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Judgment: approved by the Court for handing down | *Delivered:* 25/03/13

*(subject to editorial corrections)**

IN THE CROWN COURT OF NORTHERN IRELAND SITTING AT BELFAST

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THE QUEEN

v

PAUL SHAW, CATHAL KERR and THOMAS ROONEY

_____

His Honour Judge Kerr

JUDGMENT

[1] The defendants pleaded not guilty to an indictment containing 3 joint counts. Possession of a firearm with intent contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004 (Count 1), Possession of a firearm in suspicious circumstances contrary to Article 64(1) of the same Order (Count 2) and Possession of Offensive Weapons in a public place contrary to Article 22(1) of the Public Order (Northern Ireland) Order (Count 3).

FACTS

[2] The offences are alleged to have occurred on the 9th of March 2010. They arise from a police search of a vehicle in which the defendants were travelling which was stopped by police at the Pantridge Road/Stewartstown Road shortly before 10.30pm.

[3] The search of the vehicle uncovered a knuckleduster in the driver's side pocket, a baseball bat in the boot, a two way radio on the driver's seat and a loaded revolver in the rear passenger footwell.

[4] The driver of the vehicle was Rooney, he was arrested by Constable Rainey. He was wearing a green headover, a black long-sleeved top, black tracksuit bottoms

and had black gloves. At time of arrest he was cautioned under Article 3 of the Criminal Evidence (NI) Order 1988. He made no reply. Prior to being taken from the scene he was cautioned under Articles 5 and 6 of that Order in relation to his presence in the vehicle and the articles recovered in the car. He made no reply.

[5] The front seat passenger was Stephen O'Donnell. Although originally charged and returned for trial with the other persons in the car he is not before me on these charges.

[6] In the rear seat on the driver's side was Cathal Kerr. He was arrested at the scene by Constable Walker. At arrest he was cautioned under Article 3. He made no reply. He was cautioned under Article 5 to which he said "I have no idea". When cautioned under Article 6 he said "I'll speak to my solicitor." Kerr's clothing was seized in the Antrim custody suite. Police took from him, a black outer coat BWB4, a dark T shirt BWB5, blue jeans BWB6 and white shoes BWB7.

[7] In the rear passenger seat was Paul Henry Shaw. The revolver was found in the footwell at this position. Shaw was arrested at the scene by Constable McAuley. He was cautioned under Article 3. When asked if he wished to reply he said "No". He was cautioned under Article 5 to which he replied "I know nothing about it." He was cautioned under Article 6 and replied "I just took a lift".

[8] The vehicle was seized and brought to Ballynafeigh. There it was searched by Ms McBride CSI. In addition to the items already mentioned she recovered, JMB41 black gloves from between the seats, JMB42 woollen hat beside the handbrake, JMB43 Black scarf, JMB44 Black hat from the rear seating, JMB45 cream brown duvet cover rear drivers side footwell, and JMB47 navy baseball cap between rear footwells.

[9] The radio on the driver's seat was examined by Mr Hogan a member of the Royal Signals. It was a Binatone 650, it was turned on and was on channel 6.

[10] The firearm was examined by Mr McLaughlin in the Forensic Science Agency. It was loaded with 5 bullets. It was a .38 special calibre Ruger Speed Six model revolver. It was successfully test fired using 2 of the bullets recovered. They were MFS .38 Special cartridges. The revolver and ammunition were described by Mr McLaughlin as being a firearm and ammunition within the meaning of the Firearms (NI) Order 2004. This opinion was not challenged and is within the agreed evidence.

[11] Buccal swabs were taken from all three defendants and testing took place in relation to the items recovered from the car. DNA swabs were taken from the firearm. Insufficient material was available from the ammunition for genetic profiling. A complex mixed profile from at least three people was recovered. The

characteristics of Rooney and Kerr were present. The opinion of Ms Quinn Forensic Scientist was that Rooney and Kerr could not be eliminated as contributors. A blood stain was recovered from the duvet cover. DNA analysis showed this did not match any of the samples from the defendants.

