Neutral Citation Number: [2020] EWCA Crim 1266

Case No: 202001282 B1
& 202001379 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT TEESSIDE HHJ CROWSON
& CROWN COURT AT AYLESBURY HHJ TULK
T20197344, T20197386 & T20187056

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2020

Before :

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

- -

Between :

Simon Paul FLINT	**1st Appellant**
Anthony Michael HOLMES	**2nd Appellant**
-and-	
REGINA	**Respondent**

- -
- -

Mr Mark Styles (instructed by **Representation Order**) for the **1st Appellant**
Mr David Smith (instructed by **Phillips Osborne Solicitors**) for the **2nd Appellant**
Mr Louis Mably QC (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates : 22nd July 2020

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Approved Judgment

Lord Justice Fulford :

The issue

1. These two cases involved the possession of explosive substances for the suggested object of experimentation and self-education/curiosity. The applicants were convicted before the decision of the Supreme Court in *R v Copeland* [2020] UKSC 8; [2020] 2 Cr App R 4. The common issue is whether this court should grant their applications for exceptional leave to appeal out of time, bearing in mind the majority decision in *Copeland*. We have outlined the circumstances and the arguments in each case before discussing their respective merits. At the end of the judgment we have made a number of observations about the potential difficulties in establishing the defence of lawful object in cases involving the possession of explosive substances in this general context.

Anthony Holmes

2. On 13 December 2018 in the Crown Court at Aylesbury before Judge Tulk and a jury, the applicant Anthony Holmes (who is now aged 49) was convicted of five counts of having an explosive substance, contrary to section 4 of the Explosive Substances Act 1883 ("ESA") (counts 3, 4, 5, 6 and 7) and he was sentenced to 5 years' imprisonment on each count to be served concurrently.

3. His application for an extension of 472 days for leave to appeal against his conviction has been referred to the Full Court by the Registrar of Criminal Appeals. As set out in [1] above, exceptional leave to appeal against conviction out of time is sought as a result of the recent decision of the Supreme Court in the case of *Copeland*. As developed below, it is submitted that the applicant will suffer substantial injustice if leave is not granted. The jury were directed that as a matter of law, failure to hold an appropriate licence meant that the applicant could not have had a lawful object in his possession of the substances. It is submitted that the effect of the legal direction was to remove a crucial element of the applicant's defence.

4. On 25 June 2016 the applicant made contact with the police to report a suspected burglary at his home address in Burnham. It transpired that no burglary had occurred. However, the police officers noticed a number of different chemicals whilst they were at the premises. As a consequence, a search warrant was obtained and Crime Scene Investigators uncovered a large cache of chemicals and laboratory equipment, together with explosive substances which included primary high explosives. Amongst these were black

powder (gunpowder) (count 3); Hexamethylene Triperoxide Diamine ("HMTD") (count 4); Triacetone Triperoxide ("TATP") (count 5); Nitrocellulose (gun cotton) (count 6); and various fuses (count 7).

5. In addition, the police discovered potassium nitrate, potassium permanganate, sulphuric acid, acetylsalicylic acid, hexamine boric acid, calcium carbide, acetone, nitric acid, hydrogen peroxide and ammonia, along with the remains of improvised explosive devices

6. The Crown relied on a forensic explosives expert, Lorna Philp, who gave evidence about the items covered by the counts on the indictment (see [4]). The judge provided the jury with a summary of the materials which had been discovered. Black powder/gunpowder (a combination of potassium nitrate, charcoal and sulphur) (count 3), is commonly used in fireworks. HMTD (count 4) is an extremely sensitive primary high explosive, which has no commercial use in powder form. It is used in liquid form in commercial detonators. There were sufficient chemical ingredients at the property to manufacture 195 – 270 grams of HMTD. TATP (count 5) is of such instability that it has no commercial uses within the mainstream explosives industry. There were sufficient chemical ingredients at the property to manufacture 205 – 290 grams of TATP. The HMTD and TATP must have been manufactured by someone as they are not commonly available in powder format because of their instability. Nitrocellulose (count 6), otherwise known as gun cotton, is commonly used in firearms as a propellant for ammunition. The fuses (count 7) could be used to explode a large quantity of explosives.

7. The applicant had conducted a number of internet searches relating to explosives which included visiting sites for the Anarchist's Cookbook, Pitric Acid Synthesis and 'making plastic explosives from bleach'. A number of video recordings in the applicant's possession showed him igniting explosives which he had manufactured in his kitchen, garage and garden.

