

**Neutral Citation No:** [2019] NICC 5

**Ref:** 2019NICC5

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

**Delivered:** 28/02/2019

**IN THE CROWN COURT IN NORTHERN IRELAND**

**SITTING IN BELFAST**

**BILL NUMBER - 18/067210**

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**REGINA**

**-v-**

**KEVIN ANTHONY McLAUGHLIN**

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**His Honour Judge McFarland**

**Recorder of Belfast**

**28<sup>th</sup> February 2019**

[1] Kevin Anthony McLaughlin (“the defendant”) was returned for trial on Bill 18/067210 by Belfast Magistrates’ Court on the 3<sup>rd</sup> August 2018. On the 7<sup>th</sup> September 2018 a Deputy Director of the Public Prosecution Service certified under the Justice and Security (NI) Act 2007 that the trial be conducted without a jury. The defendant was arraigned on the 14<sup>th</sup> September 2018 and pleaded not guilty to the five counts on the indictment.

[2] The counts on the indictment are as follows -

- (i) Possession of explosives under suspicious circumstances, contrary to section 4 (1) of the Explosive Substances Act 1883.
- (ii) Possession of explosives with intent to endanger life or cause serious injury to property, contrary to section 3 (1) of the Explosive Substances Act 1883.

- (iii) Possession of a firearm and ammunition in suspicious circumstances, contrary to Article 64(1) of the Firearms (NI) Order 2004.
  - (iv) Possession, acquiring or selling prohibited ammunition, contrary to Article 45(2)(e) of the Firearms (NI) Order 2004.
  - (v) Possession of pistol ammunition with missile expanding on impact, contrary to Article 45 (2)(f) of the Firearms (NI) Order 2004.
- [3] The Explosive Substances Act 1883 provides as follows:

“Section 3(1) A person who in the United Kingdom ... unlawfully and maliciously –

...

(b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the United Kingdom or elsewhere, or to enable any other person so to do,

shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence..”

Section 4 (1) “Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of an offence.”

The Firearms (NI) Order 2004 provides as follows:

“Article 45 (2) “Subject to Article 46, a person who without the authority of the Secretary of State has in his possession, or purchases or acquires, or sells or transfers –

...

(e) any ammunition for military use which consists in or incorporates a missile designed, on account of

its having a jacket and hard-core, to penetrate armour plating, armour screening or body armour;

- (f) any ammunition which is designed to be used with a pistol and incorporates a missile designed or adapted to expand on impact”

“Article 64(1) A person who has in his possession any firearm or ammunition in suspicious circumstances shall be guilty of an offence unless he shows that he had it in his possession for a lawful purpose.

- (2) In paragraph (1) “suspicious circumstances” means circumstances such as to give rise to a reasonable suspicion that the person does not have the firearm or the ammunition in his possession for a lawful purpose.”

[4] The hearing was very short in duration. A set of agreed facts was placed before the court. A forensic scientist was tendered by the prosecution and she was cross-examined by the defence. That concluded the prosecution case. The defence applied for a direction that the defendant did not have a case to answer and this was refused. My ruling in respect of this application is set out in the Annex. No evidence was presented by the defence.

### **The evidence**

[5] On the 22 November 2015 the police searched property in the Dunmurry area of Belfast. The defendant has no connection with the property, or its owners and occupiers.

[6] In the attic of the premises a large burn bag was found. It was given exhibit No: JJD71. No further details concerning this bag were provided and I have assumed that it is a paper bag of some strength and durability, the primary purpose of which is to contain material such as documents which are intended to be incinerated.

[7] The burn bag contained a number of plastic bags which could be described as typical plastic bags issued by supermarkets for holding groceries, a number of socks and tubs. Within these bags, socks and tubs a substantial number of items were found. These included 695 assorted rounds of ammunition, an AK47 rifle magazine, three mercury tilt switches, small arms propellant, fireworks composition, a modified large calibre firearms cartridge, improvised detonator cord, detonators and initiators.

[8] All the 695 rounds of ammunition are classified as ammunition as defined by the Firearms (NI) Order 2004. 88 of the rounds incorporated a missile which is

designed to expand on impact, and 4 of the rounds were for military use incorporating a missile designed to penetrate armour plating. The Minister of State, acting under powers delegated by the Secretary of State, has confirmed that the defendant has not been given authority to possess such ammunition. The AK47 magazine is a component part of a firearm and is classified as a firearm under the Firearms (NI) Order 2004.