[12] Thomas Rooney was interviewed on 10/3/2010, between 15:44 and 16:27 in the presence of his solicitor. He answered preliminary questions in relation to his name and understanding the process. When asked if he wished to comment to Articles 5 and 6 at this stage he replied "No comment". He was asked a series of question in relation to his presence and purpose in the car and his knowledge of the passengers. He did not reply.

[13] He was further interviewed the same day from 16:34 to 16:53. In that interview after not answering questions about his presence in the car and the occupants he told police that the knuckle duster and the (baseball) bat were gifts from his girlfriend's sister. He said he was "too lackadaisy "to take them out of the car. He did not name the sister or answer questions in relation to the other items.

[14] He was further interviewed the same day between 20:50 and 21:33. He answered no questions in relation to his presence in the car or the articles recovered.

[15] He was further interviewed on the same day between 21:40 and 22:06. He answered no questions about the facts of the case.

[16] He was further interviewed on 11/3/10 between 15:14 and 15:42. He refused to answer questions about the car journey or the items recovered.

[17] Kerr was interviewed in the presence of his solicitor on 10/3/10 between 14:59 and 15:13. In interview he stated that "I do not have any idea what or where the firearm came from, it's not mine and I didn't bring it into the car … I'm not a member of any unlawful organisation, and the reason I was in the car was getting a lift and that's all that's all I really I've got to say." He maintained that stance and did not answer any further questions about his presence in the car, his knowledge of the others in the car or the recovered items in that interview or in two further interviews that day between 15:27 and 16:10 and between 16:44 and 17:20.

[18] Shaw was interviewed in the presence of his solicitor on 10/3/10 between 19:51 and 20:29. He said he and his wife had an argument so he left his house at 6 Oranmore Street in Clonard and took a lift in the car in Poleglass. He accepted it was a considerable distance and said he walked there. He said he knew the front seat passenger as he coached his child at boxing. He described getting the lift "I seen Stephen aye I was just walking and I just got a lift and that's that's it the next thing I know is I'm in I'm arrested at gun point. I knew nothing about no gun." Later he

said "Thought I was going to get shot. Knew nothing about a gun that was when the officer showed me. What the fuck do I want to be in a car anything to do with a gun for?" He said he knew no one in Poleglass, wasn't there to see anyone just walked there after leaving Clonard at 5pm. "Just wanted to clear my head just." He described how he knew O'Donnell's son from boxing. He said he didn't know Rooney or Kerr. He said he didn't ask for a lift anywhere in particular just "down the road." He claimed a policeman at the car told him to pick up the gun.

[19] He was further interviewed the same day between 20:35 and 21:04. He denied knowing anything about the knuckleduster. He answered no further questions on his movements and his knowledge of the other items.

[20] He was further interviewed on the 11/3/10 between 11:56 and 12:36. He denied being in any organisation. He repeated that he had been coming that night from his wife's in Oranmore. He then said his own address was at 22 Clondarragh Street. He said he had a room there. He said he sometimes stayed with his wife but it depended on his child's health.

[21] As part of the prosecution case I was asked to view video footage which showed a thermal image. It showed the car parked in a cul de sac and movement of up to 7 people in and around the car. The vehicle was stopped in the road. It remained at the area for minutes with movements into and out of it. It then commenced driving and drove continuously to where it was stopped by police who stopped it at the roundabout by driving in front of it.

[22] An investigating officer was called. He confirmed that the three defendants were of good character.

APPLICATIONS

[23] At the end of the prosecution case I was invited by Mr Magee QC/SC on behalf of Rooney, Miss McDermott QC on behalf of Kerr and Mr Colton QC on behalf of Shaw to rule that there was no case to answer in respect of all the charges.

[24] I was referred to the well known principles in Galbraith. I was referred to a number of cases dealing with factual scenarios submitted to be similar to this case. In particular the Court of Appeal judgment in R v Whelan [1972] NI 153, and a Crown Court decision in R v Hyde and Hyde [2004] NICC 29.

[25] In Whelan a firearm and ammunition were found under clothing on a chest of drawers in a bedroom jointly occupied by three brothers. Each of the brothers denied possession of the items and each alleged it had been planted. As the head note states the Court of Criminal Appeal held that "though there was very strong evidence that

somebody was guilty of an offence in connection with the revolver and ammunition there was nothing to indicate which individual was guilty, and insufficient evidence on which to found the inference that all three persons were in possession and that accordingly the convictions must be quashed."

