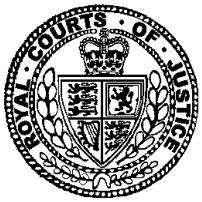

Neutral Citation Number: [2021] EWCA Crim 39

Case No: 202001136 B4, 202002603 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT SITTING AT BIRMINGHAM
HHJ INMAN QC & HHJ FARRER QC
T20197814

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE EDIS
and
MR JUSTICE FOXTON

- -

Between:

Paul Dunleavy	**Applicant**
- and -	
REGINA	**Respondent**

Mr Tom Schofield (**assigned by the Registar of Criminal Appeals**) for the **Applicant**
Mr Leo Seelig (instructed by **CPS Appeals, Counter Terrorism Division**) for the **Respondent**

Hearing date: 17th December 2020

- -

Approved Judgment

Lord Justice Fulford V.P. :

Introduction

1. The applicant stood trial, commencing on 24 February 2020, at the Birmingham Crown court (Judge Inman Q.C.) on an indictment containing 10 counts. Count 1 charged him with the preparation of terrorist acts contrary to section 5(1) of the Terrorism Act 2006. The particulars of the offence were:

> "PD between the 28th day of April 2019 and the 3rd day of September 2019 with the intention of committing acts of terrorism, or assisting another to commit such acts, engaged in conduct in preparation for giving effect to that intention, namely:
>
> a) Obtained extreme right wing ideological texts;
> b) Joined extreme right-wing chat forums;
> c) Searched for information on firearms, ammunition and weapons;
> d) Distributed information on firearms and ammunition;
> e) Searched for blank firing weapons;
> f) Sought to visit a gun shop."

2. Counts 2 to 10 charged the applicant with possessing various documents of use to a terrorist, contrary to section 58(1)(b) Terrorism Act 2000. The nine documents found in the applicant's possession that were charged individually in counts 2 to 10 were as follows:

> Count 2: Expedient Homemade Firearms – BSP – SMG machine gun
> Count 3: The Khyber Pass Pistol –Practical Scrap Metal Small Arms Vol. 4
> Count 4: Expedient Homemade Firearms –9mm machine pistol
> Count 5: Expedient Homemade Firearm 9mm Sub machine gun
> Count 6: 12 Gauge Pump Action Shotgun Construction Plans
> Count 7: Expedient Homemade Firearms – Break Barrel Shotgun
> Count 8: Expedient Homemade Firearms – 9mm machine gun
> Count 9: Expedient Homemade shotgun ammo and Handgun ammo
> Count 10: Expedient Handgun ammo

3. On 20 March 2020 in the Crown Court at Birmingham, Judge Inman ruled that the potential defence that he had a reasonable excuse for possessing the documents charged in counts 2 to 10 was not available to the applicant. On 23 March 2020, the applicant pleaded guilty to each of these 9 counts.

4. On 24 March 2020, the judge discharged the jury in respect of count 1 as a result of a number of factors, including the loss of three jurors along with the administrative and personal difficulties posed by the beginning of the COVID-19 pandemic.

5. The applicant was retried on count 1 in the Crown Court at Birmingham (Judge Farrer Q.C.). The trial commenced on 1 September 2020 and he was convicted on 2 October 2020.

6. The applicant was sentenced on 6 November 2020. On count 1 he received 5 ½ years' detention and 2 years' detention on each of counts 2 – 10, concurrent with each other and concurrent with count 1.

7. Before this court he renews his application for leave to appeal his conviction on counts 2 to 10 after refusal by the single judge (Judge Inman). His application for leave to appeal his conviction on count 1 has been referred to this court by the single judge (Judge Farrer).

The Facts

8. On Thursday 22 August 2019, officers from the West Midlands Counter Terrorism unit executed a firearms warrant at the applicant's home. Multiple items were seized, including a Huawei mobile telephone belonging to the applicant. The telephone was analysed. This revealed that there had been "*chat*" conversations between the applicant and a number of individuals on various online platforms and messaging applications. There were numerous digital copies of books on firearms, explosives and military tactics. These included manuals on how to construct homemade guns and ammunition. There were, additionally, a number of digital copies of books which tended to reveal extreme right-wing views and objectives.

9. In the applicant's bedroom the police found a Lansky locking knife with a black handle; a metal knife, 4" in length, in a handmade sheath; an airsoft handgun; a .22 air rifle; an Albainox black lock knife; a black rubber knife; a black skull face covering; 2 spent bullet cases; a face paint camouflage container; a cardboard and green tape replica handgun; a spent shotgun cartridge; a section of metal tubing; a set of red pipe cutters; a small piece of brass tubing; a wooden gun stock; a section of metal tubing (35cm long) with white tape at one end; makeshift cardboard targets; a Dremel electric multi tool; a Loctite glue gun; a work zone cordless drill; a black Stanley toolbox containing various tools; and a camouflage backpack containing items of camping equipment.

10. The prosecution case was that the applicant had joined extreme right wing chat forums and participated in conversations about guns and mass shootings. He searched the internet for information on firearms, ammunition and weapons. He found and shared information about how to make homemade guns. It was alleged that the applicant was planning to convert a blank firing handgun into a viable firearm, which he intended either to use himself in an act of terrorism or to provide it to another for this purpose. Alternatively, he intended to help convert a blank firer, for the same purpose. Overall, it was said he had the documents in his possession without reasonable excuse which would be of use to a terrorist.

