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Judgment: approved by the Court for handing down | *Delivered:* **26/6/2009**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

DAMIEN WILLIAM McKENNA, GARY TOMAN AND SEAN GERARD PATRICK McCONVILLE

_____

Ruling No 2

HART J

[1] This is an application by the prosecution to admit the evidence of Gordon Hugh McMillen as bad character evidence under the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order").

[2] Mr McMillen examined four exhibits and has come to certain conclusions regarding the discovery of, and the significance of, PETN on each of these four items.

(1) Item CJB10. PETN was detected upon a swab taken from the upper front and waistband of the jeans worn by McKenna.

(2) Item CJB6. PETN was detected on a swab taken from the outer surface, cuff and sleeve of the jacket worn by McKenna.

(3) Item EN3. High levels of PETN were detected on swabs taken from both gloves which were removed from McKenna's jacket during a search when the car was stopped.

(4) Item PW9. PETN was detected upon a black "fleece material" glove found in a dark green jacket. The evidence is that the jacket was found on the rear seat of the car, and in the rear seat were Toman and a fourth man. This was Ryan McKenna, who is a brother of the defendant Damien McKenna but is not before

the court. The prosecution attribute the coat, and hence possession of the glove, to Toman for three reasons -

(a) its proximity to him on the back seat;

(b) he was the only one of the four occupants of the car who was not wearing a coat; and

(c) DNA analysis of swabs from the jacket produced a mixed profile with DNA present from two or more persons, and the profile of the major contributor of DNA present in the mixture matched Toman.

[3] In his witness statement at pages 129 and 130 of the committal papers Mr McMillen referred to PETN in the following passage –

> "PETN is an explosive compound that may be used on its own or mixed with other substances in a variety of explosive products. In Northern Ireland it is most frequently encountered in the product Semtex-H, a plastic high explosive and in detonating cords, a commercial blasting accessory, Semtex-H normally also contains RDX, which is also an explosive compound. PETN also has use in certain medical preparations for the treatment of heart conditions.
>
> **Conclusion**
>
> The high level of PETN detected on the gloves in item 68 EN3 indicates a direct contact of these gloves with a concentrated source of this compound such as a sample of explosive itself or a surface heavily contaminated with this compound. It is unlikely that this PETN originated from direct contact with the explosive found in the device in this case, as no RDX was detected.
>
> The presence, of PETN on items 2 CJB1O, 4 CJB6 and 106 PW9 indicate a contact of these items with a source of this compound or a surface contaminated with this compound."

[4] Although reference was made during his submissions to this PETN as being "a different type of PETN", it is perhaps more accurate to say that the PETN discovered on these items has a different origin to the PETN found in the explosive device in this case because there was no RDX present in any of the

samples, whereas RDX and PETN were both present in the explosive device. Indeed, Mr McDowell (who appears on behalf of the prosecution with Mr Kerr QC) concedes that the PETN detected by the swabs on these items must have come from another explosive device. As can be seen from the passage quoted above, Mr McMillen states that PETN –

(1) may be used as an explosive on its own, or
(2) mixed with other substances in a variety of explosive products – notably Semtex-H in Northern Ireland, or
(3) may be used in certain medical preparations for the treatment of heart conditions.

[5] It is unnecessary to refer to the other evidence in the case which I have already set out at some length in my earlier ruling in this case of 22 May 2009 at [9] to [16] and [70].

[6] The application is brought by the prosecution under Article 6(1)(d) of the 2004 Order, namely that "it is relevant to an important matter in issue between the defendant and the prosecution". The notice served by the prosecution stated that the evidence was relied upon as establishing "propensity" thereby invoking the provisions of Article 8(1)(a) of the 2004 Order. During the submissions, whilst not abandoning the "propensity" argument, Mr McDowell principally relied upon Article 6(1)(d) itself on the basis that the evidence concerning the discovery of PETN upon these four items was relevant to an important issue, namely did the defendants handle the device and have possession of it. In essence the prosecution assert that this evidence, if admitted, comprises one of the strands in the circumstantial case which the prosecution say links the defendants to the devices. Mr McDowell referred to the discussion of similar fact evidence that would have been admissible at common law contained in Archbold 2009 at paragraphs 13-39 to 13-42 in particular.

[7] He contended that the evidence relating to the discovery of PETN and its significance may help to eliminate any doubt that the trial judge might have that the defendants in the car had contact with or possession of the device.