[26] In the judgment of the court delivered by Lowry LCJ as he then was he stated:

> "….Every argument of logic and common sense would indicate that there was a very strong case that at least one of these men was in possession of this gun, and it is quite clear that none of them had a licence or permit to have the gun and no explanation is forthcoming as to what this gun was doing in this house. It appears to the court, however, that this is a case which could well be approached on the basis that that guilt appeared in the alternative, that is to say, that one or possibly two, of these men might have been guilty while the remaining two or one, as the case may be, were or was innocent of the offences which have been included in the indictment and the difficulty, in fact the impossibility, of laying the blame conclusively at the door of one accused is not a warrant for permitting or inviting a finding of guilty against each of them. So far as I have said that we are dealing with the case where a direction was sought at the end of the Crown case and in our opinion a direction ought to have been granted at that stage on the ground that while there was very strong evidence that somebody was guilty of an offence in connection with this gun, there was absolutely no indication which individual was guilty and insufficient evidence on which to found the inference that all three were in possession of the gun."

[27] In Hyde the court faced another house search. The items the subject of the charge were 25 8 mm rounds in a plastic bag in a hollow brick surround in the living room and 73 blank and 61 live rounds of ammunition in a lunchbox in a wheelie bin at the front door. The bin was emptied every week. The defendant brothers were interviewed and denied knowledge. There was no forensic evidence to link either. In his ruling on an application to stop the case Morgan J as he then was stated:

> "The circumstances of this case do not assist me in concluding that the possession was joint or that one of the defendants was individually or jointly in possession. In particular I consider that the materials in the hollow in

> the living room the balaclavas and the spent cartridge might have been secreted by one of the defendants without the knowledge of the other. In respect of the material in the wheelie bins it is impossible to form any view as to how long they may have been there given that the bins are emptied weekly or where they may have been before hand. Accordingly I have to approach this case in accordance with the principles set out in R v Whelan [1972] NI 153 and accede to these applications for a direction that the defendants have no case to answer on the basis that a reasonable jury properly directed could not convict either accused."

[28] I carefully considered the principles in those cases. I note that both were house searches where the items were recovered in situ. Each of the defendants were residents and lawfully there. There was simply no evidence to show that either or both had placed them there or knew of and assented to their presence. I do not consider this case is similar.

TEST TO BE APPLIED

[29] The proper test for the Court to apply is as stated in PSNI v LO [2006] NICA 3. At paragraph 14 of the judgment it states:

> "The proper approach of a judge or magistrate sitting without a jury doesn't therefore involve a different test from that of the second limb of Galbraith. The exercise the judge must engage in is the same suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not seek to ask himself the question at the close of the Crown case 'do I have a reasonable doubt?' The question that he should ask himself is whether he is convinced that there are *no circumstances in which he could properly convict* (my emphasis). Where evidence of the offence charged has been given the judge should only reach that conclusion where the evidence was so weak or so discredited that it could not *conceivably* support a guilty verdict."

RULING

[30] I rejected the applications by all three defendants. I considered the evidence and had full regard to the principles set out in both Whelan and followed in Hyde.

As set out in Whelan in a possession case there must be either physical possession or evidence of knowledge, assent and control. The possession can either be individual or joint and must arise from reasonable inferences from the evidence which at the no case to answer stage is that presented by the prosecution taken at it's height.

[31] I considered the case on two bases (a) was there evidence of joint possession involving all three defendants? (b) was there evidence of individual possession or joint possession of only some of the defendants? Having done so I had to consider whether any evidence of individual possession would be inconsistent with a finding of joint possession?

