HOUSE OF LORDS

SESSION 2008–09
REPORT
[2009] UKHL 13
on appeal from:[2008] EWCA Crim 922
[2008]EWCA Crim 1161

APPELLATE COMMITTEE

R *v* G (Respondent) (on appeal from the Court of Appeal Criminal Division)
R *v* J (Respondent) on appeal from the Court of Appeal Criminal Division)

REPORT

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ON
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REPORT

from the Appellate Committee

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4 MARCH 2009

R *v* G (Respondent) (on appeal from the Court of Appeal Criminal Division)
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ORDERED TO REPORT

The Committee (Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood and Lord Mance) have met and considered the cause *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division)* and *R v J (on appeal from the Court of Appeal Criminal Division)* We have heard counsel on behalf of the appellants and respondent. The report has been prepared by Lord Rodger.

1. This is the considered opinion of the committee.

2. There are two appeals before the House which raise issues relating to the interpretation of section 58 of the Terrorism Act 2000 ("the 2000 Act"). Since some of the argument is based on a comparison between section 57 and section 58, it is convenient to begin by setting out the relevant parts of both.

3. Section 57(1)-(3) provides:

> "(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
>
> (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.
>
> (3) In proceedings for an offence under this section, if it is proved that an article –
>
> (a) was on any premises at the same time as the accused, or
>
> (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,
>
> the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it."

Subsection (4) originally provided for a maximum of 10 years imprisonment plus a fine on conviction on indictment, but this was increased to 15 years imprisonment by section 13 of the Terrorism Act 2006 ("the 2006 Act"). On summary conviction the maximum penalty is imprisonment for six months and a fine not exceeding the statutory maximum.

4. Section 58(1)-(3) provides:

> "(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, or
>
> (b) he possesses a document or record containing information of that kind.
>
> (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."

Subsection (4) provides for a maximum penalty of 10 years imprisonment plus a fine on conviction on indictment and a maximum penalty of six months imprisonment and a fine not exceeding the statutory maximum on summary conviction. Subsection (5) empowers the court, before which a person is convicted of a section 58 offence, to order the forfeiture of any document or record containing information of the kind mentioned in subsection (1).

5. Section 118(1)-(4) is important for the operation of both these sections. They provide:

> "(1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.
>
> (2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution prove s beyond reasonable doubt that it is not.
>
> (3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court -
>
> (a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or
>
> (b) may accept a fact as sufficient evidence unless a particular matter is proved.
>
> (4) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection (3)(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond a reasonable doubt."

By subsection 5(a), subsections (2) and (4) apply to sections 57 and 58 of the 2000 Act.

The Facts of G's Case

6. The first case concerns a Mr G who is awaiting trial in the Crown Court at Woolwich where he faces two counts of terrorism. The first is under section 5(1) of the 2006 Act. It alleges that between 13 April 2006 and 3 February 2007 Mr G was preparing to commit acts of terrorism. The second count, under section 58 of the 2000 Act, alleges that between 27 January 2005 and 3 February 2007 Mr G collected information of a kind that was likely to be useful to a terrorist.

7. In 2005 Mr G was sentenced, for a number of non-terrorist offences, to detention in a young offender institution for a period of three years six months. On 22 March 2006 he was released on automatic conditional licence, but on 26 March 2006 he was re-arrested under section 136 of the Mental Health Act 1983 and returned to detention. His licence was subsequently revoked. On 25 October 2006, he was transferred to an adult prison. During his time in detention, Mr G had converted to Islam.

8. In the current proceedings against Mr G, the prosecution case is that, while in custody, he collected and recorded information likely to be of use to a person committing or preparing an act of terrorism. The items which he collected include plans for making bombs, including a diagram of a pipe bomb, and various textbooks containing information relating to explosives. He made notes on how explosives could be manufactured and used. No explosives or viable explosive device or part of any explosive device were recovered from him. The Crown further alleges that Mr G drew a map of the Territorial Army Centre in Chesterfield and identified the location of the armoury there. He wrote down plans to attack the Centre and to kidnap the caretaker. Extremist material containing his observations on the waging of Jihad in Great Britain was also recovered from him.

9. The items in question were recovered during repeated searches of Mr G's cell accommodation at HMYOI Stoke Heath on 4 April and 10 August 2006, and at HMP Featherstone on 30 December 2006 and 23 January 2007.

10. Mr G was released from prison on 2 February 2007, but was immediately arrested and interviewed by police officers under caution in relation to these various items. In summary, the explanation which Mr G gave for collecting and recording the information was that he wanted to "wind up" the prison staff because they were provoking him. He said, "… so I wanted to wind them up and I know how this terrorism stuff … really gets on their nerves…". He said that he left the material in his cell so that it could be found.

11. After the second interview it became apparent to the interviewing officers that Mr G was mentally ill and was not fit to be questioned further.

12. On 7 February 2007 Mr G was diagnosed as suffering from a paranoid psychosis or schizophrenia and on 12 June he was transferred to Ashworth Hospital under the provisions of the Mental Health Act 1983.

13. In a psychiatric report dated 7 November 2007, Dr Qurashi, a consultant forensic psychiatrist, concluded that Mr G is suffering from a severe and enduring mental illness, viz paranoid schizophrenia, which had not previously been diagnosed or treated. The Crown accepts that, in Dr Qurashi's opinion, Mr G collected and recorded the information in question as a direct consequence of his illness. In his report Dr Qurashi said this:

> "In summary [G's] account of the various documents found in his cell whilst on remand was to 'wind up' prison officers. He has consistently reported that he had no intention of committing acts of terrorism. When asked why he felt the need to antagonise prison officers he believes that [they] were 'whispering' about him. This is highly likely to be a psychotic experience, namely an auditory hallucination."

14. Dr L P Chesterman prepared a further psychiatric report dated 20 March 2008 at the request of the Crown Prosecution Service. It included the following passage:

> "It would of course be a matter for a jury to determine [G's] intent. Whilst the presence of mental illness may be relevant to [G's] motivation for committing the alleged index offences, his mental illness would not have prevented him forming the necessary intent nor does Dr Qurashi express such an opinion."

15. On 18 January 2008 Calvert-Smith J ordered a preparatory hearing under the Criminal Procedure and Investigations Act 1996 to resolve whether evidence about Mr G's mental illness, and his motivations in light of it, was capable of amounting in law to a defence under section 58(3) of the 2000 Act. At the preparatory hearing on 8 February 2008, Pitchford J held that Mr G had no defence of reasonable excuse under section 58(3) and granted leave to appeal.

