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*Judgment: approved by the Court for handing down* | *Delivered:* **22/03/2017**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE CROWN COURT SITTING IN BELFAST**

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**R**

**-v-**

**KEITH McCONNAN**

_____

Before: Morgan LCJ, Weatherup LJ and Weir LJ

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**WEATHERUP LJ (delivering the judgment of the court)**

[1] The appellant appeals against conviction and sentence. On 4 May 2016 Her Honour Judge Crawford, sitting without a jury, convicted the appellant of possession of an explosive substance in suspicious circumstances and possession of ammunition in suspicious circumstances. On 10 June 2016 the appellant was sentenced to a determinate custodial sentence of five years imprisonment. Mr Macdonald QC and Ms Doherty appeared for the appellant and Mr Mooney QC and Mr Steer appeared for the prosecution.

**The charges against the accused**

[2] The appellant was jointly charged with Orla O'Hanlon –

on a first count of making explosives with intent to endanger life contrary to section 3(1)(b) of the Explosives Substances Act 1883 ("the 1883 Act"),

on a second count with making explosives under suspicious circumstances contrary to section 4(1) of the 1883 Act,

on a third count of possessing explosives with intent to endanger life or cause serious injury to property contrary to section 3(1)(b) of the 1883 Act,

on a fourth count of possessing explosives under suspicious circumstances contrary to section 4(1) of the 1883 Act,

on a fifth count of possessing explosives with intent to endanger life or cause serious injury to property contrary to section 3(1)(b) of the 1883 Act,

on a sixth count of possessing explosives under suspicious circumstances contrary to section 4(1) of the 1883 Act,

on a seventh count of possession of ammunition with intent contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004 ("the 2004 Order"),

on an eighth count of possession of ammunition in suspicious circumstances contrary to Article 64(1) of the 2004 Order,

on a tenth count of preparation of terrorists acts contrary to section 5(1) of the Terrorism Act 2006.

Orla O'Hanlon was also charged on a ninth count with possession of articles for use in terrorism contrary to section 57(1) of the Terrorism Act 2000.

[3] At the close of the prosecution case the prosecution decided not to proceed with counts 1 and 3. Orla O'Hanlon was acquitted of all charges. The appellant was convicted on counts 6 and 8 and acquitted of all other charges. The appeal therefore concerns the conviction and sentence imposed in respect of counts 6 and 8.

[4] The appellant was brought up in Kilcurry, County Louth where his parents are still living. He left school in Dundalk in June 2012 and commenced a course in exercise and nutrition at the National Training College, Dublin. On completion of the six month course he qualified as a personal trainer. At the same time he attended a part-time degree course in business and psychology at a business school in Dublin. In January 2013 he signed on for Jobseekers Allowance and continued his part-time degree course in Dublin. Around this time he received a telephone call from an Oliver Trainor who owned a gym in Dundalk. Mr Trainor was a friend of the appellant's brother Vincent. The appellant commenced employment at the gym and in February 2013 he accepted an offer of a share in the business if he worked for a year without pay. He completed the first year of his part-time degree in May 2013 and deferred continuation of the course to work in the gym. In July 2013 he also became involved in Mr Trainor's fuel business.

[5] The appellant's evidence was that the items which founded the charges were received from Mr Trainor. His defence was to the effect that he acted under duress from Mr Trainor or alternatively out of fear of Mr Trainor. In respect of the items for which he would eventually be convicted he claimed that he had no knowledge of the items being in his possession.

[6] An agreed statement of facts was admitted under section 2 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 -

1 On Tuesday 17th of December 2013 police arrived at 67 Tievecrom Road, Forkhill in order to search the premises under section 24, Schedule 3 of the Justice and Security Northern Ireland Act 2007.

2. At 23:41 hours police arrived at the rear of the premises and saw the defendant Keith McConnan inside the house walking towards the glass doors at the rear porch. He was challenged by police who then forced entry by smashing the panel of the door. Police then detained Mr McConnan who was on his knees at the end of the sofa and he was handcuffed.

3. At 23:43 hours police saw the defendant Orla O'Hanlon standing in the doorway from the hall into the kitchen, she was challenged by police and told to get onto her knees. She was then taken into the kitchen and sat on a chair. Ms O'Hanlon gave her name and personal details and said that they were renting the property and had lived there for four weeks.

4. At 23:46 hours a police officer entered the front bedroom and observed what he believed to be an electrical grinder. This was in the corner of the bedroom. The grinder was described as being approximately 30 inches in height, of metal construction with an operating panel and a funnel on the side. A black plastic bag was seen on the floor adjacent to the door which contained a beige coloured substance similar to sawdust. The search terminated at 23:49 hours. The police officer who entered this room first and searched the room, subsequently confirmed that a pair of latex gloves shown in photograph 103 of album D T1 exhibit 2 were present on the windowsill at the time of the search. Police also observed white powder within the works of the grinder. A vacuum cleaner with a clear cylinder was in the hallway close to the front door, within the cylinder police could see a small quantity of white powder.

5. At 23:51 hours Mr McConnan was searched, police found a black mobile phone in his front pocket and recovered a pair of white latex gloves in his rear pocket.

6. At 23:52 hours Mr McConnan was arrested under section 41 of the Terrorism Act, cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988 and made no reply. Mr McConnan was then given the Article 5 caution and asked to

account for the presence of the white latex gloves in respect of the offence of preparation for acts of terrorism and replied, "I was putting diesel in my tanker". At 23:54 hours he was given the Article 6 caution in respect of his presence at 67 Tievecrom Road and he replied,"I've just been at home here with my partner." He was asked if he wished to account for anything and he replied, "there's roughly 900 pound sitting on the dining room table ", he was asked who it belonged to and said, "it is for the gym I work for in Dundalk, I do their finances".