11. Focussing on counts 2 to 10, there is no dispute that the prosecution had proved the elements of each offence, namely, the defendant was in possession of the relevant material which in relation to each count was likely to be useful to a person

committing or preparing an act of terrorism and the defendant knew the nature of the material.

12. The defence case was that the applicant had a reasonable excuse under section 58(3) Terrorism Act 2000. Section 58 provides:

> **"Collection of information.**
>
> (1) A person commits an offence if–
>
> (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism,
>
> (b) he possesses a document or record containing information of that kind, or
>
> (c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.
>
> (1A) The cases in which a person collects or makes a record for the purposes of subsection (1)(a) include (but are not limited to) those in which the person does so by means of the internet (whether by downloading the record or otherwise).
>
> (2) In this section *"record"* includes a photographic or electronic record.
>
> (3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.
>
> (3A) The cases in which a person has a reasonable excuse for the purposes of subsection (3) include (but are not limited to) those in which—
>
> (a) at the time of the person's action or possession the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
>
> (b) the person's action or possession was for the purposes of—
>
> (i) carrying out work as a journalist, or
> (ii) academic research.
>
> […]"

13. On behalf of the applicant, it was suggested he was carrying out legitimate research out of boyish curiosity. His counsel, Mr Schofield, argued that as with many boys of his age, he was fascinated with firearms and military matters. The applicant was a member of the Air Cadets and hoped to join the armed forces when he was older. He had not intended to commit an act of terror and instead was simply fascinated by armed conflict and its paraphernalia.

14. The applicant gave evidence in support of this defence. He said he had a long-standing and obsessive interest in firearms and all things military which developed into a preoccupation with homemade firearms and ammunition. He downloaded the material set out above out of curiosity and in order to educate himself. He supplied copies of various of the documents, and shared information extracted from this material concerning the construction and conversion of firearms to members of the chat group or groups and individuals with whom he was in contact. He suggested he was boasting about his knowledge and he enjoyed receiving the praise and thanks of others.

15. He understood that those with whom he was in contact held extreme right-wing views and supported terrorist action. He shared those views at the time he distributed this material. However, he said he did not intend to commit any terrorist act or to assist others to do so. He did not believe the individuals with whom he communicated intended to prepare for, or to commit, a terrorist act. He suggested his words and conduct were merely the expression online of a fantasy. He believed those with whom he was in contact were similarly motivated.

16. He accepted, however, that this unlawful material may be of some practical use in the event of a race war or an apocalyptic event of the type envisaged in scenarios such as that set out in the extreme publication the Turner Diaries which would involve the indiscriminate murder of so-called inferior races, as reflected in the slogan "*The Day of Rope*". At the time of his possession of the material, he believed such an event would occur and he wanted it to occur, albeit he had no wish personally to participate. He maintained he no longer held these views and now believed an apocalyptic event of this kind would not occur.

The Grounds of Appeal

The admissibility of Dr Lambert-Simpson's evidence (Judge Inman – the first trial)

Background

17. At the conclusion of the applicant's evidence in the first trial, Judge Inman ruled on the admissibility of a report dated 31 January 2020 by a psychologist, Dr Lambert-Simpson, on which the applicant sought to rely. Amongst a number of matters that the doctor was asked to address, in addition to the general question of whether or not the applicant met the criteria for high functioning Autism Spectrum Disorder ("ASD")), those relevant to this application were whether i) the expert was able to express any kind of opinion as to whether or not the defendant was genuinely intending to commit an act of terror or was merely being boastful; ii) the defendant was vulnerable; iii) there were any other matters which the expert considered to be relevant to the case.

18. Dr Lambert-Simpson concluded that the applicant appeared to meet the criteria for ASD. There was a dispute between the prosecution and the defence as to whether Dr Lambert-Simpson could provide a specific diagnosis of ASD, given his methodology, but it was agreed that for the purposes of the judge's ruling the doctor's evidence should be treated as a diagnosis of ASD.

19. The applicant submitted that the opinion of Dr Lambert-Simpson was admissible, as being relevant to four principal issues:

> ***The first issue***
> The doctor could explain how the defendant's obsessive and compulsive pursuit of information about guns was capable of being viewed as a symptom of high functioning autism, for instance boastfulness, as opposed to preparatory steps for an act of terrorism.
>
> ***The second issue***
> The applicant's evidence that he did not believe that the messages and information he sent online would be acted upon by others was capable of being explained by the difficulties autistic people have in forming a "*theory of mind*" – that is the ability to understand the intentions and desires of others.
>
> ***The third issue***
> The doctor's view would assist the jury to understand the applicant's matter-of-fact responses (as they were suggested to be) to questions in cross-examination.
>
> ***The fourth issue***
> The psychologist could provide assistance as to the explanation advanced by the defendant as to his conduct and actions online, namely that he was merely fantasising, and that he had no intention himself of committing an act of terrorism, and no intention of assisting anybody else so to do.