16. Five days later, on 13 February 2008, the Court of Appeal (Lord Phillips of Worth Matravers LCJ, Owen and Bean JJ) gave judgment in two appeals which are relevant for present purposes. In *R v Zafar* [2008] 2 WLR 1013, the Court dealt with the interpretation of section 57 of the 2000 Act, while in *R v K* [2008] 2 WLR 1026, the Court considered, first, the nature of the documents which fall within the section and, secondly, the scope of the defence of reasonable excuse under section 58(3).

17. As to the nature of the documents which fall within section 58(1), the Court said this in *R v K* [2008] 2 WLR 1026, 1031, paras 13 and 14:

> "A document or record will only fall within section 58 if it is of a kind that is likely to provide practical assistance to a person committing or preparing an act of

> terrorism. A document that simply encourages the commission of acts of terrorism does not fall within section 58.
>
> 14. The provisions of section 2 of the 2006 Act, and in particular those of section 2(5), require the jury to have regard to surrounding circumstances when deciding whether a publication is likely to be useful in the commission or preparation of acts of terrorism. Contrary to [counsel for the Crown's] submissions, we do not consider that the same is true of section 58 of the 2000 Act. The natural meaning of that section requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that calls for an explanation. Thus the section places on the person possessing it the obligation to provide a reasonable excuse. Extrinsic evidence may be adduced to explain the nature of the information. Thus had the defendant in *R v Rowe* [2007] QB 975 been charged under section 58, evidence could have been admitted as to the nature of the substitution code possessed by the defendant. What is not legitimate under section 58 is to seek to demonstrate, by reference to extrinsic evidence, that a document, innocuous on its face, is intended to be used for the purpose of committing or preparing a terrorist act."

18. The Court then went on to deal, at p 1031, para 15, with the scope of the defence of "reasonable excuse" in section 58(3):

> "As for the nature of a 'reasonable excuse', it seems to us that this is simply an explanation that the document or record is possessed for a purpose other than to assist in the commission or preparation of an act of terrorism. It matters not that that other purpose may infringe some other provision of the criminal or civil law."

19. On 2 April 2008 a differently constituted Court of Appeal (Rix LJ, Henriques J and Sir Richard Curtis) heard Mr G's appeal and allowed it, but reserved judgment. On 29 April 2008 the Court held that it was bound by the decision in *R v K* concerning the defence of reasonable excuse, and so it would be a reasonable excuse if Mr G had collected the material to wind up the officers. The court, however, certified that three questions of law of general public importance arose. On 11 June 2008 the Appellate Committee granted the Crown leave to appeal.

20. We turn now to explain the circumstances in which the Crown's appeal in Mr J's case comes before the House.

The Facts of J's Case

21. Mr J is at present in custody awaiting trial at the Crown Court sitting at Birmingham. In terms of the amended indictment, Mr J faces six counts. On the first count he is charged with possessing articles for a purpose connected with the instigation, preparation or commission of an act of terrorism, contrary to section 57(1) of the 2000 Act. The particulars of that offence are given in these terms:

> "[J], on the 15th day of December 2006, had in his possession an iPod portable digital media player containing an electronic torrent file entitled 'Military Training.torrent', a digital file (numbered 804) containing a document entitled 'How Can I Train Myself for Jihad?' and a digital file (numbered 1012) containing a document entitled '39 Ways to Serve and Participate in Jihad', a CD-ROM (identified as exhibit TAS/23, disk number 61) containing a digital file (identified as folder 14) entitled the 'Al Qa'eda Training Manual' and a Sony Ericsson mobile telephone containing a digital file containing a video recording of West Midlands Police Headquarters in circumstances which give rise to a reasonable suspicion that his possession of them was for a purpose connected with the commission, preparation or instigation of an act of terrorism."

The five other counts are of possessing records containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58 of the 2000 Act. These refer to the five items covered by the first count: the Military Training.torrent file (count 2), the digital file entitled "Al Qa'eda Training Manual" (count 3), the digital file containing a document entitled "How Can I Train Myself for Jihad?" (count 4), the digital file containing a document entitled "39 ways to Serve and Participate in Jihad" (count 5) and the digital video file containing moving images of the West Midlands Police Headquarters.

22. The prosecution case against Mr J is that, when arrested on 15 December 2006, he was in possession of a large quantity of digitally stored information, contained on his iPod digital music player, telephone, laptop computer and two collections of digital disks. A considerable quantity was of an extreme Islamist nature. Some of it was clearly of a kind likely to be useful to a terrorist in that it included the electronic "key", viz the torrent file, to a large library of bomb-making, guerrilla, poisons, chemical weapons, improvised weapons and other manuals, some with an express terrorist (as opposed to simply military) purpose, such as the Terrorist's Handbook and the disk containing the copy of the Al Qa'eda Training Manual.

23. In count 1 the prosecution case is that Mr J possessed the specified articles in circumstances which give rise to a reasonable suspicion that his possession of them was for a purpose connected with the commission, preparation or instigation of an act of terrorism. In the remaining counts the prosecution case is that Mr J had certain articles in his possession and they contained information that was of a kind likely to be useful to a person committing or preparing an act of terrorism.

24. In a defence statement dated 5 September 2007 Mr J set out the nature of his defence to each of the charges. He dealt specifically with the individual items under counts 2 to 6. So far as count 1 is concerned, he said that the presence of the files and video was not for any purpose connected with the commission, preparation or instigation of any act of terrorism held [sic] by himself or anyone else.

25. In respect of the Military Training.torrent file (count 2) Mr J said that he acquired it as a result of an internet search which he conducted in respect of military training, when speculating on alternative careers which he might pursue in the future. The search was conducted out of curiosity to learn the nature of the training he would have to undertake were he to return to his home country, the Gambia, and undertake a military career there. He went on to say that, when he downloaded the file, he was unfamiliar with the procedure for opening it and so he was never able to open it. He was therefore never aware of the exact content of the torrent file or the contents of the material to which it might afford access. For the avoidance of doubt, he denied that the file contained information likely to be useful to a terrorist, he was unaware of his possession of any information likely to be useful to a terrorist and he asserted that he had a reasonable excuse for possession of the file.

26. In respect of the digital file entitled "Al Qa'eda Training Manual" (count 3), Mr J said that on a number of occasions he purchased, or was given, material relating to Islamic religious, historic and current affairs. It was a tenet of his Islamic belief that followers were obliged to learn about their faith. The DVD was one such item and at the time of his arrest Mr J did not know its complete content and was not aware of a file entitled "Al Qa'eda Training Manual" or of its content. In this case also he stated for the avoidance of doubt that he was unaware of possessing any information likely to be useful to a terrorist and asserted he had a reasonable excuse for possessing the file.