7. In the living room of the house police observed a small stack of £10 notes along with an instruction booklet for a MACPAN bread grinder model MAC100LUX on a small coffee table. The remainder of the property and a shed was also searched.

8. At 23:55 hours police noticed a black bin bag on the kitchen floor which contained a powdery substance and a latex glove. The bin bag was searched and found to contain a paper Dunnes bag, a latex type glove which appeared to have been worn, a Royal Mail delivery note addressed to Keith McConnan 67 Tievecrom Road as well as a powder like substance. Ms O'Hanlon was asked what the powder like substance was and she replied that it was ground flour as she had started baking. Ms O'Hanlon was asked why the latex glove was there and replied that she did not know anything about that. On being advised by other police of the presence of the grinder the police officer dealing with Ms O'Hanlon then asked if she owned the grinder to which she replied that she did.

9. At 00:04 hours Orla O'Hanlon was arrested under section 41 of the Terrorism Act 2000 and then cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988, she replied, "Can I have my tablets", she said that she was on tablets for depression and anxiety and she was given her medication. Ms O'Hanlon was then given the Article 5 caution and was asked to account for the presence of the grinder at 67 Tievecrom Road, she made no reply to this caution.

10. At approximately 00:25 hours both detained persons were transported to Antrim PSNI station where custody was transferred to the custody suite."

[7] Counts 1 to 4 concerned fertiliser that was to be put through the grinder. Counts 5 to 9 concerned a timing unit and ammunition found in a bag. Count 10 concerned all the items recovered. Counts 1 and 3 having been dropped, the

appellant was acquitted of the remaining charges save for counts 6 and 8. The trial judge found that the appellant was not acting under duress or out of fear.

**The charges of which the appellant was convicted**

[8] The evidence in respect of counts 6 and 8 was that on 18 December 2013, on a search of the premises occupied by the two accused at 67 Tievecrom Road, Forkhill, County Armagh, in a bedroom, police recovered a plastic bag on the top shelf of the wardrobe. The plastic bag was white in colour and opaque. As the police officer lifted the plastic bag from the shelf it up-ended and an item fell from the bag onto the shelf. The bag was a bin liner style of plastic bag with the word "Killeen" on one side and pale yellow drawstring at the top. The appellant's fingerprints were on the outside of the bag. There were no fingerprints or DNA recovered from any of the items in the bag or the inside of the bag itself. The appellant agreed that he had put the bag in the wardrobe but stated that he was not aware of the contents of the bag.

[9] The particulars of count 6 were that the appellant and Ms O'Hanlon, on 17 December 2013, knowingly had in their possession or under their control certain explosive substances, namely an improvised mobile phone operated switch unit and portable power supply, under such circumstances as to give rise to a reasonable suspicion that they did not have them in their possession or under their control for a lawful object. The particulars of count 8 were that the appellant and Ms O'Hanlon, on 17 December 2013, had in their possession, ammunition, namely a reloaded 0.455 calibre cartridge, under such circumstances as to give rise to a reasonable suspicion that they did not have them in their possession for a lawful purpose.

[10] The contents of the bag recovered from the shelf in the wardrobe were first of all an improvised mobile phone operated switch unit. This was the item that had fallen from the bag on to the shelf. It comprised a plastic lunch box, a toggle switch, an LED light, a modified mobile telephone, a battery, a cable and wiring and was wired together to form an electrical circuit. Forensic evidence established that similar types of devices have been determined to be the initiators in a number of improvised explosive devices in Northern Ireland. Secondly, the bag contained a power bank which could be used to power the mobile phone and the battery of the power bank was approximately half full. Thirdly, the bag contained packaging for the power bank which bore the name of the appellant's father, Eugene McConnan. Fourthly, the bag contained a .455 calibre cartridge which had been reloaded with a 262 grain cast lead bullet. The reloaded cartridge was 'ammunition' within the meaning of the 2004 Order. Fifthly, the bag contained a .410 calibre shotgun cartridge which had been cut in half and the wad shot and propellant removed. This item could no longer be classified as ammunition within the meaning of the 2004 Order.

[11] The appellant's computer records revealed that the power bank had been purchased on 10 December 2013 on eBay in the account name of the appellant's father, Eugene McConnan. The appellant's evidence was that Mr Trainor had asked

him to order a battery pack that could power a mobile phone. He ordered the power bank on eBay using his father's account and paying for it by his own Paypal account. The item was delivered to his father's house around 12 or 13 December 2013. He stated that he gave the power bank to Mr Trainor and never saw it again. On 15 December 2013 the appellant was at Mr Trainor's house when he was told to take the bag with him. He took the bag and placed it in the wardrobe.

[12] In her judgment the trial judge found the relevant circumstantial evidence to be as follows:

> 233. The bag was found in a wardrobe in the first defendant's house. He brought the bag to the house and placed it in the wardrobe.
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> 234. The first defendant was, on his own evidence, aware at the time that he received the bag of the intended purpose of the grinder which was on order.
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> 235. The first defendant's evidence that he brought the grinder and the AN into the house.
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> 236. The proximity in time of the arrival of the bag and these other materials. On the first defendant's evidence the bag was brought to the house around 15th December 2013. Two days later the first defendant brought the grinder and fertiliser to the house.
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> 237. The presence of the power bank in the bag. The power bank was obtained by the defendant using his father's eBay account and it was delivered to his parent's address. It was purchased on the first defendant's own PayPal account. The prosecution contend that the presence in the bag of this item, which had been purchased by the first defendant, is a fact in support of his knowledge of the contents of the bag. The prosecution rely also on the alleged attempt by the first defendant to disguise his identity as the purchaser.
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> 238. I find that the fact that first defendant paid for the purchase using his personal PayPal account, despite the account on eBayand the order address being that of his father, is inconsistent with the prosecution's contention of a deliberate attempt to disguise the identity of the purchaser. However, the evidence before the court both from Mr Fulton and the first defendant is that a power bank is an innocent item. Hence there would be no reason to disguise the identity of the purchaser as the acquisition of this item *per se* would not arouse suspicion. Therefore, I find that the *mode* of purchase of the power bank is neither inculpatory nor exculpatory. I consider it to be a neutral circumstance.
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> 239. In contrast, I find that the presence in the bag of an item purchased by the defendant to be a circumstance consistent with his having knowledge of the contents of the bag.