8. The police considered the exchanges on social media between the applicant and some of his friends. Messages from the applicant included:

    i) "I'm nitrating some fine cotton strips […] Bit risky on hob but I don't mind a little excitement. [….] Should be halfway between plastic and powder If u hear an extra-large firework. It's probably Burnham. Am a little concerned with acid fumes."

    ii) "Rosemary's vehicle will be my next big bang. Working on remote electronic detonation."

iii) "Made some weird shit today, Powdered metals and stuff explodes or catches fire in contact with water."

iv) "Made some perchlorate yesterday. Watch this charred space."

v) "Syllabus will not be anything like what part of chemistry I'm interested in. It's kind of untaught and certainly not allowed in a uni environment I fear. Only end up thieving all their glassware for home products!"

vi) "If I'm going to prison might as well make it worthwhile. Working on remote electronic detonation...A shaped powder charge of a mere 100g will be plenty to make a mess of strawberry jam and twiste[d] smoking metal and glass. Charge needs to b replaced accurately under floor pan of driver's side." (This was apparently a reference to his hostility towards Rosemary Alexander.)

vii) "Quit scared but not certain. Don't wanna move it...too scared to test...2 greenhouse glass windows gone. I'm deaf. Paving slab shattered."

viii) "holy shit. I'm not making any more. scared witless. Proper detonation."

ix) "I got a phone call from a neighbour asking if I'd heard any loud explosions. She has had the gas board out today."

x) "Its a risky pastime. Wouldn't suggest it as a safe hobby."

xi) "There's a theoretical 380ml. probably get 65% of that. still enough to demolish part of the house I guess."

9. Two neighbours had heard bangs of varying volume coming from the applicant's house over the preceding months. One of these was sufficiently loud that it made someone in the vicinity jump. One neighbour kept a log between 14 and 23 June 2016, in which he recorded nine such incidents. His concern was such that he contacted the police. However, another of the neighbours did not consider this activity presented any danger and concluded somebody was messing around.

10. The applicant was interviewed on three occasions. The first interview was on the day of the search, 25 June 2016. The applicant told the police that the items they had found were all used as cleaning products or for other domestic purposes; he denied mixing any of the chemicals, save when making gun cotton; and he said he was unaware that the compounds of the chemicals had been mixed in a way which would result in explosives. The second interview was on 26 June 2016, when the applicant again denied making explosives and he said he needed strong bleach for cleaning. He claimed the loud bangs heard by his neighbours were firecrackers purchased from Amazon. The third interview was on 7 March 2017, almost 10 months later. The applicant was asked about the expert findings and he was shown a selection of the videos. He said he did not know if he was featured in the footage, given the person's face was not visible and he did not recognise the voice. He admitted in due course that he was to be seen in one of the videos but said he had been making white chocolate. He did not deny taking the firecrackers apart, and said he did things of this kind to amuse himself rather than to make objects "go bang". He did not recognise the remains of one of the improvised explosive devices that had been found. He said it was irrelevant where the black powder came from. He knew nothing about the HMTD. He suggested, "If I'm not allowed to try to educate myself around chemicals, it must be a police state we live in".

11. At trial, there was no dispute that he knew the relevant items were explosive substances which were in his possession or under his control. It was the prosecution case at trial that the applicant did not have these items for a 'lawful object'.

12. The defence case was that the applicant had the chemicals for his own entertainment and amusement and that this amounted to a lawful object. The applicant testified as to how he used to help out at his father's factory. His father, when he passed away, left the house where the applicant lived to a friend, Rosemary Alexander. The applicant said he had sent negative messages about Rosemary when drunk late at night, albeit he described the messages as dark-humoured banter and said that they were a joke; he claimed he avoided Rosemary like the plague. The messages in [8] (ii) and (vi) about planting a bomb under Rosemary's car were intended as humour and the prosecution had taken them out of context. He said that he had acquired most of the chemicals via the online retailer, Amazon, although there were small quantities of some substances which had been in the house for many years. He indicated he manufactured the black powder and made "little bangs" with it. He had put the powder in a banger and used a fuse to make a firework; one of the videos showed him igniting an item of this type. He accepted that the videos showed him causing explosions and lighting the gun cotton. He did not see it as presenting a danger to anyone apart from himself, and described it as, "Just

morbid curiosity to entertain myself". He thought he would be the only person who was likely to be harmed. He explained that he had manufactured the HMTD and TATP and the method used. He made the HMTD and TATP for the same reason as the black powder (*viz.* to make a banger in the garden). He went on the internet on a daily basis for information and had read various sections of The Anarchist's Cookbook. He had no specific intention in his mind as to what he was going to do with all the items and did not consider he was doing anything wrong. As to the messages, they were the late night talk of "sad old men, sitting there at 3am having drunk your wine". His activities were, therefore, the result of a morbid curiosity and provided entertainment to broaden his knowledge of what made the world tick, and enabled him to avoid sitting around drinking all day. He could not remember if he had lied in his police interview.

13. With the agreement of counsel, the sole issue for the jury was whether the applicant had explosive substances in circumstances such as to give rise to a reasonable suspicion that he did not have them for a lawful object. The judge left this issue to the jury as follows, in part responding to a question she received from them during the summing up:

> "The elements of the offence which the prosecution must prove, so that you are sure, are, first of all, that the substance specified in each of those five charges was in the possession or under the control of Anthony Holmes, and that he knew that the substance was in his possession or under his control. That the substance concerned was an explosive substance, and that he knew that it was an explosive substance. And, finally, that the circumstances in which the substance was in his possession or under his control, were such as to give rise to a reasonable suspicion that he did not have it for a lawful object. Explosive substance includes any materials for making any explosive substance; any apparatus, machine, implement or materials used or intended to be used, or adapted for causing or aiding in causing – used or adapted for causing or aiding in causing, any explosion in or with any explosive substance, and any part of such, any such, apparatus, machine or implement. It is a bit of a mouthful, but all you need to know, is that there is no dispute that in each of the five cases, the item concerned – the substance concerned – was in the possession or under the control of the defendant.

