

'Lawful object' - Section 4(1) of the Explosive Substances Act 1883

On the 11 March 2020 the Supreme Court gave their judgment in the case of *R v Copeland* [2020] UKSC 8. This case concerned the interpretation of the Explosive Substances Act 1883 ('the Act'), section 4(1). This provides that anyone who makes or has in their possession explosive substances is liable to prosecution unless they can show it was 'for a lawful object'. Specifically, the Court considered the meaning of what constituted 'a lawful object' and the case is likely to be of some interest to those involved in counter-terrorism matters.

Background

The case concerned Mr Chez Copeland and his interest in bomb disposal. Mr Copeland has autism and an intense interest in military things. He developed an obsessive interest in bomb disposal after watching the film 'Hurt Locker'.

This drove Mr Copeland to try and understand the science behind explosives and experiment with them himself. Mr Copeland purchased chemicals online, made explosives, and detonated them in his back garden. In April 2018 a search warrant was executed at the property Mr Copeland lived at.

Homemade Hexamethylene Triperoxide Diamine (HMTD), a sensitive primary high explosive, was found in a shed and in Mr Copeland's bedroom. Mr Copeland's computer also contained manuals for making explosives and notes on making HMTD.

When Mr Copeland was interviewed, he admitted that he had made and detonated explosive substances with other chemicals over the previous months. His plan was to do the same with the HMTD.

Path to the Supreme Court

Amongst other offences, Mr Copeland was charged with two offences under s4(1) of the Act - making or possession of explosives under suspicious circumstances. In his defence statement, Mr Copeland raised the following in relation to those counts:

- '1. The circumstances do not give rise to the reasonable suspicion that the defendant had not made [the HMTD] for a lawful object; and
2. The defendant made it for a lawful object'

The 'lawful object' in this case was said to encompass interest, education, and experimentation.

There was a preparatory hearing in the Crown Court at Birmingham. On that occasion the Court determined whether the defence raised could amount to a defence in law. His Honour Judge Wall QC ruled that the proposed defence was not good in law due to the Court of Appeal decision in *R v Riding* [2009] EWCA Crim 892. The consequence of this was that a jury would

be directed accordingly and evidence about Mr Copeland's desire for experimentation and self-education would be excluded.

Therefore, Mr Copeland appealed to the Court of Appeal however the appeal was dismissed for the same reasons.

For context, the case of *R v Riding* was a Court of Appeal case which considered section 4(1) of the Act. In this case the appellant had made a pipe bomb and was convicted of a section 4(1) offence. The appellant appealed his conviction and argued that it was wrong to hold that it could not be a lawful object to make the pipe bomb for no other reason than to see whether or not he could. The thrust of the argument was that for the purposes of section 4(1) 'a lawful object is the absence of any object which is criminal'.

The Court of Appeal rejected this notion. It held that section 4(1) does not mean 'the absence of criminal purpose' but rather requires the accused to identify 'a positive object which is lawful'.

The Court of Appeal certified the following point of law of general public importance: for the purposes of section 4(1) can personal experimentation or own private education, absent some ulterior unlawful purpose, be regarded as a lawful object?

Outcome at the Supreme Court

In a majority ruling, the Court answered the question in the affirmative.

Interestingly, the Court distinguished *R v Riding* rather than overruling the case.

It was the statement that 'mere curiosity simply could not be a lawful object in the making of a lethal pipe bomb' that the Court of Appeal treated as a proposition in law when they should have treated it as a statement regarding the case-specific facts of *Riding*. Curiosity in *Riding* could have been satisfied by filling the pipe bomb with sand rather than gunpowder - this would have shown whether or not the appellant was capable of constructing a pipe bomb.

Another reason for *Riding* being distinguished could have been the fact that the pipe bomb in this case was capable of doing serious harm, whereas the HMTD that Mr Copeland had manufactured was in a small quantity that had a risk of insubstantial injury or damage.

Furthermore, the pipe-bomb in *Riding* had been made a significant time before it was subsequently found in the appellant's possession, whereas in *Copeland* the experimentation was recent and ongoing.

Furthermore, the Court found that experimentation and self-education could be lawful objects for the purposes of section 4(1) as there is nothing unlawful about them and that this is a matter of the ordinary use of language.

Practical Considerations

The Court raised and considered matters which practitioners may want to bear in mind when dealing with cases such as these.

Firstly, the Court clarified the burden and standard of proof under section 4(1) and there are two

limbs.

Limb 1: The prosecution should prove that there are circumstances which give rise to a reasonable suspicion that the making or possession of the explosive substance is not for a lawful object.

Limb 2: The burden then shifts to the defendant to show that the object or purpose for which he made the substance or had it in his possession is lawful. The standard of proof in this limb is on the balance of probabilities.

Secondly, 'mixed objects'. There may be instances where there are two objects and one of those is unlawful or 'where unlawfulness taints the potentially lawful object on which the accused seeks to rely in his defence'. For example, if an 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' (para 29). However, the judgment makes clear that these would be matters explored and evidenced at trial and for a jury to consider.

Furthermore, the Court found that the term 'lawful object' 'does not require specification of the precise way in which the substance in question will be used by the accused' (para 41). Similarly to above, it is for a jury's consideration. An absence of a precise plan as to how the substance in question is to be used in the course of self-education or experimentation might be a relevant matter to be taken into account at trial.

For defence solicitors this will give way to questions about what this means in relation to defence statements. Indeed, the respondent in *Copeland* raised that the defence statement had not given sufficient details of how Mr Copeland intended to use the HMTD in experiments. Paragraph 42 of the judgment indicates that it is not necessary for a defence statement to outline exactly how an explosive substance is intended to be used and that Mr Copeland's defence statement gave fair notice of the defence which he proposed to present at trial. However, this should be treated with some caution as the judgment also stated that this specific matter was not within the scope of the issues of the appeal.

Consequently, Mr Copeland's defence should have been allowed to be presented at trial and not ruled out at the preliminary hearing.

Curiosity vs Experimentation

The judgment creates a distinction between a person drawn to create an explosive substance because of curiosity and a person who experiments with making and detonating explosive substances. Despite its subtleties this is a distinction that practitioners should be aware of.

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