

Judicial Communications Office

23 February 2021

COURT DELIVERS JUDGMENT IN APPEAL FOR FIREARMS OFFENCES

Summary of Judgment

The Court of Appeal¹ today allowed an appeal against conviction in respect of one of three offences of which John Thomas Murphy was convicted. It dismissed his appeal against conviction for the other two offences.

On 31 July 2020 at Belfast Crown Court following a non-jury trial, John Thomas Murphy (“the Appellant”) was convicted of the following offences, all alleged to have occurred on 11 June 2017:

- Possession of ammunition without a certificate, contrary to Article 3(2) of the Firearms (Northern Ireland) Order 2004 (the “2004 Order”);
- Possession of ammunition in suspicious circumstances, contrary to Article 64(1) of the 2004 Order;
- Possession of an imitation firearm with intent by that means to cause any person to believe that unlawful violence would be used against him or another person, contrary to Article 58(2) (a) of the 2004 Order.

These were the second, third and fourth counts on the Indictment. On 11 November 2020 the Appellant was sentenced to 3½ years imprisonment equally divided between custody and licensed supervision. This was an appeal against conviction. There was no appeal against sentence.

The prosecution arose out of a police search of a house at 17 Beechmount Close, Belfast (“the premises”) on 11 June 2017. The Appellant and three other persons were present. The search of a bedroom uncovered a holdall containing an imitation firearm, five containers of ammunition, bullets, black armoured gloves, armoured gloves, latex gloves, a cool bag and a knuckle duster. The prosecution sought to attribute to the Appellant guilty knowledge by inference, sufficient to establish beyond reasonable doubt that he, as a matter of law, had possession, namely control, of the offending articles. The Appellant’s DNA was found on the zip of the cool bag; on two items inside the cool bag, namely the armoured gloves and the latex gloves; and on a transparent bag containing ammunition, inside the holdall. None of the other three adult occupants of the premises was forensically linked to any of the offending items. The prosecution case had a further dimension, namely that an inference adverse to the Appellant should be made arising out of his silence when interviewed by police and his failure to testify at the trial. Neither the Appellant nor any witness on his behalf gave evidence at the trial.

Grounds of Appeal

The grounds of appeal were:

¹ The panel was the Lord Chief Justice, Lord Justice McCloskey and Mr Justice McAlinden. Lord Justice McCloskey delivered the judgment of the Court.

Judicial Communications Office

- The trial judge failed to give the Appellant a good character direction;
- The convictions are unsustainable having regard to the total absence of any direct DNA or finger print evidence linking the Appellant to the firearm or ammunition; the movable, ubiquitous and non-sinister items to which the Appellant was connected by DNA or finger print evidence; and the absence of any evidence of the vintage of the DNA or finger print evidence or the circumstances in which the Appellant had come into contact with these non-sinister items;
- The trial judge's finding that the offending items were situated in a place which "... would have been obvious to anyone habitually using that room" is unsustainable as it failed to take adequately into account the poor condition and state of disarray of the wardrobe and bedroom in question; it incorrectly assumed that the items had been present for a prolonged period of time; it failed to recognise that they were readily movable; and it failed to acknowledge that "... a real possibility existed that they were in transit";
- The trial judge's professed disregard of any inference adverse to the Appellant in finding the three charges proved against him was inconsistent with his statement, when making his conclusion on the issue of possession, that the Appellant had failed to give evidence;
- The trial judge failed to attach adequate weight to the several items of evidence relating to the Appellant's brother; and
- With specific reference to the third conviction, there was insufficient evidence to warrant a finding that the Appellant intended others to fear unlawful violence. It was claimed this conviction was inconsistent with the trial judge's finding that the Appellant did not have the requisite intent to convict him of the first count of the indictment.

The Possession Ground of Appeal

This ground of appeal raised a single issue, namely possession as a matter of law, common to all three convictions. It focused particularly on the "brother factor". The Appellant's brother was described as the "*one common factor*" to the intelligence-led search operation giving rise to the charges. The brother, who resides nearby, was arrested in light of what the search uncovered. The brother's DNA was present on several items contained in the bags seized by the police, the expert evidence being that DNA profiles either could not exclude the brother as a contributor or showed him to be a less than significant contributor to the mixed profiles. The forensic scientist testified, in terms, that this evidence would have been insufficient to establish the brother's guilt beyond reasonable doubt of any offence arising out of his contact with the items in question. The resulting submission developed was that, based on this evidence, there was a real possibility whereby a jury could properly infer that some person other than the Appellant had knowledge of and was legally in possession of the offending items.