JOINT POSSESSION OF THE THREE DEFENDANTS

[32] Taken at its height the evidence could show all three defendants were stopped in a car in which there was a loaded revolver a knuckle duster and in the boot a baseball bat. The car in which they were travelling had stopped outside a number of houses and there were was considerable movement in and around it. Then it travelled without stopping until it was stopped around 10:30 p.m. When it was stopped the occupants were removed from the car and on the passenger seat there was a two way hand held radio which was on and had a selected channel. This is a device that is used in such a way that it is open and not consistent with being used privately. It is also an unusual means of communication in any normal social setting. The revolver which was loaded was not secreted in the car but was lying openly in the rear passenger footwell. It was at the position from which Shaw left the car. DNA evidence from the revolver which at seizure was in it revealed a mixed profile from which the other two occupants Rooney and Kerr could not be excluded. Although all three denied knowledge of the weapon and two (Shaw and Kerr) claimed they were getting a lift. None of the defendants would give details of their destinations or purpose. In Shaw's case his account of leaving Clonard and finding a lift "down the road" over five hours later appeared most unconvincing. The reasonable inference was that someone possessed the firearm and it was inherently unlikely that such a person when travelling with it would give lifts to or receive lifts from unwitting persons.

[33] In my opinion the circumstances of this stop combined with the evidence above was such that the evidence was not so inherently weak that there were no circumstances in which I could convict in relation to all three counts.

[34] Individually the evidence included the circumstances of the arrest and the items recovered and the following facts in each individual case:

(i) Shaw. The revolver was in the footwell on the passenger side where he was sitting when arrested. Given the gun's size and position as shown in the

photographs and the size of the footwell it was unlikely that a person sitting in that position would be unaware of its presence. His account of his presence was also unlikely. In my opinion on an individual basis the evidence was sufficient for him to have a case to answer on the firearms counts but not the offensive weapons charge as the knuckleduster was in the drivers pocket and the baseball bat in the boot.

(ii) Kerr. The DNA finding on the revolver found that he and Rooney could not be excluded from the mixed profile. A reasonable tribunal of fact could hold that the co-incidence of such a finding with their presence along with the weapon was significant. That was entirely unexplained. In my view the evidence was sufficient for him to have a case to answer on the firearms charge on an individual basis but as in Shaw's case not on the offensive weapons for the same reason.

(iii) Rooney. He was the driver of the vehicle. The two way radio was recovered on the seat he vacated. The DNA result of swabbing the weapon meant that he along with Kerr could not be excluded from the mixed profile even though the firearm was recovered in the back of the vehicle. His presence in the car with that item or the presence of the others in the vehicle was entirely unexplained. In my view the evidence was sufficient to establish a case to answer on the firearms charge on an individual basis. As he had made admissions in relation to his ownership and knowledge of the knuckleduster and baseball bat the evidence was such that he had a case to answer.

[35] I then had to consider whether the evidence in relation to the individual defendants was inconsistent with the finding of a case to answer on a joint basis thus leading me to reconsider my finding of a case to answer on that basis. In my view the individual findings were not inconsistent.

DEFENCE CASE

SHAW

[36] Shaw through his counsel indicated that he would not give evidence. He was given the standard allocution as to the effect of Article 4 of the Criminal Evidence (NI) Order 1988. His counsel confirmed he was aware of the potential inferences that could result from his failure to do so.

[37] A chartered Consulting Engineer Laurence McGill was called on his behalf. Mr McGill had been given access to the firearm and had taken photographs of it. In an album of photographs containing 5 photographs the firearm is shown as No 1. A rule is beside it and his evidence was that the revolver's width at it's widest point was 38mm. Its weight was slightly above 1kg. Photograph No 2 shows the front passenger seat. No 3 shows the seat and the footwell behind it. Nos 4 and 5 show the

view and space beneath that seat and he gave evidence of the depth of the passageway from the front seat to the footwell behind. He gave evidence that the revolver was capable of moving underneath the front passenger seat towards the footwell. In cross examination it was suggested to him that the weight of the gun would be such that it could not slide between the two areas. He did not accept that braking or acceleration would not do that. It was put to him that photos Nos. 4 and 5 showed there were obstacles preventing movement. He did not accept that they did.

[38] Kerr through his counsel indicated that he would not give evidence. He was given the standard Article 4 allocution and his counsel confirmed that he was aware of the potential inferences the court could draw from his failure to do so.

[39] Rooney through his counsel indicated that he would not give evidence. He was given the standard Article 4 allocution and his counsel confirmed that he was aware of the potential inferences the court could draw from his failure to do so.