27. So far as the digital file containing a document entitled "How Can I Train Myself for Jihad?" (count 4) is concerned, Mr J made the same kind of explanation as in relation to count 3, with the addition of a reference to a tenet of Islamic belief that all Muslims are obliged to participate in Jihad. The file was obtained pursuant to that obligation and contained material of a theological nature relating to Jihad. He repeated the same points, for the avoidance of doubt, as in respect of count 2.

28. The nature of his defence to count 5 relating to the document entitled "39 ways to Serve and Participate in Jihad" was the same as the nature of his defence to count 4.

29. In relation to count 6, he had acquired a mobile phone with a video facility. Shortly afterwards, he was travelling on a bus and decided to test the phone's capability and so activated its video function. There were no signs to indicate that videoing was prohibited in the area and, indeed, the actual images captured were immaterial to him. For the avoidance of doubt, he denied that the file contained information likely to be useful to a terrorist, he was unaware of his possession of any information likely to be useful to a terrorist, he had a reasonable excuse for the creation and possession of the video and he had no way of knowing that he was committing an offence by videoing what he captured.

30. When interviewed by the police, Mr J answered "No comment" to all questions which were put to him.

31. On 12 December 2007 Mr J pleaded not guilty to all the counts on the indictment.

32. On 1 February 2008 Mr J invited the trial judge to give an indication as to sentence. The judge agreed, but allowed an adjournment for him to give instructions in person to his solicitors and counsel as to whether or not to enter guilty pleas.

33. On 7 February 2008 Mr J pleaded guilty to counts 2, 3, 4 and 6. Counts 1 and 5 were not disposed of, but the prosecution indicated that it proposed in due course to offer no evidence on count 1 and to invite the court to order count 5 to lie on the file on the usual terms. Sentence was adjourned until 25 February.

34. In the meantime, as already explained, on 13 February, the Court of Appeal handed down its judgment in *R v K*, dealing with the defence of reasonable excuse under section 58(3). Basing himself on that decision, Mr J applied to vacate his guilty pleas on the basis that he had received erroneous legal advice as to the ambit of the section 58 offence, particularly (but not exclusively) in relation to the defence of reasonable excuse. On 25 February the judge heard the application but reserved his ruling and directed that an affidavit be filed in respect of these matters. On 10 March an affidavit made by Mr J was filed and on 19 March the judge ruled that Mr J could vacate his guilty pleas. He directed that a preparatory hearing take place; Mr J was arraigned and pleaded not guilty to each of the four counts to which he had previously pleaded guilty.

35. At the invitation of the Crown, Judge Chapman ruled on a question of law formulated in these terms, under reference to *R v K*:

> "For the purposes of the counts contrary to section 58 of the Terrorism Act 2000, in the event that the defendant raises evidentially in the trial that he had a reasonable excuse for his possession of one or more of the records of information referred to in the indictment, is it necessary for the prosecution to prove that his possession was 'for a purpose … to assist in the preparation or commission of an act of terrorism'…?"

The judge answered the question in the affirmative and refused the Crown leave to appeal. He explained his answer in this way:

> "I regard myself as bound by the decision of the Court of Appeal in *R v K* and it seems to me that the only way I can interpret that, because it is plain and simple language, is that the effect is that the Crown must prove that possession was for a purpose to assist in the preparation or commission of an act of terrorism. It is a conclusion that has resonance in common sense. Otherwise, if the Crown's argument is correct, whilst it may be possible for someone to demonstrate a reasonable excuse to (sic) possession of such items on the basis of academic or

> political research, counter-espionage, law enforcement, it certainly would not cover in the ordinary way curiosity, and it might have this consequence that people engaged in non-terrorist activities, who were in possession of articles which were likely to be useful to a person committing or preparing an act of terrorism, would be guilty of a terrorist offence. So we have the argument that a safe cracker reading his handbook on how to handle gelignite would be caught by a terrorist provision. The Court of Appeal seemed to be making it plain that a reasonable excuse for the purposes of this section of this Act encompasses not just the kind of excuse which would be a reasonable way of dealing with possession of an offensive weapon but extends to other activities which, of themselves, may infringe either criminal or civil law. The narrowing of the kind of documents caught by section 58 is no doubt designed to exclude things in ordinary circulation like maps, timetables, elementary books on chemistry, mobile phones, use of the internet, that sort of thing which might or could be of use to someone preparing to commit an act of terrorism, whether or not that was the intention. And the narrowing of the definition at paragraph 13 in the case of *R v K* seems to me not only common sense but what the Parliament must have intended."

36. The Crown's application for leave to appeal was referred for consideration by the full Court of Appeal. On 1 May 2008 the full Court (Sir Igor Judge, President of the Queen's Bench Division, Aikens and Swift JJ) granted leave to appeal against the judge's ruling, on the basis that he had erred in concluding that he was bound by the decision in *R v K*. The Court then proceeded to hear and dismiss the appeal. In essence, the Court held that, having regard to the decision of the differently constituted Court of Appeal in *R v G* two days before, by which the Court was bound, it was not open to the Crown to argue that the observations of the Court in *R v K* on the ambit of the defence of reasonable excuse in section 58(3) were not part of the ratio decidendi.

37. The Court granted a certificate in similar terms to the certificate in *R v G* and on 11 June 2008 the Appellate Committee granted leave to appeal. The three points of law of general public importance certified by the Court of Appeal are:

> a) What are the ingredients of the offence contained in section 58(1) of the Terrorism Act 2000?
>
> b) What is the scope of the defence contained in section 58(3) of the Terrorism Act 2000?
>
> c) What is the relationship between section 57 and section 58 of the Terrorism Act 2000?

38. We find it convenient to address the issues in a slightly different order. We start with the ingredients of the offence contained in section 58(1) of the 2000 Act, but leave over consideration of the defence in section 58(3). We shall then deal with the ingredients of the offence in section 57(1). These two steps pave the way for considering the relationship between the two sections. After that, we shall come to the defence in section 58(3) and, in that connection, first consider the defence in section 57(2).

The Section 58 Offence

39. As the formulation of the first point of law itself suggests, the ingredients of the offence created by section 58(1) must be found by interpreting that subsection, which creates the offence. On the one hand, it tells anyone who is interested what he is not permitted to do; on the other, it tells the prosecution what it must prove if someone is to be convicted of the offence. If the Crown proves the elements in subsection (1) beyond a reasonable doubt, then it is entitled to ask for a conviction – unless the defendant successfully raises a defence under subsection (3).

