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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

PAUL MARTIN McKERR

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Mr Hutton KC with Mr Forde (instructed by Phoenix Law Solicitors) for the Appellant
Mr D Russell (instructed by the PPS) for the Crown

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Before: Keegan LCJ, Treacy LJ and Fowler J

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Ex Tempore

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] We are grateful for the written arguments that we have had a chance to read before today and we have listened carefully to the oral submissions. We are, therefore, in a position to give a ruling today. I will summarise the ruling of this court.

[2] This is an appeal from conviction after a trial before His Honour Judge Kerr KC ("the judge") sitting as a judge alone on 6 July 2023 with his written reasons provided thereafter on 18 July 2023. The appellant was convicted of two charges, namely possession of a firearm or ammunition in suspicious circumstances contrary to Article 64 of the Firearms (Northern Ireland) Order 2004, and possession of a firearm other than a handgun without a firearm certificate, contrary to Article 3(1)(b) of the same 2004 Order. The appellant was thereafter sentenced to nine months' imprisonment which he has now served. His co-accused Shane Stevenson pleaded guilty to a range of similar and additional offences and received a sentence of 16 months' imprisonment.

[3] There are two core grounds of appeal which were ably argued before us by Mr Hutton. The first is that the judge erred in failing to accede to a submission of no

case to answer at the close of the prosecution case. Second, it is submitted that the judge erred in ultimately convicting the appellant. Both grounds it is said, are evidenced by failings in the judgment as to the judge's assessment of core facts and an alleged failure to assess matters pointing away from guilt.

Background facts

[4] The background facts in this case are not contentious as Mr Hutton has stated at the outset. These are summarised at para [3] of the appellant's skeleton argument as follows:

> "The broad allegation which was not contested related to the fact that police stopped the appellant's motor vehicle, a works van, used in his painting and decorating trade, on the night of 21 February 2018. Having stopped and searched it located a black bin bag in the passenger footwell close to where Stevenson was seated containing further black bin bags and within those were 22 oiled and rusty empty gun magazines suitable for use with an AK47 type rifle. Having arrested the pair their homes were searched. In Stevenson's home there were found handwritten entries written on cigarette type paper secreted in the bottom of a thermos type flask which contained vehicle details associated with a PSNI officer and details of a vehicle attending Lurgan Police Station. Other incriminating items were found. No incriminating items were found in McKerr's house."

[5] In addition, the defence statement which is set out at para [4] of Mr Hutton's skeleton argument refers to matters which were put in play by the defence. In summary, at para 4(a) of the defence statement the appellant accepts that on the date in question at 21:06 hours or thereabouts police stopped the white Peugeot van in Lurgan. The defendant accepts that this vehicle is his works van. The appellant accepts that he and Shane Stevenson were the occupants of the van at this time, the appellant being the driver and Shane Stevenson in the front passenger seat. A point is raised at (b) of the defence statement that the appellant's works van contains a separate driver's cab which is sealed off from the rear compartment of the van. The locks to the rear compartment work and that compartment can be locked and sealed. The locks to the driver's cab do not work and the appellant cannot secure the driver's cab. This was the position with the van on 21 February 2018 and remains the position today.

[6] Point (d) in the defence statement also reads:

> "The [appellant] does not dispute the police case that a black bag containing multiple other black bags which

> ultimately contained approximately 22 empty rifle magazines were located by police in the front passenger footwell area of the works van."

[7] Point (f) reads that the appellant was not in possession of the contents of the black bags allegedly recovered by police. The appellant was not in possession, in that possession requires actual or potential physical control with knowledge of the nature of what is being kept or controlled and that it is voluntary. The appellant denies voluntariness control and knowledge.

[8] The defence statement from (g) to (k) goes on to set out the appellant's position in broad terms. There the appellant reiterates that he is self-employed as a painter and decorator. At the time of this offending, he was working on a site. He travelled to work in his works van and returned home that day. In the evening he drove his son to a local boxing club, the appellant then said that after dropping his son he went to Shane Stevenson's home to collect him and to take him to a location in Annsborough which was the site of a housing development.

[9] The gravamen of the defence position is perhaps found in (i) which reads:

> "The reason for going there is that Stevenson wanted approximately 15 building blocks or breeze blocks to serve as the foundation for a garden shed he was intending to install. He had previously asked McKerr if these could be accessed from the building site and McKerr had cleared this with the site foreman. They were therefore going to collect the blocks."