Neither is there any dispute that each substance is in fact an explosive substance within that definition. There is no dispute that the defendant both knew that the substances were in his possession or under his control, and that they were explosive substances. And, therefore, the only question which you must decide, is whether the circumstances in which they were in his possession or under his control, were such as to give to rise to a reasonable suspicion that he did not have them for a lawful object. You have seen the photographs of all the chemicals that were found at the house and the various positions in which they were found. Do you think it would be reasonable for somebody walking into that house and seeing all those chemicals, to suspect that he did not have them for a lawful object or a purpose? It is not a requirement of the offence that the prosecution prove that he did not have a lawful purpose for possessing them, merely that the circumstances were such as to give rise to a reasonable suspicion that he did not.

Now, if you are sure of all those elements, there is an available defence to Mr Holmes. So, even if the prosecution made you sure of the elements of the offence, Mr Holmes will not be guilty if he can show you that he, in fact, did have the substance in his possession or under his control for a lawful object. And, unlike the prosecution, he would not need to make you sure that he had it for a lawful object. He only needs to persuade you on the balance of probabilities. In other words, you just need to find that it is more probable that he had it for a lawful object, than not.

Now, there are some regulations that cover explosives, as you may anticipate - the Explosive Regulations 2014 – and they make it unlawful to acquire or keep explosives without a valid certificate, and to manufacture explosives - in the circumstances in which Mr Holmes admits that he manufactured them – without holding a licence and complying with the conditions of that licence. The fact that

> Mr Holmes did not know or may not have known that he required a certificate or a licence, does not matter. Ignorance of the law is no defence – that is something you might have heard said before. The explanation which Mr Holmes has given for making and keeping the explosive, therefore, is not capable in law of amounting to a lawful object.
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> […]
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> (Following a question from the jury – "Is making fireworks to keep yourself amused a legal reason?" – the judge gave a further direction:)
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> Just to go back to the question that I have just had from the jury, is making fireworks to keep yourself amused, a legal reason? The answer to that is no, unless you have got – as I said in the legal directions – if you want to manufacture fireworks for any reason, unless you are doing so under laboratory conditions – there is an exemption in the Explosives Regulations 2014, which allows you to manufacture explosives for the purpose of laboratory analysis, testing, demonstration or experimentation. So, in other words, under controlled conditions. If you think about it, logically, the purpose of those regulations is to make sure that people who are dealing with fireworks – dealing with explosives in any circumstances and manufacturing explosives, are doing so under safe and controlled conditions. So, if you are in a laboratory and you are making a limited amount of explosives, then you do not need a licence, but in order to make explosives in your own home, you would have to apply for a licence and the people who issue the licences would want to be sure that you were a fit and proper person to be doing it, and they 'd also want to come and have a look at your premises to make sure that the premises were safe for you to be doing it in. And, if you have not gone through that process and you have not got that licence, then it is not lawful for you to be doing it.

14. Section 4(1) ESA provides:

> "Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of an offence."

15. The regulations to which the judge referred are the Explosives Regulations 2014 (SI 2014/1638). They do not prohibit making and keeping explosives for recreational purposes, but, by way of summary, they require that any person doing so must obtain a licence. Making or keeping explosive substances without a licence constitutes a breach of the Regulations, and an offence. The applicant conceded he had not complied with these regulations, in that he did not hold a licence at the relevant time, or at all.

16. In the grounds of appeal and in oral argument, Mr Smith, on behalf of the applicant, advances by way of a central proposition that following the decisions of the Court of Appeal in *R v Fegan* (1984) 78 Cr App R 189 and the Supreme Court in *R v Copeland* [2020] UKSC 8, it is possible for a defendant to have a lawful object for the purposes of section 4(1) ESA notwithstanding the fact that his possession of the explosive substances in question involved the commission of relevant regulatory offences. On this basis, it is contended that the judge erred in directing the jury, as set out above, that since the regulations had been contravened, the applicant's explanation for making and keeping the explosives was incapable in law of amounting to a "lawful object". Put otherwise, it is argued that the jury should have been given the opportunity to consider the applicant's account and to reach its own conclusions as to whether he had demonstrated, on the balance of probabilities, that entertainment and amusement was his true purpose and whether on the facts this amounted to a lawful object. It is suggested, therefore, that the judge erroneously removed the applicant's defence, when there was evidence on which he could properly have been acquitted.

17. For the Crown, Mr Mably QC, first, highlights that given the time limit for an appeal against conviction has expired, the applicant is applying for exceptional leave to appeal out of time, relying on a suggested change in the law. The court is reminded that in *R v Johnson and others* [2016] EWCA Crim 1613; [2017] 1 Cr App R 12 (at [18]) it was highlighted that a change in the law does not of itself result in previously decided cases being reopened. Exceptional leave will only

be granted if the applicant can establish that a substantial injustice would otherwise result.