40. Putting flesh on these bones, a person can commit an offence under subsection (1) in either of two ways. First, he commits an offence if 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. There are allegations to that effect against both Mr G and Mr J. Secondly, he commits an offence if he possesses a document or record containing information of that kind. There is an allegation to that effect against Mr J.

41. Section 58 is the current embodiment of a provision which was first found in legislation applying to Northern Ireland and was later extended to Great Britain by the Criminal Justice and Public Order Act 1994. Section 57 embodies a provision with a similar history. Lord Lloyd of Berwick was asked to review the terrorism legislation and his report, *Inquiry into Legislation against Terrorism*, was published in 1996. Lord Lloyd explained the thinking behind the provision that became section 57 in paras 14.4 and 14.5 of his report:

> "14.4 The purpose of the provision is to allow action to be taken against a person who is found in possession of articles which, though perhaps commonplace in normal circumstances, are well known to be used in the manufacture of bombs. It is, of course, not the possession of the items themselves which constitutes the offence, but possession in such circumstances as to give rise to a reasonable suspicion of their connection with terrorism.
>
> 14.5 The need for the police to intervene against the terrorist at an early stage, before he has an opportunity to plant a bomb, is well recognised. Given that terrorist bombs are usually home-made, it is quite possible that, during a search of premises occupied by a suspected terrorist, the police will find materials such as timers or chemicals in highly incriminating circumstances without also finding explosives or other prohibited materials. If other evidence exists, he might be charged with conspiracy to cause explosions, or with the new offence of being concerned in the preparation of a terrorist act. Otherwise I see no reason why the person should not be required to account to the court for his possession of the articles."

Lord Lloyd went on to give his views on the provision which became section 58 at para 14.8:

> "Its purpose is similar to that of the offence of possession described above and the case in favour of retaining the power is very much the same. It is designed to catch possession of targeting lists and similar information, which terrorists are known to collect and use."

42. Obviously, on one reading, section 58(1) could cover a multitude of records of everyday common or garden information, which might actually be useful to a person who was preparing to carry out an act of terrorism – e g a Yellow Pages directory listing outlets where he could buy fertiliser and other chemicals for making into a bomb, a timetable from which he could discover the times of trains to take him to the city where he was going to plant his bomb, or an A to Z directory of that city which he could use to find his way to the target. But, rightly, appearing for the Crown, Mr Perry QC repudiated any such interpretation. Parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain or use, simply because that information could also be useful to someone who was preparing an act of terrorism.

43. Indeed, it is clear from what Lord Lloyd said in his report that the aim was to catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population. So, to fall within the section, the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act or terrorism. Because that is its nature, section 58(3) requires someone who collects, records or possesses the information to show that he had a reasonable excuse for doing so. The information is such as "calls for an explanation", as Lord Phillips of Worth Matravers LCJ, said in *R v K* [2008] 2 WLR 1026, 1031, para 14. Of course, it is not necessary that the information should be useful only to a person committing etc an act of terrorism. For instance, information on where to obtain explosives is

capable of falling within section 58(1), even though an ordinary crook planning a bank robbery might also find it useful.

44. The role of extrinsic evidence is limited. It can be used to explain to the jury the significance of something in the document, say, a chemical formula, in connection with the planning of an explosion. It can also be used to explain the true nature of the information in a document which has been prepared so as to appear innocuous but whose actual nature and contents are concealed by the use of some sort of code or equivalent device. But, since the document must contain information which is, of its very nature, likely to be useful to a potential terrorist, evidence cannot be led with the aim of showing that a document, such as a timetable, containing everyday information, should be treated as falling within section 58(1). That evidence will be relevant to a charge under section 57(1), but not to a charge under section 58(1).

45. Interpreted in that way, section 58(1) would cover, for instance, a training manual about making or planting bombs or explosives, or a document containing information about how to get unauthorised entry to military establishments, government offices etc. It would also cover information, whether in the form of an electronic key or otherwise, which enabled a potential terrorist to obtain access to such information. Parliament has made it an offence to collect, record or possess such material, unless the defendant can show that he has a reasonable excuse for doing so.

46. To be guilty of the section 58 offence, the defendant must collect or make a record of the information in question, or must possess a document or record containing such information. So far as possession is concerned, it is noticeable that section 58 does not contain any equivalent of section 57(3), which allows the court to assume that the defendant was in possession of the articles in question in certain circumstances. The obvious inference is that, under section 58(1), the Crown must prove beyond a reasonable doubt that the defendant knew that he had the document or record and that he had control of it. So, in order to prove its case under section 58(1), the Crown must satisfy the jury beyond reasonable doubt, for instance, either that a defendant who owned a flat was aware that her boyfriend had brought a document of the relevant kind into the flat, or else that, despite her claim that he had kept it locked away beyond her control, she not only knew that the document was in the flat, but she also had control over it. If the Crown fails to establish these matters, the defendant does not rely on any defence under subsection (3): she is entitled to be acquitted simply because the Crown has not proved her possession of the document, which is one of the essential elements of the section 58(1) offence.

47. Is it a requirement for conviction of an offence under section 58(1)(b) that the defendant not only possessed the document but was aware of the nature of the information which it contained? In our view, it is. The immediate setting of section 58(1)(b) is important. Section 58(1)(a) makes it an offence to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism. That paragraph envisages the defendant collecting or recording that particular kind of information, rather than collecting or recording a general mass of information which happens to contain information of the kind in question. But in order to collect or record that particular kind of information, the defendant must know what he is looking for. So knowledge of the nature of the information is certainly a necessary element in the offence in para (a). Paragraph (b) deals with someone who possesses a document or record containing information of the relevant kind, which he or someone else has collected or recorded. Given that knowledge of the nature of the material is required where the offence is committed in the manner specified in para (a), it would be very strange if similar knowledge were not also required for commission of the offence in the manner specified in para (b). We are therefore satisfied that the Crown must prove that the defendant was aware of the kind of information which was in the document or record which he possessed. That conclusion is in line with the approach of the House in *Sweet v Parsley* [1970] AC 132.

48. This does not mean, of course, that the Crown has to show that the defendant knew everything that was in the document or record. It is enough if he knew the nature of the material which it contains. That may often be apparent from the title of the document or from even a cursory glance at its contents. Nor can a defendant keep a document in his possession and claim ignorance

of its contents by deliberately choosing not to inquire into them. If the document is hidden in some way, this will often be a basis on which the jury can be asked to infer that the defendant was aware of the nature of its contents.