240. The difference in the description of the bag in the first defendant's defence statement and the bag found in the wardrobe. There is a significant difference in appearance between the bag in which the items were found and the Dunnes Store plastic bag produced by the prosecution on the trial. One bears no resemblance to the other. The Killeen plastic bag is a bin liner type of bag with a drawstring top. In the experience of the court of such common everyday items, it does not bear any resemblance to the shape or size of a typical bag bearing either a Dunnes Store logo or any other supermarket logo such as Tesco, Asda or Sainsburys.

241. In the closing submissions on his behalf, it was suggested that the first defendant's usage of the brand name "Dunnes" in reference to a white plastic bag is comparable to the usage of the word "Hoover" in reference to a vacuum cleaner. The latter usage is commonplace and well established. There is no evidence of any common usage of the brand-name Dunnes as a generic description of a white plastic bag. I find this explanation to be fanciful.

242. I am not satisfied that the difference in the description of the bags of itself provides a sufficient basis on which to find that the first defendant actually transferred the items from one bag to another. However, I find that the evidence given by the defendant in an attempt to explain his misdescription of the bag to be far from convincing and implausible. This is a relevant circumstance in assessing his evidence that he did not know of the contents of the bag. I remind myself that a lie in itself does not prove guilt, however, it does allow me to discount an explanation as raising a doubt concerning the prosecution case.

243. The fact that the bag bore the defendant's fingerprints on the outside coupled with the fact that there were no fingerprints or other forensic evidence connecting the first defendant to the materials inside the bag nor to the interior of the bag itself. Mr McConnan relies on these facts as evidence that he was ignorant of the contents of the bag. It was submitted that whoever placed the items in the bag took care to avoid leaving any fingerprints and that the presence of the first defendant's fingerprints on the outside is inconsistent with his having been the person who placed the items inside the bag.

244. The presence of the fingerprints on the outside of the bag merely proves that the first defendant held the bag. He admits that this was the case. The absence of fingerprints or other forensic evidence is not inconsistent with the first defendant having either looked inside the bag or having handled its contents. I am satisfied that the presence of fingerprints on the outside and the absence of forensic evidence connecting him to the inside of the bag does not prove and is not a circumstance from which I can infer that he had no knowledge of the contents of the bag. It is not a circumstance inconsistent with guilt. It is a neutral circumstance.

245. I find that the note on the defendant mobile telephone is consistent with the photograph no 72, exhibit 2 in so far as the wiring of the mobile phone fits the description of the note that the red wire is to the left and the black wire is to the right. The photograph does not show the black wire taped to the right. The only tape shown in the photograph is silver tape which extends over the top of the Nokia phone.

246. In providing his explanation of the note the defendant said "I had entered into my phone that the red wire went to the left and the black went to the right".. This is entirely consistent with the wiring shown leading from the mobile telephone within the TPU. It was put to him that, despite his explanation regarding the generator, it was a remarkable coincidence that the TPU, which he claimed never to have seen, contained a red and a black wire and the red is to the left and the black is to the right. There then followed a number of questions and answers regarding the contention that there were many coincidences consistent with his guilt. He denied that and then said "and that's – sorry, it's silver tape." He went on to say "it's on the actual note it was black tape that I had used on the wires inside the generator, that's not black tape. "

247. I note that the first defendant did not make reference to the black tape at the outset. This appeared to be something of an afterthought. However, the fact remains that although the wires do bear a striking resemblance in terms of both colour and location, there is no black tape in the TPU and one cannot say that the black wire is taped to the right. I consider the evidence regarding the wiring to be a neutral circumstance.

248. I have considered all of the facts and circumstances as outlined. On the defendant's own evidence, by the time that he had been given the bag by Oliver Trainor he had been asked to test the first grinder and was aware that it was intended for the grinding up of fertiliser which he knew to be a material in home-made explosives. Further, when he took possession of the bag he knew that he had ordered the 2nd grinder and the purpose that it was intended to fulfil. Leaving aside the reservations expressed as to this evidence, on his own account, at the time of receipt of the bag he was engaged in seeking to prevent the manufacture of explosives. In those circumstances, I find it inconceivable and wholly implausible that the defendant would have taken possession of any bag from Oliver Trainor and placed it in his home without checking its contents.

249. I am satisfied that the first defendant had knowledge of what he possessed, namely the TPU, power bank and ammunition, and that the prosecution has proved this beyond reasonable doubt.

250. Inference pursuant to Article 3 of the Criminal Evidence (Northern Ireland) Order 1998.

251. The first defendant made no comment at interview regarding the items found in the bag. He did not mention any of the matters subsequently relied upon in connection with the power bank, Oliver Trainor and the bag. He said that he had not answered questions at interview following advice from his solicitor, that she warned him about recording devices at Antrim Custody Suite and asked that he refrain from giving her instructions.

252. Given this defendant's age at the date of his arrest, I would expect him to rely on the advice of his solicitor. Therefore I draw no inference from any failure to mention these matters.

