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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

PAUL CAMPBELL

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Before: Treacy LJ, Maguire LJ and O'Hara J

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Orlando Pownall QC & Joseph O'Keefe (instructed by Phoenix Law) for the Appellant
Ciaran Murphy QC & Philip Henry (instructed by the PPS) for the Prosecution

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TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] Following a non-jury trial, the appellant was convicted of unlawfully and maliciously causing an explosion of a nature likely to endanger life or cause serious injury to property, contrary to section 2 of the Explosive Substances Act 1883 ("the 1883 Act"). He appeals against that conviction.

[2] At the conclusion of the oral hearing we dismissed his appeal and indicated that we would provide our written reasons later.

Background

Basic Summary

[3] On the evening of 26 March 1997 Soldier A was in Coalisland when he observed two men each appearing to be carrying an object in their hands running at speed into an alleyway leading to the rear of the police station. He then heard what he considered to be two explosions and observed the same two men running out of the alleyway and towards him. Believing his life to be in danger he discharged rounds of ammunition from his service pistol. One of the men was struck by the

gunfire and was apprehended at the scene. The soldier described the other man as getting into a white coloured vehicle which was driven off. Shots were also fired in the direction of this man and at the vehicle. The man who was apprehended at the scene was Mr Gareth Doris. He was convicted of an offence under section 2 of the 1883 Act at Belfast Crown Court on 14 September 1998. The prosecution case is that the other man was the appellant. The appellant's case put forward at the trial is that he is not the man. He admits to being in Coalisland on 26 March 1997. On approaching a shop he heard a loud explosion and then gunshots. He felt a burning sensation between his legs, was fearful of sustaining further injury and got into a white vehicle which then drove away.

Fuller Summary

[4] Soldier A described himself as being on duty in civilian clothing undertaking an operation with seven colleagues in five unmarked vehicles. The operation involved surveillance of a person of interest to the security services. Soldier A was on his own and in a parked vehicle which was in a car park adjacent to the Heritage Centre on Line Quay in Coalisland. The car-park was situated just off Line Quay, and was separated from Line Quay by a raised flower bed with shrubs growing from it. Two retaining walls held the bed and railings were also in place on top of the wall adjacent to Line Quay. This would have formed an obstruction although would not have fully obstructed Soldier A's view of Line Quay. It would not have given him a clear unobstructed view.

[5] Soldier A had taken up this position as he had anticipated that the subject of their surveillance would pass along Line Quay.

[6] Completely independent of the surveillance operation, Soldier A described how he observed two men running in front of him from left to right. They were on the opposite footpath immediately in front of a row of shops and offices. He described the two men as each appearing to be carrying something in their right hands. He was not sure what they were carrying but said that it was about the size of a large coffee cup. He said that both men appeared to be exercising care when running. The men then turned left into an alleyway and moved out of his sight.

[7] His suspicions having been raised by their conduct, he got out of his vehicle and walked towards Line Quay. When he reached a point at the vehicular entrance to the Heritage Centre (which is opposite, but not directly opposite the entrance to the alleyway) he heard what he thought were two explosions and a flash. He did not see the seat of the explosion. He then saw the two men, who he had observed earlier, run out of the alleyway. At that stage both were running towards him. He described how both appeared to be rummaging in their waist area, and he then formed the view that his life was in danger, either through both men being armed and threatening him with a weapon, or weapons, or with the two men overpowering him and seizing his weapon.

[8] He said that he immediately shouted "Army, Army, Army" and drew his weapon aiming it above the men. One of the men continued towards him and the other broke off to the right (Soldier A's left). Still fearing for his life, Soldier A then discharged what he thought were two shots in the air as a warning. The man still continued to run towards him, and believing his life to be in immediate danger, Soldier A fired two aimed shots into what he described as the man's "upper left quadrant." These shots halted the progress of the man who fell to the ground, face down.

[9] Soldier A then turned his attention to the other man who was then approaching a parked white motorcar. This vehicle was located adjacent to a bus shelter on Line Quay and was pointing away from Soldier A. Soldier A said that he had not been aware of its presence until that point. As the man approached it he moved towards the near-side rear door and at that stage was turning to face Soldier A. The distance between the two was estimated to be about 30 metres. Soldier A remained concerned that the man would produce a weapon and fired two shots in his direction. At the same time the man opened the door and got into the vehicle, which then left the scene. Soldier A was not in a position to describe the direction taken. Further shots were fired at the vehicle in an attempt to disable it, the shots being described as being aimed at the tyres.