49. Section 58(1) focuses on the nature of the information which the defendant collects, records or possesses, rather than on the circumstances in which he does so. The description of the information is given in general terms: information will meet that description, irrespective of who might commit or prepare an act of terrorism and so be likely to find the information useful. It could be a third party or it could indeed be the defendant himself. So the offence is apt to catch someone who gathers the information and stores it with a view to passing it on to someone else who is preparing an act of terrorism. But, equally, it will cover someone who does these things with the intention of using the information himself to prepare an act of terrorism. Or else, the accused may have gathered and stored the information without having any clear idea of what he intends to do with it. None of this matters, since the legislation makes it an offence simply to collect, record or possess information of this kind. Parliament must have proceeded on the view that, in fighting something as dangerous and insidious as acts of terrorism, the law was justified in intervening to prevent these steps being taken, even if events were at an early stage or if the defendant's actual intention could not be established. At the same time, Parliament enacted section 58(3), which introduced the necessary element of balance by giving the accused a defence if, with the benefit of section 118, he proves that he had a reasonable excuse for doing what he did.

50. To summarise: in order to obtain a conviction under, say, section 58(1)(b), the Crown must prove beyond reasonable doubt that the defendant (1) had control of a record which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism, (2) knew that he had the record, and (3) knew the kind of information which it contained. If the Crown establishes all three elements, then it has proved its case against the defendant and he falls to be convicted - unless he establishes a defence under subsection (3).

The Section 57 Offence

51. Section 57 of the 2000 Act derives from section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. The effect of that provision was considered by Lord Hope of Craighead in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326. What he said is relevant to the interpretation of section 57, even though section 57 is different from section 16A in certain material respects.

52. So far as section 57 itself is concerned, the elements of the offence are to be found in subsection (1). It is immediately obvious that the section covers the possession of far more things than could ever fall within the scope of section 58. While section 58 is concerned only with the possession of documents or records containing information, section 57 extends to the possession of any "article". This includes a substance and any other thing: section 121.

53. The first thing that the Crown has to establish under section 57(1) is that the defendant possessed the article in question. So the Crown must prove both that the defendant knew he had the article and that he had control of it. But, in the case of section 57, subsection (3) contains a provision which allows the court to assume that the defendant was in possession of the article in question if it was on any premises at the same time as the defendant or was on premises of which the defendant was the occupier or which he habitually used otherwise than as a member of the public. The court is not, however, able to make that assumption if the defendant adduces evidence to show that he did not know of the presence of the article on the premises or that he had no control over it. In that event, the court is to treat what that evidence contains as proved, unless the prosecution disproves it beyond reasonable doubt. See section 118(3)-(5).

54. Next, and crucially, the Crown must prove beyond reasonable doubt that the circumstances in which the defendant possessed the article gave rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

So, in contrast to section 58(1), the circumstances of the defendant's possession form one of the crucial elements of the section 57(1) offence.

55. It is unusual, but not unprecedented, for Parliament to create an offence of this kind, based on a reasonable suspicion as to the purpose behind a defendant's possession. Section 57(1) is presumably modelled on section 4(1) of the Explosive Substances Act 1883, which 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 felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years, and the explosive substance shall be forfeited."

Section 9 includes within the definition of "explosive substance", for example, apparatus used, or intended to be used, with any explosive substance. So the section would apply, for instance, to a timer. Under section 4(1) the Crown has to prove that the circumstances of the defendant's possession or control of an explosive substance are such as to give rise to a reasonable suspicion that he does not have it for a lawful object. In this context, "object" is synonymous with "purpose": *R v Berry* [1985] AC 246, 254D-E. It is not necessary for the Crown to go further and to prove what the accused's unlawful object was – which might well be impossible to establish. The defendant is then given a defence if he can show that, despite appearances, he actually had the substance in his possession or under his control for a lawful object. Similarly, under section 57(1) of the 2000 Act, the Crown does not need to prove what the accused's purpose connected with the commission, preparation or instigation of an act of terrorism actually was – something which might well be impossible to prove. It is enough if the Crown satisfies the court or jury, beyond reasonable doubt, that the circumstances give rise to a reasonable suspicion that the defendant's possession was for the relevant purpose. The defendant is then given a defence under subsection (2).

56. Most people have no lawful reason for having an explosive as such. On the other hand, they may have a perfectly good reason for having a timer. So, under section 4(1) of the 1883 Act, in practice, in the case of a timer, more is likely to be required to justify the reasonable suspicion that the defendant's possession was not for a lawful object than in the case of an explosive as such. Cf the reasoning of Lord Taylor of Gosforth LCJ on the proof of mens rea in *R v Berry (No 3)* [1995] 1 WLR 1, 13 B-C. The same will apply in the case of, say, a bag of fertiliser under section 57(1) of the 2000 Act, since many people have a perfectly good reason for having fertiliser. As Lord Hope of Craighead said of the predecessor of section 57(1) in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 387B-C, "It should not be thought that proof to this standard will be a formality."

The overlap between Section 57(1) and Section 58(1)

57. Obviously, the scope of section 57 is different from the scope of section 58 in a number of ways. First, section 57 applies only to possession, while section 58 applies also to collecting or making a record. Secondly, section 57 applies to the possession of any "article", widely defined. By contrast, section 58 applies to the collection of information of a certain kind and to the possession of a "document or record" containing that information.

58. Thirdly, precisely because section 57(1) covers any "article", the section only bites on the defendant's possession of the article in certain circumstances, viz "circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism." It is not the possession of the article as such which is criminal, but its possession in those particular circumstances. By contrast, section 58 is directed at information of a particular kind, viz, "information of a kind likely to be useful to a person

committing or preparing an act of terrorism." So, while section 57 focuses on the *circumstances of the defendant's possession* of the article, section 58 focuses on the *nature of the information* which the defendant collects, records or possesses in a document or record. Subject to the defence in section 58(3), the circumstances in which the defendant did these things are irrelevant. So, unless it amounts to a reasonable excuse under subsection (3), his purpose in doing them is irrelevant. In particular, there is nothing in the terms of section 58(1) that requires the Crown to show that the defendant had a terrorist purpose for doing what he did.

59. The definition of "article" in section 121 of the 2000 Act is wide enough to cover a document or record. And indeed, after the Act came into force, the Crown soon adopted the practice of charging defendants with possession of a document or record, contrary to section 57(1) or, alternatively, contrary to section 58(1). In *R v M* [2007] EWCA 298, however, the Court of Appeal held that documents or records to which section 58 applied could not fall within the differently drawn terms of section 57, since

> "Parliament could not have intended that the regime for documents and records in section 58 could be sidestepped by using section 57 and describing them as articles. Section 58 is not redundant."