[13] The trial judge was not satisfied that the appellant was in possession of the timer unit or the ammunition with the necessary intent. In considering possession of the items in suspicious circumstances the trial judge stated as follows –

263. In order to find the first defendant guilty under section 4(1) of the Explosive Substances Act 1883 in respect of the TPU and power bank, I must be satisfied beyond reasonable doubt that he knowingly possessed these items under such circumstances as to give rise to a reasonable suspicion that he did not have these in his possession for a lawful object.

264. I have found that the first defendant had knowledge of the contents of the bag which was in his possession and which contained explosive substances.

265. The nature of the items is such that possession could satisfy the requirement of a reasonable suspicion within the meaning of the section. The prosecution must prove that the first defendant did not possess the items for any lawful object.

266. I refer to my earlier comments that the court has not made any finding of fact that the defendant sabotaged the AN. Even if the first defendant had an intention to sabotage the fertiliser, *if* that was his object, which the court does not accept as a fact, there is no evidence whatsoever that, knowing of the contents of the bag, the first defendant took any steps to put the TPU and power bank beyond use or to render them harmless.

267. I am satisfied beyond reasonable doubt that the first defendant had possession of the TPU and power bank under circumstances as to give rise to a suspicion that he did so without any lawful object.

268. In order to find the first defendant guilty under section 64(1) of the Firearms NI Order 2004, I must be satisfied beyond reasonable doubt that the ammunition was in his possession in suspicious circumstances and for no lawful purpose.

269. The factual and legal matrix regarding this offence is identical to that just considered in respect of the TPU and the power bank.

270. My findings in relation to count 6 apply equally to count 8. I am satisfied beyond reasonable doubt that the first defendant is guilty of possession of the ammunition in suspicious circumstances and without a lawful object.

271. I therefore find the first defendant guilty of counts 6 and 8.

[14] The appellant's grounds of appeal against conviction on counts 6 and 8 state that the conviction was unsafe for the following reasons (referring to the paragraph numbers in the trial judge's decision) -

(1) The trial judge erred in finding that:

(i) The presence in the bag of an item purchased by him was a circumstance consistent with his having knowledge of the contents of the bag (249).

(ii) The difference between the bag and its description in the defence statement is significant and the evidence given by the defendant to explain the difference is a relevant circumstance in assessing his evidence that he did not know of the contents of the bag (240 – 242).

(iii) The appellant's evidence that he took the bag from Oliver Trainor without checking its contents was so implausible that it was "inconceivable" that he had done so (248).

(iv) The note on the appellant's mobile phone about wiring was consistent with the photograph number 72 Exhibit 2 (245).

(2) The trial judge gave undue weight to the evidence that:

(i) The bag was not a Dunnes bag (240–242).

(ii) There was a note on the appellant's mobile phone about wiring (245).

(iii) The appellant took no steps to put the timer power unit (TPU) beyond use (266).

(3) The trial judge failed to give any adequate weight to the evidence that:

(i) The appellant paid for the power bank using his own Paypal account, ordered it through his father's eBay account and had it delivered to the family home (238).

(ii) A power bank can be used for entirely innocent purposes (232).

(iii) The weight of the TPU would make little if any differece to the weight of the bag when it contained the other items (231).

(iv) No fingerprint DNA or other forensic evidence implicating the applicant was found on the inside of the bag coupled with the fact that his fingerprints were found on the outside (243 – 244).

(v) The appellant filed a detailed defence statement explaining the circumstances of his involvement in the matters alleged.

(vi) The appellant gave evidence at the trial.

(vii) The appellant's testimony that he had sabotaged first the grinder and then the fertiliser may be truthful (181 – 193) which would mean that he not only had no wish to become involved in terrorism but was prepared to take positive steps to prevent potentially explosive substances and equipment from being used as such.

(viii) The appellant had no previous convictions.

(ix) The appellant had no sympathy with dissident Republicanism, does not support terrorism, made no application to be transferred into the Republican wing at Maghaberry, had no wish to associate with dissident Republicans, received favourable testimonials from the Governor at Hydebank and had showed himself to be of good character in various respects so as to be entitled to have evidence given more favourable consideration by the Judge.

(4) Notwithstanding the trial judge's assertion that she did not take into account the reasons advanced on behalf of the co-accused for her not giving evidence, the conviction is unsafe because the judge is liable to have been (if not bound to have been) prejudiced subconsciously or otherwise by the suggestion made on behalf of the co-accused to the effect that she did not give evidence because she would have been cross-examined about her boyfriend and inferentially was unwilling to implicate him in the offences charged. The only inference that could have been drawn from this suggestion made on behalf of the co-accused (reinforced by reference to Crown counsel's contention that she had lied to conceal her boyfriend's involvement) was that she knew something that implicated the appellant. Apart from this being an improper and inadmissible suggestion, it was not, in fact, true. But it was particularly prejudicial to the appellant in circumstance where the trial judge had to make an assessment of his credibility on the issue whether he knew the bag contained a TPU.

[15] The principles which guide an appellate court in a criminal non-jury trial were stated by Lord Lowry LCJ in R v Thain [1985] NI 457 at 474A as follows -

(1) The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.

(2) The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions.

(3) The trial judge can be more readily reversed if he has misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose this judgment may be analysed in a way which is not possible with a jury's verdict.

(4) The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusions.

[16] The general approach to a review of factual findings was restated in the Supreme Court in DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7 where Lord Kerr at paragraph [79] restated the observations of the United States Supreme Court in Anderson v City of Bessemer [1985] 470 US 567.574-575:

> "The trial on the merits should be the 'main event' rather than a 'try out on the road'. For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception."