[10] The appellant underwent three interviews between 22 February 2018 into 23 February 2018. There is a helpful summary of the interviews in the trial bundle. From that we take as follows: he made no comment at the first interview. At the second interview when the thrust of the officers' statements was put and he was asked about the magazines that were found, he made no reply. At the third interview on 23 February 2018 when the evidence was put to him the appellant simply said, "I know nothing about the packages in my van."

[11] The appellant pleaded not guilty to the charges, however, shortly before trial the co-accused Stevenson, pleaded guilty to all charges against him save that alleging possession of a firearm or ammunition with intent. That plea was accepted by the prosecution and the case then proceeded against the appellant before the judge. Evidence was called from police and expert witnesses.

[12] We have had the benefit of seeing the transcript of this evidence. We can see that the witnesses were questioned by the prosecution and cross-examined by Mr Hutton. The appellant did not give evidence at the trial. Prior to that decision he

was, we have noted, appropriately warned by the judge that an adverse inference could be drawn if he chose not to give evidence.

The judge's ruling

[13] Having considered the background facts, we turn to the rulings of the judge. The judge dismissed the submission of a no case to answer on 20 June 2023 and said he would deliver reasons later. He then did so in the written ruling. Having examined that ruling, we note that the judge recounts the evidence he heard from the police witnesses who stopped the van and thereafter examined the van. Particularly, he references A35 who was one of the first police witnesses at the scene. A35 said that he observed black bin bags in the passenger footwell of the appellant's van which when examined contained the magazines. The judge records cross-examination by Mr Hutton after which the witness maintained that the bin bags were not beneath the passenger seat but in the footwell.

[14] The judge then recounts the evidence from B27, who is another police officer who attended the scene. This witness confirmed that the bags were in a footwell. This witness also referenced the appellant's phone being found in the van. Further evidence is summarised from forensic and other expert witnesses which we need not recount as it is uncontentious. The judge refers to the fact that the breeze blocks were photographed in the back of the van and the suggestion in evidence that this tallied with messages between the appellant and the co-accused.

[15] At para [27] of his ruling the judge explains why he refused the application of no case to answer. Then he summarises the overall case. He says that it is a circumstantial case and from para [23] on records his overall reasons.

[16] As part of his conclusion the judge points out that the primary facts were unchallenged. He records his acceptance of the prosecution case that the bags with magazines were in the footwell having heard all of the evidence. He records his rejection of some prosecution evidence regarding paraffin and diesel and DNA on a glove. He refers to messages between the appellant and the co-accused about moving breeze blocks which was proffered as an innocent explanation for the journey by the appellant. He accepted that this was not probative of guilt. He referred to the interviews.

[17] The judge clearly considered the ingredients required to satisfy the offence of possession at para [40] of his judgment. He refers to the silence of the appellant in terms of not giving evidence. He makes his core findings at paras [43]-[45] of the judgment. Ultimately, he was satisfied to the criminal standard that he should convict the appellant of the possession offence.

Consideration

[18] The legal principles which are to be applied are not contentious. They are summarised in a helpful section of the judgment at para [24]. There the judge refers to Mr Hutton's legal submissions and says:

> "Mr Hutton further referred to the case of *R v Murphy, Lillis and Burns* which is a 1971 case where the court, inter alia, set out the test for possession. In the judgment Lord MacDermott stated at page 199 that possession "connotes in our opinion voluntary possession by actual or potential physical control with knowledge of the nature of what is kept or controlled. This definition was affirmed by the Court of Appeal in Northern Ireland in *McKenzie*, which is 2005 case."

[19] The case of *R v McKenzie* [2005] NICA 7 considered the elements required for possession of a firearm in Northern Ireland in terms at paras [22] and [24]-[25] as follows.

> "The prosecution has to prove that the appellants had in his actual or potential physical control the prohibited weapon, voluntarily assented to such control and had knowledge of its nature."

> "In many cases the accused will be charged with possession of an article which is concealed, and the prosecution may not be able to prove that he knew what he was keeping or had under his control. The tribunal of fact may be able to infer that he assented to keeping or controlling it, knowing or being wilfully blind as to its nature."

