11 March 2020

PRESS SUMMARY

R v Copeland (Appellant)
[2020] UKSC 8
On appeal from [2019] EWCA Crim 36

JUSTICES: Lord Reed (President), Lord Carnwath, Lord Lloyd-Jones, Lord Sales, Lord Hamblen

BACKGROUND TO THE APPEAL

The appellant is 22 years old and, prior to these proceedings, had no convictions. He was diagnosed with Autism Spectrum Disorder as a child and, in 2018, he was living with his mother. He began purchasing quantities of chemicals online. According to his account, this was because he had an obsessive interest in military matters, including bomb disposal. He claimed that he had acquired the chemicals because he wished to understand how explosives worked and to experiment with them.

A search warrant was executed at the appellant's home on 24 April 2018, where it was found that he had managed to make a small quantity (about 10 grams or less) of a sensitive primary explosive, Hexamethylene Triperoxide Diamine ("HMTD"). He also possessed manuals for making explosives, notes on making HMTD and a video on his mobile phone demonstrating the making of HMTD.

When interviewed by the police, the appellant admitted his actions in acquiring chemicals and making explosives, and gave the explanation above. He was subsequently charged with certain offences, including two counts under section 4(1) of the Explosive Substances Act 1883 ("1883 Act"). As clarified in the course of the appeal, these counts are that the appellant knowingly had HMTD in his possession or under his control, in such circumstances as to give rise to a reasonable suspicion that he did not possess or control it for a lawful object. There is a defence if the accused can show that in fact he had the explosive substance in his possession or control for a lawful object which he identifies.

In his defence statement, the appellant maintained that he had made the HMTD for a lawful object, namely "interest, education and experimentation". The appellant said that he had made other explosives and used them to create small explosions in the garden of his house without causing harm, and he intended to do the same with the HMTD. At a preparatory hearing in the Crown Court at Birmingham, HH Judge Wall QC held that he was bound by Court of Appeal authority, *R v Riding* [2009] EWCA Crim 892, to find that experimentation and self-education did not amount to a lawful object for the purpose of section 4(1). Accordingly, the judge ruled in advance of trial that the appellant's proposed defence was bad in law.

The appellant appealed unsuccessfully to the Court of Appeal, who considered themselves similarly bound. The court certified the following point of law of general public importance: for the purposes of section 4(1) of the 1883 Act, can personal experimentation or own private education, absent some ulterior unlawful purpose, be regarded as a lawful object?

JUDGMENT

By a majority, the Supreme Court allows the appeal. Lord Sales gives the majority judgment, with which Lord Reed and Lord Carnwath agree. Lord Lloyd-Jones and Lord Hamblen deliver a joint dissenting judgment.

REASONS FOR THE JUDGMENT

The majority examines the 1883 Act in light of other amendments to the criminal law around the same time, namely the Offences Against the Person Act 1861 ("1861 Act") and the regulatory Explosive Substances Act 1875 ("the 1875 Act") **[14-15]**. The 1883 Act was passed by Parliament with great speed due to fears around Irish nationalism and a perception that the 1861 Act, in particular, did not provide sufficiently for protection of the public **[16]**.

The current regulatory regime is now primarily contained in the Explosives Regulations 2014, which like the 1875 Act before them, make clear that it is expected that private individuals, including "hobbyists", may manufacture and keep explosives for their own private use **[18]**.

In *R v Fegan* (1984) 78 Cr App R 189, the Court of Criminal Appeal in Northern Ireland explained that section 4(1) had been passed to address perceived deficiencies in other offences. These required proof of a specific mental element, and so were inadequate to guard against the risk of making or possessing explosives. The appellant, Fegan, acquired a firearm and ammunition (which qualified as explosive substances for the purpose of the 1883 Act) to protect himself and his family from threats against their safety and was convicted of an offence under section 4(1) of the 1883 Act. His appeal was successful, on the basis that although he had no licence for the possession of the firearm and ammunition, nonetheless he possessed them for a lawful purpose, i.e. to defend himself and his family **[19-22]**.

Fegan was followed on similar facts in *Attorney-General's Reference (No 2 of 1983)* [1984] QB 456 **[24-25]**. Finally, in *Riding*, the Criminal Division of the Court of Appeal of England and Wales held that in the particular circumstances of that case, curiosity did not qualify as a lawful object for the possession of a home-made pipe bomb **[26]**.

Under section 4(1), it is for a defendant to prove on the balance of probabilities that he had possession or control of an explosive substance for a lawful object. In English law, a purpose is lawful unless it is made unlawful by statute or the common law. A lawful object may, however, be tainted by an ulterior, unlawful purpose, including by knowledge or recklessness of a risk of injury or damage; but these would be matters to be explored on the evidence at trial **[27-29].**

The decision in *Riding* was correct on its facts, because the defence of the accused in that case was that he acted out of curiosity to see if he could construct a pipe-bomb but he did not need to use real explosives for that; and it was no part of his defence that he had wanted to experiment by making it explode. The decision does not provide an answer in the different circumstances of the present case and was misinterpreted in the courts below. Experimentation and self-education are "objects" within the ordinary meaning of that term and are capable of being lawful objects for the purposes of section 4(1). This view is reinforced by the background against which section 4(1) was enacted, including the 1875 Act, under which possession of explosive substances for private experimentation and use was regarded as lawful and legitimate **[30-33], [35]**. The Court of Appeal was wrong to conclude that the appellant was obliged to specify more precisely than he had done how the explosives would be used and that this would be lawful. The Court of Appeal's reasoning was inconsistent with the *Fegan* and *Attorney-General's Reference* cases, in which it had been held that an assertion of a general object of self-defence was lawful **[34]**. As there is nothing unlawful about experimentation and self-education as objects in themselves, they are capable of being lawful objects **[37]**. There is no requirement in law that a defence statement in relation to a charge under section 4(1) has to give a more detailed account of the proposed use of the explosive substance than that provided by the appellant **[39]**. The appellant ought to have been permitted to present his defence at trial **[41], [43]**.

Lord Lloyd-Jones and Lord Hamblen dissent from the majority's reasoning and would dismiss the appeal. They take the view, in common with the courts below, that personal experimentation and private education cannot in law amount to lawful objects within the meaning of section 4(1) **[51]**. The word "object" refers to the reason for doing something, or the result you wish to achieve by doing it. As such, the Court of Appeal was correct to hold that, to make out the defence, a defendant is required to show the use to which the explosive substance is to be put, and to do so with sufficient particularity to demonstrate that that use is lawful **[52]**. Reference to private education and personal experimentation is not enough, as the Court of Appeal previously held in *Riding* **[54]**.

The defence is only made out if it is shown that the way in which the explosives were intended to be used is lawful. It is not enough to show that it may be lawful. A defence statement in response to a charge under section 4(1) should elaborate upon this and provide some details of the intended use. In the present case the

appellant envisaged that experimentation would take the form of detonations of the explosives in his back garden, carrying an obvious risk of causing injury, damage to property, and a public nuisance. It was necessary to particularise how this would be carried out so as to avoid any such risk or would otherwise be lawful. Vague and general statements referring to personal experimentation or private education were insufficient and did not show how that was to be carried out lawfully **[55]**.

Finally, *Fegan* and *Attorney-General's Reference* are distinguishable, insofar as the object of use in lawful self-defence was plausibly raised in each. In contrast, in the present case no lawful use is identified, and the claimed objects neither give sufficient indication of the use to which the explosives are to be put, nor do they permit assessment of the lawfulness of any such use **[56]**.

References in square brackets are to paragraphs in the judgment