**Ground 1 – Erroneous Findings**

[17] Under Ground 1 the trial judge is said to have erred in finding that the presence in the bag of the power bank purchased by the appellant was 'consistent' with the appellant having knowledge of the contents of the bag. The appellant contended that purchase of the item was not evidence of knowledge of the contents of the bag. The trial judge first found the mode of purchase of the power bank to be a neutral circumstance and then, by way of contrast, found the presence in the bag of the purchased item to be 'consistent' with knowledge of the contents. The appellant contended that the purchase of the item was a 'contra indicator' of knowledge in that had the appellant been aware of the presence of the item in the bag he would have

disposed of the item. The trial judge was entitled to reach the conclusion she did, a conclusion that was carefully measured by the use of the word 'consistent'.

[18] The second error of the trial judge is said to be the finding that the explanation offered by the appellant for the difference between his description of the bag in the Defence Statement as a 'Dunnes' bag and the description of the bag recovered, being a clear bin liner with a drawstring, was a matter relevant to the issue of the appellant's knowledge. The appellant contended that the bag recovered was an exhibit in the case before the Defence Statement was filed and the appellant knew that the bag was available so the description of the bag was of no significance. The appellant's explanation for the difference was that he referred to a Dunnes bag as meaning a white plastic bag. The prosecution produced a Dunnes bag to illustrate the difference. The prosecution contention was that the items recovered in the bag had been transferred by the appellant from a Dunnes bag to a white plastic bag. The trial judge was not satisfied that the difference in the description of the bag provided any basis for finding that the appellant had transferred the items from one bag to another. However she found that the evidence given by the appellant to explain the misdescription of the bag was far from convincing and was implausible and that this was a relevant circumstance in assessing his evidence that he did not know of the contents of the bag. The trial judge was entitled to conclude that the appellant's explanation for the misdescription of the bag was implausible and that this explanation was a relevant circumstance on the issue of knowledge.

[19] The third error that the trial judge is said to have made is the finding that the appellant's evidence that he took the bag from Mr Trainor without checking its contents was 'inconceivable'. The following sequence of events is relevant. In August or September 2013 Mr Trainor asked the appellant to purchase a grinder which could be used to grind down material to facilitate fuel laundering. The grinder was ordered by the appellant at the beginning of November 2013 and purchased in a false name. The grinder arrived on 23 November 2013 and rather than being a single phased grinder it was a three phase grinder. Mr Trainor gave the appellant a black bin bag containing material and told him to go to his shed on the Forkhill Road and to make sure the grinder worked. The appellant went to the shed and when he opened the bag he found that it contained fertiliser. He realised that this was not material for fuel smuggling and suspected that the fertiliser was for use in explosives. He sabotaged the grinder by burning out the motor by overloading it. Mr Trainor then instructed the appellant to order a single phase grinder which arrived on 17 December 2013. Mr Trainor gave the appellant a small bag of fertiliser and instructed him to test the grinder. In the meantime it was on 15 December 2013 that Mr Trainor gave the appellant the bag that was found on the shelf in the wardrobe.

[20] Thus the trial judge stated her conclusion about the appellant checking the contents of the bag after referring to the appellant being given the bag by Mr Trainor. This occurred after the appellant had been asked to test the first grinder and when he was aware that it was intended for the grinding of a fertiliser, which he

knew to be a material in homemade explosives. In addition the appellant took possession of the bag when he knew that he had ordered a second grinder for that purpose and he was then engaged in seeking to prevent the manufacture of explosives. It was in those circumstances that it was stated to be "inconceivable and wholly implausible" that the appellant would have taken possession of a bag from Mr Trainor and placed it in his home without checking its contents. In the circumstances referred to above, this is a conclusion that the trial judge was entitled to reach.

[21] The fourth error which the trial judge is said to have made is the finding that a note in the appellant's mobile phone about wiring was consistent with the photograph of the item found in the bag. The note on the appellant's mobile phone read "red left, black tape right". The prosecution contended that the note was consistent with the wiring of the timer with a red wire on the left and a black wire on the right. There was no black tape on the timer but there was silver tape. The appellant's explanation for the note was that it related to a generator from which he had removed a switch and made a note of the wiring. The trial judge stated that the note was consistent with the item in that the red wire was on the left and the black wire was on the right. She then observed that the black wire was not taped to the right and the only tape was silver. The trial judge concluded that although the wires did bear a striking resemblance in terms of both colour and location there was no black tape in the timer and one could not say that the black wire was taped to the right. The evidence relating to the wiring was stated to be a neutral circumstance. The trial judge has once more adopted careful language to address this point. The consistency to which she refers cannot be challenged, namely that relating to the colour and location of the wires. The inconsistencies were also noted. The trial judge was entitled to find that the wiring note was 'consistent' with the wiring of the timer to the stated extent and that this was a neutral circumstance.

**Ground 2 – Undue Weight**

[22] The second ground of appeal concerns undue weight being given to some of the evidence. The first matter in respect of which it is said the trial judge gave undue weight is that the bag containing the items was not a Dunnes bag, as stated by the appellant in his Defence Statement. The appellant contended that any difference in the description of the bag had no significance. As stated above the trial judge did not rely on the appellant's description of the bag as a Dunnes bag but rather relied on the inadequacy of the appellant's explanation for the difference between the description given and the actual bag. The trial judge found the appellant's explanation for the misdescription to be unconvincing. Such weight as was accorded went to the inadequate explanation and not the nature of the bag. This was an approach that the trial judge was entitled to take and she was entitled to reach the conclusion she did. We reject this complaint of undue weight.

[23] The second matter in respect of which the trial judge is said to have given undue weight is the note on the appellant's mobile phone about the wiring. The trial

judge found that the note was consistent with the item in that the red wire was to the left and the black wire was to the right. This consistency was not stated to extend to and did not extend to black tape or the black wire not being taped. The overall conclusion was stated to be that the evidence regarding the wiring was a neutral circumstance. That was a conclusion that the trial judge was entitled to reach. We reject this complaint of undue weight.