18. Second, Mr Mably emphasises that this application is, in any event, not dependent on the decision of the Supreme Court in *Copeland*. He submits it was clear from earlier authorities such as *Fegan* and *AG's Ref (No 2 of 1983)* that any offence committed under the Explosives Regulations did not of itself render the applicant's object in possessing the explosive substances unlawful for the purposes of section 4(1). This position was merely confirmed in *Copeland* (see [21] and [24]). Therefore, any error by the judge in Holmes's case in her direction as regards the consequence of the breach of the Explosives Regulations was clear at the time the summing up was delivered. The judge's direction was focussed on the impact on the applicant's defence of the failure to obtain a licence, thereby leading to the commission of regulatory offences. Therefore, it was entirely open to Holmes to appeal in 2018 based on the law of England and Wales at the time of his conviction.

19. Mr Mably, by way of a third submission, argues that on the undisputed facts the applicant's defence was, at best, tenuous; indeed, his admitted use of the explosive substances involved the commission of criminal offences involving people and property. In all the circumstances, it is argued that it cannot sustainably be argued that substantial injustice will be caused to the applicant if exceptional leave is refused or that the applicant's conviction is unsafe.

Simon Flint

20. On 9 December 2019, in the Crown Court at Teesside before Judge Crowson, the applicant (now aged 43) changed his plea to guilty on two offences of having an explosive substance, contrary to section 4 ESA (counts 4 and 8).

21. In addition, the applicant changed his plea to guilty to count 3, affray, and, at an earlier hearing (on 9 August 2019), he had pleaded guilty to counts 2 and 5 (both possessing a prohibited weapon), count 6 (having an offensive weapon) and count 7 (having an article with a blade or point).

22. On 16 December 2019 he was sentenced to 27 months' imprisonment on each of the explosive substance offences (counts 4 and 8), concurrent with each other but consecutive to a 3-month sentence imposed on count 3 (affray). He was sentenced to 12 months' imprisonment on counts 2 and 5; 1 month's

imprisonment on count 6; and 10 months' imprisonment on count 7, all to be served concurrently. The total sentence was 30 months' imprisonment.

23. His application for an extension of time (118 days) for leave to appeal against his conviction has been referred by the Registrar. The applicant submits he would suffer substantial injustice should leave to appeal out of time not be granted. In essence, it is argued the ambit of the defence of 'lawful object' was clarified in *Copeland* in a way that was highly relevant in this case, given it is submitted experimentation and self-education can potentially constitute a lawful object.

24. On 28 June 2019 Mr Greenwell, a man in his later years, was walking his dogs near a beauty spot in the vicinity of Bishop Auckland Rugby Club. He saw the applicant arguing with a group of youths. As he approached, the applicant raised a crossbow to his shoulder and aimed it at Mr Greenwell. Mr Greenwell retreated to his vehicle and called the police. The applicant drove away from the scene in his campervan.

25. Approximately 30 minutes later, shortly after 4pm, the police stopped the applicant, who was under the influence of cannabis. The police seized the crossbow and a number of swords. Additionally, they found a black box in the sleeping area labelled "Explosive 1". The box contained seven rocket motors, a type ordinarily used to propel amateur hobbyists' rockets. One rocket had fuse wire attached to it, and there were other ignition fuses in the box. In a separate section of the box there was a smaller case containing seven modified pen bodies and on further scientific examination one was found to contain three blank firing 8mm cartridges, a 6mm cartridge and an 8mm cartridge. There was a quantity of black low explosive powder. One of the pens had been prepared for use and was attached to the head of a crossbow bolt with tape.

26. Towards the rear of the camper van there was a second box labelled "Explosive". The contents of the box were examined by a forensic scientist. It contained a number of items relating to explosives. These included certain electrical and other components: bulbs with filaments intact, one of which had two wires soldered to its terminals; high voltage batteries; electrical block connectors; an electrical circuit board receiver; a wireless transmitter device; and a length of plastic pipe with two conductor wires which were connected, via holes drilled in the side, using hexagonal threaded end caps. There was a containment vessel for explosive powder. There was also a functioning railway fog signal which contained up to 8.42 grams of low explosive powder. There were various types of ammunition, comprising a shotgun cartridge, which had been cut open to allow removal of its low explosive propellant; 16 8mm blank firing rounds, two of them emptied of propellant; 23 9mm blank firing rounds,

one of which had been emptied of propellant; a number of nail gun cartridges containing low explosive powder; and two containers with 44.8 and 3.1 grams of low explosive powder.

27. Other items found within the camper van included a crossbow bolt with tape round the head, attaching an 8mm blank firing cartridge. The cartridge had been resealed after being overfilled with propellant. There were three 8 mm firing rounds which had been duct taped and glued together. There was a further crossbow bolt which had been modified to contain a converted 8 mm blank cartridge and a firing pin. The cartridge, in turn, had been modified by the removal of the blank rounds from the plastic burst capsule, which were replaced by pointed metal projectiles. As set out above, a number of offensive weapons were found in addition to the crossbows. Amongst these there were 85 knives, 29 lock knives, 6 modified crossbow bolts with Stanley knife blades inserted in them; 3 swords; and credit card knife, with a concealed blade.