[10] Soldier A then remained at the scene. At this point other soldiers from the team had moved to Line Quay to deal with a situation that had developed with a large hostile crowd. Police and ambulance personnel also attended to remove the injured man. During this disturbance shots were fired into the air, and stun grenades were discharged.

[11] Several witnesses indicated that they had witnessed the aftermath of the incident, but there was no other evidence relating to the two men and Soldier A, save for a sighting by Debra Donnelly and a possible sighting by Martin Armstrong.

[12] As part of the police investigation an examination was undertaken of the area within the alleyway. The alleyway leads into an area of rough ground with garages and is adjacent to the back wall of Coalisland police station. This wall is of some height and its outside edge consisted of steel cladding. The evidence of an army technical officer (ATO) was that there had been one explosion (discounting the remote possibility that two devices could have been adjacent to each other when they both detonated simultaneously). It was caused by about 500–750grams of military or commercial explosives and it damaged the cladding to the perimeter wall but did not penetrate through the inner brick skin of the structure. He was unable to recover any debris or shrapnel from the device. He considered that it was likely that the explosives would have been detonated by some sort of impact mechanism, discounting a fuse or timing device. He said the discovery of a starting pistol in a poor condition in the area was not relevant to this incident.

[13] A forensic expert also visited the scene and later examined items recovered at the scene. His opinion was similar to the ATO, estimating the device contained about a pound in weight (one pound equalling 450 grams), although he considered that a fuse could have been inserted and lit to cause the detonation.

Hearsay Application

[14] At the commencement of the trial the Prosecution made a number of applications the first of which was that various statements, both oral and written, made by Father Seamus Rice be admitted under the hearsay provisions contained in the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order"). The Prosecution had applied to introduce these statements from Father Rice as he was unavailable to give evidence due to his physical and mental health. Father Rice, at the time of the trial, was aged 84. Medical evidence has been furnished to the court and no issue was raised on behalf of the appellant about his inability to give oral evidence at the trial. Pursuant to the provisions of Article 18 and Article 20 of the 2004 Order the trial judge acceded to the application.

[15] Father Rice was a priest serving in the Coalisland Parish at the time of the incident which occurred at approximately 9.30pm on Wednesday 26 March 1997.

[16] He made six statements during the police investigation, three formal written statements, two oral statements in the presence of police officers, the content of one being incorporated into the second in time of the written statements and one in the presence of Aidan Conway.

[17] Aidan Conway attended the Parochial House at approximately 10.30pm on 26 March 1997 and spoke to Father Rice. He has recorded his recollection of that conversation in a statement of 15 May 1997. Aidan Conway described Seamus Rice as being in a shocked and distressed state and he told him that he had been asked to go down to Lineside in the town as someone was injured and on his arrival by motorcar someone jumped into the back of his motorcar and told him to take him to Clonoe, but that he refused to do this. Because of his distressed state, no further clarification was given, or sought by Aidan Conway.

[18] The next day on 27 March 1997, Father Rice made a formal statement to the police in which he stated that he was driving his motorcar in the area, he had heard bangs and observed flashes and he left the scene, before returning shortly later to observe a wounded man being taken away by ambulance and a number of armed men in civilian clothing.

[19] On 1 April 1997 at approximately 8:50am, Father Rice attended a police station with another man and made an oral statement to Detective Chief Inspector Sproule and Detective Superintendent Cooke. His statement was recorded by both officers and later that day was incorporated into a written statement signed by Father Rice. In his statement he said that he was driving along Lineside when he

heard bangs and saw flashes. He heard his name being mentioned and stopped the motorcar. The rear passenger door opened and a young man entered. He heard and felt an impact to his motorcar which felt like an explosion with the rear window glass coming in. The man shouted "drive" and Father Rice drove in the direction of Annagher Hill. Adjacent to a football pitch, Father Rice considered his duty was to go back to Lineside and turned the motorcar. The man then said "let me out" and then exited the vehicle. The priest could give no further detail about the man who he did not recognise. He said that he was in a state of shock the next day when he made his statement to the police and that over the following days he attempted to speak to police to clarify his evidence. He said that he did not deliberately try to hide or conceal any evidence but had just been in a state of shock and confusion after the incident.

