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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REGINA

-v-

EAMONN McCANN, SEAN HEATON, JAMES ANTHONY KELLY, COLM DONAL SARTO BRYCE, EAMON O'DONNELL and KIERAN VINCENT GALLAGHER

PROSECUTION APPEAL PURSUANT TO ARTICLE 17 OF THE CRIMINAL JUSTICE (NORTHERN IRELAND) ORDER 2004

Before Kerr LCJ, Campbell LJ and Higgins LJ

KERR LCJ

Introduction

[1] This is an application for leave to appeal against a ruling made by His Honour Judge Burgess, the Recorder of Belfast, on the trial of Eamonn McCann and others, whom we shall refer to as 'the defendants'. The defendants were charged on an indictment with a number of offences including three counts of criminal damage contrary to article 3(1) of the Criminal Damage (Northern Ireland) Order 1977. The Recorder concluded that the criminal damage charges should not be left to the jury and it is against this ruling that the prosecution seeks leave to appeal.

Background

[2] On 9 August 2006 the defendants went to the premises of Raytheon Systems Limited which is situated at the Science Park, Branch Road, Derry. They claimed that their aim was to enter the premises and, if that proved

possible, to cause such damage as would hinder, disrupt or interfere with the role of the company in Derry as part of the Raytheon group supplying missiles to carry out attacks that resulted in damage to the property of Lebanese citizens.

[3] Arising from the incidents that took place on 9 August, the six defendants are currently being tried on indictment for the following offences:

Count 1 – Affray
Count 2 – Criminal Damage to an office building
Count 3 – Criminal Damage to computer and office equipment
Count 4 – Criminal Damage to a Vauxhall Astra motor vehicle

Eamon McCann is further charged with the theft of three computer disks and Kieran Gallagher is charged with the theft of four computer disks.

[4] The trial is taking place before His Honour Judge Burgess sitting with a jury at Belfast Crown Court. The defence case is that they honestly believed (a) that the damage caused by them was to protect the property of Lebanese citizens from being destroyed by the Israeli Defence Force; (b) that the property of Lebanese citizens was in immediate need of protection given the reports of the destruction of property at the end of July and beginning of August 2006 by the Israeli Defence Force; (c) that the actions taken by them were reasonable having regard to all of the circumstances, including the information which they say they had and believed to be credible as to the use by Israeli Defence Forces of Raytheon products (including software) in those attacks; and (d) that those beliefs were honestly held, based as they were on the extensive material known to them through research, the media and their connections with groups also objecting to the supply of weaponry and what was happening over the years in the Middle East.

[5] On 4 June 2008, the Recorder gave a written ruling that, on the evidence, no jury properly directed would convict the defendants on counts 2, 3 and 4 on the indictment (*i.e.* the criminal damage charges). He therefore withdrew the offences charged in those counts from the jury.

The Criminal Damage (Northern Ireland) Order 1977:

[6] Article 3(1) of the 1977 Order provides: -

> "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

[7] So far as is material article 7 provides: -

> "(2) A person charged with an offence to which this Article applies shall, whether or not he would be treated for the purposes of this Order as having a lawful excuse apart from this paragraph, be treated for those purposes as having a lawful excuse-
>
> (a) …
>
> (b) if he destroyed or damaged … the property in question … in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed-
>
> (i) that the property, right or interest was in immediate need of protection; and
>
> (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
>
> (3) For the purposes of this Article it is immaterial whether a belief is justified or not if it is honestly held."

Lawful excuse

[8] The provisions of article 7 of the 1977 Order are identical to those contained in section 5 of the Criminal Damage Act 1971 (the English version of the legislation).

