> A. After the files have been lost, that is correct.
>
> Q. What you are able to say about the first file is that someone using this computer viewed that file via the internet on 03 January 2004?

A. That's correct.

Q. You cannot say how long it was viewed for?

A. That's correct.

Q. But you can say that the only occasion on which it was viewed was on that date?

A. That's also correct.

Q. Just to clarify, when in this statement you use the term "downloaded" it is not that someone has physically copied it on to the computer it is simply that somebody has viewed it and the programme internet explorer places it on to the internet history record?

A. That is correct in that it's an automatic process and a record of it is made in the internet history and a copy of the file is created in the temporary internet files directory which is known as the web cache.

Q. On the 03 January 04 the user of this computer could have viewed tens of files over a short period of time and you don't have any way of knowing how long they viewed each of these files or whether they viewed them for long enough to read them?

A. That's correct.

Q. In relation to the second file, you say you examined internet history records and in relation to the first file you say you found no internet history records. What is the significance of that distinction?

A. It's probably a question of time. The internet history is only stored on the computer for a specific period of time, once that period has elapsed the internet history record will become deleted and a new record created. It is also possible for a user at any time to delete their internet history."

(17) I am satisfied that this passage can only be taken to mean that the person who accessed these files viewed them for a very short period of time. In order

to view them the computer brought the files up on the screen by placing them in the Temporary Internet Files directory. As a result this was a temporary and extremely short period during which the web pages were stored within the computer. This period was probably a matter of seconds. The downloaded files were not downloaded to, and hence not recorded on, the computer in any normal sense of the use of that term because the files had to be placed in the Temporary Internet Files Directory in order for them to be viewed.

(18) The charges against the defendant on counts 2 and 3 are that he "possessed a record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism". "Record" is not defined in the Terrorism Act 2000, other than it "includes a photographic or electronic record". In one sense it may be argued that to cache the webpage may constitute the creation of an electronic record, and that to create the cache by viewing the page amounts to "possession" of the information of the information in the webpage. However, I do not believe that this is a proper interpretation of the legislation, or the mischief aimed at. In this context "record" means to "set down in writing or other permanent form", see Chambers English Dictionary. A temporary record may, depending upon the circumstances, have existed for a sufficient period of time to justify the conclusion that a record was created. For example, someone gathering information about a member of the security forces who writes a policeman's car registration number down on a piece of paper creates a record because the method of writing it down implies a degree of permanence, however short. The fact that the record may subsequently be destroyed seconds later does not necessarily render it any less a record. On the other hand, an evanescent or fleeting picture cannot be said to have the necessary degree of permanence, however short, that is constituted by a record.

(19) In the present case the prosecution evidence goes no further than to show that the two downloads viewed by the defendant were stored by the computer in order that they could be viewed, and there is nothing whatever to show that they existed in this form for more than a fleeting period of time. I consider that to view the downloads cannot be said to possess a record within the meaning of Section 58(1)(b) merely because the computer, in order to display the picture to be viewed by the operator places the file in the Temporary Internet Files directory before it is subsequently deleted. I consider that there is therefore no evidence to justify the defendant being placed on trial on counts 2 and 3 and I enter a no bill on those counts accordingly.

(20) So far as count 4 is concerned, this alleges that the defendant possessed the computer which was found in his house "in circumstances which gave rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism", contrary to Section 57(1). First of all it is suggested that the charge is too vague and lacking in particulars and therefore does not comply with Section 3(1) of the

Indictments Act (Northern Ireland) 1945. It is suggested that it is not possible to identify with certainty or precision "the circumstances giving rise to reasonable suspicion". I reject this submission as the committal papers, although voluminous, contain a significant number of web pages, emails and/or downloads which contain information which is plainly of interest to terrorists. A few examples from the list prepared by Mr Russell in his written submissions illustrate this. Page 714 and following contain instructions as to how to make a tennis ball bomb. Page 716 and following contain detailed information as to the construction and utility of silencers for various automatic weapons. Pages 527 and following contain details as to how to prepare and apply poison. The list prepared by Mr Russell is in itself a form of particulars which, in my opinion, adequately indicates the nature of the allegations under this count if they are not otherwise indicated.

(21) A further submission was that the documents were not such as would constitute material likely to be of assistance to terrorists, but the material is such that I have no hesitation in rejecting this submission.

(22) Finally, it is suggested that in so far as the circumstances comprise the matters which are the subject of the first three counts that this is a form of duplicity and that the count should accordingly be quashed. There is no duplicity within the wording of count 4 and this submission is rejected. I therefore refuse the application to enter a no bill on count 4.

(23) The application for a no bill is therefore granted on counts 2 and 3 but refused on counts 1 and 4 and the defendant will accordingly be arraigned on counts 1 and 4 alone. Count 4 will be renumbered count 2.