[20] Finally, Father Rice made a written statement on 18 August 2011 that gave some details about his purchase of the motorcar and its cleaning, and further that he had a familiarity with the name 'Gareth Doris' (the wounded person apprehended at the scene) and with the Campbell family of Killowen, but that he did not know the defendant personally, and had not given a lift to anyone called Paul Campbell.

Grounds of Appeal

[21] The appellant in his helpful note prior to the hearing of the appeal considerably narrowed his grounds of appeal. It was made clear that it was not proposed to argue:

(i) That the trial judge misdirected himself on the issue of joint enterprise;

(ii) That he failed to properly direct himself on circumstantial evidence;

(iii) That there should have been an identification parade involving soldier 'A';

(iv) That the location of the blood on the rear seat was of great significance;

(v) That the evidence of Father Rice could be described as being of "such significance or importance as is likely to be determinative of the outcome of the case" (*Horncastle v UK* [2014] ECHR1394.

[22] The final ground of appeal, Ground 13, is that the decision of the court to refuse to stay the proceedings as an abuse of process was wrong in law. This became a central plank of the appeal as is apparent from paras 8-38 of the Note and the submissions advanced at the hearing.

[23] The appellant relies on both limbs of abuse (i) whether the appellant could have a fair trial; and (ii) whether it was unfair to try the appellant.

[24] As to the first limb it was submitted that the circumstances showed that the Prosecution was at fault for a delay of over 18 years between the identification of the appellant as being responsible and him being charged. It was submitted that this case was truly exceptional and the delay caused real and identifiable prejudice such that the appellant could not have a fair trial.

[25] As to the second limb it was submitted that there was a compelling basis for the conclusion that a trial should offend the court's sense of justice, undermine public confidence in the criminal justice system and bring it into disrepute. Accordingly, it was submitted that the proceedings should have been stayed on the ground that it would be unfair to try the appellant.

[26] The remaining grounds of appeal relate to the admission under the hearsay provisions of the evidence of Father Rice, the identification evidence and other matters going to the safety of the conviction and Section 2 of the Explosives Substances Act.

Abuse of Process

[27] The law governing abuse of process was acknowledged as uncontroversial and both parties accepted the following propositions:

a) The evidential burden falls upon the defence to demonstrate that the proceedings amount to an abuse of process.

b) A stay may be granted where it is shown that the offender cannot have a fair trial and or where it is shown that it would be unfair to try him.

c) The exercise of the power to stay proceedings must be sparingly exercised and only in the most exceptional circumstances.

d) The discretion to stay proceedings is not an exercise in disciplinary jurisdiction.

e) Delay of itself and a breach of an offender's Article 6 Convention Rights to a fair and public hearing in a reasonable time will not necessarily result in proceedings being stayed.

f) The period of delay would normally end when proceedings are brought against an alleged offender unless it can be shown that there has been unjustifiable and undue delay since that date. The delay was one of over 18 years.

g) Courts are more concerned with any serious prejudice as a consequence of delay as opposed to the mere fact of delay itself.

h) If an offender has caused or substantially contributed to the delay in proceedings it will or might militate against the grant of a stay.

i) It will be very rare for there to be a stay in circumstances where there is no fault on the part of the prosecution.

j) Regard should be had for the fact that the court can regulate proceedings and the admissibility of evidence to avoid or mitigate any prejudice arising from delay.

[28] It was not contended that the trial judge had misdirected himself on the relevant law.

[29] We accept that where delay has been deliberate on the part of the prosecution or delay has been used by the prosecution to manipulate the process then that could well be evidence that there is an abuse of process. If it has not, then it could still be an abuse of process, provided the appellant can show, on the balance of probabilities, that there has been an inordinate or unconscionable delay or when the appellant has been prejudiced by the delay. The delay must produce genuine prejudice or unfairness (see *Bow St Stipendary Magistrate, ex parte DPP* (1989) 91 Cr App R 283). Hughes LJ in *Brants v DPP* [2011] EWHC 754 stated at [47] that:

> "There is a public interest in prosecuting offences which transcends any consideration of punishing the prosecution for delay. If delay by the prosecution does not cause prejudice to the defence then normally it would not be appropriate to stay proceedings as an abuse of process."