28. The applicant was interviewed. He told the officers that he had a container lock-up on Dockside Road in Middlesbrough where he stored items. When asked what they would find there, he disclosed that there were precursor chemicals that he had used in previous attempts to make gunpowder inside a similar box to those recovered from the camper van and that the gunpowder was used to attempt to propel his skateboard. He told the police that inside the case was a metal tube that he was going to turn into a rocket, but he never got around to doing it. He then said "That's probably going to look like a pipe bomb [….] I don't feel I have explained myself enough. A suitcase full of chemicals to make gunpowder, a metal tube – it looks horrendous".

29. On 30 June 2019 the lock-up was searched and a metal style suitcase was removed and examined. It contained 550 grams of charcoal powder; 500 grams of potassium nitrate; 50 grams of potassium permanganate; 500 grams of sulphur powder; a pestle and mortar containing black powder; a small metal pipe end cap which had been drilled with two holes; four further pipe end caps, two of which had four holes drilled into them for ignition fuses to pass through; and a 17cm steel pipe that had been crimped and welded at one end and the other end had a screw thread head, and the cap had been drilled with two holes. One of the officers concluded that due to its construction, the steel pipe was a casing for a pipe bomb (an improvised explosive device or "IED").

30. A second box contained a plastic pipe with threaded end caps. It contained high voltage batteries, a wireless transmitter and receiver unit, and the officer concluded that these items represented all that was required to make an IED, with the only missing item being the explosive material.

31. A number of digital communication devices were seized. On examination they were found to contain a number of videos of the applicant engaged in detonating IEDs, along with one video of the applicant igniting a rocket motor taped to the underside of a skateboard. One recording was of the applicant using an IED with a wireless transmitter to destroy an apple and another video showed the applicant using an IED to destroy a cucumber. There was a recording of the applicant firing modified crossbow bolts at a laptop which had ceased working.

32. On 17 October 2019 the applicant pleaded not guilty to both counts. On 5 November 2019 he provided a Defence Statement. He indicated that he relied on the defence of "lawful object". He maintained that he had a long-standing interest in physics and engineering, inherited from his father. He suggested he is an enthusiastic engineer who enjoys "tinkering with various and diverse projects". He had a significant amount of equipment in his possession at Dockside Road, Middlesbrough that he claimed was connected with his former metal machine business. The 8 improvised crossbow bolts were said to "make them more fun" when shooting at a wooden target. The 7 rocket motors were to create a rocket propelled skateboard. His initial efforts had been unsuccessful and he had bought some additional materials, including the chemicals, with the intention of making a more effective rocket. His possession of gunpowder and shotgun propellant was to assist in the development of a solid fuel propellant, as well as to improve the "flash" on the crossbow bolts. Any modification to one or more of the pipes was not to create IEDs but instead they were part of an improvement to the design of the rocket skateboard.

33. This Defence Statement was significantly untruthful.

34. The applicant, on 5 December 2019, appeared before the nominated trial judge, Judge Crowson, at Teeside Crown Court for a hearing to ensure the case was ready for trial. There was a discussion as to whether the applicant had a defence to the charges, and the judge focussed particularly on the decision in *R v Riding* [2009] EWCA Crim 892; [2010] 1 Cr App R (S) 7 (considered below). The judge did not give a ruling, nor did he express any concluded view.

35. Having received further advice from his counsel, Mr Styles and Ms Towers, on 9 December 2019 the applicant pleaded guilty on the following accepted basis:

> "i) The defendant accepted that he had engaged in the acquisition and modification of component parts for the construction of IEDs.

ii) The defendant had no intention to cause any damage to any property or harm to person. He accepts however that such activity, which stemmed from 'interest' and 'curiosity' cannot amount to lawful object.

iii) The use to which the devices were contemplated is demonstrated in a series of videos in which the defendant explodes pieces of fruit and damages a laptop computer through IED devices.

iv) It is accepted that the item GCR/37 has the capacity to act as a containment vessel for an IED. Again it was not to be used with intent to harm anyone and was a 'project' which has not been advanced for some 5 years."

36. It was accepted during his mitigation that the explosive substances involved an inherent risk of harm to people or property.

37. In the grounds of appeal and in oral argument, Mr Styles submits that the guilty plea was entered on the basis of the decision of the Court of Appeal in *Riding*. However, following the decision of the Supreme Court in *Copeland*, he should have been able to rely, by way of a defence to both charges, on the interest and curiosity which he expressed in his defence statement. It is contended that his explanation in this context constituted, at least potentially, a "lawful object", similar to the experimentation and self-education which was considered in *Copeland*.