[40] Although no evidence was called on Rooney's behalf I was asked by his counsel to look again at the Thermal imaging DVD of the car and it's movements. I was invited to observe in particular the movements of the driver of the vehicle when the vehicle pulled up to park at the cul de sac. It was submitted that following the person who got out of the driver's side showed that the driver (Rooney) who was stopped was not the person who drove to the car to that area. The original driver appearing to leave the area when the vehicle started again and go to an unidentified house. At this stage I merely comment that multiple thermal images when moving can be hard to differentiate.

DISCUSSION

[41] In order to convict the accused I must be satisfied that the evidence establishes their guilt of the required elements of the offences charged beyond a reasonable doubt. When in this judgment I say I am satisfied I am referring to the criminal standard of proof.

[42] I remind myself that the evidence against the defendants is largely circumstantial. When the court is dealing with circumstantial evidence it is not necessary that each individual strand of evidence be established to the criminal standard. Each strand may have differing weight or significance. The issue is whether taken together the strands establish that there is no possibility of a reasonable innocent explanation ie the possibility of a reasonable doubt has been excluded. I further remind myself that any circumstance inconsistent with guilt will carry more weight that any other.

[43] None of the defendants has given evidence in this case. They were not obliged to do so. The court is entitled where proper to draw appropriate inferences against them. The nature and extent of the inference must be determined by the circumstances of individual cases against them including the nature of the evidence and the strength of that evidence. Their silence does not mean they are guilty and if the case is otherwise weak then the justification for drawing inferences may not be established.

[44] In each case the defendants have established in evidence that they are for the purposes of this case entitled to have the benefit of good character. That is relevant in two ways. Firstly if they gave evidence then I should have regard to the fact that a person of good character may be more likely to be truthful. None of them have done so but in so far as they made statements to the police I have regard to that. The second matter is that other things being equal it may be less likely they will have committed the acts alleged. I take account of that in each case.

[45] I have already referred to the case of Whelan and the matters to be proved before I can convict. I specifically warn myself that I must analyse the evidence meticulously and guard against the danger of being influenced by what Lord Lowry described as the "logic and commonsense … that at least one of these men was in possession of the gun."

JOINT POSSESSION OF THE THREE DEFENDANTS

[46] I have set out the evidence on this issue in paragraph 33 above. In relation to those facts and inferences I have already found that a prima facie case of joint possession exists. I am entitled as against each defendant to draw inferences against them having failed to give evidence in relation to those facts. In Rooney's case he did not give the police any account of the reason for him being in the car or the destination, or his knowledge of the persons he was driving. In the case of Kerr his bare assertion that he knew nothing of the firearm and was getting a lift was not supported by him in evidence and otherwise he gave no details to the police. In Shaw's case he gave a more detailed account but did not stand over it in evidence.

[47] There was evidence before me that there was a fourth person in the car. Indeed a fourth person was named on the Indictment. That person was not before me and I have no evidence relating to him other than his position in the car which was the front passenger seat. I cannot and do not speculate in this case about what may or may not have been the evidence in relation to his presence and purpose in the car. But I must have regard to the evidence that is before the court. The evidence of Mr McGill was called before me. His evidence was that the revolver found could have been moved from the position of the front passenger seat to the rear passenger seat. The effect of that evidence is that in deciding whether this is a case involving

joint possession of the defendants I could not exclude as a real possibility that the revolver had been in a position around or in the possession of the person in the front passenger seat about who there is no evidence before me. In addition I could not exclude as a real possibility that this possible transfer took place in a way or at a time that Shaw in the rear was unaware of it.

[48] The case in relation to the searches was on the basis of the agreed statements. Accordingly the officers involved in the stop and search were not called and I have no specific evidence as to the order of persons out of the car or the time each was in the car.

[49] Although I am not finding that joint possession in relation to a lesser number of passengers than are in a vehicle is not possible. (Indeed I am going on to consider that). The inferences to be drawn from presence in the car and the circumstances of the arrest alone are less compelling when the court is unaware of what if any role the other passengers may have had.

[50] Having regard to all the evidence including the proper inferences I can draw from the failure of the accused to give evidence I am not satisfied beyond a reasonable doubt that the accused are guilty on the basis of joint possession involving all these three defendants together.