[30] The starting point with reference to the delay in the present case is that the appellant made himself a fugitive from justice and gave a palpably mendacious account for his reasons for absconding to the Republic of Ireland, leaving a false trail by giving the wrong name in hospital and by giving a history that he had fallen off a motorcycle.

[31] For the purposes of the abuse of process application the trial judge accepted the accuracy of the appellant's evidence as to his movements and whereabouts the basic details of which were as follows:

- Explosion 26 March 1997.
- Defendant leaves the jurisdiction 26/27 March 1997.
- Defendant presents himself to Louth Hospital 27 March 1997.
- Defendant arrested in Louth 1 April 1997.

- Defendant released 2 April 1997.

- Defendant remained living in the Republic of Ireland using his own name, working and claiming benefits.

- Defendant states he was arrested for a motoring matter in the Republic of Ireland.

- Defendant states that he returned to the jurisdiction in 2001 to reside in his family home.

- Defendant purchased the family home obtaining a mortgage for that purpose.

- Defendant stopped by police in Northern Ireland for motoring matters in 2003.

- Defendant stopped by police in Northern Ireland on 10th May 2007 and given a fixed penalty notice for a driving matter. On that occasion it was noted that he was wanted in connection with this matter, but no steps taken due to absence of a case file.

- In October 2008 a police arrest alert for the defendant was removed.

- Defendant left the jurisdiction to work in Monaghan in 2011.

- Defendant arrested at Portadown railway station in 2015.

[32] As to why the appellant left the jurisdiction of the UK for the Republic of Ireland he gave evidence that he had received and followed advice from his family and others the thrust of which was that if you were innocent of any wrongdoing and were ever shot by the security forces you should not cooperate with government agencies (north and south of the border) and you should seek medical assistance in the Republic of Ireland. The trial judge having heard and seen him being cross-examined on his reasons, unsupported by any evidence other than his own and in circumstances were there were witnesses who on his account could have supported his case but were not called, unsurprisingly rejected his account. There is nothing new in a guilty man fleeing from the authorities. The appellant behaved in the way in which a guilty man trying to evade detection for a serious crime would have done. Had the appellant not absconded he could have been arrested and samples taken by the NI authorities to enable a match to be made to the blood found in the rear of the vehicle. He could also have been dealt with at the same time as his accomplice who was dealt with in 1998.

[33] It is clear that the appellant was suspected early on by the then RUC as having been involved in the incident and a person of interest. However, it has to be borne in mind that whilst Soldier A claimed to have shot at the second bomber he did not claim to have actually shot him. Whilst there was blood from an unidentified male in the rear of the priest's car the priest did not know the injured man**.** Blood was recovered from the car but there was no match to the appellant's DNA until 2015 when he was arrested. It is noteworthy that the appellant only admitted his presence in the car after DNA established he was in the car. That, in its turn, then led to Defence Statement No.3.

[34] Having made himself a fugitive from justice the appellant enabled himself to lead a life in the Republic of Ireland and then return to the North, when he may have assumed that he had successfully evaded the risk of being prosecuted

[35] He was questioned by the Gards at the time about alleged membership but refused to answer any questions.

[36] No steps were taken to extradite him or to use the extra-territorial jurisdiction. The court has been furnished with no evidence as to whether consideration was given as to either course or if so why either was not pursued.

[37] There were opportunities to arrest him in the North and they were not pursued. We are satisfied that there are periods of apparent inactivity resulting in delay that has not been satisfactorily explained. This has resulted in a prosecution being taken much later than should have occurred. On the face of it, there has been some avoidable delays and the court has no clear explanation to explain the delays. There is no evidence that the delay was deliberate or the result of misconduct or improper behavior. But delay there has been but first and foremost one must not lose sight of the fact that had the appellant not absconded he would, like his co-accused, have had a timely trial.

[38] Delay of itself is not a basis for taking the wholly exceptional step of stopping a prosecution where the evidential test is satisfied. It is generally in the public interest that where the evidential test is satisfied those believed to have committed serious crimes should be brought to trial. The central question for us is whether the trial judge was wrong in his assessment that a fair trial could take place and alternatively whether it would be unfair to try the appellant.