[9] The material recovered from the contents of the burn bag included three commercially manufactured mercury tilt switches which were viable switches and similar switches have been used in the initiation circuits of explosive devices in Northern Ireland. 3.5 grams of small arms propellant was also found. Four glass bulbs with wires were recovered. Silver powder was contained within the bulbs, and this consisted of a pyrotechnic composition consistent with being improvised initiators. A large calibre firearms cartridge was also recovered. It contained a glass bulb similar to the four described above, and a hole drilled through adhesive tape wrapping the cartridge would have facilitated the ignition of small arms propellant. The device could have been used as a blast device or may have been used to expel a bullet forward. All these items fall within the definition of explosive substances contained in section 9 of the Explosive Substances Act 1883.

[10] Forensic examination of the various bags, socks and tubs revealed that the defendant's palm print was located on the inside surface of one of the plastic bags (Exhibit No JJD 19) which contained 26 assorted rounds of ammunition. Swabs were taken from the handles and knot of another of the plastic bags (Exhibit No JJD 42) which contained 20 shotgun cartridges. A mixed DNA profile was obtained. The partial major contributor to that profile matched the defendant's profile. The match is one in a billion times more likely to arise if the DNA profile originated from the defendant than from an unrelated male. Four imprints were recovered from the lower exterior of the burn bag. One of the prints matched the defendant's right palm print and another matched the defendant's right little fingerprint.

[11] In addition to the various bags, socks and tubs contained within the burn bag, the police also found a Paypoint receipt (Exhibit No JJD 67). This receipt was recovered from the bottom of the bag. The details on the receipt indicate that a cash payment of £10 was made at a shop known as "Ann's" at Springhill Avenue, Belfast at 8 pm on the 28<sup>th</sup> March 2015. The receipt was made in respect of a life insurance policy in the name of E McLaughlin, date of birth 3<sup>rd</sup> December 1954, of 20 Ballymurphy Drive, Belfast.

[12] The police searched the premises at 20 Ballymurphy Drive, Belfast on the 21<sup>st</sup> February 2017. This property is the residence of six people, including the defendant and an Elizabeth McLaughlin. Elizabeth McLaughlin was present during the search and she identified herself as the house owner.

[13] The defendant was also present and was arrested at this address. He was subsequently interviewed on the 21<sup>st</sup> and 22<sup>nd</sup> February 2017. He declined to answer any questions.

### **Consideration of the evidence**

[14] The prosecution must prove that the defendant is guilty of the offences alleged against him so that I am sure of his guilt.

[15] The case against the defendant is based on circumstantial evidence. Circumstantial evidence has often been likened to a rope composed of several strands, as opposed to a chain. One strand might be insufficient to bear the burden placed on the prosecution and if that strand had been a link in a chain, then the case would collapse, but when each of the different strands is taken together, the combined 'rope' would be sufficient to bear the burden placed on the prosecution. Juries are often directed that "there may be a combination of circumstances, no one of which raises a reasonable conviction, or more than a mere suspicion, but the whole, taken together, may create a strong conclusion of guilt." However, care must be taken to ensure that circumstantial evidence is considered correctly. Evidence can be fabricated. In addition, there may be one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that a defendant is guilty. Again, juries are often directed that:

"This is particularly important because of the tendency of the human mind to look for and often to slightly distort facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant."

[16] The defendant is alleged to have been in possession of the various objects set out in the five counts on the indictment on a date unknown between the 27<sup>th</sup> March 2015 (the day before the Paypoint receipt) and the 23<sup>rd</sup> November 2015 (the day after the search). Lord MacDermott in **R v Murphy [1971] NI 193** defined possession, in the context of the Firearms Act (NI) 1969, in the following terms - "*it connotes, in our opinion, voluntary possession by actual or potential physical control, with knowledge of the nature of what is kept or controlled*". The principal issues are therefore control and knowledge.

[17] The prosecution case is that the forensic evidence proves that the defendant has handled two of the plastic bags in which assorted rounds of ammunition were found, and that he has also handled the burn bag, in which all of the explosives and firearms material was found. The presence of the Paypoint receipt connects the defendant to the bag, and given its location at the bottom of the burn bag is sufficient evidence to conclude that the possession of the explosives and firearms/ammunition

was after the date of that receipt and therefore within the time span set out in the indictment.