20. The judge focussed on the detail of the proposed evidence as set out in Dr Lambert-Simpson's report. When addressing the ***first issue*** – whether the appellant was genuinely intending to commit an act of terror – the doctor had simply expressed an opinion that the applicant was being boastful. Thereafter, he cited a passage from the website Autism.org:

> "Many autistic people have intense and highly focussed interests, often from a fairly young age. These can change over time or be lifelong. It can be art, music, trains, computers, car registration number, bus or train timetables, postcodes, table tennis, traffic lights, numbers, shapes or body parts, such as feet or elbows. For many young children, it is Thomas The Tank Engine, dinosaurs, or particular cartoon characters.
>
> Autistic people might also become attached to objects (or parts of objects), such as toys, figurines or model cars – or more unusual objects like milk bottle tops, stones or shoes. An interest in collecting is also quite common."

21. The judge observed that there was no suggestion in the doctor's report that being boastful is a symptom experienced by those who suffer from ASD, still less that it is a symptom that could be attributed sustainably to the applicant's condition. The entirety of Dr Lambert-Simpson's evidence on the issue was expressed as follows: "*(g)iven his presentation and how he tested, it is my opinion he was being boastful*". There was no accompanying analysis or explanation.

22. The judge emphasised that the quotation set out at [20] above was:

> "[…] clearly a description of what in general people who have been diagnosed as being within the autistic spectrum may suffer from or demonstrate. It is simply a repetition of what appears on the autism website. And it may well be that one can infer that that is Dr Lambert-Simpson's view himself, but whether that be the case or not, there is nothing at all specific in that evidence which relates to this defendant. There is no evidence at all contained within that evidence that this defendant has obsessive behaviour or compulsive behaviour, or has any history of it, or indeed any compulsive or obsessive interest specifically in relation to guns."

23. The judge expressed the view that the passage in the report in which Dr Lambert-Simpson observed that "*the defendant has a good knowledge of guns (his subject of choice given his autism)*" was insufficient evidence that the applicant exhibited, as a symptom of his ASD, compulsive and obsessive behaviour that related to guns. The doctor, when he expressed this view, was not addressing obsessive behaviour. Instead, the question he was answering related to the applicant's behaviour in joining a far-right group and expressing extreme views. Furthermore, on this issue, the applicant contradicted the doctor, in that his account was that he had joined a far-right group (the Feuerkrieg Division (FKD)), along with the various relevant chat groups, because he agreed with their views, albeit he did not intend to participate in turning the ideas into reality.

24. Turning to the ***second issue*** – the theory of mind and the suggestion that the applicant did not believe that the messages and information he had sent online would be acted on by others – the doctor fleetingly addressed this in a section of the report dealing with the possibility that the applicant was vulnerable. Dr Lambert-Simpson suggested *"(v)ulnerability occurs because of our overestimation of a person with autism understanding language, social situations, emotions, organisation and theory of mind*". As the judge highlighted, the issue of whether the applicant was vulnerable was irrelevant for these purposes. This suggested admissibility of this issue was based entirely on this single reference to the theory of mind that was part of an answer to a different question, and was therefore taken out of context. The doctor had not been asked to consider this issue *(viz*. the theory of mind) and the report did not analyse whether the applicant's symptoms included an inability to understand the intentions and desires of others. Finally in this regard, the judge highlighted that the applicant gave evidence that he was fully able to understand the intentions of others.

25. As to the ***third issue*** – the ability of the doctor to assist on the way the applicant dealt with questioning during the trial – the judge correctly highlighted that Dr Lambert-Simpson had not seen or heard any of the evidence in the case and, particularly, he had not commented in an additional report on the way the defendant gave evidence. Furthermore, there was no evidence that ASD could have affected the way that the applicant gave his account.

26. Finally, on the ***fourth issue*** – fantasy as opposed to intending terrorism – the doctor had not suggested that the applicant or others with ASD suffer from delusional fantasies. Furthermore, the applicant had explained what he meant when he referred to

being motivated by fantasy, namely that he enjoyed being involved in the various discussions that took place, but he did not intend to act on the ideas then aired.

27. As a consequence, the judge decided that the four reasons advanced in support of the admissibility of the psychological evidence were not, on analysis, made out. Moreover, the report was very general in nature and failed to relate with any particularity to the applicant. In the circumstances, this was not expert medical evidence that addressed issues which the jury would not properly understand unless they heard Dr Lambert-Simpson's testimony.

28. In support of this application for leave to appeal, essentially the same arguments are relied on as those raised before Judge Inman. The particular emphasis is that Dr Lambert-Simpson's report is said to have been admissible for three reasons (as set out in the Perfected Grounds of Appeal):

> "i) Principally, the applicant's obsessive and compulsive pursuit of information about guns, was capable of being viewed as a symptom of his diagnosis of high functioning autism, as opposed to deliberate acts engaged in, in preparation for an act of terrorism; and
>
> ii) The applicant's evidence that he did not believe that the messages and information he sent online would be acted upon by others, was capable of being explained by the difficulties autistic people have in forming a 'theory of mind' *i.e.* the ability to, *inter alia,* understand the intentions and desires of others; and
>
> iii) As a way of allowing the jury to understand the applicant's 'matter of fact' responses to questions in cross examination. In other words, to assist the jury in assessing the applicant's presentation."

29. Given that it featured in counsel's submissions on this application, we note that in the retrial before Judge Farrer the applicant renewed his submission to introduce evidence from Dr Lambert-Simpson. However, the evidential basis for this application had changed from that advanced in the original application. As Judge Farrer observed, two further reports from Dr Lambert-Simpson had been served, along with a report from Dr Holt, a chartered clinical psychologist. The Crown conceded that the material was markedly different to that presented to Judge Inman.