[9] In *R v Jones and Others* [2004] EWCA Crim 1981, the English Court of Appeal dealt with conjoined appeals arising out of incidents at RAF Fairford in March 2003 in which the defendants were arrested for committing, conspiracy to commit and carrying articles intending to commit, criminal damage. They claimed, inter alia, that their actions were intended to stop the bombers at the airbase taking part in an illegal war. The Court of Appeal summarised the 'lawful excuse' provisions of section 5 of the 1971 Act in paragraph 44 of its judgment: -

> "The effect of the provisions is that a person is treated as having a lawful excuse if:
>
> (i) he acted to prevent damage to property, whether his own or another's. This test requires an answer to the question: 'Could the act done be said to be done in order to protect property?' see *R -v- Hunt* 66 Cr App R 105,
>
> (ii) at the time he acted, he believed that property was in immediate need of protection, and
>
> (iii) he believed that the means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
>
> (iv) in determining the answers to (ii) and (iii), it is immaterial whether the belief was justified, provided that it was honestly held."

[10] It can be seen, therefore, that there are three elements to the defence of 'lawful excuse': firstly, that the defendant acted in order to protect property; secondly that he honestly believed that that property was in immediate need of protection; and, thirdly, that he honestly believed that his actions were reasonable having regard to all the circumstances. It is clear that the second and third elements of the defence involve the application of a subjective test, *i.e.* did the defendant honestly believe that the conditions therein arose in the particular case. Different considerations arise in relation to the first element of the defence, however.

[11] In *R v Hunt* (1978) 66 Cr App R 105, the appellant had been charged with setting fire to a guest room in an old people's home. He claimed that he had done so in order to draw attention to a defective fire alarm system. He sought to set up a statutory defence under section 5 (2) of the 1971 Act by claiming to have had a lawful excuse for doing what he did. The trial judge withdrew the defence from the jury. In giving the judgment of the Court of Appeal, Roskill LJ said at page 108: -

> "I have said that we will assume in his favour that he possessed the requisite honest belief. But in our view the question whether he was entitled to the benefit of the defence turned upon the meaning of the words 'in order to protect property belonging

> to another'. It was argued that those words were subjective in concept, just like the words in the latter part of section 5 (2) (b) which are subjective. We do not think that is right. The question whether or not a particular act of destruction or damage or threat of destruction or damage was done or made in order to protect property belonging to another must be, on a true construction of the statute, an objective test. Therefore we have to ask ourselves whether, whatever the state of this man's mind and assuming an honest belief, that which he admittedly did was done in order to protect this particular property, namely the old people's home in Hertfordshire? If one formulates the question in that way, in the view of each member of this court, for the reasons Slynn J gave during argument, it admits of only one answer: this was not done in order to protect property; it was done in order to draw attention to the defective state of the fire alarm. It was not an act which in itself did protect or was capable of protecting property".

[12] Roskill LJ's judgment was cited with approval by the Court of Appeal in *R v Hill and Hall* (1989) 89 Cr App R 74. That was a conjoined appeal where the applicants were tried on an indictment charging possession of an article with intent to damage property. In each case the article in question was a hacksaw blade and it was the prosecution case that the applicants intended to use the blades to cut part of the perimeter fence of a United States Naval Facility. The defence in each case was one of lawful excuse. It was claimed that the actions were aimed at forcing the United Kingdom to abandon nuclear weapons, thereby saving their own property and that of their neighbours from destruction. The trial judge in each case had directed the jury to convict on the basis, first, that the causative relationship between the acts and the alleged protection was so tenuous and nebulous the acts could not, objectively, have amounted to protection. On applications to appeal against conviction it was contended that the test was a subjective one and that it should have been left to the jury as a question of fact as to what in each case the applicant believed. Lord Lane CJ, giving the judgment of the Court of Appeal, said: -

> "There are two aspects to this type of question. The first aspect is to decide what it was that the applicant in this case, Valerie Hill, in her own mind thought. The learned judge assumed, and so do we, for the purposes of this decision, that

> everything she said about her reasoning was true. I have already perhaps given a sufficient outline of what it was she believed to demonstrate what is meant by that. Up to that point the test was subjective. In other words one is examining what is going on in the applicant's mind. Having done that the judges in the present cases and the judge particularly in the case of Valerie Hill turned to the second aspect of the case and that is this. He had to decide as a matter of law, which means objectively, whether it could be said that on those facts as believed by the applicant, snipping the strand of wire, which she intended to do, could amount to something done to protect either the applicant's own home or the home of her adjacent friends in Pembrokeshire. He decided again quite rightly in our view that that proposed act on her part was far too remote from the eventual aim at which she was targeting her actions to satisfy the test."