[51] I have already stated that if I did not consider there was a case to answer on the basis of joint possession I would have stopped the case on count 3 of the Indictment as against Shaw and Kerr. Accordingly I find Shaw and Kerr not guilty of count 3.

[52] I now turn to consider the cases on the basis of individual possession and potential joint possession not involving all three of these defendants.

SHAW

[53] I have set out above the factors which established a case against Shaw. He was the person in the seat at which the revolver was found in the footwell. It would be reasonable to infer that if it were in that position when he got into the car he would have been aware of it given the revolver's size and the space available. He gave an account at the time which in my view was an unlikely account. Part of his account was that he got a lift because he knew the person in the front seat of the car from coaching his child. He did not give evidence. He is a man of good character.

[54] On the evidence before the court I have found there is a reasonable possibility that the revolver could have been in the front of the vehicle or under the front seat and come backward, in submissions it was stated it was possible that it was dropped

there by a front or the other rear seat passenger. There is no forensic or other evidence to connect the defendant to the weapon. In those circumstances any inference I would draw would not be strong because the only certain evidence against him is his presence in the car. This is the very situation Whelan warned about. In those circumstances I am not satisfied beyond a reasonable doubt that he is guilty of possession of the firearm and I acquit him of counts 1 and 2.

KERR

[55] I have set out the facts that established a prima facie case against this defendant above in paragraph 35(ii). He was present in the car in the rear seat. He had characteristics from his DNA in the mixed profile found on the revolver and could not be eliminated as a contributor. Nor can the driver Rooney. There is no evidence before me as to the circumstances in which his characteristics were found and the finding is not of the positive nature which would allow one to properly conclude in isolation that he was in possession of the item. I am satisfied that the fact that the finding is made in relation to both him and Rooney and that both are found with the article driving in a car at 10:30 p.m. combined with the finding of the two way radio are such as to call for an explanation. In interview he said "I've no idea where the firearm came from, it's not mine or I didn't bring it into the car. I am not a member of any unlawful organisation, and the reason I was in the car was getting a lift and that's all". He then declined to answer any questions about how he came to be in the car, who he was with and where he was going. He was not willing to go into the witness box to be tested on those statements. I find that inferences of guilt can properly be found from his failure to give evidence.

[56] I remind myself that Kerr is a person of good character and I take it into account.

[57] In Shaw's case I could not be satisfied of his guilt because of the evidence of another person in the car in front of him and the reasonable possibility that the firearm could have ended up at Shaw's position after Shaw had left the car. His position in the vehicle was the only evidence connecting him to the weapon.

[58] I have considered whether that finding and the potential presence of another person in possession of the firearm is such that it would prevent me being satisfied on the evidence as against Kerr. In my opinion it does not. The circumstances are such that I am satisfied on the evidence against him that he and Rooney were in joint possession of the firearm either together or with a third person in the car.

[59] Accordingly I find Kerr guilty of possession of the firearm. I shall later consider the specific possession charges.

ROONEY

[60] Rooney was the driver of the vehicle. When the passengers were removed from the car the radio which was on was found in his seat. The revolver when examined was found to have his characteristics in the mixed profile. The same findings were made in relation to one of his passengers Kerr. At the scene when cautioned, and in interview he did not reply to questions about the firearm or the occupants of the car or the purpose or destination of the journey. He did reply in interview and answer questions in relation to the knuckleduster in the driver's pocket and the baseball bat in the boot. He declined to give evidence in the case. I repeat the comments I have made when referring to the DNA evidence however although not a positive finding which by itself would establish a direct connection to the revolver, the circumstances of the DNA on it in a car driven by him with Kerr in the car and the radio on the seat he was in are such as to call for an explanation. None was given

[61] I have taken account of the fact that the defendant is of good character.

[62] As in the case of Kerr I have considered the effect of my finding in relation to Shaw and I have come to the same conclusion in Rooney's case. I am sure beyond a reasonable doubt that Rooney was in joint possession of the firearm with Kerr together or with another person in the car. As in Kerr's case I will come to the specific charges later.

[63] Count 3 is the possession of offensive weapons in a public place contrary to Article 22(1) of the Public Order (Northern Ireland) Order 1987. Under that article it is an offence to have such a weapon in a public place without lawful authority or reasonable excuse (proof of which lies on him)".

