Neutral Citation No. [2006] NICC 2 | *Ref:* **DEEC5463**

Judgment: approved by the Court for handing down | *Delivered:* **16/01/2006**

(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

_____

THE QUEEN

v

STEPHEN HUGH HARTE

_____

DEENY J

[1] The defendant Stephen Hugh Harte was tried by me on two counts of an indictment at Belfast Crown Court on Wednesday 11 January 2006. These were scheduled offences under the Terrorism Act 2000 which I heard without a jury. Mr Magill appeared with Mr Creaney QC for the prosecution and Miss McDermott QC led Mr Brolly for the defendant.

[2] It was alleged against the defendant that on 22 day of March 2003 in the County Court Division of Belfast he had in his possession firearms, namely an AKM rifle and a converted Derringer replica pistol and 14,000 or thereabouts rounds of assorted ammunition, with intent by means thereof to endanger life or cause serious injury to property or to enable some person by means thereof to endanger life or cause serious injury to property. On the second account it was alleged that on the same occasion he unlawfully and maliciously had in his possession or under his control certain explosive substances, namely five timer power units, with intent by means thereof to endanger life or cause serious injury to property in the United Kingdom, or to enable some other person so to do.

[3] He pleaded not guilty to both counts when arraigned on 9 September 2005. He stood charged with Francis Dominic Mackin who likewise had pleaded not guilty to those counts on the indictment. However the parties had applied for an adjournment of this case when listed on 9 January for a number of reasons. I adjourned the matter until 10 January when Francis Mackin pleaded guilty to a lesser count of making property available, namely the warehouse adjacent to the Menagerie Bar/Club at University Street, Belfast, knowing or having reasonable cause to suspect that the said might be used for the purposes of terrorism. He was an employee of that bar and had

lawful access to it, I was told. The Crown accepted this plea ie. that he would not be shown to have the necessary intent to enable others to endanger life. On their application I directed that Counts 1 and 2 be left on the books not to be proceeded with without the leave of the court or the Court of Appeal.

[4] The facts of the matter can be briefly stated. At approximately 1700 hours on Saturday 22 March 2003 police officers were directed to search a warehouse adjacent to the Menagerie club. They forced the warehouse door and on entry they discovered therein the defendants Harte and Mackin. Sergeant Stephen Atkinson and other officers noted a number of sports holdalls sitting on the ground spread across the floor. It later transpired that these holdalls contained the assault rifle, the other pistol, three replica firearms which were not the subject of charges, and some 14,000 rounds of ammunition. When asked what he knew about these holdalls Mr Harte replied "I just came in here and found these guns." Outside the warehouse was a motorcar with a male sitting in the driver's seat. Although interviewed by the police he was never charged. Constable Stuart McFarland saw the defendant Harte attempt to crawl and hide beneath the body of van as he entered the warehouse. He desisted in this when confronted by the officer. When he asked him about a long barrelled weapon he had found in a bag and cautioned him Stephen Harte said: "found them". When asked why he was in the warehouse he replied: "over for a drink". Harte was subsequently interviewed by detectives from the Police Service of Northern Ireland but did not respond to their questions when interviewed.

[5] The evidence against him was admitted in its entirety by consent under Section 2 of the Criminal Justice (Miscellaneous Provisions) (Northern Ireland) Act 1968. The Crown did not exercise its right to give oral evidence of any of the matters admitted.

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

[7] The forensic evidence appears in the papers put forward by the Crown. However the matters of significance that assist the Crown are limited. Essentially they are that 19 fibres from a fleece jacket belonging to the defendant Harte were found on the outside of one of the holdalls and 13 fibres from the same fleece on a different holdall. Fibres also indicated that he had been in the car that was found outside.

[8] On the other hand although checked forensically no fingerprint, fibre or DNA evidence was found establishing any link between Harte and any of the contents of the holdalls.