[13] In *R v Kelleher* [2003] EWCA Crim 3525, the appellant had been convicted of criminal damage to a statute of Margaret Thatcher. He claimed that he had done so in order to protect his son's future. He asserted that he had committed the offence in the hope of obtaining publicity in order to persuade others to adopts his views and bring about improvements in the world situation. Agreeing with previous decisions of the Court Of Appeal in, inter alia, *Hunt* and *Hill and Hall*, Mantell LJ, giving the decision of the court, stated (at paragraph 34): -

> "Of course, Professor Sir John Smith is right to say that the words "in order to" involve a consideration of a defendant's state of mind, but what a judge has to decide is whether the defence of lawful excuse is raised on the evidence. In other words, does the declared or stated purpose engage the subsection?"

[14] We are satisfied that the first element of the defence available under article 7 (2) of the Order involves the application of an objective test. The jury is required to consider whether the defendant who asserts the defence in fact did what he did in order to protect the property of another. This involves an examination of the defendant's intention, not his belief.

The judge's ruling

[15] At paragraph 3 of his ruling, the Recorder said: -

> "The essential elements of this defence are:
>
> > (1) The defendant damaged the property in question in order to protect property belonging to another;
> >
> > (2) The defendant at the time of the damage of the property believed that the property belonging to another was in immediate need of protection; and
> >
> > (3) The defendant believed that the means of protection adopted were reasonable having regard to all the circumstances.
>
> The three elements refer to the belief of the defendant. It is immaterial whether that belief was justified or not. Provided it is honestly held, then if each of the three elements is present any such damage caused would not be unlawful – see Article 7 (3) of the 1977 Order."

[16] That there can be no doubt that the trial judge regarded the first element of the defence as requiring no more than an assessment of the defendants' belief is clear from this later passage of his ruling at paragraph [5] : -

> "… the defence position is that they honestly believed
>
> > (a) that the damage caused by them was to protect the property of the Lebanese citizens from being destroyed by the Israeli Defence Force;"

[17] Contrary to the judge's ruling on this point, the issue for the jury was whether the defendants had *in fact* carried out the alleged acts of criminal damage for the purpose of protecting the property of Lebanese citizens or for a different purpose entirely. There was ample material available to challenge that claim. The choice of the date on which this action took place (the anniversary of the bombing of Nagasaki) is at least *prima facie* inconsistent with a desire to afford immediate protection to the property of Lebanese citizens. Moreover, certain aspects of the way in which the alleged criminal damage was committed – such as the throwing of computer equipment from the windows of Raytheon - arguably partakes of an intention to generate

maximum publicity for the enterprise rather than to protect the property of Lebanese citizens.

[18] In paragraph [9] of his ruling the Recorder referred to a submission of Mr Ramsey QC for the prosecution taking issue with the contention that the defendants believed that by damaging the offices of Raytheon in Derry they would disrupt the activities of the company in supplying equipment used by the Israeli Armed Forces to damage property of civilians in Lebanon. Of this submission, the judge said:-

> "I cannot reconcile this submission with
>
> - His acceptance that the defendants honestly believed that systems (and this must include JETTS) worked on by Raytheon (including Derry) were being used by the Israeli Armed Forces in the conflict raging at that time in Lebanon;
>
> - The unassailable evidence, never once disputed, that those weapons and systems were causing damage to property of Lebanese citizens; and
>
> - The evidence of the witnesses from Raytheon as to the effect the actions of the defendants had been on the working arrangements of the company."

