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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MARK McGUIGAN

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against the appellant's conviction on 15 November 2013 by Her Honour Judge Philpott QC sitting at Belfast Crown Court without a jury on one count of possession of a firearm with intent to enable others to endanger life contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004 (the 2004 Order). He also appeals against a determinate custodial sentence of 12 years comprising 5 ½ years in custody and 6 ½ years on licence imposed on 14 February 2014. Ms McDermott QC appeared with Mr Shields for the appellant and Mr Murphy QC with Mr Russell for the prosecution. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On 11 October 2010, the appellant was the driver of a Ford Fiesta, the movements of which had been captured by a surveillance camera in a police helicopter. The footage showed the vehicle travelling in convoy with another vehicle, a Vauxhall Corsa, behind it between 20.30 and 21.33 from an area close to Strabane. The Vauxhall Corsa was purchased and registered to Darryn McCallion who, on the evening in question, was driving it. Martin McLoone was his passenger. Both vehicles stopped at a gateway on the Ligford Road just outside Strabane at approximately 20.33. A person, later identified as Daniel Turnbull, carrying a bag, was seen getting into the front passenger side of the Ford Fiesta. Both vehicles then travelled along a series of remote country roads before reaching the Gorticashel Road, another narrow country road, leading to Davagh Forest. At 21.17 they parked

in close proximity to each other in the car park in a clearing at Davagh Forest. The footage showed some of the occupants of the two cars getting out of their vehicles. At 21.20 the Ford Fiesta left Davagh Forest by another exit leaving the Vauxhall Corsa in the clearing and returned to the Gorticashel Road where it was stopped by police at 21.33.

[3] When a two vehicle police patrol identified the appellant's vehicle, the lead police vehicle, displaying blue flashing lights and flashing headlights, approached the Ford Fiesta so that the two vehicles were immediately facing each other. Constable Magowan got out of the first police patrol car with his rifle raised and shouted, "Armed police, armed police, show me your hands." The Ford Fiesta immediately reversed at some speed for about two car lengths. The second police patrol car passed the Ford Fiesta and positioned itself behind it so as to block the road. The Ford Fiesta then moved forward causing a minor collision with the first police patrol car. The judge concluded that the DVD footage did not make it clear that the Ford Fiesta deliberately drove into the first police car. However, she stated that it was clear that the Ford Fiesta immediately reversed when confronted by the police vehicle which had its blue lights flashing and that the first reaction of the appellant driver when confronted by the police vehicle was to see if he could evade the police stop.

[4] Constable Acton exited from the second police patrol car and approached the driver's door of the Ford Fiesta, shouting, "Police, police, stop the car." He stated that because the appellant ignored his demands he broke the driver's window with the butt of his rifle. Constable Acton pulled the appellant out of the car and put him to the ground. He heard other police officers shout out that a firearm had been found in the Ford Fiesta.

[5] After being removed from the Ford Fiesta, the appellant gave no reply when asked his name and address and continued to struggle. He was arrested under section 41 of the Terrorism Act and cautioned. He did not reply after being cautioned and was then handcuffed and searched. A roll of black tape, two latex gloves and a bundle of bank notes were found in his left trouser pocket and his driver's licence was found in his upper left outer pocket. At 22.00, he was taken to the rear of the Ford Fiesta and shown the revolver found in his car. He made no reply in relation to the cautions under Articles 5 and 6 of the Criminal Evidence (Northern Ireland) Order 1988 regarding the presence of the revolver and his presence at Gorticashel Road respectively.

[6] Constable Dallas stated that, initially, the appellant refused to get into the police vehicle to take him from the scene and he stood for a moment before shouting, "*Tiocfaidh ár lá*". He was then placed into the rear of the police vehicle and brought to Antrim Serious Crime Suite. All of the other occupants of the vehicle were arrested and cautioned.

[7] When the Ford Fiesta was stopped by the police, there were four occupants in the vehicle, the appellant, Turnbull, McLoone and McCallion. Turnbull was in the front passenger seat, his position being consistent with being the person picked up on the Ligford Road at 20.33. McLoone and McCallion were both in the back of the vehicle on top of the rear seats which were placed down flat so that the seats and boot were a single compartment. McLoone and McCallion at some stage were trying to cover themselves with a green sleeping bag or blanket.

[8] A bag containing a change of clothes was found in the front of the Ford Fiesta. A Webley revolver was found in the rear of the vehicle in a black sock inside a green bag. Ammunition was found in another sock with a blue trim which was tied in a knot. Two sets of blue surgical gloves were found in the driver's door beside a hand held torch. The Vauxhall Corsa was seized by the police and a sledge hammer was found in the vehicle.