30. Judge Farrer made his decision, as had Judge Inman, on the basis of the written report or reports. In this the judges followed the provisions of the Criminal Procedures Rules 19.3 and 19.4, namely that a party who wants to introduce expert evidence (otherwise than as admitted fact) must serve a report by the relevant expert which complies with the requirements as to the contents of experts' reports. This extends to such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence and a summary of the conclusions reached. Both judges declined to allow the applicant to call Dr Lambert-Simpson on a voire dire either to raise issues not contained in his written evidence or to provide greater detail on the issues already outlined.

31. Dr Lambert-Simpson in his second report, which was not before Judge Inman, set out the basis for a conclusion that there was a link between the applicant's autism and his intense obsession with firearms. This was relevant because it potentially undermined the suggestion that he was motivated by a terrorist mindset. The judge concluded it was necessary to admit this material because the jury's understanding of this issue was likely to be uninformed and potentially inaccurate. Judge Farrer rejected the suggestion that Dr Lambert-Simpson could give relevant evidence on the theory of mind, given this was insufficiently made out in the doctor's report as regards the present applicant. As to the issue of boastfulness, Judge Farrer reached the same conclusion as Judge Inman, essentially on the same material. By way of conclusion, Judge Farrer stated:

> "39. In conclusion, Dr Lambert-Simpson is entitled to express his opinion that the defendant suffers from Asperger's and entitled to explain the relevance of this to the defendant's obsession with guns. He is not entitled to go beyond this and therefore is not entitled to give a comprehensive list of possible symptoms of Asperger's without reference to the defendant specifically. […]"

Submissions

32. The submissions on this proposed ground of appeal are, in summary, that Dr Lambert-Simpson's conclusions were relevant to the applicant's defence of conducting research for private education and indulging a boyish curiosity about guns. It is suggested that the obsessive nature of the applicant's behaviour was indicative of autism, which was in turn relevant to whether he intended to make or obtain a gun and whether he had a reasonable excuse to have possession of the gun-related material. Furthermore, it was relevant to whether the applicant fully grasped the intentions and desires of those with whom he was in contact because individuals who suffer from autism have difficulties forming a theory of mind. It is suggested Judge Inman was too restrictive in his approach to the report and that he should have paid greater attention to what the doctor "*was seeking to convey in his answers*". It is suggested that any uncertainties as to the doctor's evidence could have been explored in evidence before the jury or on a voire dire. Finally, it is argued that Judge Inman improperly criticised the report on the basis that Dr Lambert-Simpson had not considered all of the evidence before the jury (the evidence amounted to almost 100,000 pages).

33. It is relevant at this juncture to note the relationship between the two applications for leave:

    i) As we have explained, at the trial before Judge Inman, the applicant entered a guilty plea on counts 2 to 10 following the Judge's ruling that the defence of "*reasonable excuse*" was not available to him on the evidence he had given. The jury was discharged on count 1, and the applicant retried by Judge Farrer who made a fresh decision on the admissibility of expert evidence from Dr Lambert-Simpson on the basis of different material.

    ii) In these circumstances, any appeal against Judge Inman's ruling on the admissibility of Dr Lambert-Simpson's report in the trial before him could only be relevant to the extent that the material was said to bear on the defence of reasonable excuse.

iii) If the applicant's conviction on count 1 before Judge Farrer cannot be impugned and the applicant had possession of the materials "*with the intention of committing acts of terrorism, or assisting another to commit such acts*", then the applicant cannot on any view have had a reasonable excuse for being in possession of those materials (and in fairness Mr Schofield did not seek to suggest otherwise).

Discussion

34. The Criminal Practice Directions in Part 19 provide:

> "19A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion."

35. As Lawton LJ observed in *R v Turner (Terence)* [1975] QB 834 at 841:

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury."

36. We emphasise that expert evidence is not to be called on a serendipitous basis, in the hope or expectation that something useful will emerge. Again, as Lawton LJ set out in *Turner* "*(b)efore a court can assess the value of an opinion it must know the facts upon which it is based"* (page 840). The justification for applying to introduce the evidence must be set out in sufficient detail in the report or reports. In our judgment the approach of Judge Inman was faultless, and he was undoubtedly correct not to hold a voire dire to enable the applicant to attempt to adduce material not set out in the report. It was necessary that the evidence contained in the report was focussed sufficiently on the applicant rather than simply on the range of effects that ASD may have on some sufferers. Dr Lambert-Simpson provided no basis for expressing the opinion that the applicant, as a consequence of ASD, was being boastful rather than intending to commit an act of terror. Moreover, the report contained no suggestion that boastfulness is a symptom that could be attributed to the applicant's condition. There was a lack of any evidence in the report that the applicant suffered from obsessive or compulsive behaviour as regards guns, or otherwise. There was equally no analysis of the suggested theory of mind, either generically or as to how it might apply to the applicant. Dr Lambert-Simpson was not in a position to comment on the answers given in evidence by the applicant, having not seen or heard his account, or addressed this issue in writing. The doctor had not explained that the applicant or others with ASD suffer from delusional fantasies. As Judge Iman fairly concluded, the report was very general in nature and failed to relate with any particularity to the applicant.