[19] This analysis again proceeds on the basis that the first element of the defence under article 7 (2) (b) requires no more than a subjective belief. It also assumes that where there is a belief that property is in need of protection the requirements of this first factor are satisfied. What is required, of course, is an examination of whether the need to defend the property of others was *in fact* the motivating cause for the destruction of the property that is the subject matter of the charge. The defendants may well have believed that the systems that Raytheon were working on were used by the Israeli armed forces; that the weapons and systems which were the product of that work were causing damage to the property of Lebanese citizens; and that the actions of the defendants impeded the working arrangements designed to produce those weapons and systems. These considerations do not establish, however, that *the intention* of the defendants was that the damage to Raytheon's property was to protect property belonging to Lebanese citizens. It is entirely conceivable that the defendants, although armed with knowledge of all these factors, had a completely different purpose such as to generate maximum

publicity for one of their allegedly avowed intentions of ridding Derry of Raytheon.

[20] Much of the Recorder's commendably detailed ruling is taken up with an examination of the viability of various theories advanced by the prosecution as to possible reasons for the alleged criminal damage other than the claimed intention of protecting Lebanese property. The first of these appears to be that the decision to take action against Raytheon was not sufficiently prompt (after various meetings to discuss it had occurred) to support the suggestion that the motivating cause for the action was to protect the property of Lebanese citizens. Dealing with this, the Recorder said: -

> "As to the first of these propositions, the evidence from Mr McCann was that there was a meeting on the 2nd August 2006. The main business of the meeting was addressed in two talks by two speakers relating to Iraq, but given the nature of that business the discussion came around to taking steps in protest against what was happening in Lebanon, and what was going to be happening for some time to come – see my earlier remarks about the absence of any response to a ceasefire. That discussion gave rise to various points of view, some for [and] against an occupation of the Raytheon offices, and some for and against damaging the computers. Given that difference of approach, a further meeting was organised for the 7th August and this action took place on the 9th.
>
> I cannot see how the failure there and then to take action affects the right of the Article 7 defence. The provisions of Article 7 do not require 'immediate action'. That is to misunderstand the meaning of the statutory provision. Instead it refers to the need for 'immediate protection' of property. The need of any protection of property in the Lebanon was just as immediate on the 9th as it was on the 2nd or the 7th."

[21] One can quite understand that action taken some time after it is conceived to be required cannot necessarily be condemned as not being for the defence of property that is in immediate need of protection. But the important significance of this particular part of the evidence surely lies in the discussion about possible types of action. It appears that a range of options was canvassed and considered. Some were against the occupation of

Raytheon offices, some were in favour. Some were in favour of damaging computers, others opposed this. The very fact that such a debate was taking place indicates strongly that an issue to be determined was whether the motivation for the action was the protection of property in Lebanon. Such an issue is pre-eminently one for the jury.

[22] The second issue addressed by the trial judge in this context was the alleged transformation of what had begun as a peaceful protest in the Raytheon premises to one of "wanton destruction motivated by the seeking of publicity and the feelings of deep antipathy towards Raytheon". In addressing this issue the Recorder set out the background of the protest by the group to which the defendants belonged in the following passages: -

> "The anti-war group to which the defendants belong commenced its objections to the presence of Raytheon in Derry from the outset. For them whether Raytheon in Derry were involved in military applications did not affect their view that Raytheon in any form, with its military connections, should not have a facility within the City. Protests began before 2004 about specific military applications. All of those protests had been peaceful. The police were aware a demonstration was to take place on this morning and but only two officers were deployed. This demonstration was therefore not an isolated act on the part of the defendants, but part of a continuing protest again the presence of Raytheon.
>
> [14] The reaction of Raytheon to such demonstrations was articulated first by Mr McGivern who stated that it was "business as usual" notwithstanding any or all of the demonstrations: and Mr Reilly, a member of the main board, indicated none of them had made any difference, indeed although he may have discussed the protests with some directors, he had not taken it to board level and saw no need to meet any of the protestors.
>
> [15] And so one comes to the next stage as to what changed in relation to those protests to give rise to the damage caused by the defendants on this particular day - the reasons they have given or a spontaneous outburst of resentment against the company after the protestors gained access to

carry out a peaceful protest, as argued by the prosecution?

