Hilary Term
[2020] UKSC 8
On appeal from: [2019] EWCA Crim 36

JUDGMENT

R *v* Copeland (Appellant)

before

Lord Reed, President
Lord Carnwath
Lord Lloyd-Jones
Lord Sales
Lord Hamblen

JUDGMENT GIVEN ON

11 March 2020

Heard on 27 January 2020

Appellant	*Respondent*
Paul Bogan QC Sarah-Kate McIntyre (Instructed by Hodge Jones & Allen LLP (London))	Louis Mably QC Tom Walkling (Instructed by CPS Counter Terrorism Division (Westminster))

LORD SALES: (with whom Lord Reed and Lord Carnwath agree)

1. This appeal concerns the proper interpretation and effect of section 4(1) of the Explosive Substances Act 1883 ("section 4(1)" and "the 1883 Act", respectively). This provides in material part as follows:

> "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 …"

2. As originally enacted, section 4(1) provided that a person convicted of this offence was liable to penal servitude for a term not exceeding 14 years, or to imprisonment for a term not exceeding two years with or without hard labour. Currently, the maximum sentence is imprisonment for life.

3. 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?

Factual background and the proceedings below

4. The appellant is aged 22 and has no convictions. He was diagnosed with Autism Spectrum Disorder as a child. In April 2018 he was living in a terraced house in Coventry with his mother.

5. The appellant had been purchasing quantities of chemicals online. His explanation for this is that he had from a young age developed an obsessive interest in things military. He became interested in bomb disposal after watching the film "The Hurt Locker" about a US bomb disposal unit in Iraq and wanted to understand how explosives worked and to experiment with them.

6. On 24 April 2018 a search warrant was executed at the house. The chemicals the appellant had purchased were found in a garden shed which he used as a laboratory. The appellant had managed to make a small quantity, of the order of about 10 grams or less, of Hexamethylene Triperoxide Diamine ("HMTD") from Hydrogen Peroxide, Hexamine and Citric Acid. HMTD is a sensitive primary high explosive that can easily be detonated. According to the Statement of Facts and Issues for the appeal, such a small amount of HMTD potentially carries a risk of insubstantial injury or damage. It should also be noted that the appellant might only have used part of this quantity at any one time when experimenting with it.

7. The HMTD was found in the form of a powdery substance in a petri dish in the shed and in another in the appellant's bedroom. Material found in the appellant's bedroom and on his computer included manuals for making explosives, notes on the making of HMTD and a video downloaded to his mobile telephone of a demonstration of the making of HMTD.

8. Over the previous months the appellant had made explosive substances with other chemicals on about six or seven occasions. By means of homemade initiators made from fairy lights filled with firework powder or by means of a mobile telephone signal, he had detonated or attempted to detonate these substances in his back garden and had made a video record of this on his mobile telephone. According to his explanation, his plan was to conduct similar experiments with the HMTD he had made.

9. The appellant was interviewed by the police over many days. He admitted his actions and gave the explanations referred to above. He was charged with a number of offences, including six counts of having possession of information likely to be useful for an act of terrorism contrary to section 58 of the Terrorism Act 2000. The two relevant charges on the indictment for present purposes are in identical terms, as counts 1 and 2, as follows:

"STATEMENT OF OFFENCE

MAKING OR POSSESSION OF EXPLOSIVE UNDER SUSPICIOUS CIRCUMSTANCES, contrary to section 4(1) of the Explosive Substances Act 1883

PARTICULARS OF OFFENCE

CHEZ COPELAND on 24 day of April 2018 knowingly had in his possession or under his control a certain explosive

> substance, namely [HMTD], in such circumstances as to give rise to a reasonable suspicion that he had not made it for a lawful object."

10. As this court pointed out at the hearing, and as counsel on both sides agreed, this charge is in defective form. It elides the two limbs of section 4(1), ie (1) making any explosive substance under circumstances giving rise to a reasonable suspicion that the defendant is not making it for a lawful object and (2) knowingly having in his possession or control any explosive substance under circumstances giving rise to a reasonable suspicion that he does not have it in his possession or control for a lawful object. Mr Louis Mably QC, for the Crown, gave an undertaking to amend the charge so as to replace the words after "reasonable suspicion" with the phrase "that he did not have it in his possession or under his control for a lawful object". Mr Paul Bogan QC, for the appellant, accepted that this amendment would not cause any prejudice to the appellant and said it would not be resisted. On the particular facts of this case, the alteration makes no material difference, since the appellant's defence would be the same whether he was charged under limb (1) or limb (2), namely that he had both made the HMTD and had it in his possession with a view to experimentation and self-education regarding its manufacture and properties, by conducting detonations with it in the garden of his home. The appeal therefore proceeded on the basis that the indictment could be taken to refer to limb (2) of the offence.