[9] Captain Andrew Stockdale photographed the timer power units referred to and to be found at exhibit 2A. Their function speaks for itself and is obviously of lethal significance. However Mr Magill conceded that not only were no actual explosives found but nor were any detonators and nor were there any batteries in the power units. Although it is not made clear in the scenes of crime statement it seems implicit that the timer power units were found in one of the bags in the warehouse.

[10] The first issue which I have to consider in the light of the evidence and the submissions of counsel is whether the accused was in possession of the firearms and ammunition and in possession of the explosive substance ie the timer power units contrary to Article 17 of the Firearms (NI) Order 1981 and the Explosive Substances Act of 1883. The second issue is whether the Crown have established that if he was in possession whether he had the specific intent alleged in either count 1 or count 2 of the indictment.

[11] With regard to possession the Crown rely on the presence of the accused in the warehouse with the items. They rely on the evidence through fibre contact indicating that he personally had been in physical contact with at least two of these holdalls proximate in time to their discovery. No adequate explanation is given by him for his presence in the warehouse, as it was not a place where drink was being served. The conduct of the defendant is covered by Section 77 of the Terrorism Act 2000. (Mr Magill said it was not necessary for him to rely on this but if I did consider it necessary he would do so). Section 77(2) reads:

> "If it is proved that the article –
>
> (a) was on any premises at the same time as the accused, or
>
> (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,
>
> the court may assume that the accused possessed (and, if relevant, knowingly possessed) the article, unless he proves that he did not know of its presence on the premises or that he had no control over it."

In accordance with the earlier provisions to the same effect the accused must only prove this on the balance of probabilities. However as Miss McDermott QC properly acknowledged the accused had not discharged this burden upon him. Despite being called upon to do so he had not given evidence at the hearing. He had not called any other evidence to show that he was properly and lawfully on the premises. He had not given any explanation in the interviews by police officers, a matter about which a separate adverse inference can properly be drawn. In all the circumstances therefore I conclude that the Crown have satisfied me beyond a reasonable doubt that the accused knew of the presence of the articles named in the indictment, whether or not he had knowledge of the precise number of rounds of ammunition. They have also satisfied me that he had at the time of his arrest control over those articles. I consider he was in possession of them therefore.

[12] I then turn to the second aspect of the matter as to whether the Crown have proven the necessary intent set out in each count of the indictment. It is indisputable that the material found was capable of endangering life. It is relevant, nevertheless, to note that in the case of the weapons that could only be done if further work had been done upon them. The very existence of the blank pistols which had not been altered for actual use was of a similar character to the non functioning firearms. Mr Magill accepted that this was not a situation where the police had interrupted an actual or intended terrorist operation. Not only were the weapons not loaded they were not even operable. He accepted that the very bulk of the ammunition militated against any immediate use as did the absence of any evidence that the accused had personally handled any of the contents of the bags. He effectively conceded that he could not establish the first limb of the intent case ie that the accused himself intended to endanger life or cause serious injury to property. However he relied on the same fact of the scale of the find as pointing to an intention to enable others not before the court to do so albeit not at that time. He did not refer to any authority in support of that contention. That concluded his submissions.

[13] Miss Eilish McDermott QC for the defendant immediately drew attention to the very different approach required of the court with regard to intent as opposed to possession. The Crown must prove the necessary intent beyond reasonable doubt before the court could convict. She submitted that even on the second limb they were quite unable to do so in this case. She submitted that the considerable bulk of ammunition clearly pointed to a storage of it. Was he there to move it? Was he there to count it? Was he there to clean it? Or for some other purpose? I observe that if I was satisfied in the way that I must be that he was there to clean it that would certainly assist the Crown case. Gun cleaner and gun oil was found among the holdalls. However there was nothing to link the defendant with those particular materials, although that may be because of the expeditious intervention by the police I do not know and therefore cannot draw any safe conclusion. She

submitted that there was only a circumstantial case against the defendant. For a conviction there would need to be an irresistible inference that he intended to enable others to endanger life or cause serious injury to property. Miss McDermott, like Mr Magill, felt that there was no authority which she had located which was of assistance to the court. I do note, inter alia, the decision of Sir Robert Carswell LCJ in the Court of Appeal in R v Darren Clarke [2003] NICA 43. The facts are quite different but at paragraph 13 he asks whether something was merely likely or whether "a necessary or compelling inference" could be drawn from the evidence. In that case the court overturned a conviction in a shooting case by Nicholson LJ on the basis that such an inference could not have safely been drawn, despite the suspicion or even likelihood that existed.