[16] Again some background should be given. Questions were put to Mr Fulton and accepted by him about the background which was in the public domain as to events that had occurred within a two or three week period prior to this event, and in the weeks after it. That background was put in this way.

> "On 12 July Hezbollah's military wing ... attacked an Israeli patrol inside Israel, killing three Israeli soldiers and capturing two others. A major military confrontation ensued between Israel and Hezbollah's forces. The Lebanese Government said it had no advance warning of the attack by Hezbollah that triggered the conflict, did not condone it and sought a ceasefire from the outset.
>
> Hostilities ended on 14 August, following a U.N. Security Council resolution 1701, which imposed a ceasefire and enlarged the role of the UN Interim Force in Lebanon. On 17 August the Lebanese Army moved into Southern Lebanon."

[17] One of the attacks by Israel was on the town of Quana. I allowed a small portion of a news report of that attack and its consequences to be shown. It established that the attack had been carried out by Israel, something it has never denied, and the nature of the property that was completely destroyed and the loss of life and injury that was caused was illustrated. This occurred some 9-10 days before the events that bring us here today. This and subsequent events of the actions on both sides of this conflict were widely reported in every form of the media – newspapers, television and the internet. It was accepted by Mr Reilly from Raytheon that such coverage would have been available to the defendants, and indeed that given their professed concern evidenced by their previous protest, that they would have been more likely to follow that

coverage and the effects of the various military actions. Mr McCann detailed the extensive researches he had undertaken, and confirmed that his co-defendants had a similar interest both over the years and over this period in question. It was never challenged nor put forward in any argument or questions but that the defendants were not aware of these events in the Lebanon in the days leading up to the 9th August 2006.

[18] No evidence was adduced by the prosecution to gainsay the proposition as to the availability of information relating to the destruction of property in Lebanon in this time.

[19] At paragraph [12] above I detailed the meetings that led to the assembly of the protestors on the 9th August. At this point and for reasons that will [be]come apparent there is no evidence that Mr Heaton was at either or both of those meetings. In interview he said that he didn't know many of the other protestors, and he didn't 'think' the others had planned to enter the premises to cause damage for the reasons put forward by them. What is clear from all the statements made to the police within hours of their arrest, each of the other defendants confirmed in terms that their objectives were as set out in paragraph [3] above. Also as I have recorded Mr McCann made a similar statement on the radio whilst the damage was being caused.

[20] So what did happen this day, based on the evidence adduced by the prosecution?

The protestors, including the defendants arrived at the front door after a relatively short and peaceful demonstration. They stayed there for some time and some members of staff entered the premises without any efforts being made by any of the protestors to follow them in. One of the security staff had positioned himself in the space, or vestibule, between the first set of doors and the second set of doors. The operation he had undertaken was to let members of staff into the vestibule, close the outer doors and only then open

the inner doors to allow the member of staff through.

At some point around 8.30/40 a.m. the protestors rushed in behind a member of staff who had been afforded entrance to the vestibule. The two police officers who were present entered the vestibule as well and one gave evidence that there was a bit of scuffling, some of the protestors were standing and others were sitting down, his radio mike was detached, but there was nothing “dramatic”. After some further pushing at the inner door which the security officers were holding, someone used a bar of some description to break the glass in one of the doors and it was through that gap that the protestors came through. They went up the stairs, and when confronted by the door giving entrance into Raytheon they forced it sufficiently to be able to gain access.

There was a member of staff in the premises. She confirmed that no violence was shown to her but, and perhaps this should not come as any surprise, when confronted by a number of men she was in her words “shaken and scared”. That appears to have happened over a very short period of time and no other member of staff was called to indicate whether they were present, let alone if the presence of the men had any adverse affect on them.