The Court said the trial judge was clearly alert to the "brother" issue:

"The evidence pointing to physical connection between the Appellant's brother and some of the offending items was considered by the judge. The case made on behalf of (not by) the appellant was that this established the real possibility that some person other than the appellant had knowledge of and was legally in possession of the offending items. We consider it clear from the judgment that the judge engaged with this case. His duty was to acknowledge this case and to balance it in his deliberations. More specifically, it was incumbent on the judge to consider whether this case gave rise to a reasonable doubt about the Appellant's guilt in respect of any of the counts."

Judicial Communications Office

The trial judge had considered the circumstantial evidence against the Appellant to be “compelling” and the Court considered this assessment was properly open to him. Furthermore, there was no flaw in any aspect of his self-direction. The Court said it therefore followed that the judge’s treatment of the “possession” aspect of these two counts cannot be faulted.

Specific intent was not an ingredient of either of the first two offences of which the Appellant was convicted. The third offence, however, was different in that the first ingredient of this offence was possession. The trial judge had to be satisfied beyond reasonable doubt that the Appellant was in possession of the imitation firearm. The Court said its conclusions in respect of the first two convictions applied fully to this element of the third conviction, however, possession *simpliciter* was not sufficient in order to sustain this discrete conviction. Rather the prosecution had also to establish beyond reasonable doubt the requisite specific intent. The Court said it was incumbent on the trial judge to be satisfied beyond reasonable doubt that the Appellant had the imitation firearm in his possession “with intent ... by that means ... to cause another person to believe ... that unlawful violence ... would be used against him or another person”: “The exercise of segregating the several ingredients in this way serves to draw attention to the very specific nature of the requisite intent and its multiple elements”.

The Court said the trial judge was correct in his recognition that this offence could be established only on the basis of the relevant circumstantial evidence (to include, of course, the scientific evidence). He was also correct to recognise that the necessary intent could be established only by inference. However, the Court expressed concern that the trial judge glossed the statutory language and did not engage with the individual ingredients of the offence. It also commented that the trial judge’s description of the requisite intent as “*more generalised and lesser*” did not bear scrutiny as each of these two offences entailed a specific intent framed in different terms:

“The statutory language in respect of each is in circumscribed and focused terms. The application of the prism of “*lesser*” or “*greater*” is not appropriate. Ditto that of more (or less) “*generalised*”. In summary, the judge did not engage with the constituent elements of the Article 58(2)(a) count and conducted an exercise which we consider inappropriate, one which led him into error. It follows that the conviction in respect of the fourth count cannot be sustained.”

The Adverse Inference Ground

Articles 3 and 4 of the Criminal Evidence (NI) Order 1988 prescribe the circumstances in which inferences may be drawn from an accused’s failure to mention particular facts when questioned or failed to give evidence at trial. The Court said the trial judge’s treatment of this issue had two elements. First, he considered that the prosecution evidence clearly called for an answer from the Appellant. Second, he considered that the only fair and proper conclusion was that the Appellant either had no answer to provide or had none that would bear scrutiny. The submission advanced to the Court was that it was not “*altogether unexpected*” that the Appellant both refused to answer police questions about his brother’s access to or connection with the premises and declined to submit himself to cross examination which would *inter alia* focus on this issue. This ground of appeal, in substance, challenged the judge’s disinclination to accept this rationalisation.

The Court considered it important to analyse the trial judge’s treatment of this issue in the correct way. It said that in matters of this kind an appellate court must accord to the trial judge an appropriate degree of latitude, a discretionary area of judgement. Approached in this way, the

Judicial Communications Office

question was whether it was reasonably open to the judge to reject the “not altogether unexpected” theory and to espouse the different analysis for which he opted. The Court said this was a case in which the trial judge’s approach clearly lay within the range of approaches reasonably available to him having regard to the array of facts and factors associating the Appellant with the presence of the offending articles in the premises.