The point came before the Court of Appeal again in *R v Rowe* [2007] QB 975. The court held that, because certain assumptions made by the court in *R v M* had been wrong, it need not follow that decision. The court then went on to conclude that the decision in *R v M* had been wrong. Lord Phillips put the point in this way, at p 985, paras 34-36:

> "34. There is undoubtedly an overlap between section 57 and 58, but it is not correct to suggest that if documents and records constitute articles for the purpose of section 57, section 58 is almost superfluous. Collecting information, which falls within section 58 alone, may well not involve making a record of the information. Equally a person who possesses information likely to be useful to a person committing or preparing an act of terrorism may well not be in possession of it for a purpose connected with the commission, preparation or instigation of an act of terrorism.
>
> 35. Sections 57 and 58 are indeed dealing with different aspects of activities relating to terrorism. Section 57 is dealing with possessing articles *for the purpose* of terrorist acts. Section 58 is dealing with collecting or holding information that is *of a kind likely to be useful* to those involved in acts of terrorism. Section 57 includes a specific intention, section 58 does not.
>
> 36. These differences between the two sections are rational features of a statute whose aims include the prohibition of different types of support for and involvement, both direct and indirect, in terrorism. There is no basis for the conclusion that Parliament intended to have a completely separate regime for documents and records from that which applies to other articles."

On this basis, the Court of Appeal held that the possession of a document or record could, in an appropriate case, fall within section 57 as well as section 58. The decision in *Rowe* was not challenged in the hearing before the House. It is plainly correct for the reasons which Lord Phillips gave.

The operation of the defences under section 58(3) and under section 57(2)

60. We turn now to consider the operation of the defence in section 58(3). At para 50 above we summarised the elements of the offence created by section 58(1). It is only where the prosecution has already proved all these elements, and so is otherwise entitled to a conviction, that the defendant needs to rely on the defence in section 58(3) in order to avoid conviction. If, applying section 58(3), the jury accept that the defendant had a reasonable excuse for possessing the material, then, because of that additional factor in the circumstances, he is entitled to be acquitted, *even though it remains*

the case that the Crown has proved all the necessary elements of the offence in terms of section 58(1). It necessarily follows that, if the jury do not accept the defence put forward by the defendant under section 58(3), the defence fails and their duty will be to convict him of the offence under section 58(1).

61. Mr McNulty contested that approach. Even though the defences in section 57(2) and section 58(3) are expressed in very different terms, they are similar in one particular respect, viz, that section 118(2) applies to both of them. For that reason Mr McNulty relied on authority dealing with section 57(2) as support for his submission that section 118(2) applied in relation to section 58(3) so as to produce the result for which he contended. It is therefore convenient to look first at section 57(2).

62. As already indicated in para 55, the need for the defence in section 57(2) only arises when the Crown has proved all the elements of the offence in section 57(1). Under subsection (2), it is a defence for the defendant to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism. So the jury must acquit the defendant, if they find this defence proved, *even though they are simultaneously satisfied beyond a reasonable doubt that the circumstances of his possession give rise to a reasonable suspicion that it was for a purpose connected with the commission, preparation or instigation of an act of terrorism.* In other words, the defendant has a defence when, despite any reasonable suspicion to the contrary, his possession of the article in question was not in fact for a purpose connected with the commission etc of an act of terrorism.

63. Suppose that the Crown leads evidence to prove all the elements in section 57(1) beyond reasonable doubt. Then, if the defendant adduces sufficient evidence to entitle the court or jury to find that the defendant did not have the article for a purpose connected with the commission etc of an act of terrorism, they are to assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that the defence is not satisfied. The section gives statutory expression to the familiar concept of an evidential burden on a defendant to raise a defence, which the Crown must then disprove beyond reasonable doubt.

64. Mr McNulty referred, however, to the way in which the operation of sections 57(2) and 118(2) had been described in *R v Zafar* [2008] 2 WLR 1013 as support for the proposition that, when there was evidence raising a defence under subsection (2), it was not enough for the Crown to prove the elements in subsection (1). The Crown had, in addition, to prove beyond reasonable doubt that the defendant's possession of the relevant article or articles was for a purpose connected with the commission etc of an act of terrorism. Mutatis mutandis, Mr McNulty submitted, the same should apply to section 58(3).

65. The facts of *Zafar* were complex, but, essentially, the young defendants were charged under section 57(1) with possessing computer disks and hard drives containing extreme political and religious material which, the Crown alleged, were part of a settled plan to commit a terrorist act or acts in Pakistan. It is not clear exactly what defence the defendants advanced under section 57(2). The recorder directed the jury, inter alia, however, that, in the case of each of the defendants, the Crown had to prove:

> "that his possession of the article or articles in question was for a purpose connected with committing, preparing for or instigating, that is to say, bringing about or making happen, of an act of terrorism…."

Some of the defendants were convicted and appealed. The essential issue in the appeal appears to have been as to the effect of the words "connected with" in section 57(1). The argument for the defence was that, unless the words were given a restrictive interpretation, the ambit of the section would be too uncertain to satisfy the requirements of legality.

66. That particular issue, as to the effect of the words "connected with", does not arise in the present appeals. But, in the course of their judgment, given by Lord Phillips of Worth Matravers

LCJ, the Court of Appeal quoted section 57(1) and (2) and continued, [2008] 2 WLR 1013, 1018, paras 15 and 16:

> "The effect of section 118 of the 2000 Act is that, if a defendant adduces evidence that raises an issue as to whether his possession of the article in question was for a purpose connected with the commission, preparation or instigation of an act of terrorism, the burden shifts to the prosecution of proving beyond reasonable doubt that the possession of the article was held for such purpose.
>
> 16. The Crown accepted in this case that, by the end of the evidence, each of the defendants had adduced evidence that sufficed to raise the issue as to whether his possession of the relevant article or articles was for a purpose connected with the commission, preparation or instigation of an act of terrorism. This thus became a matter that the Crown had to prove beyond reasonable doubt."

67. This is the passage on which Mr McNulty relied. On its face, it is indeed open to the interpretation that, if a defendant adduces evidence sufficient to raise a defence under section 57(2), then, in order to obtain a conviction, the Crown must prove beyond reasonable doubt that the defendant's possession of the article was for a purpose connected with the commission etc of an act of terrorism. That would, however, be to misapply section 118(2) and to mix up what the Crown has to prove in order to establish the offence and what the Crown has to prove in order to rebut the defence. So, if the passage is to be interpreted as Mr McNulty contended, then in our view it should not be followed, since it is inconsistent with the clear meaning of section 57(2).