[14] Miss McDermott submitted that there was no evidence before the court that these materials belong to any unlawful organisation although she sensibly conceded that it was likely to be the case. Certainly it seems to me that 14,000 rounds of ammunition would justify the court in drawing the inference that this was a store being held for some organisation rather than any individual or purely criminal gang.

[15] She drew attention to the fact that contrary to many such cases no evidence was being offered that these firearms had been used lethally in the past or that the ammunition was connected with other ammunition with a particular history.

[16] She made the valid submission that it was not enough for the Crown to say that merely because there was so much ammunition the court must conclude that the accused had the intention to enable others to endanger life. If that were so why had Parliament enacted Article 23 of the 1981 Order providing for possession in suspicious circumstances?

An offence thereunder is committed if a person "has in his possession any firearm or any ammunition under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession for a lawful object".

[17] She invited me to take judicial notice of the state of the country in 2003. This was relevant to her earlier submission that the materials might be being moved or counted, I conceive. If I were to be satisfied beyond reasonable doubt I would have to exclude any reasonable possibility that the defendant did not have an intention to enable others to endanger life. One such reasonable possibility would be that he was in some way associated with the Provisional IRA and that these were their materials but that he, as a supporter of the peace process, was in fact either identifying or counting the materials in this store with a view to preparing an inventory or was proposing to move them to some less readily accessible place with a view to putting them beyond

use. It does not seem to me that he can actually have been doing that as part of some approved scheme under the Northern Ireland Arms Decommissioning Act 1997 for otherwise that would have been drawn to my attention or indeed no prosecution would have been commenced. However I envisage the possibility that the defendant was engaged in some step preliminary to such a scheme. If so, of course, the Crown might well establish that in his possession of the ammunition, whether for movement counting or otherwise he was contemplating, as he was not part of a statutory scheme, that other persons might choose not to decommission the material and may well use them at some future point to endanger life or use the timer power units in connection with other items or the firearms, when made effective, to endanger life. Would that be enough for a conviction?

[18] This situation was contemplated in a decision of the English Court of Appeal R v Jones and Others 1997 1 CAR 46. That was a case where a registered firearms dealer and former police officer, Ivor Jones, was prosecuted with others for illegally supplying arms to criminals. Their convictions were quashed because the charge of the learned trial judge did not properly direct the jury on the issue of intent. As it happens at page 52 of the judgment the charge was quoted to the following effect:

> "…… but let us just consider someone who supplied guns to an illegal terrorist organisation and for simplicity by way of example one might choose the IRA or the other side the terrorist Loyalist side it matters not which, at a time when there is peace in Northern Ireland but at a time when there were some people who do not want to hand in or give up the arms in case they want to revert to terrorism. That would be an offence of possessing an arm and then supplying it to a person so as to enable them to endanger life at some future time should they so decide."

At page 54 Hutchinson LJ, in the judgment of the court notes counsel's argument that that passage was:

> "Another clear instance of the judge's incorrect approach. His example is admittedly a strong one, on the basis of which it would plainly be open to a jury to draw the requisite inference as to intent. But even the high likelihood of the use of the weapon to endanger life is not the same as a sufficient intent on the part of the donor, and even in such a case the jury should have been made to appreciate that it was for

> them to decide whether they could draw such an inference."