11. The appellant's defence statement in relation to counts 1 and 2 on the indictment was as follows:

> "It is the defence case that:
>
> > 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 defendant has a longstanding obsession with the armed forces and has collected military paraphernalia over many years. More recently, and inspired by the film 'The Hurt Locker', he has been interested in explosives.
>
> In pursuit of this interest he has researched manuals and recipes on the internet. He sought to understand how explosives could

> be made and acquired certain chemicals to do so. He experimented with the chemicals and caused small explosions to be made in the back garden of his home.
>
> His own ambition to join the armed forces has been thwarted by a diagnosis of Autism Spectrum Disorder when aged around 14 years. He had regularly engaged in role play, dressing and purporting to behave as a member of the armed forces. The condition of Autism Spectrum Disorder has manifested itself in interests and hobbies becoming obsessional and, in the context of explosives, an obsessional need to understand how explosives work."

By way of an addendum, in the appellant's written submissions at first instance it was asserted that, "For the avoidance of doubt the defendant's object or objects encompass interest, education and experimentation".

12. On 23 October 2018 a preparatory hearing took place before His Honour Judge Wall QC in the Crown Court at Birmingham, at which it was agreed that he should determine, among other things, whether the potential defence to counts 1 and 2 on the indictment could amount to a defence in law. The judge ruled that the appellant's proposed defence that he made the HMTD and had it in his possession for a lawful object, being experimentation and self-education, was not good in law, holding that he was bound to reach that conclusion by the decision of the Court of Appeal in *R v Riding* [2009] EWCA Crim 892. This ruling meant that the judge proposed that he would direct the jury accordingly and would exclude evidence and prevent submissions directed to trying to support that part of the defence case.

13. The appellant appealed to the Court of Appeal, Criminal Division (Sir Brian Leveson P, Elisabeth Laing and Whipple JJ). The appeal was dismissed: [2019] EWCA 36 (Crim). Like Judge Wall QC, the Court of Appeal considered that it was bound by *R v Riding* to reach the conclusion that the appellant's proposed defence under section 4(1) was bad in law. The court certified the point of law set out above at para 3.

The statutory context

14. The Offences Against the Person Act 1861 ("the 1861 Act") consolidated various enactments in England and Ireland relating to offences against the person, including the offences of destroying or damaging a building with gunpowder or other explosive substance, with intent to murder (section 12, now repealed),

unlawfully and maliciously causing bodily injury by gunpowder or other explosive substance (section 28), unlawfully and maliciously causing gunpowder or other explosive substance to explode etc, with intent to do grievous bodily harm to some person (section 29), placing gunpowder or other explosive substance near a building etc, with intent to do bodily injury to any person (section 30) and making or having possession of gunpowder or any explosive substance etc, with intent by means thereof to commit any of the felonies set out in the Act (section 64).

15. In parallel with these primary provisions of the criminal law, the Explosive Substances Act 1875 ("the 1875 Act") amended the previous regulatory regime in relation to such substances. Although the Act uses the term "gunpowder" in its operative provisions, by virtue of section 3 this term also covers other explosive substances. Section 4 provided that gunpowder should not be manufactured except at a lawfully existing factory or one licensed under the Act, "[p]rovided that nothing in this section shall apply to the making of a small quantity of gunpowder for the purpose of chemical experiment and not for practical use or sale". Section 5 provided that gunpowder should only be kept at certain approved places including places licensed under the Act, subject to a proviso that it should not apply to (among others) "a person keeping for his private use and not for sale gunpowder to an amount not exceeding on the same premises 30 pounds". Thus, the 1875 Act recognised that possession of small quantities (or, in the case of section 5, a comparatively large quantity) of explosive substances for private use for experimentation or otherwise could be legitimate and would not require regulation. In fact, there is a long and well-established tradition of individuals pursuing self-education via private experimentation in a range of fields, including with chemicals and explosives. The 1875 Act acknowledged and made allowance for such practices. The penalties for breach of the regulatory provisions in the 1875 Act were at a much lower level than the penalties in respect of the primary criminal provisions in the 1861 Act and the 1883 Act, underlining the distinction between those primary criminal provisions and the regulatory offences.