[39] The judge who heard the case and heard and saw all the witnesses is particularly well placed to determine whether a fair trial was possible. The appellant refused to answer any police questions and put in two defence statements with the benefit of legal advice which did not advance any positive case. The third defence statement dated 2019 for the first time admitted that he had been in the vicinity of the incident, had been shot, had got into the rear of the priest's car via the passenger door behind the driver (as stated by A) and that the blood in the rear of the car was his. If he had been wholly innocent one wonders why he did not

disclose these matters in his first two defence statements. As a result of his third defence statement the prosecution case had just got a lot simpler.

[40] We are in agreement with the trial judge's analysis that there is no evidence of any deliberate decisions being made to cause delay in this case. The court's analysis of this issue correctly took into account the consideration that the appellant deliberately left the jurisdiction and failed to maintain any contact with the authorities in Northern Ireland. The trial of Gareth Doris, who had remained in the jurisdiction, proceeded with reasonable haste. Had the appellant taken the same course there is no reason to suppose that there would not have been a joint trial with his accomplice Doris. The appellant caused or substantially contributed to the delay. Whilst there has been some unexplained delay there is absolutely no evidence of any misconduct on the part of the police or the prosecuting authorities nor any evidence of serious prejudice to the appellant.

[41] The defence argued before the trial judge that the delay in some way caused prejudice to it in presenting its case. The trial judge indicated that he did not propose to deal with this in much detail noting that in its argument, the defence suggested the following areas of prejudice:

- Inability of prosecution witnesses to recall the incident and related matters;
- Inability of Seamus Rice, Gary Montgomery and Andrew Ballentine to give evidence;
- Death of the defendant's grandmother and uncle and Denis Faul;
- General non-availability of Coalisland CCTV images of scene;
- Failure to provide forensic examination of Seamus Rice's vehicle, the defendant's clothing, and the defendant's hair sample;
- General non-availability of witnesses such as the sanger occupants, radio operator, the helicopter crew, and civilian witnesses of the Line Quay scene;
- Absence of documents such as a radio log and inventory of weapons and ammunition seized from the soldiers.

[42] As the trial judge noted the prejudice must be shown, on the balance of probabilities, to an extent that the appellant cannot receive a fair trial. The trial process often has to deal with situations were witnesses cannot be traced, or if traced are either unable to give evidence at all or if they can give evidence, have difficulty recollecting matters. Suitable warnings will be given to jurors about this so that they take it into account when considering if the prosecution have proved the case beyond reasonable doubt.

[43] The defence highlighted before the trial judge a number of individual witnesses, or groups of witnesses, which they contended presented some difficulties. As the trial judge stated, contemporaneous statements had been made by some of these witnesses about what they say happened, or setting out their professional opinion about matters. Professional witnesses also made working notes of their examinations and the notes are available. Some witnesses were not available and could no longer be traced. The court stated that it would be speculating about what those witnesses could say or add to the case.

[44] The trial judge also observed that whilst it is accepted that the appellant does not have to prove anything, there are a number of witnesses who would have been available to be called to give evidence on his behalf – Gareth Doris, the unnamed third man in Seamus Rice's vehicle, the several relatives who were present in the grandmother's home and the relatives who transported him to Louth Hospital. The appellant did not suggest before the trial judge that these witnesses were not available or were unable or unwilling to give evidence. He had just chosen, as was his right, not to call them.

[45] In a conclusion with which we wholeheartedly agree, the trial judge stated that, except in the most general terms, the appellant had failed to show that he has been prejudiced in undermining the prosecution case and/or in the presentation of his case. The trial process and the warnings he gave himself concerning the impact of delay on the defendant were, in the trial judge's assessment, well able to deal with any alleged prejudice.

[46] The exercise of the power to stay proceedings must be sparingly exercised and only in the most exceptional circumstances. We consider that the trial judge was right to reject the application to stay the prosecution as an abuse of process on either limb.

Causing an explosion likely to endanger life or cause serious injury to property

[47] Section 2 of the Explosive Substances Act 1883 provides that a person who in the UK unlawfully and maliciously causes by any explosive substance "an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has actually been caused or not" shall be guilty of an offence.