68. Suppose a defendant is charged, under section 57(1), with the possession of a quantity of fertiliser in circumstances giving rise to a reasonable suspicion that his possession was for a purpose in connection with the preparation of a bomb to be used in an act of terrorism. Suppose also that the Crown has proved all the necessary elements of this offence beyond a reasonable doubt. But the defendant has adduced evidence to suggest that he possessed the fertiliser for a non-terrorist purpose, namely, to improve the quality of the soil in his garden. By virtue of section 118(2), the jury are to assume that this defence under section 57(2) is satisfied, i e made out, unless the prosecution proves beyond reasonable doubt that *the defence is not satisfied*. In other words, the prosecution must satisfy the jury beyond reasonable doubt – for instance, by leading evidence that the garden had been consistently neglected, that there were no gardening tools in the house, and that the quantity of fertiliser was more than would be required for the garden in question – that the defendant did not possess the fertiliser for gardening purposes. If the prosecution succeeds in proving this, the jury will reject the defendant's explanation for his possession of the fertiliser and the position will be as if that defence had never been advanced. So the Crown will have established the defendant's guilt of the section 57(1) offence by proving beyond reasonable doubt that he possessed the fertiliser in circumstances giving rise to a reasonable suspicion that his possession was for a purpose connected with the commission etc of an act of terrorism. There is no need whatever for the Crown to go further - as Mr McNulty would contend - and prove, beyond reasonable doubt, that the defendant actually possessed the fertiliser for a purpose connected with the commission etc of an act of terrorism. That would be to impose on the Crown a requirement that is not to be found in section 57(1).

69. Exactly the same reasoning applies to section 118(2) and to the defence under section 58(3). Suppose, for instance, the Crown proves beyond a reasonable doubt that, when a defendant was stopped and searched, a disk containing the Al Qa'eda Training Manual was found in his pocket and that he knew what was on the disk. The defendant adduces evidence to the effect that he had found it on a train only a few minutes before and was on his way to hand it in to the nearest police station when he was stopped. Assume that this would be a reasonable excuse. The jury would have to find the defence satisfied and acquit the defendant, unless the Crown proved beyond a reasonable doubt that the defence was not satisfied – in the hypothetical example, by proving that the defendant's story was not true and that, in fact, he was not on his way to hand in the disk when he was stopped. If the Crown proved this, then, in terms of section 118(2), it would have proved that the defence was not satisfied – in other words, that it had not been made out. The supposed defence would then

vanish from the scene and the Crown would be entitled to ask for a conviction on the basis of the evidence of the defendant's possession of the disk.

70. It follows that section 58(1) contains all the elements which the Crown must prove, irrespective of whether or not the defendant raises a defence under section 58(3).

Scope of the defence under Section 58(3)

71. Another strand in the respondents' argument was based on what the Court of Appeal said about the nature of the section 58(3) defence in *R v K* [2008] 2 WLR 1026, 1031, at para 15, which we repeat here:

> "As for the nature of a 'reasonable excuse', it seems to us that this is simply an explanation that the document or record is possessed for a purpose other than to assist in the commission or preparation of an act of terrorism. It matters not that that other purpose may infringe some other provision of the criminal or civil law."

72. At this stage we touch on the scope of the defence under section 58(3), the second of the issues raised in the appeal. Mr Perry submitted that this passage in the Court of Appeal's judgment was wrong. The court had, in effect, substituted for the defence of reasonable excuse which Parliament had enacted in section 58(3) a quite different defence, which was, in substance, a reproduction of the defence in section 57(2). Where Parliament had deliberately framed different defences to charges under the two sections, the courts had to respect the difference and apply the defence which Parliament had enacted for the charge in question.

73. We accept that submission. In our view the Court of Appeal went wrong in *R v K* when it interpreted the defence of reasonable excuse in section 58(3) in this way. The language of sections 57(2) and 58(3) is completely different and it is neither appropriate nor possible to interpret the two provisions as if they said substantially the same thing. Had Parliament intended to provide substantially the same defence to both sections, nothing would have been easier than to use the same language.

74. The defence in section 57(2) is crafted to suit the offence created by section 57(1). The offence arises only because of the reasonable suspicion that the defendant possesses the article for a purpose connected with the commission etc of an act of terrorism. That is why the accused is given a defence which relates to the actual purpose for which he possesses the article. So it would indeed be a defence to a section 57(1) charge for a defendant to show, for instance, that his actual purpose for having an explosive was to blow open a bank vault. He would get out of the section 57(1) charge but would have constructed a cast-iron case against himself under section 4(1) of the Explosive Substances Act 1883, which carries a maximum penalty of 14 years imprisonment.

75. By contrast, as we have already explained, the offence under section 58(1) does not depend on the defendant having a terrorist purpose. It depends, rather, on the nature of the information which the accused collects, records or possesses. The defendant cannot change the nature of the information, but is not to be convicted if he shows that he had a reasonable excuse for collecting, recording or possessing it.

76. A defence in terms of reasonable excuse is to be found in a whole range of provisions under the 2000 Act. And it is, of course, a familiar feature of many other offences, such as possession of an offensive weapon under section 1(1) of the Prevention of Crime Act 1953 and section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, and failure to provide a specimen of blood or urine under section 7(6) of the Road Traffic 1988. The Court of Appeal's decision in *R v K* [2008] 2 WLR 1026, 1031, para 15, singles out this particular use of the defence in section 58(3) and imposes on it a construction which is utterly different from the construction which has been put on the equivalent defence in other statutes.

77. More than that, however, the Court of Appeal's construction robs the adjective "reasonable" in section 58(3) of all substance. Neither the judge nor the jury is left with any room to consider whether the excuse tendered by the accused for, say, his possession of the document or record is actually reasonable. Provided only that he proves that his purpose was not connected with the commission etc of an act of terrorism, the Court of Appeal give him a defence under subsection (3). Indeed they expressly affirm that it matters not that the defendant's purpose may infringe some other provision of the criminal or civil law. Suppose, for example, that the accused had a document containing information about the security system protecting the Home Secretary's residence. The interpretation adopted by the Court of Appeal means that, if the defendant proved that he had this document because he was planning to burgle the Home Secretary's house and steal her jewellery, this would, by definition, be a reasonable excuse since the defendant's purpose would not be connected with the commission etc of an act of terrorism. The same would apply if the defendant's purpose was to murder the Home Secretary for purely personal motives. Even if the jury rightly considered that these "excuses" were outrageous rather than reasonable, in each case the judge would have to direct them that the defendant's purpose amounted to a reasonable excuse in terms of section 58(3) and that they would have to acquit him. In our view, Parliament could not have intended section 58(3) to be interpreted or applied in that way.