38. Mr Mably argues that, even allowing for the clarification provided by the decision in *Copeland*, it had always been open to the applicant to rely on curiosity and self-experimentation as a defence. He suggests that the relevant part of the judgment in *Riding* was not expressed as a principle of law and was instead limited to the particular explosive substance in that case. Accordingly, he submits that there was no reason for the applicant to interpret the decision in *Riding* as being of general applicability. Against that background, it is contended the real complaint by the applicant is that he pleaded guilty on the basis of incorrect legal advice, and not because the law founding his conviction subsequently changed because it was in error. Mr Mably, furthermore, emphasises that the applicant accepted that the explosive substances involved a risk of harm, most particularly to the applicant but also to members of the public. We interpolate to note that at least one of the IEDs was detonated inside the lockup garage where other explosive substances were stored, thereby

creating a real risk of causing damage to people and property (*viz*. the land on which the containers stood and nearby commercial premises, along with anyone in the immediate vicinity). Mr Mably highlights that the explosive substances were stored with swords, knives and pepper spray. Some of them had been taken to a public place in a camper van, at a time when a member of the public was threatened with a crossbow. There was no credible reason why the applicant's curiosity should lead him to drive some of the explosive substances around in a camper van, and the applicant was detained in a public place when intoxicated and in possession of these substances. The explosive bolts were compatible for use with a crossbow. Finally, Mr Mably relies on the significant and admitted lie in the defence statement, namely that the applicant had not been making IEDs. In all the circumstances, it is suggested that the applicant, on this application for exceptional leave to appeal out of time, has failed to demonstrate that a substantial injustice would be done if leave is not granted. The court is reminded this is a high threshold and in determining whether it has been met, the court will "primarily and ordinarily" have regard to the strength of the case advanced and whether the suggested change in the law would, in fact, have made a difference. It is argued by the Crown that on these facts it is highly unlikely that the applicant would have been acquitted.

Discussion

Holmes

39. The applicant is correct to submit that the judge should not have directed the jury that the breach of the Explosives Regulations was determinative of the issue as to whether, on a balance of probabilities, he had a lawful object. However, Mr Mably is equally correct when he observes that the erroneous nature of this direction was clear on the jurisprudence at the time of the trial. This was amply demonstrated, for instance, in *Fegan* (judgment reported in 1984). In that case, the appellant had a firearm in his possession without a permit or other authority as required by the relevant legislation, yet the court accepted that did not lead to the consequence that it could not be possessed at the same time for a lawful object. As was highlighted, the absence of a certificate, permit or other authority may well be evidence of whether there was a lawful object, but its absence was not necessarily incompatible with the firearm being possessed for a lawful object. On the facts of that case, the court concluded that possession of a firearm for the purpose of protecting the possessor, his wife or family from acts of violence may constitute possession for a lawful object. It was stressed that the danger must be reasonably imminent and of a nature that could not be reasonably met by more pacific means. The lawful object in that particular context fell, therefore, within a "strictly limited category", one that will not provide a justification for going beyond what the

law permits for meeting the situation of danger. (See also in this regard the *Attorney General's Reference (No 2 of 1983)* (1984) 78 Cr App R 183 at 188: the fact the commission of other offences was unavoidable in the making and possessing of the explosive substance did not result in any of those offences becoming one of the accused's objects for the purposes of section 4(1)).

40. In consequence, the incorrect direction the judge gave before and after the jury's question was apparent at the time of the trial (*viz.* the instruction that since the applicant had not gone through that process of applying for a licence, his object could not be lawful). As a result, the ordinary test of whether the conviction is safe applies, and the court, if relevant, will need additionally to consider whether substantial grounds have been provided for the period of the delay. In this regard, it is important to note that the test to be applied in cases relating to a change in the law is different from that otherwise applied in the Court of Appeal (Criminal Division). As was set out by this court in *Johnson*:

> "18. In our view […] the fact that there has been a change in the law brought about by correcting [a] wrong turning […] is plainly, in itself, insufficient. […] a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re- opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important.
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> […]
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> 21. In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of

> force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice.
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> […]
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> 23. […] the task of the court is first to determine whether there may have been a substantial injustice which involves the wider considerations to which we have referred. Having said that, if the threshold required to justify exceptional leave to appeal is reached, it is likely to be difficult to conclude that the conviction remains safe."

(See also *R v Towers and Hawkes* [2019] EWCA Crim 198 in this context.)

41. Accordingly, the questions for this court are whether Holmes' convictions are safe on the five counts, and (if relevant) whether there are substantial grounds to justify the notable delay (472 days).

42. We are unhesitatingly of the view that the conviction is safe. If the correct directions had been given to the jury on the issue of lawful object, we are confident the applicant would have been unable to make out the defence on a balance of probabilities. In reaching that conclusion it has been necessary to consider the law as explained in *Copeland.* This was another explosive substances case in which the majority in the Supreme Court held that the accused did not have to identify precisely how the explosive was to be used, but instead he or she needed to identify a relatively general object to which the explosive substance was to be put, it being within his or her reasonable contemplation that the explosive substance might be required for that purpose and could lawfully be used for that purpose. The majority determined that experimentation and self-education, including to satisfy one's curiosity in relation to the subject of investigation, are lawful objects, applying that approach ([33]).