[20] In addition, the judge reminded himself of the circumstantial nature of this case. As such Mr Hutton rightly referred us to the case of *R v McGranaghan* [2022] NICC 32 and *R v Carney* [2015] NICA 27 where the law in this area is discussed. At para [98] of *McGranaghan*, Mr Justice Fowler sets out the need in cases of this nature to weigh and scrutinise evidence carefully to look not just at evidence pointing to guilt but evidence which points away from a defendant having committed an offence. Reference is also made, and we refer again, to the case of *McKenzie* which reiterates the law in this area.

[21] In addition, in relation to legal principles, as this was a non-jury trial, Mr Russell has properly referenced the case of *R v Courtney* [2007] NICA 6. This is helpful authority as to the test to be applied when an application is made at the end of the prosecution case in a non-jury trial. The question to be asked is framed as

"whether [the judge] is convinced that there are no circumstances in which he could properly convict." There is no issue taken with any of these legal principles.

[22] In analysing the arguments the context of this case is important. As we have said, the primary facts as to recovery of the magazines in the bags in the appellant's van were not disputed. The prosecution, therefore, alleged that a proper inference could be drawn that both accused were jointly in possession and had knowledge and control of the magazines which were in the bags.

[23] Given the uncontentious primary facts it is hard, in our view, to see how the judge fell into error in refusing the submission of no case to answer. We consider that there was sufficient evidence to allow the case to proceed past the prosecution test and that the judge was best placed to assess this having heard and seen the evidence. The matters alleged by the appellant as pointing away from guilt were not, in our view, of such moment to prevent a case proceeding, that is the movements of the appellant beforehand to collect breeze blocks, the phone issue and the locking mechanism. This is all ultimately because the co-accused accepted possession at the outset and the other evidence as to the position of the bags in the van. We reject the ground of appeal based upon the refusal of no case to answer.

[24] Thereafter we consider that the judge was entitled to draw an adverse inference against the appellant for failing to give evidence as to his knowledge of the magazines which were found in his van. In addition, to our mind, the judgment read as a whole captures all of the core elements of this case. We see no merit in the judge's alleged misunderstanding of *R v Whelan* [1972] NI 153 which was a case where convictions were quashed. because, ultimately, he said this was not a *Whelan* type factual scenario. We think that the judge was entitled, having heard the evidence, to make a factual finding that the bags were found in the footwell of the van. Mr Hutton's cross-examination of one police witness was mentioned by the judge. In addition, we are attracted to Mr Russell's argument that looking at the transcript as a whole there is an internal inconsistency in that witness's evidence, and, in addition, two other police witnesses were very clear about where the bags were found.

[25] The judge could perhaps have been clearer in his overall analysis of this core issue regarding the position of the bags in the van. However, the fact that with hindsight it is thought that better reasoning could be provided is not fatal to a first instance decision. That is because it is our clear view that there was more than enough evidence from the transcripts upon which the judge could reach the factual finding which he ultimately did. This is not a finding which we would interfere with.

[26] The judge does also reference factors in favour of the appellant. Particularly, he references in his judgment the account of collecting breeze blocks and the locking mechanism. He does not, we agree, mention the phone issue. However, we do not find that argument particularly convincing in the overall circumstances of this case.

In fact, the background circumstances do not go very far, if anywhere, to explaining the appellant's case that he did not have any knowledge of the bags with the magazines contained within them. Put simply, if this was a good Samaritan situation in which an innocent errand backfired and led to criminal charges, the appellant could have given evidence as to his position and did not do so. The judge was therefore entitled, to draw an adverse inference.

[27] We agree with the judge's analysis that the legal ingredients were met to establish the possession offence. The presence of the bag, the size and nature of the contents, the position in the front of the van in the footwell, not in the rear of the van, presented a strong prima facie case. The appellant was aware and assented to them. In these circumstances, it is reasonable to expect an explanation. It is also entirely reasonable for the judge to say, as he did in his judgment, that there is no sensible explanation provided.

Conclusion

[28] In conclusion, we return to the fact that the judge heard all of the evidence in this case, considered it, applied the law, which was uncontentious, and reached factual conclusions which we consider he was entitled to reach.

[29] Accordingly, in all of the circumstances this appeal must fail. We dismiss the appeal.