[24] The third matter in respect of which the trial judge is said to have given undue weight is that the appellant took no steps to put the timer power unit beyond use. The appellant contends that this matter cannot be relied on to reach a conclusion on the appellant's knowledge when his case was that he had no knowledge of the item. We are satisfied that the trial judge did not rely on a failure to put the timer beyond use as evidence of knowledge. The trial judge, having considered the circumstances, found it inconceivable and wholly implausible that the appellant would have been in possession of any bag from Mr Trainor and have placed it in his home without checking its contents. Thus the trial judge found that the appellant had knowledge of the contents of the bag. Having done so the trial judge proceeded to consider, first of all, whether the items constituted explosive substances or ammunition and secondly, whether the appellant had intention to endanger life or property and thirdly, whether the appellant was in possession in suspicious circumstances. It was in the course of considering possession in suspicious circumstances that the trial judge stated, on the basis that the appellant did have knowledge of the contents of the bag, that the appellant did not take any steps to put the items beyond use. This consideration contributed to the conclusion that the appellant, with knowledge of the contents of the bag, did indeed have possession in suspicious circumstances. The trial judge was entitled to find that, given the finding of the appellant's knowledge of the contents of the bag, the appellant failed to take any steps to put the items beyond use. We reject this complaint of undue weight.

**Ground 3 – Inadequate Weight**

[25] The third ground of appeal is that the trial judge failed to give any or adequate weight to certain evidence. The first two items can be taken together, namely that the appellant paid for the power bank using his own Paypal account, ordered it through his father's eBay account, had it delivered to the family home and that the item could be used for entirely innocent purposes. The trial judge noted that the item could be used for an innocent purpose and found that the mode of purchase was neither inculpatory nor exculpatory and was a neutral circumstance. That was an entirely appropriate conclusion. We reject this complaint of inadequate weight.

[26] The third matter in respect of which it is said that the trial judge had given insufficient weight is that the weight of the timer would have made little difference to the weight of the bag when it contained the other items. However this consideration does not bear on the basis on which the trial judge concluded that the appellant would have had knowledge of the contents of the bag, namely his

knowledge that Mr Trainor had recently involved him in possession of fertiliser connected to explosives, rendering it inconceivable that the appellant would not have checked the contents of the bag given to him by the same person and which he was proposing to keep in his home. We reject this complaint of inadequate weight.

[27] The fourth item in respect of which it is said that the trial judge gave insufficient weight is the absence of forensic evidence linking the appellant to the inside of the bag. The trial judge concluded that the absence of forensic evidence on the inside of the bag was not inconsistent with the appellant having either looked inside the bag or having handled the contents. The trial judge was satisfied that this did not prove and was not a circumstance from which she could infer that the appellant had no knowledge of the contents of the bag, that it was not a circumstance inconsistent with guilt and that it was a neutral circumstance. The appellant contends that the absence of forensic evidence linking the appellant to the inside of the bag is not a neutral circumstance but rather a circumstance that favours the appellant. The trial judge found it to be inconceivable and wholly implausible that the appellant had not checked the contents of the bag but it does not follow that there would be forensic evidence of such check. The appellant could have checked the contents without leaving forensic traces. The absence of forensic traces does not undermine the conclusion that, in the circumstances outlined by the trial judge, the appellant checked the contents. The approach of the trial judge was one that she was entitled to take, as was the conclusion she reached. We reject this complaint of inadequate weight.

[28] The seventh matter in respect of which it is said that the trial judge failed to give sufficient weight is the appellant's evidence that he sabotaged the grinder and fertiliser and had no wish to be involved in terrorism and had taken positive steps to prevent explosive substances being used. Having considered the evidence of the appellant that he had sought to sabotage the equipment, the trial judge found that the prosecution had failed to prove beyond reasonable doubt that the appellant was guilty of count 2 and count 4 and continued -

> "193. In reaching my conclusion in the preceding paragraph, I have taken into account the defendant's explanation. I can put it no higher than it is a possible explanation which may be truthful. Given the shortcomings in the prosecution's expert evidence, it is of sufficient weight to raise a reasonable doubt in my mind concerning the prosecution case in relation to counts 2 and 4.

[29] Thus the appellant's evidence on the issue of sabotage was described as a possible explanation that may be truthful. As the trial judge later repeated, she did not make a finding that the appellant sabotaged the equipment. We reject this complaint of inadequate weight.

[30] The remaining four grounds may be dealt with together, namely the detailed Defence Statement, the evidence at the trial, the absence of previous convictions and of any connection to dissident Republicanism. The trial judge did remind herself that the appellant was entitled to a good character direction both as to credibility and propensity. It is not the fact of a Defence Statement being submitted or of a defendant giving evidence that determines the weight to be accorded but rather the evaluation of the content of the Defence Statement and of the evidence. A central part of that Defence Statement and of the evidence was based on the duress claimed by the appellant and the fear claimed by the appellant, both of which were rejected by the trial judge. In addition the Defence Statement and the evidence both relied on the appellant's absence of knowledge of the contents of the bag, being a matter rejected by the trial judge. We are satisfied that the trial judge took account of these matters and accorded appropriate weight. We reject this complaint of inadequate weight.

**Ground 4 – The Comments of Counsel for the Co-Accused**

[31] The fourth ground of appeal concerns the suggestion by Counsel for the co-accused that co-accused did not give evidence because she might have been cross-examined about the appellant, the implication being that she would thereby prejudice the appellant.