[18] I have carefully considered what the forensic evidence actually proves. In the case of the fingerprint evidence it proves that the defendant has touched the plastic bag JJD 19, and has touched the burn bag JJD 71. It does not prove when the defendant touched the bags, and what was in the bags when he touched them. In relation to the plastic bag JJD 42, the presence of a DNA match proves that cellular material from the defendant is present on the handles and knotted part of the bag. Again, this cannot prove when his cellular material came to be on the bag, or what was in the bag at the time. In addition, unlike fingerprints, it does not necessarily prove there was contact. Cellular material can transfer from direct touching, but can be transferred through a secondary party or by other transfer.

[19] The presence of the palm print on the inside of bag JJD 19 cannot prove anything beyond the fact that the defendant touched the inside of the bag. The presence of the palm and finger print on the outside of the bottom of the burn bag JJD 71 could indicate that the defendant's hand came in contact with the bag when he was carrying it, as it would be a normal way to carry the burn bag considering its bulk and undoubted weight, with a hand or hands supporting the bottom part of the bag. Had the presence of the defendant's DNA resulted from him handling bag JJD 42, then the location of the DNA on the handles and knotted part of the bag, could indicate that the defendant was either carrying the bag, or tying the handles of the bag to secure the contents.

[20] I do not discount the possibility that there could be an explanation for any of these links when considered in isolation. The bags JJD 19 and JJD 71 could have been handled at a time when the bags were empty or contained other contents. His DNA could have been placed on the bag JJD 42 by a secondary method such as transfer. However, when one considers the accumulation of the evidence, with the forensic links to the burn bag (in which all the material was found) and the two plastic bags (containing in total 46 items of ammunition), and add to that the presence of the Paypoint receipt at the bottom of the bag which connects the defendant's address with the bag, the prosecution have presented a substantial 'rope' on which it hangs its case.

[21] I have considered whether this evidence was fabricated but there is no evidence before me to suggest that, and the defendant's representatives do not make such a suggestion. I therefore discount that as a possibility. There is no evidence presented in the case which would lead me to conclude that there is a reasonable possibility that the forensic links between the defendant and the three bags could have come about in innocent circumstances, and that the connection derived from the Paypoint receipt again could have arisen in innocent circumstances. Although one could not discount the possibility that there could be such an innocent explanation, the fact that there are four pieces of evidence found together connecting the defendant with the explosive substances, firearms and ammunition could not be

explained away by coincidence. The possibility of coincidence diminishes with each added piece of evidence, and with four links it becomes implausible.

[22] I have also considered the defendant's failure to give evidence at the trial. The appropriate warning was given to him, through his counsel. The law relating to this is very well established. The defendant is entitled not to give evidence, to remain silent and to make the prosecution prove his guilt beyond reasonable doubt. However, I can draw inferences from his failure to give evidence in certain circumstances –

- First, the inferences must be fair and proper inferences based on his failure to give evidence.
- Second, that the prosecution's case is such that it clearly calls for an answer from him.
- Third, that the only sensible explanation for his failure to give evidence is that he has no answer, or none that would bear examination.
- Four, that it is for me to decide whether it is fair to do so in all the circumstances.
- Five, that the defendant should not be found guilty only, or mainly, because he did not give evidence.

[23] I have mentioned the accumulation of the evidence in this case which links the defendant to these items. I believe that this does call for an answer from him. The fact that he has handled the burn bag and one of the bags within the burn bag, his DNA is present on another bag within the burn bag, a Paypoint receipt connected to his residence and a person living at that residence when considered collectively do call for an explanation.

[24] No evidence has been placed before me to indicate that the defendant has any particular problems with his memory, speech, cognitive functioning or other difficulty that would prevent him from giving evidence, or from being able to give some sort of explanation. I appreciate that the items were found by police in late 2015, which is now over 3 years ago, but the defendant was arrested two years ago in February 2017, and through information imparted to him through the questions posed by the police, he would have been aware of the discovery in November 2015 of the bag at the Dunmurry location, its contents and his connection with that bag and the contents. He has therefore had 2 years to consider an explanation for all, or any, of this evidence.

[25] I consider that the evidence presented by the prosecution does call for an explanation, and the defendant's failure to give evidence to suggest an explanation can only be the result of an inability on his part to do so, or in giving one it would

not stand up to examination. I consider that to be a fair conclusion based on the evidence available to me.

[26] Taking together all the strands of the prosecution case, and also by factoring in the further support provided by the defendant's failure to give evidence, I am firmly convinced that the defendant was in possession of the contents of the burn bag. He had sufficient control of it, and must have had knowledge of its contents. As the Paypoint receipt was at the bottom of the burn bag, and the other bags and contents were placed on top of it, I can infer that the contents were placed in the burn bag on or after the 28<sup>th</sup> March 2015, and therefore within the date range.

