Neutral Citation No [2020] NICA 58 | *Ref:* **TRE11362**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/11/2020**

2018 No. 067210

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

KEVIN McLAUGHLIN

David Scoffield QC and Dessie Hutton QC (instructed by Phoenix Law Solicitors) for the Appellant

Liam McCollum QC with Michael Chambers appeared for the PPS

Before: STEPHENS LJ, TREACY LJ & HUDDLESTON J

TREACY LJ ***(delivering the Judgment of the Court)***

Introduction

[1] The Appellant appeals against convictions for:

(i) Possession of explosive substances in suspicious circumstances between 27 March 2015 and 23 November 2015, contrary to section 4(1) of the Explosives Substances Act 1883 ('the 1883 Act');

(ii) Possession of a firearm and ammunition between the same dates in suspicious circumstances, contrary to article 64(1) of the Firearms (Northern Ireland) Order 2004 ('the 2004 Order');

(iii) Possession of rounds of ammunition for military use between the same dates, without authority of the Secretary of State, contrary to article 45(2)(e) of the 2004 Order; and

(iv) Possession of rounds of ammunition between the same dates, without the authority of the Secretary of State, contrary to article 45(2)(f) of the 2004 Order.

[2] Mr David Scoffield QC and Mr Dessie Hutton appeared for the Appellant and Mr Liam McCollum QC and Mr Michael Chambers appeared for the Prosecution.

[3] At the conclusion of the oral submissions this Court allowed the appeal, quashed the convictions and stated we would give our reasons later, which we do now.

Factual Background

[4] On 22 November 2015 the police searched property at 4 Broom Close Belfast. The defendant has no connection with this property, or its owners and occupiers.

[5] In the attic of the premises a large burn bag was found (Exhibit No: JJD71). No further details concerning this bag were provided and the Trial Judge ("TJ") assumed that it was "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".

[6] The burn bag contained a number of plastic bags within which 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.

[7] The materials recovered at the Broom Close address were forensically examined and the forensic and other evidence in the case was recorded in a Statement of Agreed Facts settled and signed by all Counsel. This Statement of Agreed Facts was the main basis upon which the original trial proceeded. The other source of evidence available was direct testimony from forensic witness Fiona Purdue.

[8] Forensic evidence from the burn bag consisted of four fingerprints from the "lower exterior of the bag". One of these was agreed as a match to the right little finger of the Appellant. It was also agreed that one palm print on this exhibit was a match with the Appellant. No evidence was agreed in respect of the identity of the maker of the other imprints.

[9] Within the burn bag was Exhibit JJD19 described as a "white knotted plastic bag … which contained 26 rounds of ammunition". Examination of this item recovered only one imprint, namely a palm print from the inside surface which, it was agreed, matched the Appellant. It was further agreed that it was not possible to

age the constituents of contact marks. It was not possible to say when the Appellant might have touched JJD71 or JJD19 nor in what circumstances he may have done so.

[10] Also within Exhibit JJD71 was Exhibit JJD42 described in the Agreed Facts as "a poly bag". The handles and knot of this bag were swabbed for DNA. A mixed DNA profile was obtained and it was "largely possible" to determine a partial major contributor. It was agreed that this partial profile matched the Appellant and that this match was one in a billion times more likely to arise if the DNA profile originated from the Appellant than from an unrelated male.

[11] Also recovered from the bottom inside of the burn bag was a Paypoint receipt marked as Exhibit JJD67. The receipt showed that a payment of £10 was made at "Ann's" 4 Springhill Avenue Belfast on 28 March 2015 at 20:00hrs. Investigations revealed that the payment was made in respect of a Life Insurance Policy in the name of an E McLaughlin, DoB: 3 December 1954 of 20 Ballymurphy Drive Belfast. A finger imprint was found on the receipt. This imprint was agreed **not** to be matched with the Appellant.

[12] In addition to the Statement of Agreed Facts, the forensic witness, Fiona Purdue, gave evidence and was cross-examined during the trial. When asked about the "poly bag" she confirmed that it was a "white, generic, plastic shopping bag" with a handle. The bag was tied close to the top, adjacent to the handles and there was a rip in the bag just below the knot. The bag was a plastic surface so it was suitable for the retrieval of DNA. Both the handles and the knot were swabbed but only the material from the knot was forwarded for analysis.