[9] Jonathan Greer, a firearms expert employed by Forensic Science Northern Ireland, examined the firearm and ammunition. He stated that the revolver was a firearm as defined by the Firearms (Northern Ireland) Order 2004 and that the cartridges, whose provenance he established from the marking on the shells were in good condition and were ammunition as defined in the Firearms Ammunition Order 2004. We will consider his evidence in more detail in the consideration section.

[10] The appellant was interviewed on eleven occasions between Tuesday 12 October 2013 and Wednesday 13 October 2013 and further interviewed on 1 and 2 December 2013. In his first police interview, after being cautioned by the police, he said, "*I would like to state that I am not a member of any illegal organisation and I don't wish to make any further comment on that matter*." He did not respond to any questions about his movements and the movements of those who were in the car with him on 11 October 2010.

[11] In his second police interview, he made no response when asked about Turnbull, McCallion and McLoone. He made no response when asked how the four accused came to be in the car together, where they had been or how long they had been together. He made no response when questioned about the ownership of the Ford Fiesta or the Vauxhall Corsa. He made no response when asked if he had been under duress. When asked why each of the other three accused were in the Ford Fiesta and why they were on the Gorticashel Road, he made no response.

[12] In his third police interview, he stated that he had no knowledge of the firearm until it was shown to him by the police. He stated he had never seen it, he had never handled it and he was unaware of it. When asked how the gun came to be in his car he replied, "*I can't explain*." In his fourth police interview, he was shown photographs of the Vauxhall Corsa and he made no response. He was asked why two of his co-accused were lying down in the rear of his car and he gave no

response. In his sixth police interview, when asked about the black tape and gloves found in his pocket when he was arrested, he made no response.

[13] There was no forensic evidence connecting the appellant to the revolver, ammunition or the bag in which they were held. Prior to his trial each of the other occupants of the car pleaded guilty to possession of a firearm and ammunition with intent to enable some other person by means thereof to endanger life or cause serious damage to property contrary to Article 58(1) of the 2004 Order.

The learned trial judge's conclusion

[14] The underlying facts were not in dispute. The first issue was whether the Webley revolver was a firearm and the bullets were ammunition. The definition of a firearm is contained in Article 2(2) of the Firearms (Northern Ireland) Order 2004.

> "'firearm' means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged…"

The definition of a lethal barrelled weapon was considered in Grace v DPP 1989, 153 JP.

> "Whether the weapon was one from which any shot, bullet or other missile could be discharged or whether it could be so adapted so as to be capable of discharging such a missile…"

[15] The judge relied on Mr Greer's evidence that the revolver would be able to fire if a simple adjustment was made to the firing pin. The ammunition was in good condition and contained a maker's ammunition mark. Six of the rim fire cartridges were positioned in the revolver ready to fire. Mr Greer had not been challenged directly on the proposition that the ammunition was not, in fact, ammunition. The challenge was only in relation to the fact he did not test fire the ammunition. She added that Mr Greer's evidence was that he did not test fire the ammunition as it was obvious that it was in good condition. Her Honour Judge Philpott concluded, on the evidence before her, that the revolver was a lethal weapon within the legislation and the ammunition was clearly ammunition as defined by the legislation.

[16] The judge stated that in order to establish the charge the prosecution had to prove an intention on the part of the possessor that life shall be endangered. The court had to consider the evidence and decide what inferences, if any, should be drawn from the failure of Mark McGuigan to give evidence at the trial in order to reach its conclusion. She recognised that this was a circumstantial case and relied on the following passage from R v McClean and McCready [2001] NICA 32.

> "It is the proper use of the amalgam of factors in a case of circumstantial evidence which is of importance. It is possible in many instances to take any individual piece of evidence and show that it cannot bear much weight or can bear an explanation consistent with innocence, so that it could not of itself be the foundation of a finding of guilt. When such straws in the wind are placed together, if they all point in the same direction, their combined effect may be very convincing of guilt…"

[17] The judge concluded that the appellant and his co-accused were acting in concert due to the clear arrangement to pick up Turnbull to travel to the car park in Davagh Forest where the other two co-accused, one carrying a bag, got into the Ford Fiesta which was then driven off by the appellant. She referred to Turnbull carrying a fresh change of clothes and to the appellant having black tape and latex gloves in his possession. She added that it was not without significance that the other three co-accused had pleaded guilty to the offence of possession with intent to enable others to endanger life or damage property. In her view, the prosecution had established a clear prima facie case against the appellant and the question for the court was what inferences, if any, could properly be drawn from his failure to give an explanation for the revolver being in his car, his presence in the car on the Gorticashel Road when stopped by the police and his failure to give evidence at trial. These questions were, also, not answered in police interview.