[48] Ground 5(2) of the Notice of Appeal states as follows:

> "The conviction of the appellant for 'causing an explosion of a nature likely to endanger life or cause serious injury' was wrong in law, given that the evidence was that the explosion was not of a nature likely to endanger life or cause serious injury to property, in accordance with the interpretations of section 2 of the Explosive Substances

> Act 1883 by the respective courts in *McIntosh v HM Advocate* [1993] SCCR 165, *R v Jones* [2007] NICA 28 and *R v Marcus* [2012] NICA 60."

[49] We recall that the evidence of the army technical officer (ATO) was that there had been one explosion (discounting the remote possibility that two devices could have been adjacent to each other when they both detonated simultaneously). It was caused by about 500–750grams of military or commercial explosives and it damaged the cladding to the perimeter wall but did not penetrate through the inner brick skin of the structure. He was unable to recover any debris or shrapnel from the device.

[50] The court was referred to *McIntosh v HM Advocate* (1993) SCCR 165. McIntosh had thrown a petrol bomb at the rear wall of an occupied dwelling and it exploded causing scorch damage to the exterior wall. The appeal against a section 2 conviction was allowed because of a misdirection by the sheriff who told the jury that they were entitled to take into account what might have happened had the bomb gone off inside a bedroom. The Lord Justice Clerk at p170E stated that:

> "The essence of the charge is that the appellant has caused an explosion, and, to be guilty, the explosion which he has caused must be of a nature likely to endanger life. This meant that the jury had to consider the nature of the explosion which the appellant had caused and that it was wrong for the sheriff to direct the jury to consider what might have happened if the bomb had gone off inside the house rather than outside, as that was not what happened."

[51] We were also referred to two Northern Ireland authorities on this issue: *R v Jones* [2007] NICA 28 and *R v Marcus* [2013] NICA 60. Jones involved a home-made mortar device in a vehicle parked adjacent to a police station. There was an initial explosion which propelled the mortar bomb (which contained 79kgs of explosive) out of the vehicle in which it was placed but it fell a short distance away and failed to explode. Jones was convicted of a section 2 offence, the trial judge determining that the explosion of the propellant charge was likely to endanger life because of the likelihood of the devastating consequences on impact of the mortar in the urban setting. The Court of Appeal allowed the appeal holding that the essential ingredient is that the explosion caused is of a nature likely to endanger life and that:

> "The fact that the mortar device would have had the consequences stated, if it had exploded, does not render the explosion by which it was propelled, one likely to endanger life."

[52] In Marcus a nail bomb was thrown through the window of an occupied house and landed in the hallway. The occupant was in another room when it exploded.

The bomb had a modest amount of low grade explosives but contained nails which were projected in the hallway with evidence of them striking the walls of the hallway up to a height of several feet. The trial judge refused a direction and the jury convicted the defendant.

[53] Girvan LJ at [17] gave some guidance as to the meaning of the word "likely" in the following terms:

> "As pointed out by the House of Lords in Boyle v SCA Packaging Limited [2009] NI 317 the word "likely" has several different shades of meaning. As Lady Hale at page 337 points out predictions are different from findings of past fact. It is not a question of weighing the evidence and deciding whom to believe. It is a question of taking a large number of different predictive factors into account. Assessing whether something is a risk against which sensible precaution should be taken is an exercise which is carried out all the time. The context of the relevant legislation may compel the conclusion that when the word "likely" is used it is in the sense "could well happen" rather than that it was probable or more likely than not. Section 2 of the 1883 Act criminalises the causing of explosions which have the real capacity to endanger life or cause serious injury to property, that is to say could well cause danger to life or cause serious physical damage to property. In this case there was clear evidence at the close of the Crown case more than sufficient to raise a prima facie case."

[54] This Court of Appeal decision confirms that notwithstanding the fact that the explosion occurred in an unoccupied area of the house and no one could have been injured by the explosion, it did not prevent a safe conviction for the section 2 offence. The offence is not causing an explosion that endangers life or causes serious injury to property, although evidence that it did would be clearly sufficient. The offence is causing an explosion of a nature likely to endanger life or cause serious injury to property.

[55] This requires an analysis of the nature of the explosion which will include the capacity of the explosion and whether, it "could well" have caused endangerment to life or serious injury to property.