As to the damage to the property itself. It was against the computers. Desks and chairs were thrown over, and drawers rifled seemingly for paper. Some glass panels were damaged. A server, an integral part of the communication system allowing transmission of information not just between the terminals within the Raytheon property but between Raytheon and other facilities around the world, was damaged by pouring water into it and removing parts which were thrown out of the window, together with computer terminals. This throwing of the equipment out of the windows did not happen immediately the defendants entered the premises. A Ms Penny arrived at 9.40 and stated that only papers had

been thrown out at that time. The evidence of a Mr Christie who arrived to take photographs at 9.56, was that about ten minutes passed from his arrival until the computers were thrown out. We heard evidence from Ms McColgan that on entering, one of the protestors looked at her screen and then asked others to start looking, and in doing so they began to go through drawers.

It would appear therefore that for upwards of an hour only paper was taken out and thrown out of the windows. The evidence of the prosecution witnesses was that the computers were thrown out over an approximate 10 minute period. When the damaged server was caused is not known. There was damage to two windows and some of the blinds.

Damage to the property (which included the clearing up) came to some £96,000. The damage to Mr McGivern's car which the Court did not see but it was advised cost some £250. The damage to the Raytheon property was the subject of some debate not least since a substantial claim in terms of certain air control systems had not been paid by the Compensation Agency since Raytheon had indicated they have no intention at least for the time being of replacing them. It would appear that approximately two years later no such decision has been made. Otherwise the cost was approximately £100,000.

[21] This is the sequence of events as proved by the prosecution. They have the burden of proving that the motive of the defendants was not that which they have stated they firmly and honestly believed. To counter that defence the prosecution assert that it was a spontaneous outburst of wanton violence. On what evidence is this put forward so that the jury can consider if they have discharged that burden beyond a reasonable doubt? I am asked to direct the jury that they can infer this from the events that I have particularised, and the evidence of Mr Heaton."

[23] The Recorder then addressed what he perceived to be the difficulties that this evidence presented in relation to his charge to the jury in the following passage: -

> "It is a basic principle given by way of direction to a jury in any trial that they should not speculate or guess what might or might not have happened. What they are entitled to do is to draw commonsense inferences from a body of evidence that they have considered and accepted as facts on which they are firmly convinced. What can I direct them in this case in terms of evidence in order to determine facts on which any inference could be properly drawn?
>
> We have a group of men who represent two movements that have conducted protests against this company on virtually a weekly basis for years without a hint of violence or damage.
> No violence was shown to any employee.
> There was not an immediate and spontaneous outburst of violence if the throwing out of the computers is evidence of such a reaction – nearly an hour passed before that happened and before that only paper was thrown out.
> They stayed in the premises for many hours, but any damage evidenced by what was thrown out (and this constituted the main damage over and above the server) ceased within the first hour.
>
> I could not determine that on this evidence alone, a jury properly directed could properly conclude that there was such a spontaneous outburst founded in hatred of Raytheon, or as a basis for the inevitable proposition that Mr McCann lied. Apart from that consideration it would be to ignore the evidence as to the reason for the protest and the background of events in Lebanon occurring contemporaneously with this event, all proved through the prosecution evidence, and the acceptance by the prosecution that these men held the honest belief that this company (including the Derry facility) was involved in the supply of weapons or weaponry systems being used by the Israeli Armed Forces in Lebanon at the relevant

time with the damage to property that was causing.

[23] As to the evidence of Mr Heaton that is to be found entirely in his police interviews. I have read these carefully and repeat what I said earlier as to the absence of any evidence from the prosecution that he was at either or both meetings at which the evidence is that the plans were laid for this demonstration. Mr McCann was not asked. As to specific answers I will address those that seem pertinent not least since they were referred to in legal argument:

When asked at the outset as to what had had happened and his involvement, Mr Heaton replied at pages 164 and 165 of the exhibited interviews:

> 'I was there as part of the Derry war, Anti-War Coalition ... to gain entry into Raytheon, which is a cog in the Israeli death machines. They are killing hundreds ... probably thousands by now of innocent civilians which I feel very strongly about. That is why I was there today.'

At page 166 in reply to the question what was done when they got to the offices he replied:

> 'We proceeded to barricade ourselves in … and destroyed the computers … to stop them being able to work, maybe for a week, two weeks, who knows.'