37. It follows that the justification for suggesting that this expert evidence was relevant to one or more issues in the proceedings was not made out. The judge fairly observed that the doctor failed to base his analysis and conclusions on the evidence in the case as it related to the applicant rather than on generalities.

38. In any event, we cannot see how any of the issues by reference to which it was argued that the report was admissible before Judge Inman bear on the one issue which was decided at that trial, namely whether, on the evidence the applicant had given, it was open to the jury to find that he had a reasonable excuse for being in possession of the material which was the subject of counts 2 to 10. The judge reached his decision to withdraw the reasonable excuse defence from the jury on the basis of the applicant's own account. The effect of the applicant's evidence, with the exception of one phrase, was agreed between the prosecution and the defence, and the judge assumed the disputed phrase in the sense favourable to the applicant.

39. As we have already observed, the difference of approach taken by Judge Farrer on this question was properly explicable given the different evidence that he was considering. His decision to admit Dr Lambert-Simpson's testimony that the defendant suffers from Asperger's and his explanation of the relevance of this to the defendant's obsession with guns has no impact on the sustainability of the decision by Judge Inman to exclude this material on the basis of the material set out in the single report before him by Dr Lambert-Simpson.

The withdrawal of the defence under section 58(3) Terrorism Act 2000 (Judge Inman – the first trial)

Background

40. The applicant highlights that the judge should only withdraw a defence of reasonable excuse under section 58(3) Terrorism Act 2000 if, as a matter of law, no jury could accept it (*R v Y(A)* [2010] EWCA Crim 762; [2010] 2 Cr App R 15 at paragraph 25:

> "We accept the proposition […] that a defence of reasonable excuse advanced under s.58(3) must be left to the jury unless it is quite plain that it is incapable of being held by any jury to be reasonable. […]"

41. The judge reached the following conclusions on the applicant's evidence, which Mr Schofield on behalf of the applicant accepts he is unable to characterise as inaccurate:

> "The defendant's excuse for possession of the unlawful material is that (i) he had a longstanding and obsessive interest in firearms and all things military which developed into an interest in home-made and converted firearms and ammunition; (ii) he downloaded the unlawful material in pursuit of that curiosity and in order to educate himself about such matters; (iii) he supplied copies of specific documents within the unlawful material and gave information taken from the unlawful material about the construction or conversion of firearms and ammunitions to others in chat groups or to individuals with whom he was in contact electronically or otherwise than face to face; (iv) he acted as

> set out in (iii) above because he wanted to boast that he had such material or information and enjoyed receiving their praise and thanks; (v) he believed that those others with whom he communicated held extreme right-wing views and supported terrorist action to advance those views and he shared those views at the time of his possession of the unlawful material; (vi) he did not intend to commit any terrorist act and did not intend to assist anyone else to prepare or commit any such act. He believed that none of the individuals with whom he was in contact had any intention of preparing for or committing a terrorist act; (vii) his words and conduct were all merely an online fantasy and he believed those with whom he was in contact were also only engaging in online fantasy and no one intended to prepare for commit any act of terrorism; (viii) he also believed that the unlawful material may be of some practical use in the event of a race war or apocalyptic event of the type envisaged by, for example, The Turner Diaries and called by some "The Day of the Rope" which would involve the indiscriminate murder of inferior races. At the time of his possession of the material, he believed such an event would occur and which he wanted to occur but in which he did not want to and would not actively participate. The final phrase, as to participation, is evidence I have accepted for the purposes of this ruling only in favour of the defendant; (ix) the defendant no longer holds the same views and now believes the chance of such an event as described in paragraph (viii) above were nil."

42. The judge decided, *inter alia*, that a jury could not conclude that it was reasonable for the applicant to be in possession of this material for the purpose of supplying the unlawful material to others he knew or believed supported terrorism, particularly given the potential use of this material for terrorist violence in support of a future race war.

Submissions

43. Mr Schofield submits that the usefulness of the documents in the event of an apocalyptic event (*viz*. the future race war referred to in his police interviews) was "*plainly not the reason or main reason why he obtained the documents in the first place, and the illicit use of the documents for this purpose would be contingent on the occurrence of an event that is most unlikely to happen".* It is argued that the judge placed impermissible weight on what is suggested were throw-away remarks. Mr Schofield has attempted, therefore, to distinguish between his primary reasons for having the material in his possession and ancillary purposes (such as boasting or passing it to others who supported terrorism).

44. Mr Seelig, for the respondent, supports the conclusions of Judge Inman.

Discussion

45. The House of Lords considered the section 58(3) defence in *R v G; R v J* [2009] UKHL 13; [2010] 1 AC 43. In giving the opinion of the Committee, Lord Rodger observed:

> "79. […] Under section 58(1), the mere fact that the defendant's purpose was not to commit an act of terrorism is neutral. What he has to show is that he had an objectively reasonable excuse for possessing something which Parliament has made it, prima facie, a crime for him to possess because of its potential

utility to a terrorist. An intention to use information in connection with a bank robbery may well be an explanation of why the defendant had the information, but it cannot be a "reasonable" excuse for having it. So the accused would be guilty of the section 58(1) offence."