[8] It is clear that this evidence relates to an "important matter" as defined by Article 17(1) of the 2004 Order, and it is not disputed that it could amount to "misconduct" because to unlawfully handle an explosive substance is clearly capable of being considered to be "reprehensible behaviour" within Article 17(1) even though there has not been a conviction for an offence in relation to it. That there does not need to be a conviction has been emphasised in McKenzie v. R [2008] EWCA Crim 758 at [22], and R v. DM [2008] EWCA Crim 1544 at [21]. In McKenzie at [22] to [26] Toulson LJ pointed out that relying upon previous misconduct which did not result in a conviction may result in the trial becoming unnecessarily and undesirably complex, even if it did not become

unfair, because of the risk of introducing collateral issues adding to the length and cost of the trial and complicating the issues which the jury has to decide. For these and other reasons identified in that decision he observed that –

> "For all these reasons applications of the kind made by the prosecution in the present case need to be approached with considerable caution."

[9] Mr Devine (who appears on behalf of McKenna with Mr O'Donoghue QC) argued that as there was no conviction in relation to the possession by McKenna of PETN on a previous occasion, and no evidence that contact with PETN was extremely unusual, this was a case where caution should be exercised. He pointed out that the presence of PETN on McKenna's clothing may be due to innocent contamination. In this context he referred to Damien McKenna's brother Darren McKenna, who he stated received a custodial sentence in 2007 for explosives offences committed in 2005.

[10] Whilst it is correct that Mr McMillen refers to PETN also being used in certain medical preparations for the treatment of heart conditions, there is no evidence before the court at present to suggest that Damien McKenna, or anyone with whom he has contact, was a user of PETN in the form of medication. It will be a matter for the trial to explore questions of contamination, but at this stage it is relevant to bear in mind that so far as the gloves item EN3 are concerned, Mr McMillen has concluded that –

> "The high level of PETN detected on the gloves and item 68EN3 indicates a direct contact of these gloves with a concentrated source of this compound such as a sample of explosive itself or a surface heavily contaminated with this compound."

I am satisfied that Mr McMillen's evidence in relation to the concentrations of PETN detected in the swabs relating to McKenna is of considerable significance for reasons which will appear later in this judgment.

[11] Mr Rodgers (who appears on behalf of Toman with Mr Barry McKenna) adopted Mr Devine's submissions and argued that the relevance of the PETN so far as Toman was concerned was tenuous, submitting that it is not known where, how or when the PETN came in contact with the glove which is attributed to Toman.

[12] Mr Mulholland (who appears on behalf of McConville with Mr Pownall QC) adopted the submissions of Mr Devine and Mr Rodgers and made a number of additional submissions. Relying upon Mr McDowell's concession that the PETN must be from another explosive device, he argued that mere contact with PETN was insufficient to justify the evidence being admitted. He

argued that in order to admit the evidence it was necessary that there should be no element of speculation or equivocation in relation to the evidence, but pointed to Mr McMillen's statement that PETN has medical applications and also the recognition that there may be innocent contamination.

[13] He also drew attention to the emphatic wording of Article 6(3) of the 2004 Order which states that –

> "The court must not admit evidence under paragraph 1(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Finally, he argued that to admit the evidence would have considerable prejudicial effect so far as McConville was concerned, and had there been a separate count on the indictment in relation to McKenna and Toman for possession of an explosive substance on another occasion upon the basis of the PETN evidence McConville would be entitled to apply for a separate trial.

[14] The starting point for consideration of the modern authorities on the admission of what is generally called "similar fact" evidence is the decision of the House of Lords in R v. P [1991] 2 AC 447 where Lord Mackay LC concluded that the essential feature of evidence to be admitted under the "similar fact" rule was that its probative force in support of the allegation being tried was sufficiently great to make it just to admit the evidence, notwithstanding that it was prejudicial to the accused by tending to show that he was guilty of another crime.

[15] In R v. Clarke (RL) [1995] 2 Cr App R 425 Steyn LJ cited the relevant passage from Lord Mackay's judgment and then quoted an extract from an article "Similar Facts after Boardman" (1975) 91 LQR 193 in which the author (now Lord Hoffman) referred to DPP v. Boardman (1974) 60 Cr App R 165 and concluded –

> "The balancing process which the court must perform is the same as in any case, civil or criminal in which it is required to decide whether evidence is sufficiently relevant to be admissible. Boardman has therefore done more than clarify what might be called the special theory of similar fact evidence. It has shown that the whole subject can be accommodated within the theory of the general theory of relevance".

Endorsing those words Steyn LJ then said –

> "The next point which we need to emphasise is that it always essential for the Court, in considering a disputed issue as to the admissibility of similar fact evidence, to consider the question not in the abstract but in the light of all the other evidence and the particular issue in respect of which the evidence is tendered."

[16] In the present case the issue to which the PETN may be said to be relevant so far as McKenna and Toman are concerned is that the presence of traces of an explosive substance, albeit relating to contact with that explosive substance on a different occasion, makes it more likely that they had contact with the device in the field. In addition, there is other evidence to the same effect and which can be found in the passages in my earlier ruling to which I have referred. What therefore is the probative force of Mr McMillen's evidence? It is that two of the four occupants of this car have had contact with an explosive substance of the same type as one of the two explosive substances which made up the device found in the field, the other type being RDX. So far as McKenna is concerned, that connection is strong – (a) Because there are traces of PETN on (i) his jeans, (ii) his coat and (iii) his gloves. (b) The high levels on the gloves "indicates a direct contact of these gloves with a concentrated source of this compound such as a sample of explosive itself or a surface heavily contaminated with this compound".