At page 176 there is a discussion about what he, Mr Heaton expected to happen. He replied: -

> Answer – Bit of a sit down ... protest blocking ones getting into work.
>
> Question – This is all outside.
> Answer – mm mm
>
> At page 180 he confirms what I have already recorded that he did not know many of the

people there that day, which is repeated at page 192.

(e) Also at page 192 there are a series of questions about what had or had not been planned and this was relied upon by Mr Ramsey as evidence that there was no pre-planning to achieve the objectives set out by the defendants. First, when the proposition was put that this was peaceful demonstration that changed, Mr Heaton made a 'No Comment' reply. There then followed a series of replies in the following terms: -

'Was this a decision that was made when the window was broken, or had you made that decision prior to that?
Answer - It wasn't planned, it wasn't planned at all.
You hadn't planned it?
Answer – I hadn't planned it.
Or are you saying that the group hadn't planned it – Just happened?
Answer – don't think the group planned it either, it just – '

That represents the entirety of the relevant answers given and which the prosecution say could allow the jury to conclude that there was no plan along the lines deployed by the defendants in their defence. The only relevant part is the last series of questions, and the answers from someone not shown to have been at the relevant meetings, and answers expressed in terms of what he 'thought'.

I repeat what I said earlier as to the directions on the drawing or inferences. Nothing in the interviews of Mr Heaton would change my opinion that a jury taking that evidence and the facts that I have set out could, even properly directed, properly conclude that there was a spontaneous outburst based on a hatred of Raytheon, or as a basis to properly conclude that Mr McCann was lying. This is an assertion without any proper evidential base."

[24] With regret we find ourselves quite unable to agree with the Recorder's analysis on this issue. The essential question for the jury was whether this action was taken for the reason advanced by the defendants on trial *viz* the defence of property in Lebanon. True it is that the prosecution, once this defence was raised, must disprove it to the requisite criminal standard but we have firmly concluded that the evidence rehearsed by the Recorder in the passage that we have just quoted is replete with material on which active debate on this issue is engaged. The Recorder appears to have concluded that, because of what he believed to be the implausibility of the theory advanced by the prosecution, the jury would simply be left with no alternative but to find that the defence under article 7(2) had not been negatived. We do not consider that such a conclusion was open to him on the evidence as he has summarised it.

[25] Several factors can be readily identified that are relevant to this issue, all of which would call for close consideration by the jury, in our opinion. These include: -

1. The fact that there was debate as to whether the Raytheon offices should be occupied or not;
2. The debate as to whether computers should be destroyed;
3. The fact that this was part of a continuing protest and not the isolated act of those designed to achieve a particular objective;
4. The circumstance that computers were not immediately interfered with and that papers only were initially destroyed;
5. The fact that computers were thrown from the windows – if the purpose of the protesters was to protect Lebanese property, why should it be necessary to eject the computers from the windows?
6. The fact that such damage as was perpetrated to equipment occurred within the first hour – why did the occupation of the premises continue well beyond that if its only motivation was the protection of Lebanese property?
7. The evidence of Mr Heaton's answers in interview – these surely indicated a possible reason for the destruction of property other than that which came within the terms of article 7(2).

Conclusions

[26] For the reasons that we have given, we have concluded that the Recorder misapprehended the nature of the test to be applied in relation to the first element of the defence under article 7(2) of the 1977 Order. For that reason alone, we consider that his decision to withdraw counts 2 to 4 cannot stand and must be reversed.

[27] We have also concluded that the Recorder was wrong in his view that a jury, correctly directed, could not properly come to the conclusion that the

defence advanced by the defendants under article 7(2) had been proved beyond reasonable doubt to be unsustainable. The material contained in the evidence was more than sufficient to raise substantial questions (at least) as to the correctness of the claim that the damage perpetrated was carried out for the purpose of protecting property in Lebanon. This was *par excellence* an issue to be determined by the jury. We are satisfied that the trial judge should not have withdrawn the relevant charges from the jury. We therefore granted leave to appeal against the trial judge's decision and we now quash that decision and direct that these matters should proceed to determination by the jury.