[…]

"81. It is comparatively easy to identify examples of excuses which could never be regarded as reasonable. It is similarly easy to give examples of excuses which everyone would regard as reasonable-the person who finds the disk on the train and immediately takes it to the nearest police officer obviously has a reasonable excuse for possessing the disk; as does the site manager, in Mr Perry's example, who mistakenly picks up plans of the layout of the Bank of England along with his newspaper. Mr Perry suggested that the defence should be construed narrowly so as to confine it to cases such as these. He pointed to *R v Lennard* [1973] 1 WLR 483, 487 where the Court of Appeal had indicated that only a very narrow range of circumstances could amount to a reasonable excuse for refusing to give a sample of blood or urine. But that approach is only possible because the circumstances giving rise to the offence are always essentially similar and so it is possible to envisage what could be a reasonable excuse for doing what it prohibits. By contrast, under the Prevention of Crime Act 1953 and the Criminal Law (Consolidation) (Scotland) Act 1995 the circumstances in which people may have an offensive weapon in a public place are many and various. So the courts have recognised that any decision on whether an accused had a reasonable excuse must depend on the particular circumstances of the case. For example, a male stripper dressed as a police officer, who was waiting outside for his performance to begin, was held to have a reasonable excuse for carrying a truncheon in a public place: *Frame v Kennedy* 2008 JC 317. Similarly, the circumstances which may give rise to a section 58(1) offence are many and various. So it is impossible to envisage everything that could amount to a reasonable excuse for doing what it prohibits. Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case. Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide. When doing so, if appropriate, the judge may indicate factors in the particular case which the jury might find useful when considering the issue-such as the defendant's age, his background, his associates, his way of life, the precise circumstances in which he collected or recorded the information, and the length of time for which he possessed it. Moreover, while, as we go on to explain in para 88, the fact that someone is suffering from a mental illness cannot, of itself, make an unreasonable excuse reasonable, it may nevertheless be a matter for the jury to take into account when considering whether to accept an excuse advanced by the defendant. For example, if someone says that he had found a disk on a train and had intended to take it to the police, but forgot, in deciding whether to believe the defendant and to accept the excuse as reasonable, the jury might well take into account the fact that he was suffering from a condition which tended to make for memory lapses."

46. In *R v Flint and Holmes* [2020] EWCA Crim 1266 this court addressed the defence of lawful object in cases involving the possession of explosive substances following the Supreme Court decision in *R v Copeland* [2020] UKSC 8; [2020] 2 Cr App R 4. In a postscript to the judgment in *Flint and Holmes* it was observed that:

> "56. […] It is a central element of the majority decision in *Copeland* that an otherwise lawful objective (such as experimentation) which involves obvious risk to other people, or their property, from the use of the explosive substance will lead to the inference that the object of the accused was mixed, and therefore was not (wholly) lawful. Further, if the defendant knew that his or her proposed use of the explosive substance in his possession would injure others or cause damage to their property, or was reckless regarding this risk, the object would be tainted by that unlawfulness inherent in the way the object was being pursued, thereby rendering it impossible to establish the defence."

47. We are left in no doubt that the judge was right to decide that the explanations or excuses advanced by the applicant could never be regarded as reasonable. To use the example of Lord Rodger's in *R v G* at [79], possessing a document or record of a kind likely to be useful to a person committing or preparing an act of terrorism for the purposes of carrying out a bank robbery is a purpose which is not connected with terrorism, but it could not constitute a reasonable excuse. Similarly, it could never amount to a reasonable excuse to possess documents of the kind with which we are concerned in the present case when the purpose, even if only in part, was to distribute them to others known to have a terrorist ideation. This would be the case even if it was believed that the recipients did not intend to act on those beliefs at that particular moment, but only in the event of some contingency. It would never be reasonable, therefore, to provide a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism to someone who was known to adhere to a terrorist ideology (save perhaps in the most exceptional circumstances of which it is presently difficult to conceive).

48. In a similar vein, the judge in our view correctly observed in the course of his ruling:

> "I am quite satisfied that there is no conceivable basis upon which any jury could conclude that possessing unlawful material in order to be able to boast to anyone that you (a) have it, and (b) of your knowledge derived from it as to how to break the law by making home-made weapons and ammunition could conceivably amount to a reasonable excuse."
>
> and
>
> "[…] the defendant's explanation included the possible future use of the material in a future intended race war. It is sufficient to say that on the defendant's account it is impossible to import any concept of lawful self defence into future terrorist violence of which the defendant maintains he would have been a supporter, not a victim."

49. As in *R v G,* there can be no question of the applicant's ASD making it reasonable for him to possess the information for a particular purpose when it would not be reasonable for anyone else to do so (see *R v G* at [88]). Notwithstanding G's paranoid schizophrenia, the House of Lords determined that "*on no view could a desire to wind up prison officers* […] *be a reasonable excuse for collecting and recording the information"* (see [87]). This conclusion is not to undermine the potential relevance, when a case is left to the jury, of factors such as the accused's age, background, associates and way of life, the circumstances in which the information was he collected or recorded, and the length of time it was in the defendant's possession. A mental illness or like condition cannot make an unreasonable excuse reasonable, but it is a potentially relevant factor when considering whether to accept the excuse advanced by the defendant. Relying on the example set out in *R v G* (at [81]), someone who suffers from a condition which tends to cause memory lapses can rely on evidence to this effect to explain why there was a failure, for instance, to take a disk found on a train to the police in the way the individual claimed he or she had intended (see [42] above).