[32] Counsel for the co-accused stated:

> "The prosecution say the only reason Ms O'Hanlon did not give evidence was because she knew there was no innocent explanation that would be capable of standing up to cross-examination.
>
> But of course Ms O'Hanlon would not only have been cross-examined about her own involvement in this case she would have been likely to have been cross-examined about her boyfriend so in our submission there is a reason which the court may consider it is not a case in which to draw an adverse inference.
>
> ……
>
> I should just say in relation to what I said earlier to the court about reasons why she may have lied or may not have given evidence. In Mr Mooney's oral submissions to the court this morning he said she lied to conceal her own involvement and perhaps her boyfriend's and in my submission Mr Mooney was in fact making the point that I have just made to the court."

[33] At a later date Counsel for the co-accused stated:

> "At the end of my closing I suggested to the court that it should not agree with the prosecution's submission that the only reason the defendant had not given evidence was that she is afraid of incriminating herself. If the court considered there may be other reasons for her not wanting to give evidence I suggested to the court that in the particular circumstances of this case it might consider there may be a reason on the part of the defendant that she would not only be cross-examined about herself but also about her co-accused who is her boyfriend. In asking the court to consider this matter it is not intended to convey to the court any suggestion that the defendant has indeed any evidence which would have incriminated Mr McConnan but a concern, that is a concern on the part of an accused if it exists about giving evidence and withstanding cross-examination should not be taken as inconsistent with the defendant's honest belief in her own innocence or a belief in the innocence of her co-accused and that is the point made by Sheil J in the Barkley decision. Accordingly what I had indicated was that in order to avoid any unwarranted speculation by the court in saying what I did I did not imply nor should the court infer that my client would if called have incriminated Mr McConnan in the offences charged or in any other terrorist activity. The concern of the court is the reason that operates in the mind of the accused and as Your Honour will recall Mr MacDonald indicated that the failure on the part of Ms O'Hanlon to give evidence could not be held against his client in any way."

[34] Counsel for the appellant then stated to the trial judge:

> "The important point here is that the court should not and I am relying on the court not to place any weight or give any credence to the suggestion that Ms O'Hanlon had given evidence should have implicated the co-accused my client. It is important in a case of this nature, particularly important in a case of this nature, that the court should not consciously or unconsciously or sub-consciously give any credence to that or draw any inference from

> what was said from the Bar by my learned friend about the reasons why his client did not give evidence because the court has to assess the testimony of Mr McConnan they would not like that testimony the assessment of that testimony to be influenced to any degree by any completely mistaken notion that may have been planted in Your Honour's head by my learned friend."

[35] The trial judge concluded her judgment in these terms:

> "In the course of closing submissions an issue arose between counsel for the defendants as to a submission made on the second defendant's behalf regarding her failure to give evidence. I do not consider it necessary to rehearse this issue. It should be apparent but for the avoidance of doubt I have not taken account of the second defendant's failure to give evidence or any reason advanced in this regard in my assessment and findings regarding the first defendant."

[36] The appellant contends that the damage was done by the remarks made by Counsel for the co-accused, despite the declaration of the trial judge at the conclusion of her judgment.

[37] Counsel for the co-accused expressly disavowed any suggestion that the co-accused may have evidence to give that would be prejudicial to the appellant. The trial judge expressly disavowed taking into account the co-accused's failure to give evidence or any reason advanced for the co-accused's failure to give evidence in her assessment and findings in relation to the appellant.

[38] The rule is that Counsel cannot give evidence and cannot make submissions on facts without an evidential basis, either directly from evidence or by inference from evidence. Accordingly, Counsel should not make submissions on the reasons for a defendant not giving evidence without there being an evidential foundation for any such submission. Some examples of the approach are as follows -

> An accused cannot avoid the risk of an adverse inference being drawn against him by reliance on a bare assertion that he feared for his own safety if he gave evidence that might be adverse to a co accused. There may however be some such genuine cases where it would be inappropriate to draw any adverse inference. No adverse inference was drawn against defendants who did not give evidence in the special circumstances that prevailed in the trial of those charged with the Maze prison breakout – R v Barkley (NICC unreported).

The Court rejected the submission of Counsel that the failure to give evidence may have been a wish not to prejudice a co-accused or because of fear, without there being any evidence to support such possibilities. The Court drew an adverse inference – R v McAnoy (NICA 4 July 1995 unreported).

Where Counsel outlined a number of possible reasons for silence at trial which may have been consistent with innocence the Court stated that the rule against advocates giving evidence applied – R v Cowan [1996] QB 373.

The advocate cannot give evidence or, in the guise of a submission to the jury, make assertions about facts which have not been adduced in evidence. That is inconsistent with the proper function of an advocate. The importance of the rule is particularly stark whenever the defendant elects not to give evidence in his own defence. Whatever the circumstances, the advocate cannot supply the evidence that the defendant has chosen to withhold from the jury – R v Farooqi [2013] EWCA 1649 at paragraph 111.

[39] In the present case the prosecution contended that there was such an evidential foundation. In police interviews the co-accused stated that she had used the grinder for domestic purposes and that the appellant had not used the grinder. In evidence the appellant admitted that he used the grinder and that the co-accused had lied to the police in order to protect him. Accordingly the prosecution contended that this was the evidential foundation upon which Counsel for the co-accused was entitled to say what he did about reasons for not giving evidence.

[40] We are unable to accept this submission. The statements made to police by the co-accused about her use of the grinder were not evidence against the appellant and were not a basis on which an inference could be drawn against the appellant. In the circumstances Counsel should not have made the comment that was made about the reasons for the co-accused not giving evidence. Only where a proper evidential foundation has been laid should Counsel make such a submission. If such a submission is made by Counsel for a co-accused without a proper evidential foundation then it should be disregarded by the trial judge. If that occurs in a trial by jury then the jury should be directed that the remark was improper and should be disregarded. It is matter for the trial judge in the circumstances of the trial to determine the impact of such an improper remark on the course of the trial. In the event, the trial judge in the present case stated that she disregarded the submissions of Counsel for the co-accused. We are satisfied that the comments of Counsel were disregarded and did not impact on the outcome.