The No Good Character Direction Ground

The factual element of this ground of appeal was that the judgment of the trial judge contained no self-direction pertaining to the Appellant’s good character. The Appellant submitted that his criminal record consists of a single conviction in respect of an offence of criminal damage in 2010 and a caution for disorderly behaviour relating to an incident in 2013. He contended that he was therefore entitled to the benefit of a good character direction.

In paragraphs [32] – [37], the Court outlined the guidance from decisions of the Court of Appeal in England and Wales. It said the Appellant is not a man of *absolute good character*, but may have been a person of *effective good character* for the purposes of his trial. Counsel for the prosecution, while acknowledging that the prosecution had not adopted any stance on this issue at the trial, submitted that if it had done so it would have accepted that that the Appellant had, for the purposes of this case, effective good character, although any resulting good character direction ought to have expressly specified the disorderly behaviour caution in 2013 in the interests of accuracy.

The Court considered that in principle there can be no distinction between “*an incorrect ruling or misdirection by the trial judge*” in the matter of a good character direction and an omission to consider it altogether as occurred in this case. The Court considered it clear beyond plausible argument that there was no issue about whether the Appellant had given a credible account – “his brief utterance at the scene of the search falling manifestly short of the notional threshold in this respect”. Thus, a good character self-direction addressing the limb of credibility would plainly have been inappropriate.

The next question was whether there should have been a good character self-direction regarding the propensity of the Appellant to have committed any of the offences charged. The Court said it was not in dispute that the trial judge correctly directed himself on the issue of adverse inferences:

“We find it difficult to conceive how this direction could have harmoniously coexisted with a good character self-direction. In this respect the intrinsic limitations of the Appellant’s brief oral utterance at the scene of the search must be recognised. Furthermore, the DNA evidence adduced at the trial connecting him directly and physically to several of the items recovered was, as we have held, such as to call powerfully for an explanation through the medium of giving evidence in his own cause. Logically and sensibly a “*propensity*” good character self-direction does not fit into this framework.”

The Court also commented that the DNA samples were mixed thereby implicating more than one person in physical contact with them. It said that in cases where there is no dispute as to the source of the crime scene DNA this may not necessarily suffice to establish guilt beyond reasonable doubt. The accused may offer an innocent explanation, such as indirect or secondary transfer or contamination, for even the strongest DNA matches. Where this occurs any such explanation must be disproved, or rejected as inherently implausible, before the accused can be convicted. The Court said that the correct approach to the question of whether a conviction based solely on mixed profile

Judicial Communications Office

DNA found on a movable object at the crime scene is safe is one which has evolved somewhat in the jurisprudence of the English Court of Appeal. Referring to the case law, the Court said this was not an appropriate case for a good character self-direction on the part of the trial judge:

“The final answer to this ground of appeal is that if a limited good character self-direction should have been made the judge’s failure to do so casts no shadow over the safety of the two convictions having regard to the potency of the prosecution case constituted by the various elements of physical, circumstantial evidence and scientific evidence accepted by the judge, coupled with his correct decision (in the alternative) to make an inference adverse to the Appellant. We reject this ground of appeal accordingly.”

The Inconsistent Verdicts Ground

The Court said the complaint of inconsistent verdicts in this case had been extinguished by its conclusion that the conviction (count 4) said to be inconsistent with the acquittal (count 1) must be quashed for the reasons given.

Conclusion

By virtue of s 2 of the Criminal Appeals (NI) Act 1980 the single overarching question for the Court was whether the convictions under appeal are unsafe. This entails the application of the test of whether the Court has a sense of unease, or a lurking doubt, about the safety of the conviction under challenge. The Court said that for the reasons given:

- The Appellant’s conviction in respect of the fourth count of the indictment, namely having in his possession an imitation firearm with intent by that means to cause any person to believe that unlawful violence would be used against him or another person is unsafe and must be quashed;
- It harbours no reservations about the safety of the remaining two convictions of the Appellant, namely possession of ammunition without a certificate and possession of ammunition in suspicious circumstances.

Thus, the appeal succeeded to the limited extent indicated immediately above.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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