50. Furthermore, Mr Schofield's attempt to differentiate between primary and ancillary purposes is without credible foundation. To adapt the reasoning in *Flint and Holmes,* if a mixed purpose results in the defendant's "action or possession" being tainted by an explanation that could never provide a reasonable excuse, it will be impossible to establish the defence.

51. Finally, as we have already observed (see [33] above), the safe conviction by the jury at the second trial of count 1 is conclusive against the applicant as regards the section 58 counts. Put otherwise, following that conviction, it would be impossible to hold that the convictions on those counts were unsafe.

Unanimity (Judge Farrer – the second trial)

52. In the written directions to the jury which formed part of the summing up, the judge set out:

> "15. In order to prove count 1, the prosecution must make you sure of 2 things:
>
> i) the defendant intended to commit an act of terrorism himself or intended to assist another person to commit such an act. And,
>
> ii) he engaged in conduct in preparation for carrying out that intention.
>
> 16. So, the first thing the prosecution must prove is that the defendant intended himself to commit an act of terrorism OR intended to assist another person to commit such an act. You must be sure of one or other of these alternative specific intents, but it is not necessary for you all to be agreed upon which intent the defendant had. The prosecution do not need to identify the specific act which the defendant had in mind. It is sufficient for them to prove that he had a general intention to commit or assist an act of terrorism of some sort. It is agreed that Mr Dunleavy was in this country and it is irrelevant whether the intended terrorist act was to be in this country or abroad. In relation to the allegation that

> he intended to assist another person to commit a terrorist act you should bear in mind that recklessness is not sufficient. In other words, if you are satisfied that the defendant provided advice and assistance to others on how to make guns and was reckless as to whether they would use that information for a terrorist purpose, but you are not sure that he actually intended this to happen then this would not be sufficient."

53. Mr Schofield had earlier submitted to the judge that the jury should be directed that i) the prosecution case was that the applicant intended both to commit an act of terrorism himself and to assist another to do so; ii) they all needed to be sure, as a minimum, that the defendant intended one or the other ; and iii) it would not be sufficient for some of the jury to be sure that he intended to commit an act of terrorism himself, and the rest to be sure that whilst he didn't intend to commit an act of terrorism himself, he intended to assist another to do so.

54. In our judgment, Mr Seelig is right to contend that this submission is misconceived. The ingredients of the offence under section 5 Terrorism Act 2006 are a) the defendant intended to commit an act of terrorism himself or intended to assist another person to commit such an act and b) he engaged in conduct in preparation for carrying out that intention. This offence of preparing for a terrorist act was introduced following the "*7/7*" bombings in London in 2005. It is an inchoate offence, which is designed to allow the authorities to intervene at an early stage, before the broad details of the plans are necessarily formulated.

55. It is a requirement that the jury are unanimous as regards each of the ingredients of the relevant offence: *Brown (K)* (1984) 79 Cr App R 115. In that case the court explained that when a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them was capable of doing so, then it was enough to establish the ingredient that one of the matters was proved to the satisfaction of the whole jury. However, that seemingly sweeping requirement has been explained and qualified in subsequent authorities, the most important of which in the present context is *Smith (Owen)* (2014) EWCA Crim 2163; [2015] 1 Cr. App. R. 13. The defendant in that case was charged with possessing a firearm with intent to endanger life, contrary to section 16 Firearms Act 1968. At trial, the prosecution case was either that the defendant had possession of the firearm himself intending to endanger life or that he had possession intending to enable another to endanger life, thereby reflecting the terms of section 16, as follows:

> "It is an offence for a person to have in his possession any firearm or ammunition with intent by means thereof to endanger life or to enable another person by means thereof to endanger life whether any injury has been caused or not."

56. In addressing the central issue on the appeal, the court observed:

> 35. Turning to the present case, obviously a prosecution under s.16 of the 1968 Act involves proof of a specific intent. We can see the argument that the alternatives stated in the section are thus not simply as to the means by which the offence is committed or as to whether the offender is a principal or

> secondary party. In the present kind of case however, while accepting that the defendant's state of mind as possessor is critical, we consider it to be entirely an ancillary matter as to whether the possessing with intent involved the defendant intending himself to endanger life, or whether the possessing with intent involved the defendant intending to enable another to endanger life. There are not two separate offences under s.16 appropriately charged as two different counts. There is in substance one offence, albeit capable of being satisfied on two different scenarios: the central unifying factor for each limb being possession with intent that life be endangered.
>
> 36. The gravamen of the section, reflected indeed in the wording of the statement of offence on this indictment, thus is possession of a firearm with intent to endanger life. By whom the life is to be endangered, if such an intent is formed, is thus in practical terms a matter extending essentially to the mechanism which might be involved in life being endangered […] this is not a "relevant difference".

57. In our view this reasoning applies to the present offence, in that the essence of the crime is the defendant intended that an act of terrorism would be committed and he engaged in conduct in preparation for carrying out that intention. The jury had received the written directions set out above as to the need to be sure that the applicant intended to commit an act of terrorism himself or intended to assist another person to commit such an act. Put otherwise, they had to be sure of one or other of these two options but, given the particular means or mechanism by which the offence was committed was an ancillary issue, it did not require unanimity as regards which of the two scenarios applied.

