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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JONATHAN COLIN McCORMAC

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Before: Morgan LCJ, Stephens LJ and Treacy LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Her Honour Judge McReynolds given at Antrim Crown Court after a non-jury trial on 11 June 2019 convicting the appellant on count 1, a charge of possession of two sawn off shotguns and ammunition in suspicious circumstances contrary to Article 64(1) of the Firearms (NI) Order 2004. The basis of the appeal is that counts 2 and 3 which were arson and robbery counts were improperly joined in the indictment and that alternatively the learned trial judge ought to have severed the indictment and tried count 1 alone.

Background

[2] There is no great dispute about the background. The prosecution case was that two people were sitting in a VW Bora car at Torr Gardens, Larne at 1.40 am on 11 September 2017. They described two masked men appearing at both sides of the car, both armed with sawn-off shotguns. They ordered the occupants out of the car which the men then drove off. The hijacked VW Bora car was then used to ram the front entrance gates of a nearby dwelling house in Larne shortly before 01:48 am on 11 September 2017. The vehicle was then set alight whilst parked beside the garage attached to the house. The fire from the car spread to the side door of the garage as well as causing damage to the roller door.

[3] The forensic evidence established that windows in the building were damaged by three shotgun discharges in the course of the attack. Police arrived at 2am and discovered the householder attempting to control the fire with a bucket and hose. He was abusive to police when they asked him to leave it to the fire service. He did not offer any information to the police on the night of the attack as to the identity of the attackers but informed police the following morning that he

recognised the appellant whom he knew. He identified him largely from his gait as the attackers were both wearing masks. Bad character evidence relating to the householder was admitted indicating that police believed that he had been involved in criminality including possession of firearms and explosives, arson, assaults, the supply of drugs and burglaries.

[4] At 7.45 am on 11 September a member of the public reported to police that there was a car burnt out opposite no. 14 Owenstown Road in Larne. This appeared to be a recent fire as he said that the post at the driver's door was still smouldering. He said that he had passed the laneway at about midnight that night and there was nothing parked in the lane at that time. The evidence is therefore that the car was set on fire sometime between midnight and 07:45 hours.

[5] This car was seized by police and subsequently identified as a Peugeot 406 car registration number KUI 8485. The previous owner provided police with the mobile telephone phone number of the male to whom he sold the car at Bush filling station in Coleraine on 25 August 2017. This phone number is a number attributed to the defendant and was found in an I-phone seized from his person on 11 September 2017, the sim number being ********466. Police obtained photographs of the previous owner's mobile telephone screen showing the text messages from the number ending 466 enquiring about the car and also the outgoing call log for this phone. In addition cell site analysis puts the defendant's phone travelling from Larne to Coleraine on 25 August 2017.

[6] On 12 September 2017 at 20:00 hours Police had carried out a search of lock-up garages at Drumahoe Gardens, Larne being the housing development next to the appellant's home in Allenbrook. Military assistance was tasked and attended. Military Sergeant Alan Chapman recovered a black rucksack which was partially zipped closed but had the handles of two shotguns protruding from the bag. The rucksack had been lined with black bin bags in order to waterproof it. In addition to the guns the bag held two bin bags each containing shotgun cartridges. Item MG22 consisted of two black bin liners used to line the rucksack which contained the shotguns and the cartridges. These were examined and a fingerprint was recovered from the outside surface of one of the bin liners which matched the appellant.

[7] Police also checked CCTV in the area of Allenbrook Mews where the appellant lived and the adjacent estate Drumahoe Gardens where the shotguns were recovered. The CCTV showed a long light coloured car coming out of the Allenbrook Development and turning right onto the Drumahoe Road at 01:01:22 on 11 September 2017. At 02:00:40 a dark jeep stopped at the end of Allenbrook. Two males got out and walked up into the Allenbrook area in the direction of the appellant's house. One male can be seen to be of heavy build.

[8] The appellant was arrested on 11 September 2017 and interviewed on 4 occasions on 12 September. He made a no comment response to almost every question with regard to the purchase of the Peugeot 406 car on 25 August despite evidence showing that the phone seized from his person with the number ending in "466" was used to enquire about the car and travelled to the Coleraine area on the

day in question. The appellant only stated "I never owned any vehicle", "not guilty" and then remained silent. He also refused to provide the PIN number in respect of this phone. He was later identified by a police officer on CCTV at the Bush filling station where the sale transaction proceeded on 25 August 2017.

[9] Police examined the appellant's phone and identified the following WhatsApp conversation with Clayton Hastings:

- *07.09.2017 at 12:35:37 Clayton Hastings sent a message to the appellant saying*

"Did you get that sorted last night"

- *07.09.2017 at 12:44:29 the appellant replied*

"Yes mate all good"

- *07.09.2017 at 12:47:17 Clayton Hastings to appellant*

"Happy days maybe need to leave it in so it's handy got at here. Seen a we [sic] place for it the other day just need to talk about look to see if it's still open.