43. On a particular aspect of the issue of lawfulness, the Supreme Court was unanimously of the view, as expressed by Lord Sales, that:

> "29. If an accused does identify a specific object for which he made the substance or had it in his possession/control, which is lawful in the requisite sense, issue will be joined on that at trial. The prosecution may seek to show that this was not in fact his object, or that it was not his sole object and that his object, as correctly understood, included an unlawful element. For example, as indicated in *Fegan* 's case, if the accused had not been put in fear of a reasonably imminent risk of serious physical harm such as might be capable of providing a justification for use of the pistol, there would not be a sufficient connection between his possession of the pistol and any use of it in his reasonable contemplation which could be lawful. In my view, it would also be open to the prosecution to meet the defence under limb (2) by seeking to show that pursuit of the object specified by the accused, although the object might be lawful in a general sense, would involve such obvious risk to other people or their property from use of the explosive substance that the inference should be drawn that the object of the accused was mixed, and not wholly lawful in the sense indicated in *Fegan* 's case. If the accused knew that his proposed use of the explosive substance in his possession would injure others or cause damage to their property or was reckless regarding the risk of this, the ostensibly lawful object identified by him would be tainted by the unlawfulness inherent in his pursuit of that object. Typically, these would be matters to be explored at trial."

44. Lord Lloyd-Jones and Lord Hamblen, at paragraph 55, concurred with the majority when they observed:

> " […] In this case, for example, it was apparently envisaged that experimentation would take the form of detonations of the explosives in the defendant's back garden. (It is the prosecution case that over the months prior to his arrest the defendant had made explosive substances with other chemicals on approximately six or seven occasions, had detonated or had attempted to detonate those explosive substances in his back garden by means either of homemade initiators made from fairy lights filled with firework powder or by means of a mobile telephone, and had made video recordings of these detonations or attempted detonations on his mobile telephone.) Such detonations involve an

> obvious risk of causing injury and damage to property and causing a public nuisance. […]"

45. Holmes's possession of these explosives was not simply for experimentation and self-education, including to satisfy his curiosity. To the extent he has provided a truthful explanation, on any view his possession of the explosive substances was, in part, for an unlawful objective. The explosions constituted a continuing public nuisance given the evidence of the widespread nature of the noise, and he had destroyed property at Rosemary Alexander's house (two broken windows and a paving stone). These are criminal offences. It follows that "the ostensibly lawful object identified by him (was) tainted by the unlawfulness inherent in his pursuit of that object" (per Lord Sales at [29]). On these undisputed facts, the applicant would have been unable properly to establish his defence. Accordingly, the conviction is safe and the application for special leave is refused.

Flint

46. The first issue to be addressed for this applicant is Mr Mably's contention that notwithstanding the clarification provided by the Supreme Court in *Copeland*, curiosity and self-experimentation have always been available as a defence. He argues – based on the decision of the majority of the Supreme Court in *Copeland* – that *Riding* did not establish as a principle of law that this was not a defence, and instead the relevant part of the decision turned on the particular facts in that case.

47. In these circumstances, it is necessary to consider what this court decided in *Riding* and how it described its conclusions. In that case the defendant made a pipe bomb in which he followed instructions on the internet. His defence was that he had simply been curious and was experimenting as to whether he could construct this device. As was pointed out by the trial judge and this court, he did not use an inert material such as sand, which would equally have demonstrated whether or not he was capable of constructing it. Hughes LJ VP observed, in dismissing his contention that he had a lawful object and that a lawful object is the absence of any object which is criminal:

> "9. That is an argument which […] we are satisfied cannot succeed. We agree of course that it is the place of the criminal law to operate proscriptively rather than permissively. In this case Parliament has made a

> proscriptive order. It has proscribed by section 4 the making, and for that matter also the possession, of explosives in circumstances which give rise to the reasonable suspicion that there is no lawful object. It has then provided that the offence is not committed if there is in fact a lawful object. That is an example of a proscriptive provision of the criminal law.
>
> 10. The short point in the case is whether it is correct that a lawful object is simply the absence of criminal purpose. We are satisfied that that is not what the Act says. The Act requires that if you are found in possession or have made an explosive substance in circumstances in which there is a reasonable suspicion that there is no lawful object, it is an offence unless there was in fact some affirmative object which was lawful. That is, as it seems to us, an entirely unsurprising provision for a statute to make, given the enormous danger of explosive substances generally.
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> […]
>
> 12. […] Mere curiosity simply could not be a lawful object in the making of a lethal pipe bomb. It would indeed be very remarkable indeed if it could. Mr West was frank enough to accept that if the statute had used the words "good reason" instead of lawful object the defendant could not have established that he had good reason for making the bomb. We are entirely satisfied that he did not have a lawful object for it either.

48. In the light of that seemingly clear indication, it is useful to consider the approach taken by the Court of Appeal in *Copeland* in this context. Sir Brian Leveson P set this out as follows:

> "42. […] we agree with *Riding*. We accept that a person in possession of explosives must show, on balance of probabilities, that he or she has an "affirmative" or "positive" object for possessing those explosives. We reject the proposition that an absence of unlawful purpose is the same thing as a lawful purpose. We conclude that on a proper interpretation, s. 4 requires that the defence is only made out when the person in

possession of the explosives can show that the way in which those explosives will be used is itself lawful. That means, the person must be able to show both, first, the use to which the explosives will be put and second, that such a use is lawful.