58. This approach did not prejudice the applicant. His defence to the count was the same under either scenario, in that he submitted that neither he nor those with whom he was in communication – certainly as far as he was aware – intended to act on the information that he collected and shared. He was not advancing different defences depending on whether the record of information was likely to be useful to a person committing or preparing an act of terrorism in the United Kingdom or abroad. Furthermore, this was not a case in which there was a risk of jurors improperly aggregating the factual allegations necessary for guilt (see *R v Daniel Morton* [2003] EWCA Crim 1501).

59. The present case is entirely different from *R v Leslie Joseph Carr* [2000] 2. Cr. App. R. 149, an authority relied on by Mr Schofield. In that case, this court found that on the particular facts the lack of a *Brown* direction was fatal. The Crown had opened the case on the basis that the fatal blow was a kick delivered by the appellant, to which allegation the defence was identification. When the last defence witness was called, the Crown alleged that the fatal blow had been a punch delivered by the appellant. To that allegation, the defence was self-defence. In those particular circumstances, the appeal was allowed on the basis that given the appellant relied on self-defence in relation to the blow and identification in respect of the kick, careful directions were necessary, and, on these facts, the judge should have directed the jury to reach a unanimous decision on the basis of conviction. As just set out, in contrast in the present case the applicant was advancing a single defence, namely that he did not intend an act of terrorism to take place.

60. Although relied on by Mr Schofield, the case of *R v Giannetto* (1997) 1 Cr App R 1 does not assist the applicant. As Kennedy LJ set out in the judgment at page 8:

> "There are two cardinal principles. The first is that the jury must be agreed upon the basis on which they find a defendant guilty. The second is that a defendant must know what case he has to meet. When the Crown allege, fair and square, that on the evidence, the defendant must have committed the offence either as principal or as secondary offender, and make it equally clear that they cannot say which, the *basis* on which the jury must be unanimous is that the defendant, having the necessary *mens rea* , by whatever means caused the result which is criminalised by the law. The Crown is not required to specify the means, because the legal definition of the crime does not require it; and the defendant knows perfectly well what case he has to meet."

61. Finally, we would note that in the course of his oral submissions, Mr Schofield sought to push the unanimity ground of appeal further, and contended that (in effect) it was necessary for there to be unanimity on the part of the jury in relation to each of the communications which were said to constitute acts of preparation identified in count 1 (so that it was necessary, for example, for the jury to be directed on the need for unanimity as to the applicant's intention when sending each communication relied upon). Once again, we are persuaded that there is nothing in this complaint (and we note that it was not raised before the judge in the course of argument as to the scope of the unanimity direction nor as a ground of objection to the terms of the indictment). This was not a case in which there was any realistic scope for the applicant having a different purpose in relation to the various communications of a similar character with the members of the same chat group, and that was not the applicant's case, nor the effect of his evidence. As stated by this court in *R v Mitchell* (1994) 26 HLR 394, 400; [1994] Crim LR, 66, 67 , a *Brown* direction:

> "will be necessary only in comparatively rare cases. In the great majority of cases, particularly cases alleging dishonesty and *cases where the allegations stand or fall together*, such a direction will not be necessary. It is of first importance that the directions for juries should not be overburdened with unnecessary warnings and directions which serve only to confuse them."

62. This was such a case.

63. Notwithstanding Mr Schofield's persuasive efforts, therefore, this ground of appeal is also without merit.

Dr Lambert-Simpson: The failure to hold a voire dire and to exclude his evidence as regards the inability of the applicant to judge the intentions of others (the theory of mind) (Judge Farrer – the second trial)

Submissions

64. Mr Schofield suggests Dr Lambert-Simpson should have been called on a voir dire to enable him to provide additional evidence as to whether the applicant had difficulty in forming a theory of mind. The judge ruled:

> "7. Mr Schofield submits that I should hear from Dr Lambert-Simpson within a voir dire on the topic of relevance. Mr Schofield argues that the issues in the case have now crystallised and that this necessitates further information from Dr Lambert-Simpson. I reject that submission. The starting point is CPR 19.3 which requires the advanced service of an expert report, as soon as practicable and in a form, which complies with rule 19.4. Amongst other things, rule 19.4 requires a report to contain a summary of the conclusions reached. These provisions are designed to ensure fairness to both the prosecution and defence and unless there is a sensible basis to depart from them, I take the view that I should not do so."

65. For the reasons already given in the context of the ruling by Judge Inman (see [30] and [36] above), we consider Judge Farrer's approach was unimpeachable. The obligation is on the applicant to ensure that the report rehearses the relevant material with sufficient particularity and clarity for the judge to make a ruling on admissibility.

66. In a carefully reasoned judgment, the court below declined to allow Dr Lambert-Simpson to give an opinion on whether the applicant suffered from an ability to form a theory of mind. Centrally, the judge focussed on Dr Lambert-Simpson's evidence that symptoms of ASD vary from person to person, and his report was silent as to universal or widespread difficulties associated with the theory of mind, still less with any problems it may create in understanding how another might act or what their intention might be in the context of online conversations. Furthermore, the doctor failed to express an opinion as to whether the defendant was unable to form a theory of mind. These conclusions by the judge are in our view fatal to this ground of appeal.

Conclusions

67. For the various reasons set out above, these applications for leave to appeal are refused.

68. The conviction on count 1 (Judge Farrer) has been referred to the full court by the single judge, and Mr Schofield has the benefit of a representation order in relation to that part of the case. Given the interrelationship between the two sets of proceedings, the representation order will also cover the application as regards counts 2 to 10 (Judge Inman).