- *07.09.2017 at 12:47:36 Clayton Hastings to appellant*

"Take"

- *07.09.2017 at 12:49:54 the appellant replied*

"Yes no problem"

- *08.09.2017 at 20:39:10 Clayton Hastings to appellant*

"Do you want to bring that in tonight"

- *08.09.2017 at 22:04:44 the appellant replied*

"A lot of about"

- *08.09.2017 at 22:05:32 Clayton Hastings to appellant*

"Aye I seen that mate"

- *09.09.2017 at 17:47:23 Clayton Hastings to appellant*

"Is William going to be about later to bring that thing in!

- *09.09.2017 at 18:26:18 the appellant replied*

"He just lift me an hour ago to go get changed then he'll be back up"

- *09.09.2017 at 21:03:00 Clayton Hastings to appellant*

"Do you want to bring that in tomorrow during the day mate less about"

- *10.09.2017 at 14:00:23 Clayton Hastings to appellant*

"What's happening mate"

- *11.09.2017 at 08:28:26 Clayton Hastings to appellant*

"Going for breakfast"

- *11.09.2017 at 12:39:25 appellant replied*

"Wot u at"

- *11.09.2017 at 12:41:14 Clayton Hastings to appellant*

"In the home mate did you see the news"

Hastings sends an attachment being an image of Aislinn Hassin on the news talking about the incident from earlier that morning.

- *11.09.2017 at 13:00:04 the appellant replied*

"I'd buck it"

- *11.09.2017 at 13:00:46 Clayton Hastings to appellant*

"Sick Sick individual"

- *11.09.2017 at 13:01:07 the appellant replied*

"Just seen the news. Just to annoy her fella"

- *11.09.2017 at 13:02:12 Clayton Hastings to appellant*

"Sure they aren't together anymore they talk some shit"

- *11.09.2017 13:16:59 appellant replied*

"They do alright"

[10] The article 4 allocution having been given, the appellant indicated through his counsel that he would not give evidence nor call witnesses and that he was aware of the potential inferences which the court could draw from his failure to do so.

The law on joinder and severance

[11] There is no dispute about the legal principles on joinder. By virtue of section 4 of the Indictments (NI) Act 1945, subject to the provisions of the Rules under that Act, charges for more than one offence may be joined in the same indictment. The relevant Rules are the Crown Court Rules (NI) 1979 and rule 21 provides that charges for any offences may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

[12] In R v Barrel and Wilson (1979) 69 Cr App R 250 the defendants were charged on counts 1 and 2 with affray and assault occasioning actual bodily harm at a discotheque. The third count of attempting to pervert the course of justice concerned one of the defendants who had allegedly tried to bribe the manager of the premises to modify his evidence. It was argued that count 3, far from being founded on the same facts as count 1, derived from a new and different set of facts which was not

only different in its nature but separated by a substantial interval of time from the set of facts which gave rise to counts 1 and 2. He contended that to justify a joinder within the terms of section 4 and rule 9 the subsidiary offence must (to use counsel's terminology) be an integral part of the primary offences and must not be separated from them by any distance in time.

[13] The court rejected the submission and held that the contention rested on too narrow a construction of the language of the statute and the relevant rule. The phrase "founded on the same facts" did not mean that for charges to be properly joined in the same indictment, the facts in relation to the respective charges must be identical in substance or virtually contemporaneous. The test is whether the charges have a common factual origin.

[14] In Ludlow v Metropolitan Police Commissioner [1971] AC 29 the court examined the interpretation of a series of offences of a similar character. On 20 August 1968 the offender was seen emerging from the window of a public house and there was evidence that he was attempting to steal. On 5 September 1968 the appellant was in a public house and punched the barman to retrieve some money from him. The appellant was charged with one count of attempted larceny and one count of robbery with violence on the same indictment.

[15] The House of Lords accepted that the two charges were not founded on the same facts. In examining the alternative basis for joinder the House concluded, first, that a series could consist of two events. Secondly, in deciding whether the offences are similar or dissimilar the law and the facts should be taken into account. Thirdly, in order to establish a series of offences of a similar character there must be some nexus between them. That required a feature of similarity which in all the circumstances of the case enabled the offences to be described as a series.

[16] In R v Kray [1970] 1 QB 125 the Court of Appeal in England and Wales stated that the similar rule in that jurisdiction should not be given an unduly restricted meaning. Any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. The power to sever is contained in section 5(3) of the 1945 Act which provides that where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

The Learned Trial Judge

[17] The learned trial judge heard submissions on the application to sever the indictment both on the basis of misjoinder and in the exercise of discretion. She rejected the application and the core of her reasoning was as follows:

> "It's against the totality of this legal background in respect of nexus, as in, potential, common, factual origin between alleged offences and any quality of

series or sequencing of alleged offending that I approach the issues in this application. There is similarity of weaponry in all three alleged offences. The weapons are found in a hide, relatively proximate in time and place to the two episodes of identical weapons being described in circumstances where fear was instilled by their alleged presence.