[56] We agree with the trial judge that, having regard to the authorities discussed above, the approach in relation to the consideration of a section 2 charge is as follows:

(a) When considering the nature of the explosion the court is considering the criminal act (the actus reus), therefore the intention of the bomber is irrelevant to this issue;

(b) The defendant must have caused the explosion;

(c) The actual nature of the explosion must be considered;

(d) The location of the explosion must be considered and there should be no speculation about what could have happened had the explosion taken place at a different location (as in McIntosh) or if it had triggered, or resulted in, a secondary, or further, explosion (as in Jones);

(e) When looking at the nature of the explosion, the capacity of the explosion must be considered and this can involve the capacity to endanger life or cause serious injury to property, even though people or property may not be immediately adjacent to the explosion at the time (as in Marcus);

(f) In section 2, likely means that an eventuality could well happen (as in Marcus).

[57] We agree with the trial judge's assessment that the nature of this explosion was such that it could well have caused endangerment to life. The estimate of the two experts was a device containing somewhere between 450–750 kg of military or commercial explosives. The blast wave from the explosion could well endanger life as could airborne projectiles released, or created, by the explosion. This was the primary basis for the judge's conclusion on this issue.

[58] The trial judge however went on to say that "for the sake of completeness, in case I am wrong about my assessment of the evidence reaching the requisite standard placed on the prosecution, it could also be possible for the prosecution to rely on the conviction of Gareth Doris" (Para64). Article 72 of PACE 1989 provides as follows:

> "(1) In any criminal proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom … shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.
>
> (2) In any criminal proceedings in which by virtue of this Article a person other than the accused is proved to have been convicted of an offence by or before any court

> in the United Kingdom … he shall be taken to have committed that offence unless the contrary is proved."

[59] The trial judge said that:

> "The commission by Gareth Doris of the section 2 offence is admissible in this case. It includes a finding that he caused an explosion likely to endanger life or cause serious injury to property. Article 72 (2) of PACE 1989 means that there is evidence that such an explosion has occurred, unless the defendant proves the contrary. This would take the form of an evidential burden placed on the defendant to prove, on the balance of probabilities, that such an explosion had not taken place. For the reasons I have set out above, I consider that the defendant has not satisfied that burden."

[60] In his third Ground of Appeal the appellant states:

> "The reliance by the [LTJ] on the conviction of another person, Gareth Doris, in order to establish that an explosion of a nature likely to endanger life or cause serious injury to proper was wrong in law."

[61] This ground is similarly described by the appellant in his written submissions. The defence submissions overstate what the judge in fact said. He said he was satisfied by the appellant's guilt by applying the facts of this case to the guidance in *McIntosh, Jones and Marcus* without reference to Doris' conviction for the same offence arising from the same incident. The prosecution have stated that they had not sought to rely on Doris' conviction to establish that the explosion was of a nature that could well have endangered live or cause serious injury to property.

[62] However, one views what the judge said it is quite clear that his comments about the Doris conviction were only made after having decided, by reference to the relevant jurisprudence, that he was satisfied beyond a reasonable doubt that the nature of the explosion was such that it could well have caused endangerment to life. We have already held that that basis for conviction without reference to the Doris issue is correct in law. The trial judge was satisfied on proper grounds and to the requisite standard of the ingredients of the offence. There was therefore no need for him to rely on the Doris conviction.

The Hearsay Ground of Appeal

[63] The appellant contended that the decision of the court to admit the evidence of Father Seamus Rice as hearsay was wrong in law. The trial judge noted at para 16 of his judgment that "much of the argument had focused on whether or not the

evidence was 'sole and decisive.'" Indeed, it is plain that a lot of ink was spilt on this very issue in the skeleton arguments in the court below and in oral submissions. However, in his helpful note referred to above, the appellant abandoned this argument. It is contended now albeit that the evidence of Father Rice was not "sole and decisive" it should not have been admitted in evidence. The appellant submitted that when considering the criteria set out in Article 18(1) and (2) of the 2004 Order the trial judge ought properly to have taken account of the fact that the inability to cross examine Father Rice, a witness who he says was unlikely to be favourable to the prosecution was caused solely by the prosecution's inexcusable failure to bring proceedings against the appellant for a period of 18 years. It was further contended that if it was the trial judge's view that the evidence of Father Rice and the existence or otherwise of a third man was of minor significance, he should not have admitted the evidence applying the criteria in Article 18(2) of the 2004 Order.