[13] The material obtained from the knot was said to fall below the routine threshold for testing. There was a low level/quantity of DNA present. The sample was a mixed sample with at least two contributors. Once it gets down to a very low level it is quite difficult to say how many contributors there were but there were at least two, possibly more. It was "largely possible to determine a partial major contributor". This partial profile matched that attributed to the Appellant. The phraseology "largely possible" applied where sometimes from one or two of the tests it was not really clear and/or it was difficult to see the proportions and/or the sample was a partial sample.

[14] It was not possible to indicate what type of cellular material had been deposited. This was a minute trace of cellular material and it was not clear where it was from. The DNA profiling does not provide information in relation to when the cellular material was deposited or in what circumstances it got there or how long it may have been there. The length of time a deposit might stay on an item depended on how it was stored. If stored outside one would not expect it to last very long but if stored in a cool, dry environment it could last for a long time meaning months or years. Due to the very low level quantity in this case, one could not say that the DNA was deposited on the bag by direct transfer. One could not conclude from the DNA evidence that the Appellant had tied the knot on the bag. The best that the

witness could say on that was that there was cellular material belonging to the Appellant on the exterior of the bag.

[15] The final item retrieved from the burn bag was the Paypoint receipt. 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" shop on Springhill Avenue, Belfast at 8pm on 28 March 2015. The receipt was made in respect of a life insurance policy in the name of E McLaughlin, DoB: 3 December 1954, of 20 Ballymurphy Drive, Belfast. The police searched the premises at 20 Ballymurphy Drive, Belfast on 21 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. The Appellant was also present and was arrested at this address. He was subsequently interviewed on 21 and 22 February 2017. He declined to answer any questions.

[16] At the end of the prosecution case when all the above evidence had been led, the Defence team made an application of No Case to Answer. In the TJ's Ruling he notes that the law on this type of application is contained in R v Galbraith [1981] 2 All ER 1060 and at paragraph 4 he reviews the guidance given by Aikens LJ in R v Goddard & Fallick [2012] EWCA Crim 1756 on the application of the Galbraith test where he said:

> "(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.* [our emphasis]
>
> (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".

[17] At paragraph 5 of the TJ's Ruling on the application of no case to answer he states:

> "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".

[18] It is clear from the above that the TJ rejected the application of "No Case to Answer" because he considered that on one possible view of the evidence presented, a jury, properly directed, could be satisfied of the Appellant's guilt to the requisite criminal standard.

[19] The conclusion reached in the "No Case to Answer" application stands in contrast with the evaluation of the evidence made by the TJ in the main body of his Judgment. At paragraphs 18 and 19 of the Judgment he says:

"[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. …"

[20] This appears to us to be an accurate evaluation of what the forensic evidence at its height does prove. It is notable that there is no proof whatsoever here of any connection between this Appellant and the explosives, ammunition or any other contents of the bags. This is where the prosecution evidence stood when the application for a direction was made.

[21] We consider that the evidence led in the present case is very similar to that presented in the Scottish case of Campbell v HM Advocate [2008] SCCR 847. In that case the appellant was convicted of possession of a rifle which had been secreted inside a house to which the appellant and various others had access. The rifle was found wrapped in black refuse bags and the appellant's finger and palm prints were identified on the bag. There was no evidence as to the time when the fingerprint was affixed or the location of the bag when it was affixed. Other fingerprints were found on the bag although these could not be identified. There was no evidence that the appellant had ever been seen with the rifle and the appellant's prints were not on the rifle.

[22] On those facts, very similar to the present case, the High Court of Justiciary held that:

> "[20] … the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge and control of the rifle … In our opinion, the jury would be entitled to infer that the appellant had indeed come into contact at some time with the black plastic bag (a moveable item) which had been used by someone to wrap up the concealed rifle."

They further added:

> "Thus some additional evidence would in our view be necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had been involved in handling or concealing the rifle and thus that he had the requisite knowledge of and control over the rifle".

[23] We are troubled by the fact that when the direction was sought the circumstantial evidence and forensic links presented by the prosecution, and taken at their height only put the Appellant in contact with the bags in which the cache was found. There is no forensic evidence at all linking him to the content of these bags. Ubiquitous bags, whether paper or plastic, are precisely the kind of items that do get used and reused by many people over the course of many different transactions. Fragile threads do not make a strong rope. The jury would have been entitled to infer that the appellant had at some time come into contact with the bags which had been used to conceal the items. However the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge and control of the items. As in Campbell some additional evidence would be necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had knowledge and control of the items. For these reasons, and applying the approach in R v Goddard & Fallick [set out at para [16] above], we consider that the trial judge erred in law in refusing the application for a direction of no case to answer and accordingly the appeal is allowed.