They are also reasonably proximate to a property with which the defendant is identified. The events are closely linked geographically and in terms of time. There are some 42 hours between the first alleged event and the arms find. I am satisfied, both, that the potential, common, factual origin and the series of events' criteria as discussed in Barrell and Valliday are met. I've carefully considered whether the arson and robbery counts against the defendant have been incorrectly joined on the indictment alongside the possession of a firearm with intent count. In addressing the issue whether the criteria in rule 21 of the 79 rules have been established, I take account of the fact that the power of the court to order separate trials where more than one offence is charged in the same indictment is not confined to a situation where the accused may be prejudiced or embarrassed in his defence.

My obligation is wider than that, in Article 6 terms. The court may order a separate trial as notwithstanding that there's no prejudice or embarrassment demonstrated by an accused if it is desirable for another valid reason. In approaching this issue I have proportionately addressed the risks of proceeding on the current bill of indictment in the context of the interests of justice balancing exercise and the other relevant balancing exercises, mindful of the safeguards which exist throughout the process of trial by judge alone and I'm satisfied, having regard to the totality of the circumstances, that it's appropriate to decline the defence application."

Submissions

[18] The appellant submitted that the factual matrix relating to the firearms/ammunition offences alleged against him was entirely unrelated to the arson and robbery matters. The latter counts were based upon the evidence of witnesses contained within the depositions, together with other circumstantial matters relating to the purchase of a car allegedly used as the getaway car. The

firearms count relating to the find of two particular shotguns at a weapons hide was based almost solely on the evidence of the fingerprint examination finding that it matched the right ring finger of the appellant, located on the outside upper surface of one of the black bin liners, which lined the rucksack containing the shotguns and ammunition. The prosecution also relied on the relative proximity of the weapons hide to the appellant's address.

[19] It was submitted that there was clearly no overlap between witnesses' accounts, or an uninterrupted series of events that lead to a natural progression from the accusations against the appellant in relation to the arson/robbery counts and the alleged firearms offence, but there was a real prejudice to the appellant if he was linked by the joinder to the overall facts which would be opened against him on all the offences. This was particularly relevant in relation to the arson count where an actual arson took place, and a shotgun/s was discharged three times at the house, yet there was no physical evidence to connect the appellant to those events. The danger of prejudicial conclusions being drawn based on the firearms offences against those counts was plain.

[20] The prosecution submitted that there were three bases upon which it could establish count 1 on the evidence. First, that the appellant was guilty of count 1 by being one of the two gunmen involved in the attack on the dwelling house shortly before 01:48 hours on 11 September 2017. That was based on his connection to the getaway car, his identification at the scene, his fingerprint on the bin bag, his text messages discussing the movement of items leading up to the time of the attack and afterwards the attack itself, the CCTV showing movement near to his home on the night of the attack and the finding of the two shotguns relatively close to his home and consistent with the discussion in the texts together with his failure to provide any explanation for any of this.

[21] The second basis was that he was a secondary party to the attack based on his connection to the getaway car and the other features excluding his identification at the scene. The third alternative was that the appellant was guilty of count 1 based on the presence of his fingerprint found on the outside surface of a bin bag containing the shotguns together with other circumstantial evidence. The intent being established by the nature of the weapons, namely that they were loaded sawn-off shotguns.

[22] In light of the framing of the indictment to include each of those possibilities count 1 was both based on the proposition that this offence was both founded on the same facts as the arson offence at count 2 and was part of a series of offending involving the use of sawn off shotguns which were discharged in one instance and found loaded in another.

Consideration

[23] We are satisfied that there was no misjoinder on the indictment in this case. It is agreed that the learned trial judge identified the relevant legal principles and the leading authorities. The criticism concerns her application of those principles. It is common case that there was no forensic evidence to connect the shotguns used in

the attack on the dwelling house to the weapons found at the hide some 42 hours later. The prosecution maintained, however, that the forensic evidence indicated that the weapons found in the hide could not be ruled out as the source of the shot and wadding found at the scene.

[24] The trial judge correctly analysed the prosecution case as requiring consideration of whether the fact that the appellant had touched a bag which was later found to contain two sawn-off shotguns was potentially relevant to the identification of the appellant at the scene of the attack or the earlier hijacking. The presence of two of these non-ubiquitous items at the scene and in the bag was part of the circumstantial case on counts two and three. To sever the evidence of the find would have deprived the prosecution of a material part of its case on the question of whether the appellant was present at the scene of the attack. The find was proximate in time to the attack. The email exchanges supported the circumstantial case that there was a connection between the find and the attack over the period in question. Taking a broad view of the relevant rule the trial judge was correct to consider that these facts were so intimately connected that the charges were founded on the same facts.

[25] On any view we consider that these charges formed part of a series of offences of a similar character. Each involved the possession of sawn-off shotguns. In each case the weapons were loaded. The find was proximate in time to the attack. The possession of shotguns in each case established a more than sufficient nexus.

[26] The judge also explicitly examined whether it was desirable that the indictment should be severed. She had to be fair to the prosecution as well as the defence. To sever the indictment would have deprived the prosecution of relevant evidence on the remaining counts. The appellant had the protection of the requirement for a reasoned written judgment. Consideration of that judgment gives rise to no concern that there was either prejudice or embarrassment to the appellant.

Conclusion

[27] For the reasons given we are satisfied that the learned trial judge was correct to refuse the application to sever and that the conviction is safe.