[18] The judge referred to the remarks of Dixon J in Insurance Commissioner v Joyce (1948) 77 CLR 39 approved in R v McLernon [1992] NIJB 41.

> "It is proper that a court should regard the failure of the plaintiff to give evidence as a matter calling for close scrutiny of the facts upon which he relies and as confirmatory of any inferences which may be drawn against him. But it does not authorize the court to substitute suspicion for inference or to reverse the burden of proof or to use intuition instead of ratiocination."

She considered that the evidence outlined against the appellant clearly put him in the position where a credible denial of knowledge of the firearm and ammunition was necessary if the court was to be precluded from drawing an inference.

[19] The judge found that the appellant failed to give any explanation for what he was doing on 11 October 2010. He gave no information as to how he knew the co-accused, how long he knew them, what he was doing in their company that night, what the arrangements were to pick them up or his previous relations with them

prior to that night. He did not explain why the back passenger seats were down in his car when the co-accused were travelling in the car for some time. No account was given as to why he did not stop immediately when confronted by the police and why he acted in the manner he did. He gave no explanation why his co-accused transferred into his car in Davagh Forest or what he was doing in the forest at all. During police interviews, he said that he was not a member of an illegal organisation and knew nothing about the firearm or ammunition but he did not answer any questions touching on the issues she had already raised and he indicated that he would not be answering any questions in respect of such issues.

[20] Her Honour Judge Philpott was satisfied there was a sufficient circumstantial case to justify the Court drawing inferences against the accused as a result of his failure to answer Article 5 and 6 cautions and to give evidence at trial. She added that the court was adding his failure to give any explanation as support for the prosecution case against him. She concluded:

> "His failure to answer any of these questions leads the Court to the conclusion that there was no credible explanation for his failure to answer the question posed above other than that such answers, if tested, would point to his guilt. In the view of this Court he did not answer questions that were obviously of interest to the Tribunal of fact in deciding this case because no innocent explanation for his conduct was available to him. When the Court considers all the evidence referred to herein it is clear that the accused was fully involved with his co-accused in the transportation of a loaded firearm and ammunition with intent to enable others to endanger life."

The submissions of the parties

[21] The appellant relied on Grace v DPP (1989) 153 JP 491 as providing the definition of a "lethal barrelled weapon", and submitted that the question in this case was whether there was sufficient evidence to establish that the device could discharge a missile or could be made capable of discharging a missile. It was argued that Mr Greer was unable to discharge a missile from the alleged weapon and took no steps to adapt it to demonstrate that it was capable of discharging a missile. A similar argument was made in relation to whether the material seized was ammunition.

[22] Ms McDermott argued that there is a realistic possibility that the appellant did not know that the alleged firearm and ammunition were in his vehicle and that McLoone carried the green Celtic bag containing the materials and got in the car without the appellant being aware of what was in the bag. In relation to possession,

the appellant relied on R v Whelan [1972] 153. The prosecution had to establish the essential elements of knowledge, assent and control. The appellant similarly relied on R v Hyde and Hyde [2004] NICC 29.

[23] In order to establish the requisite intent for second limb cases, it was submitted that McGuigan must be shown to have had knowledge of the facts from which he was able to form the requisite intent. It was argued that there was no evidence that McGuigan was aware of what was going to happen next even if he was presumed to have knowledge of the items in the car.

[24] It was submitted that since this was a circumstantial case it had to be approached with the care and caution set out by the Court in R v Young [2006] NICA 30. It was asserted that Her Honour Judge Philpott may have taken into account certain circumstances which ought to have been evaluated more neutrally, in particular, (i) the pleas entered by the co-accused; and (ii) the initial reversing manoeuvre.

[25] Finally it was contended that there was not sufficient evidence from which it could be clearly deduced that McGuigan knew about the presence of the weapon or ammunition in his vehicle. It was argued that McGuigan's failure to account for the facts that the prosecution could establish should not have led to the drawing of an inference of guilt. Even if an adverse inference was drawn that McGuigan knew about the weapon, it was asserted that, in itself, this would not assist the Court in resolving the issue concerning the appropriate charge which the inference supports. An inference that McGuigan knew about the weapon could only help with the issue of possession but it would not speak to whether he thereby intended to endanger life or intended to enable another to endanger life.