43. We come then to the applicant's case that he possessed these explosives out of curiosity, or because he wished to experiment with them. Consistent with *Riding,* we reject the proposition that curiosity or experimentation is a "lawful object". The fact that a person is curious or wishes to experiment may be an explanation for why that person has accumulated the explosives; but it says nothing about his continued possession of them and the use to which they will be put. Indeed, it would be perfectly possible, if unattractive, to argue that explosives were detonated, with potential loss to life and limb, out of mere curiosity or in order to experiment. These are not objects in and of themselves; they are not uses to which explosives may be put; they are just explanations for past actions."

49. The Supreme Court in *Copeland* determined that the conclusion in *Riding* was correct on the facts of that case, given the defendant had not advanced as a part of his case that he had made the pipe bomb in order to see if he could make it explode and that the Vice-President's statement at [12] that "Mere curiosity simply could not be a lawful object in the making of a lethal pipe bomb" has to be read in this context ([31]). The majority determined that this statement had been taken to have wider significance by the trial judge and the Court of Appeal in *Copeland*.

50. The Supreme Court decision in *Copeland* is, self-evidently, binding authority, but we are unsurprised that the Court of Appeal in that case interpreted the remarks of Hughes LJ VP as having general application extending beyond the particular facts of *Riding*, given the seemingly unqualified statement that "Mere curiosity **simply could not be a lawful object** in the making of a lethal pipe bomb" (our emphasis). That proposition in *Riding* was not advanced in the context of the defendant's particular defence in that case, nor was there any suggestion that if his object – founded on curiosity and experimentation – had been to construct a lethal pipe bomb, that may have constituted a lawful object.

51. Accordingly, we are unpersuaded by Mr Mably's submission that it would have been apparent to the applicant that curiosity and self-experimentation has always been available as a defence. To the contrary, we consider it was understandable that the applicant interpreted the decision in *Riding* as indicating that his defence could not amount to a lawful object, particularly given the true position, as he accepted in his basis of plea, was that he had "engaged in the acquisition and modification of component parts for the construction of IEDs", an explanation which varied significantly from his defence as set out in his Defence Statement.

52. We are, however, equally unpersuaded that a substantial injustice will result if exceptional leave is not granted. The circumstances in which these explosive substances were in the possession of the applicant involved a clear risk of harm, most particularly to the applicant but also to members of the public. As already indicated, at least one of the IEDs had been detonated inside the lockup garage where other explosive substances were stored, thereby creating a real risk of damage to people and property. Some of the explosive substances had been taken wholly unnecessarily to a public place, which had nothing to do with the applicant's suggested experimentation and curiosity, and the applicant was detained in public when intoxicated and in possession of a sample of them.

53. As set out above, insofar as he relied on experimentation and self-education/curiosity, his basis of plea makes it clear that he had clearly gone far further than the object set out in his Defence Statement, namely of i) experimenting with the propellants in order to test their qualities and burn time; ii) improving on the commercially available rockets; and iii) enhancing the thrust delivered to the skateboard by developing a solid fuel propellant to use inside home-made rocket motors. As just rehearsed, he had, instead, engaged in the acquisition and modification of component parts in order to construct IEDs, in a way that posed a danger to people and property, thereby going beyond any potentially lawful object of experimentation and self-education/curiosity.

54. In conclusion, it follows that the applicant, in the way he pursued these activities, posed an obvious risk to other people and their property and his object was, on any view, clearly mixed and therefore not wholly lawful. At the very least, he was reckless regarding the risk of damage or injury, and in consequence his activities were tainted by the unlawfulness inherent in what he did. Furthermore, we emphasise and repeat the creation of the IEDs was not

in any sense a part of the suggested lawful object of "experimentation", as set out in his Defence Statement.

55. On the undisputed facts, the applicant would have been unable properly to establish his defence. The court will not grant leave unless it is demonstrated a substantial injustice will otherwise be done. We are confident there will be no substantial injustice and that his conviction, founded on his guilty plea, is safe. This application is refused.

Postscript

56. These cases vividly reveal the difficulties that defendants may face when seeking to prove that they had a lawful object, in circumstances broadly similar to the present two sets of facts. We have had the advantage of being able to consider the evidence as it emerged at trial. Explosive substances – depending always on their nature and the quantities involved – unless handled and stored responsibly and with care, self-evidently pose a potential danger to people and property. Some of them, such as HMTD and TATP, are inherently unstable; using explosive substances for experimentation rather than inert substances, particularly when detonating them, may well lead to damage to other people or their property, or cause a public nuisance; and the storage of these materials can be hazardous. 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.

57. All cases differ on their facts, but we emphasise, therefore, that given the obvious risks with using explosive substances, any experimentation involving them which gives rise to a risk of harm to other people or their property, or other unlawfulness such as causing a public nuisance, will not be capable of coming within the scope of the lawful object defence.