He accepts the validity of counsel's criticisms of the summing-up at page 54F. I observe that the likelihood of the use of weapons or ammunition or timer power units to endanger life must be regarded by the court as less in 2003 than it was 10 or 20 years before. While a terrorist campaign was being waged in Northern Ireland the courts must readily have inferred that anyone keeping or moving arms did have the second limb of the intent required under Article 17 because that was the obvious inference of the possession of such arms or ammunition. It seems to me that where there is no evidence linking the illegal materials to a paramilitary organisation actively committing crimes, or indeed any criminal gang committing crimes, it is more difficult for the Crown to establish the necessary intent.

[19] Hutchinson LJ goes on more generally to consider the second limb of Section 16 of the Firearms Act 1968 the equivalent legislation at the time in England. I quote from page 57:

> "The first thing to be observed, obvious though it may be, is that both limbs of the section are concerned with possession by the defendant of firearms or ammunition, not with their supply: so it is the state of mind of the defendant as possessor that has to be considered.
>
> The second equally obvious thing to remember is that there is a difference in the relevant wording of the two limbs, in that the second substitutes for the phrase 'by means thereof to endanger life' the phrase 'to enable another person by means thereof to endanger life'. The additional words are 'to enable another person'. The key to the problem is to identify the meaning of these four words in the context in which they appear – in particular to determine the shade of meaning that the verb 'to enable' carries. It plainly means something <u>more</u> than 'to give the opportunity', because to equate it with such an intent would indeed be to make the second limb offence almost one of strict liability and would certainly encompass the example of a man who negligently determines to hand a loaded firearm to an insufficiently responsible person – conduct which one cannot sensibly contemplate as running with the first limb in a section creating offences for which life imprisonment is provided.

> Mr Coward concedes, as he must do in the light of Bentham and Others (1972) 56 CAR 618, that for the second limb as for the first it is not necessary to prove an immediate or unconditional intent that life shall be endangered – it is sufficient if the intent is that the firearm shall be used in a manner which endangers life as and when occasion requires. However with that qualification it seems to us that an intention on the part of the possessor that life shall be endangered is a requirement of the second as of the first limb. Whether on the facts of the particular case that intention has been proved is a question for the jury to determine, drawing such inferences as they properly may from the evidence." (my underlining)

[20] I consider this authority a salutary reminder that one must look at the state of mind of the accused at the time of the possession. Am I satisfied beyond reasonable doubt that when in possession of these materials it was his intention to enable others to endanger life, or as the Court of Appeal put it in R v Jones that life shall be endangered? A 'high likelihood' is not enough. Judges are advised to avoid elaborating on what intention means when charging juries, if possible. However one of the elements of intention if it is necessary to analyse it is foresight of the consequences. He may have foreseen a variety of consequences. Another key factor is the probability of the result. I asked Miss McDermott about the relevance of the date of the offence because it seems to me that the circumstances that exist in the country are relevant to the extent of the probability of the material being used to endanger life or cause serious injury to property. That is reinforced by the subsequent decommissioning of weapons by the organisation that may have "owned" this stock pile, although no evidence of a particular organisation was put before the court.

[21] Taking all the factors into account it does not seems to me that the Crown have established beyond reasonable doubt that this was Stephen Harte's intention at the time of his possession of the materials but rather that his offence falls more appropriately within Article 23 of the same order ie. possession not for a lawful object, perhaps indifferent to their ultimate use. The prosecution have not proved that it is a "necessary or compelling inference" that Harte had this particular intent when in possession of the illicit materials, to use Lord Carswell's helpful phrase.

[22] Similarly I am not satisfied that the Crown have made out a case under the second count that the defendant was in possession of the timer power units with intent contrary to Section 3(1)(b) of the Explosive Substances Act 1883 but rather that they have proved in the way that they must that he had

them in his possession "under such circumstances as to give rise to a reasonable suspicion that ….. he does not have it in his possession or under his control for a lawful object …" contrary to Section 4(1) of the 1883 Act. I therefore convict the accused of the lesser offence in each case, in substitution for the counts on the indictment.