[64] By Article 22(2):

> "Offensive weapon means any article made or adapted for use in causing injury to the person or intended by the person having it with him for use by him or some other person."

[65] In interview Rooney has accepted that both articles are his. He said they were gifts and given to him by his girlfriend's sister. They were in the car since he had been given them he just didn't get round to removing them. He answered no further questions about them or their source. He did not give evidence in support of that

account. Where as here reasonable excuse has been raised in the evidence the prosecution must disprove it beyond a reasonable doubt.

[66] The two alleged offensive weapons are in different categories. The knuckle duster is made for causing injury. It is an offensive weapon per se. The bat is not so made and there is no evidence it was adapted in any way. Therefore it only becomes an offensive weapon if intended by the defendant to be used by him to cause injury or by another. On the facts of this case it was in the boot not ready for immediate use and there is no evidence of his intentions with it. Accordingly I find in these circumstances I am not satisfied it was an offensive weapon.

[67] I am satisfied that the knuckle duster is an offensive weapon. I have considered the position ie close to Rooney in the driver's door pocket. I have considered his statements in interview. There has been no evidence of lawful authority. I am satisfied there is no reasonable excuse for his possession and accordingly I find Rooney guilty of count 3 in relation to it.

[68] I turn to counts 1 and 2. I am satisfied that both Kerr and Rooney were in joint possession of the firearm and ammunition. In count 1 it is alleged they were in possession with intent to endanger life or cause serious injury to property or to enable another person so to do.

[69] In relation to this issue I was referred to the judgment of Deeny J in R v Harte [2006] NICC 2. In that case police entered premises and found holdalls containing an assault rifle, a pistol, three replicas not the subject of the charges and 14,000 rounds of ammunition.

[70] In setting out the facts at paragraph 6 the judgment states:

> "It is important to note that the AKM assault rifle was defective when found. However subsequently with a new firing pin inserted it did fire. The derringer pistol was also incapable of firing and was not in fact subsequently fired by the laboratory. There were also three replica firearms incapable of being fired. There was therefore no actual working firearm with the very considerable amount of ammunition".

[71] In the judgment the learned trial judge made it clear that the intent to endanger life must be proved beyond a reasonable doubt.

[72] Allowing for the factual differences in this case the learned trial judge considered the authorities and stated at paragraph 20 as to the second limb:

> "Am I satisfied beyond a reasonable doubt that when in possession of these materials it was his intention to enable others to endanger life …… A high likelihood is not enough."

I fully accept those principles.

[73] Each case is fact specific. One must assess intent according to the proved circumstances. As neither accused accepted they were in possession of the firearm one must do so without any explanation from them. The following facts are relevant:

(a) the gun was in transit;

(b) it was loaded and both ready to be fired and capable of being fired;

(c) there was a radio which suggested some form of communication and suggestive of use in the short term.

The combined circumstances suggest that some use of a loaded weapon in the near future was contemplated. Although there was a knuckleduster in the car and a baseball bat in the boot there is no way other than speculation for the court to assess whether they were to be used that night.

[74] In this case there is no evidence that this was a terrorist operation which would be relevant. Although the evidence suggests some operation was afoot requiring the use of the weapon the court is not in a position to be sure to the requisite standard what the operation was. It could have been a robbery, a beating, a shooting short of life threatening, the use of the gun to threaten, intimidation or murder or other serious shooting. It could have been for use by occupants of the car or by others.

[75] I cannot be sure beyond a reasonable doubt that the defendants or either of them personally intended to use the firearm to endanger life or to enable another to do so. Accordingly I find them not guilty on Count 1 of the Indictment.

[76] In Count 2 they are charged with possession in suspicious circumstances. They were stopped in a vehicle at night with a loaded weapon and a radio. No explanation has been offered. I am satisfied beyond a reasonable doubt that they are both guilty of Count 2 on the Indictment.

[77] To summarise, on Count 1 I find all three defendants not guilty. On Count 2 I find Shaw not guilty, I convict Kerr and Rooney. On Count 3 I find Shaw and Kerr not guilty. I convict Rooney in respect of the knuckleduster.