[26] The prosecution submitted that the following matters were relevant to whether the appellant was in possession of the weapon.

> "(a) he was the driver of the vehicle;
>
> (b) he was in control of the vehicle;
>
> (c) he could control the persons who got into the vehicle;
>
> (d) he was in control of where the vehicle travelled to and why it travelled to that location;
>
> (e) he had knowledge of the reasons why he was present at a location that was known to him from the outset of the journey as the driver of the lead vehicle;

(f) he had knowledge of why the other 3 men, and one can consider each of them individually and collectively, became present ultimately in his vehicle;

(g) he had knowledge of why the vehicle travelled in convoy for a significant period of time on dark country roads on a Monday night;

(h) he had knowledge of why a person was picked up and got into the vehicle at Ligford Road and it was a reasonable inference that the person who was picked up was Mr Turnbull, the front seat passenger;

(i) he knew why the other vehicle, namely, the Vauxhall Corsa, was left once the vehicles went into the forest area;

(j) he had knowledge of why there was a sledge hammer in the Corsa;

(k) he knew why the men in the Corsa got into his car;

(l) he knew why the back seats of the Fiesta were flat so that it was like a van, and why two adult men were lying in the back of that car proximate to a loaded firearm."

[27] It was submitted that the judge was correct to infer that all of these circumstances point to terrorist activity. The proposition that the three other men present in the car, who admitted to terrorist activity by their pleas of guilty, did so in a vehicle and with a driver who knew nothing about their purpose, why they were there, how they got there, what they were intending to do, where they were going or the fact that they had a lethal weapon with them loaded with ammunition was a wholly unrealistic proposition which was entirely contradicted by the inferences that were apparent on the evidence.

[28] The proper inference was that McGuigan, as the person in control of this vehicle and, therefore, control over everyone in the vehicle, and with knowledge of the point at which a passenger was picked up, and with knowledge of the point where the other car and his car stopped, and with knowledge where the other car was left, and with knowledge of the reason why they would then engage on a remote journey and come back upon themselves with two men lying in the back

knew why all of this was happening. It was a reasonable and proper inference that two men lying in the back of the vehicle were hiding as a counter surveillance technique, to avoid their detection in the car, if observed. There were four men in that car for a purpose. It was proper to infer that the four men in the vehicle had a purpose, namely, a terrorist purpose and that was directly associated with the gun loaded with 6 cartridges in the boot and the other ammunition present.

Consideration

[29] In his direct examination Mr Greer, the firearms expert employed by Forensic Science Northern Ireland, gave his opinion that the Webley revolver was a firearm as defined by the Firearms (Northern Ireland) Order 2004. He had attempted to test fire it but it did not function. After his examination he concluded that the firing pin was hitting the cartridges in the wrong place. Realignment of the firing pin by bending it with a pair of pliers by approximately 1 mm could have caused the cartridges to be fired.

[30] He explained that the weapon had been deactivated by the Birmingham proof house in 2003. The deactivation work would have required steel rods being welded into place in the cylinder chambers to prevent cartridges being chambered or alternatively a steel ring would have been welded in place to block the cylinders. The barrel would also have been blocked by a steel rod welded into place. In order to re-activate the gun steel tubing had been inserted into the cylinder to allow it to be loaded with six long rifle rimfire .22 calibre cartridges in order to contain the pressure generated when they were fired. In addition steel tubing had been inserted into the barrel to act as an improvised .22 calibre barrel.

[31] When the gun was deactivated the firing pin would have been shortened or removed from the gun. In order to reactivate it would have been necessary to create a firing pinhole to allow the passage of the firing pin to hit the cartridge. Mr Greer's opinion was that the only thing that needed to be done to correct the misaligned firing pin was to bend it with a pair of pliers so that it hit the cartridges in the correct position. He also noted the marks on the bullets which identified their manufacturers.

[32] In cross-examination he agreed that the firing pin had bent at the end. He also agreed that this would not be characteristic of steel and it might well be that a softer metal was used to improvise the firing pin. He also agreed that a softer metal would be more malleable and an attempt to straighten it out might have resulted in the bottom snapping off. Alternatively it was possible that the straightened firing pin would be too malleable to perform its function properly by failing to strike the cartridge rim with sufficient force.