[17] In Toman's case, whilst the connection is not as strong it is still a significant one. There is no PETN relating to McConville but there is the fibre evidence linking him to the gate and the device. See [13] of my first ruling.

[18] Therefore, so far as McKenna and Toman are concerned, the significance of the PETN is considerable, and I am satisfied that it can properly be admitted as "similar fact" evidence because it strengthens the inference to be drawn from the other evidence that they had contact with, and therefore possession of, the explosive device and its ingredients. It is therefore relevant and of considerable probative value.

[19] Mr Rodgers suggested that the prejudicial effect of Mr McMillen's evidence nonetheless outweighed its probative value. Mr Mulholland's submission to which I have already referred that his client would be entitled to severance had the PETN evidence been the subject of a separate charge relating to another occasion essentially made the same point.

[20] I am satisfied that the probative value of this evidence far outweighs any prejudicial effect that its admission may have in relation to McKenna and Toman. So far as McConville is concerned I have no doubt that the trial judge can be relied upon not to draw any unjustified inference against McConville

because of the nature of the PETN evidence. I am therefore satisfied that it is appropriate to admit Mr McMillen's evidence as similar fact evidence.

[21] As the propensity issue was argued I propose to deal with it also, although briefly. Mr McDowell argued that the evidence may show propensity to use explosive substances and that of course is the same point as the inference sought to be drawn under the similar fact principle. In this context Mr Mulholland in particular referred to R v. Hanson [2005] 1 WLR 3169. Hanson recognised that even a single previous conviction may be admissible to show propensity "where its circumstances demonstrate probative force in relation to the offence charged" and reference was made to DPP v. P. In Hanson three questions were posed where previous convictions were relied upon, but these are equally applicable to circumstances where the prosecution rely upon previous misconduct which did not result in a prosecution and/or conviction. Suitably modified to apply to previous misconduct the three questions to be considered may be posed as follows.

(1) Does the history of the previous misconduct establish a propensity to commit offences of the kind charged?

(2) Does that propensity make it more likely that the defendant committed the offence charged?

(3) Is it unjust to rely upon the previous misconduct, and, in any event, will the proceedings be unfair if such evidence is admitted?

[22] For the reasons I have already given I am satisfied that Mr McMillen's evidence is capable of establishing a propensity to commit offences of the kind with which McKenna and Toman in particular are charged. I am satisfied that the evidence is of considerable probative force for the reasons that I have already given. I am satisfied that such a propensity does make it more likely that the defendants committed the offence charged.

[23] The third question is whether it is unjust to admit the evidence in relation to the PETN and will the proceedings be unfair if that evidence is admitted? The defendants rely upon the exclusionary power contained in Article 6(3) of the 2004 Order and Article 76 of PACE. All of the matters to which the defence refer, that is the lack of knowledge as to where, when and how contact occurred with PETN, the possibility of innocent contamination, whether because of medical usage or because of usage of PETN by McKenna's brother Darren McKenna, can be explored in the trial. That is not to impose any legal burden upon the defendants. Any defendant who is faced with evidence upon which the prosecution rely as probative of guilt is free to advance any evidence which is relevant and admissible to weaken or controvert the inference upon which the prosecution rely. I can see no reason

to conclude that the admission of this evidence would have an adverse effect on the fairness of the trial. The defendants have been well aware of it since the committal, if not before, and Mr McMillen was called at the request of the defence as a witness at the committal and cross examined by Mr Corrigan on behalf of McConville. The defendants have had ample time to prepare for it.

[24] Put simply, the presence of indications that two of the three defendants and two of the four occupants of the same car had on a previous occasion contact with the same type of explosive substance as one of the two types of explosive substances which comprised the device of which they are alleged to have had possession, taken in conjunction with the other forensic evidence, the evidence as to the condition of their clothing and the other items found in the vehicle, is capable of providing a significant element in the circumstantial case alleged by the prosecution that all three defendants were acting in concert. I do not consider that this is a case, such as the Court of Appeal cautioned against in Hanson, where the evidence sought to be admitted is capable of bolstering what is otherwise a weak case. It would be a striking coincidence if when all three defendants in the same vehicle are alleged to have been concerned in handling a device of this type two of the three defendants had innocent contact with one of the two explosive substances making up this device on another occasion. I am satisfied that this evidence is admissible by virtue of Article 6(1)(d) of the 2004 Order, whether it is regarded as similar fact evidence or evidence of propensity and I therefore grant the application and order that Mr McMillen's evidence is to be admitted as evidence of bad character against each of the three defendants.