[64] In the run up to the trial, the appellant eventually accepted (in his third defence statement) that he was no longer challenging the DNA evidence regarding his blood found in the rear of the car, belatedly accepted he was at the scene, he was shot making his way to the priest's car, that he got into the rear of the car and made good his departure from the area. As the prosecution noted these were not previously features of his defence. As a result of this change there was a large measure of common ground between the prosecution and the defence on the facts which significantly decreased the importance of the priest's evidence. The prosecution no longer needed to rely on Father Rice to support Soldier A's account of the second bomber leaving the scene in the rear of the white car while Soldier A was shooting at him.

[65] This reduction in the probative value of Father Rice's evidence removes any possibility that its admission, could cause a significant sense of unease about the safety of the conviction. The only disadvantage of not being able to cross examine the witness promoted by the defence, is that they were unable to ask him about the number of people in the car. As can be seen from the judgment of the court below the trial judge placed little importance on the presence or absence of a third man in the rear of the car. As the prosecution point out it would only have been potentially relevant if Soldier A could have mistaken the appellant for the third man and shot an innocent bystander. However, the appellant never made the case that the third man was the second bomber nor did he describe the third man as taking a route from the alleyway to the car which was where he put himself by his own admission.

[66] Furthermore, the trial judge accepted Soldier A's account of seeing only one male running from the mouth of the alleyway towards the car. At paragraph 147 he said:

> "… I am sure that [Soldier A] did not lose sight of the man he had under observation and that man came out of the alley moved from Soldier A's right to left and then

> entered the vehicle. There is no evidence to suggest that a third man was on the street at the time, and his movements were sufficiently adjacent to the defendant so that Soldier A lost his continuity of vision and somehow mixed up the two men."

[67] The only other evidence about anyone running along Lineside Quay was the statement of Mr Martin Plunkett Armstrong, which was read as agreed evidence and referring to only one male running. He said:

> "I heard … about 5 or 6 shots. I then saw a male person in his late teens, twenties, run down lineside from the direction of the town [alley] and running towards the direction of the Canal. The first time I saw this person he was in the centre of the road and running at an angle across it."

[68] We are satisfied that the trial judge did not err in admitting the hearsay evidence. However, even if the hearsay evidence had been erroneously admitted its admission, in light of what we have said above, causes no sense of unease about the safety of the conviction. Accordingly, we reject this ground of challenge.

[69] Finally, we turn very briefly to the submission that although a strict Turnbull direction was not required in respect of Soldier A's evidence and despite the court having identified the need for caution in such cases nevertheless 'insufficient allowance' was made and reliance was placed on matters that were either 'unjustified or not born out by the evidence'. This ground is meritless. The judge saw and heard the witnesses and provided full reasons for the decision to which he came. He was best placed to address the issue of identification. The judge noted that the prosecution case is based primarily on the evidence of Soldier A and in particular his observations and actions. The judge said this:

> "I had the opportunity to observe him giving his evidence and when being cross-examined. I consider he gave his evidence in a very straightforward manner, when able to remember directly what he saw or did, he gave his evidence clearly. He answered the questions put to him by defence counsel again in a straightforward manner, and did not in any way attempt to be evasive or prevaricate."

He noted that:

> "The core of the defence case is that Soldier A has invented the presence of the second man to justify his actions that evening with the alleged unjustified

> discharge of his weapon generally, and specifically at Gareth Doris, at the defendant and towards two occupied vehicles."

The judge then analyses the evidence of Soldier A in some depth. At para 134 and following the judge notes that there is also support of a modest nature for his version of events. The judge correctly held that this is not a case which is covered by the Turnbull type of direction to a jury. He said:

> "It is not a case which depends wholly or substantially on the correctness of an identification of the defendant. The court acknowledges that an honest witness can however be mistaken. The case depends on what soldier A has described as a continuity of observation of a male of medium height and build wearing a dark green jacket, first entering the alleyway, then leaving it, then turning right and moving across his vision from Soldier A's right to left. At or about this location, the defendant admits to being in the position that Soldier A says he was, and the defendant admits moving towards the white vehicle and getting into it, as Soldier A says the man did …."

[70] We are quite satisfied that the judge considered all of the evidence carefully and dismiss this ground of challenge.

Conclusion

[71] For the reasons given above we dismiss the appeal against conviction.