78. In the course of the hearing, counsel conjured up other, more or less fanciful, scenarios which, again, smacked more of a student moot than of real life. For example, we were asked to contemplate the case of an aspiring cracksman who attends an academy for safe-blowers, takes notes on how to make explosives, and keeps his notes in order to use the information to break open a bank vault. By its nature, the information in the notes would be capable of falling within the scope of section 58(1). The suggestion was that the apprentice cracksman would have a reasonable excuse under section 58(3) for collecting, recording and possessing the information.

79. Of course, if accepted, the explanation would show that the accused's purpose was not to commit an act of terrorism. But that is not the issue under section 58. 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.

80. In fact, of course, the example is unrealistic, precisely because it is stripped of all the features of a real case. For instance, we are told nothing of why the police were searching the defendant or his premises when they found the notes. As pointed out in para 43, some items which would fall within section 58(1) would also be useful to a bank robber. So the circumstances in which they are found may have a bearing on how such items are in practice regarded by the relevant authorities. If, for example, police officers came across notes relating to explosives when searching the room occupied by the defendant in a house where other men had lived before carrying out a terrorist bombing, they would probably pursue the matter on the basis that the notes contained information that was likely to be of use to someone preparing an act of terrorism. On the other hand, the police and prosecuting authorities would be unlikely to treat the same notes in that way if they were recovered in the course of a raid on premises after a tip-off that the occupiers were about to rob a bank and then to use the proceeds to help expand their drug trafficking operation. The police and, subsequently, the Crown Prosecution Service and the Director of Public Prosecutions would take all the relevant circumstances into account before deciding whether to prefer a charge under section 58(1) or, say, to use the evidence to support a charge of attempted robbery. So the chances of a real live bank robber being charged with an offence under section 58(1) and putting forward a genuine defence that he had made the notes for use in preparing a bank robbery are slim indeed. It is no accident that, in the cases to which the House was referred, the section 58(1) counts tend to be associated with counts under section 57(1) and that the section 58(1) counts relate to training manuals and other documents which are immediately suggestive of some link with terrorism.

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 SCCR 382. 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.

82. We would refer to two other matters that were raised at the hearing.

83. First, there was much discussion of a hypothetical situation where the defendant downloaded and stored information falling within section 58(1) "out of curiosity". But the question as to whether he would have a reasonable excuse under section 58(3) is not one that can be answered in the abstract, without knowing exactly what the defendant did and the circumstances in which he did it. In an actual case where the issue arose, the specific facts of the case would inform the decision as to whether the defendant's excuse for doing what he did either could or should be regarded as reasonable in the circumstances.

84. Secondly, reference was made to the decision of the Court of Appeal in Northern Ireland in *R v McLaughlin* [1993] NI 28, where the defendant was convicted of a count of collecting or recording information likely to be useful to terrorists and of a count of possession of a document likely to be useful to terrorists, contrary to the provisions of the Northern Ireland (Emergency Provisions) Act 1978. The evidence showed that he had a radio scanner and a list of police radio frequencies. His defence was that he had a reasonable excuse, namely, that he kept the scanner for his own personal use and listened to police messages for his own pleasure and interest. The Court of Appeal allowed his appeal against conviction on the basis that the evidence showed on the balance of probabilities that the appellant was not recording the information to pass on to terrorists, and accordingly that he was recording it for innocent purposes and therefore had a reasonable excuse. In so far as the Court of Appeal proceeded on the basis that the mere fact that the appellant was not recording the information to pass on to terrorists necessarily meant that he had a reasonable excuse

for what he did, the decision is not one which we would regard as providing sound guidance on the application of section 58(3) of the 2000 Act.

85. Finally, in urging a generous interpretation and application of section 58(3), Mr McNulty argued forcefully that an over-zealous use of section 58 by the police and prosecuting authorities could alienate young people and exacerbate rather than reduce the threat of terrorism in this country. That may well be so. But prosecutors are very familiar with the need to exercise a wise discretion in deciding whether taking proceedings would ultimately be in the public interest. Sexual offences where both parties are under age and both consent are, perhaps, the most obvious example. In the case of sections 57 and 58, however, Parliament has enacted the safeguard that proceedings are not to be initiated without the consent of the Director of Public Prosecutions: section 117(2)(a). This can be seen as an acknowledgment that the nature of these offences is such that not all contraventions of the provisions should be prosecuted. More positively, the need for this consent should help ensure that prosecutors do indeed give due consideration to the public interest and do not embark on prosecutions in cases which do not merit it. It was not suggested that the decision to prosecute had been improper or unwise in either of the cases giving rise to these appeals.

Disposal of the Appeals

86. Fortunately, the two appeals can be disposed of shortly in the light of this extended discussion.

87. There is no doubt that the information which Mr G collected and recorded is of a kind likely to be useful to a person committing or preparing an act of terrorism. Indeed, Mr G collected the information precisely because it was of that kind and he knew how "this terrorism stuff" really got on the nerves of the prison officers. His reason for collecting the information was that it would wind up the prison officers who, he thought, were provoking him. On no view could a desire to wind up prison officers in this way be a reasonable excuse for collecting and recording the information.

88. As is now apparent, Mr G was suffering from paranoid schizophrenia at the time and his actions were a direct consequence of his illness. But it is agreed that, applying the test in *M'Naghten's Case* (1843) 10 Cl & F 200, Mr G remained responsible for his actions. There can be no question of his illness somehow making it reasonable for him to collect and record the information when it would not be reasonable for anyone else to do so. His illness is simply a factor – and it may be an important factor - to be taken into account in deciding on the appropriate disposal.

89. Pitchford J held that Mr G had no reasonable excuse under section 58(3). He was right to do so. As already explained, the Court of Appeal felt obliged, by the previous decision in *R v K*, to allow the appeal because Mr G's purpose in collecting and recording the information was not to assist in the commission or preparation of an act of terrorism. For the reasons we have given, that interpretation of section 58(3) was wrong. The appeal must therefore be allowed and the ruling of Pitchford J restored.

90. In the case of Mr J, Judge Chapman allowed an application that he should be allowed to vacate pleas which he had previously tendered because they had been tendered under a mistake of law. In connection with that application, the judge ruled that, contrary to the previous understanding, the decision of the Court of Appeal in *R v K* meant that, if Mr J raised evidentially in the trial that he had a reasonable excuse for his possession of one or more of the records of information referred to in the indictment, it would be necessary for the prosecution to prove that his possession was for a purpose to assist in the preparation of, or commission of, an act of terrorism.

91. For the reasons which we have given, that approach is wrong and Judge Chapman's ruling based on it cannot be supported. The appeal must accordingly be allowed, the order of the Court of Appeal, dismissing the appeal against the ruling of Judge Chapman, must be reversed, and his ruling must itself be reversed.