[41] The Court of Appeal in R v Pollock [2004] NICA 34 set out the approach on a criminal appeal. In the case of a non-jury criminal trial, factor (3) does not arise as the reason for the verdict will appear in the judgment of the trial judge.

> "(1) The Court of Appeal should concentrate on the single and simple question "Does it think that the verdict is unsafe".
>
> (2) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> [(3) The court should eschew speculation as to what may have influenced the jury to its verdicts.]
>
> (4) The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[42] Applying that approach, we are satisfied as to the safety of the convictions.

**Appeal against sentence**

[43] The appellant appeals against a sentence of five years' imprisonment. The grounds of appeal against sentence are that the sentence was manifestly excessive and wrong in principle for the following reasons:

(1) The sentence is out of line with other sentences imposed in comparable cases.

(2) The trial judge wrongly considered that this was a case where (i) a deterrent sentence was required and (ii) that the appellant's personal circumstances carried little weight.

(3) The appellant's personal circumstances and his role in the matters alleged warranted a substantially lesser sentence.

(4) The trial judge failed to make adequate allowance for the delay in bringing the case to trial.

[44] In her sentencing remarks on 10 June 2016 the trial judge concluded that the appellant was not dangerous for the purposes of the Criminal Justice (Northern Ireland) Order 2008 in that he would not present significant risk to members of the public of serious harm occasioned by the commission of further offences. The trial

judge noted the mitigating features concerning the appellant's age, his clear record, the influence on him of another individual and the favourable reports of his conduct on remand provided by the Governor and Deputy Governor at Hydebank, the leader of the drama project at Hydebank and two members of the clergy. The trial judge stated the need for a deterrent sentence for terrorist offences and stated that she was taking into account any delay on the part of the prosecution. The result was that the appropriate sentence on each count was five years imprisonment being two years and six months in custody and two years and six months on licence. The sentences were to run concurrently.

[45] As to the first ground, comparable sentences, there are no guideline cases on sentencing for possession of explosives or ammunition in suspicious circumstances. Counsel referred to examples of sentencing for possession with intent and possession in suspicious circumstances, whether on a plea or on a contest. Circumstances vary from case to case. A sentence of five years imprisonment after conviction for possession of explosives and ammunition in suspicious circumstances cannot be said to be wrong in principle nor can it be said to be manifestly excessive. Nor do the circumstances of the present case provide a basis for concluding that such a sentence was wrong in principle or manifestly excessive.

[46] As to the second ground, deterrent sentences, there is a need for deterrent sentences for those who would contribute to the infliction of terrorist acts on any society. This was confirmed in earlier times in this jurisdiction when the Court of Appeal considered the appeals of several young men who pleaded guilty to charges of making petrol bombs, hi-jacking and arson of vehicles in R v Blaney [1989] NI 286. Lord Hutton LCJ at page 289F stated:

> "Because of the grave nature of the appellant's conduct, because of its consequences to innocent citizens in the ways which we have described, because of the gravity of the background against which their criminal actions were conducted and to which they contributed, and because of the need to deter the commission of similar criminal acts in the future, previous criminal records, good family backgrounds, and opportunities for employment cannot prevent the appellants going into detention for periods."

[47] More recently in R v Wong [2012] NICA 54 the Court of Appeal considered a minimum term of five years imprisonment on a plea to possession of a pipe bomb with intention to endanger life or cause serious injury to property. The appeal was concerned with the finding of dangerousness and the imposition of an indeterminate custodial sentence rather than an extended custodial sentence. Having upheld the approach of the sentencing judge, Morgan LCJ on the appeal concluded at paragraph [22]:

> "Finally, the applicant submitted that the minimum period of five years on a guilty plea was unduly severe. We do not agree. As this court has made clear on a number of occasions those who facilitate the commission of terrorist crimes must expect deterrent sentences when apprehended. A minimum period of five years imprisonment for the possession and movement of this viable device was entirely justified."

[48] The trial judge was correct to recognise the need for deterrent sentences for terrorist offences and to conclude that such a sentence was required in the present case.

[49] As to the third ground, personal circumstances, we are satisfied that the personal circumstances of the appellant are of little weight compared to the seriousness of the offence and the requirement for a deterrent sentence. Nor does the role attributed to him by the finding of the trial judge, as opposed to the role claimed by the appellant, warrant a lesser sentence.

[50] As to the fourth ground, delay, the appellant was arrested on 17 December 2013 and returned for trial on 6 December 2014. He was arraigned on 14 January 2015 and the trial was listed for 27 April 2015. The appellant's Defence Statement was late and not served until 27 March 2015. In light of the late Defence Statement the prosecution had to make further enquiries by way of an International Letter of Request in relation to materials held by An Garda Siochana and for that reason the trial was adjourned. In August 2015 both accused made disclosure applications in relation to the video recorded interviews of Oliver Trainor by An Garda Síochána. An application was fixed in the High Court in Dublin in November 2015 and the requested materials having been obtained, no further disclosure was required. Trial dates were vacated on 27 April 2015, 1 September 2015 and 2 November 2015 and the trial commenced on 14 December 2015.

[51] There was delay in proceeding with the trial between April 2015 and December 2015. Part of the delay was occasioned by the late Defence Statement from the appellant. Further delays were occasioned by the requirement to initiate proceedings in the High Court in Dublin. We have not been satisfied that any of the delays were the result of the improper or inadequate conduct of State authorities.

[52] The appeal against conviction and sentence is dismissed.