[33] We have set out the definition of a firearm under the Firearms (Northern Ireland) Order 2004 at paragraph 18 above. The issue in this case was whether this

item satisfied the test propounded in Grace v DPP which is also set out in that paragraph. Clearly if the weapon was capable of firing with a minimal adjustment with a pair of pliers it could be adapted so as to be capable of firing a missile. We consider, however, that it is clear that very considerable work was carried out to reactivate this item and that work was such that even if it were required to replace the firing pin to enable the item to fire a missile this was still an item which could have been adapted so as to discharge a bullet.

[34] We are satisfied, therefore, that the learned trial judge was entirely correct to conclude for the reasons given by her that the Webley revolver was a firearm. In light of the description of the ammunition and the manufacturers' marks in relation to the provenance of those items we consider that there was no proper basis to go behind the expert opinion of Mr Greer that these items were ammunition.

[35] The principal issue in the conviction appeal in this case was whether the circumstantial evidence was sufficient to enable the judge to conclude beyond reasonable doubt that the appellant was guilty. We have recently reviewed the approach which should be taken in a circumstantial case in R v Wootton and McConville [2014] NICA 41. We referred to passages from R v Hillier (2007) 233 ALR 63 which emphasised the importance of considering circumstantial evidence as a whole rather than piecemeal.

[36] By their guilty pleas the other three occupants of the vehicle accepted that they were engaged in an operation in which they were transporting a loaded firearm and ammunition with intent to enable others to endanger life. The question was whether the appellant was in it together with them. The prosecution case did not examine the circumstantial evidence with a view to establishing the proof of each element of the offending by reference to specific factors. The appellant criticised the learned trial judge for not identifying the elements of the prosecution case that established the possession by the appellant of the weapon. Instead of dealing with possession she looked directly at the issue of the intent of the appellant, thereby making an assumption about possession.

[37] We consider, however, that the judge correctly considered the question of whether the appellant was acting in concert with the others immediately after this passage. She noted the arrangement to collect Turnbull, the lead given to the Corsa travelling to Davagh Forest, the picking up of those in the Corsa, one of whom was carrying a bag, Turnbull's fresh change of clothing and the black tape and latex gloves in the appellant's possession. She was also entitled to rely on the attempt by the appellant to initially evade the police.

[38] We consider that all of these matters contributed to a considerable case demonstrating that the appellant was acting in concert with the others. We also accept that the trial judge was entitled to draw an adverse inference from the failure of the appellant to give evidence. He had not explained how he knew the other

accused, how long he knew them, what he was doing in their company on the night in question, what the arrangements had been for the pick-up, why he went to Davagh Forest and why he picked up the occupants of the Corsa, why the back seats were down and why he had tried to evade the police. The learned trial judge was entitled to conclude that he was not in a position to give credible answers to those matters pointing towards his involvement with the others in this terrorist operation.

[39] For the reasons given we consider that the conviction was safe and the appeal against conviction is dismissed.

Sentence

[40] The leading authority on sentencing for this offence in the context of terrorism is Attorney General's Reference (No 3 of 2004) (Hazlett) [2004] NICA 20. That was a case in which the offender was convicted of possession of a sub-machine gun and 30 rounds of ammunition with intent by means thereof to endanger life. The court indicated that the range of sentences for this type of offence should normally be between 12 and 15 years. We accept that the sentence in any particular case will be influenced by the factors set out in R v Avis [1998] 1 Cr App R 420, namely, the sort of weapon involved, the use made of it and the record of the offender.

[41] The learned trial judge selected a starting point of 12 years and given the degree of planning and pre-meditation involved we consider the starting point appropriate. There were, however, two matters upon which Ms McDermott relied by way of mitigation. The first was the issue of delay. It was conceded that there was some delay in recovering the helicopter footage. Although the case was listed for hearing on 17 January 2012 and 12 June 2012 it did not proceed until September 2013. The learned trial judge recognised that some acknowledgment should be made of the delay by reducing the custody period of the determinate custodial sentence. We consider that the appellant is entitled to an acknowledgment of that delay by way of some reduction in sentence.

[42] Secondly, Ms McDermott indicated that there had been considerable agreement of evidence in the case which reduced its length and enabled the number of witnesses to be significantly reduced. The manner in which a defendant conducts his defence can, in certain limited circumstances, result in a degree of mitigation (see R v Khatab [2008] EWCA Crim 541).

[43] Taking these factors into account we allow the appeal against sentence and reduce the period of the determinate custodial sentence to 10 years comprising 5 years in custody and 5 years on licence.