[27] The final issue I must determine is - what was the defendant's intention, in the context of Count 2? This count relates to the possession of the explosive substances with intent to endanger life or cause serious injury to property or to enable some other person to do so. The prosecution must prove that at the time the defendant possessed the explosive substances he had the necessary intent. The specific explosive substances are the three mercury tilt switches, the small arms propellant, fireworks composition, detonators and initiators, a modified cartridge and improvised detonator cord. The forensic links which have been discussed above, can tell little concerning the intention of the defendant at the time. They show that the defendant possessed the explosive substances but that is all. Sometimes the nature of explosive substances is such that an inference can be properly drawn as to the intention of those possessing it. Possession of a quantity of commercial or military grade explosive substance could be enough to infer an intention to endanger life or cause injury to property. The material in the burn bag does not fall into this category. One possible use for the mercury tilt switches could be in an anti-personnel explosive device, typically an under car device, but there could be other uses. The modest nature of the explosive qualities of the explosive substances recovered is such that it is difficult to be sure that the defendant's intention was to endanger life or cause serious injury to property, or to enable someone else to do so. One possible intention could be to endanger life as there is potential that devices constructed using the substances could have anti-personnel qualities, but equally, such devices could also be used for hoaxes, decoys and propaganda purposes or other non-lethal purposes.

[28] There is, however, sufficient evidence to make me sure that he did possess the substances, and the ammunition and firearms, in circumstances that give rise to a reasonable suspicion that it was not for a lawful object.

[29] In all the circumstances, I am sure of the defendant's guilt of counts 1, 3, 4 and 5 and therefore convict him of these offences. I am not sure of his guilt of count 2, and therefore acquit him of this offence.



## ANNEX

(Ruling on application of no case to answer)

1. The defendant has pleaded not guilty to five counts of possession of explosives and ammunition. The Crown case has now closed and he has applied for an order that I direct myself, as the tribunal of fact (this being a non-jury trial) to acquit him of all counts.
2. The evidence is not in dispute and the only issue is the nature of any inferences that can be drawn from it. The police searched a property with which the defendant has no apparent connection and a large paper 'burn bag' was found in the attic. Inside that bag were plastic bags, single socks and a plastic tube containing the explosives and ammunition. At the bottom of the burn bag was a Paypoint receipt that can be attributed to a payment made under a life insurance policy in the name of the defendant's mother. Palm prints on the inside of one of the plastic bags and from the bottom of the exterior of the burn bag can be attributed to the defendant. DNA which can be attributed to the defendant was also recovered from the knot of another of the plastic bags.
3. The law in relation to this type of application is well established in the **R v Galbraith** [1981] 2 All ER 1060 decision. Specifically in relation to the consideration of circumstantial evidence it has been set out in the Court of Appeal decision of **R v Courtney** [2007] NICA 178 by Kerr LCJ at paragraphs [18] - [20].
4. Further assistance is provided by the English Court of Appeal in case such as **R v Hedgcock, Dyer and Mayers** [2007] EWCA Crim 3486 and **R v Goddard and Fallick** [2012] EWCA Crim 1756. In **Hedgcock**, Law LJ summarised the question to be considered as follows (at [21]) -

*"If at the close of the Crown's case the trial judge concludes that a reasonable jury could not reject all realistic explanations that would be consistent with innocence, then it would be his duty to stop the case."*

Aikens LJ in **Goddard** at [36] stated -

*"We think that the legal position can be summarised as follows:*

- (1) *in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the*

"classic" or "traditional" test set out by Lord Lane CJ in **Galbraith**.

(2) *Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.*

(3) *However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."*

5. The question for consideration by the court at this stage of the proceedings is whether a reasonable jury could be entitled to infer on one possible view of the prosecution evidence that it was sure that the defendant had been in possession of the explosives and ammunition, the essential elements of possession being knowledge and control.
6. I am satisfied that a reasonable jury could come to such a decision. There are three separate forensic links between the defendant and the explosives and ammunition, with a further connection between the defendant and the burn bag the other bags, socks and pipe through the Paypoint receipt. On one possible view of the evidence it is a proper inference to draw that he had handled the bags and as a result both knew of the contents of the bags and had control over the contents.
7. Applying the **Galbraith** principles, it cannot be said that there is no evidence that the crimes alleged have been committed by the defendant or that the evidence is of such a tenuous character that a jury relying upon it could not properly convict.
8. I therefore reject the Defendant's application.