16. The 1883 Act was a measure passed by Parliament at great speed as a reaction to fears of Irish nationalist terrorism, and in light of a concern that the offences in the 1861 Act did not provide sufficient protection for the public. The 1883 Act created the new offences of unlawfully and maliciously causing an explosion likely to endanger life (section 2); acting unlawfully and maliciously with intent to cause an explosion likely to endanger life or cause serious injury to property (section 3(a)); unlawfully and maliciously making any explosive substance or having it in possession or under control with intent to endanger life or cause serious injury to property (section 3(b)); and the offence in section 4(1). The 1883 Act applies to Scotland: section 9. Section 9(1) provides a very wide definition of explosive substance:

> "The expression 'explosive substance' shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement."

17. In relation to the offence in section 4(1), section 4(2) provided that the accused and their spouse should be competent to give evidence for the defence (this at a time when according to the ordinary law the accused and their spouse could not give evidence). Parliament considered that, for the accused to have a fair and effective opportunity of availing himself of the defence in section 4(1) of showing that he had made the explosive substance or had in in his possession or under his control for a lawful object, he and his spouse should have the opportunity of giving evidence about that at trial.

18. The regulatory regime in relation to explosives is now contained primarily in the Explosives Regulations 2014 ("the Regulations"). The Explanatory Memorandum published with the Regulations and Guidance in relation to the Regulations issued by the Health and Safety Executive in 2014 make it clear that it continues to be expected that private individuals may manufacture explosives and have them in their possession for their own private use. The Explanatory Memorandum referred at para 7.1 to the explosives sector being fragmented and diverse, "ranging from the storage and manufacture of large amounts of highly energetic and flammable material to individual hobbyists". See also the section of the Explosive Regulations 2014 Safety Provisions Guidance at para 9:

> "Duty holders such as employers, private individuals and other people manufacturing explosives, storing larger quantities of explosives or storing explosives that present higher hazards or greater risks of initiation should use the relevant subsector guidance to supplement the guidance in this document."

And para 13:

> "*Explosives for work, personal and recreational use*
>
> 13. [The Regulations apply] to explosives operations whether they are for work or non-work purposes. They therefore apply to anyone storing explosives for personal recreational use, or to voluntary clubs or societies storing

> explosives (examples include storage for firework displays, bonfire processions or re-enactment events)."

Authorities

19. In *R v Fegan* (1984) 78 Cr App R 189, a decision of 1971, the Court of Criminal Appeal in Northern Ireland considered the meaning and effect of section 4(1). Lord MacDermott CJ, delivering the judgment of the court, explained that section 4(1) illustrates a means of meeting a legislative problem, "of how to curb a grave evil which postulates a guilty mind or mental element on the part of offenders, when proof of that guilty mind or mental element is likely to be a matter of inherent difficulty" (p 191). In other words, section 4(1) was enacted because Parliament was not satisfied that the existing offences in the 1861 Act and the other offences created by the 1883 Act, involving as they did the need to prove a specific mental element, were sufficient fully to meet the risk posed by the making or possession of explosives. As Lord MacDermott CJ explained (p 191):

> "Section 4(1) of the Act of 1883 may be said to proceed by way of compromise. It does not make it an offence to possess explosive substances for an unlawful purpose, nor does it create an absolute offence by prohibiting the mere possession of explosive substances. Instead, its two limbs provide for a dual enquiry - (1) Was the person charged knowingly in possession under such circumstances as to give rise to a reasonable suspicion that his possession was not for a lawful object? and (2) if the answer to (1) is in the affirmative, has the person charged shown that his possession was for a lawful object? If the answer to (1) is in the affirmative and the answer to (2) in the negative a conviction follows; otherwise there must be an acquittal. The first limb allows for a conviction on reasonable *suspicion*. The second allows what may be very much a subjective defence, with the accused and his or her spouse permitted by section 4(2) (as an exception to the then existing law) to give evidence on oath as ordinary witnesses." (Emphasis in original)

20. The appellant in *Fegan* was a young Roman Catholic man married to a Protestant woman, who by reason of his religion was subjected to threats of serious violence in the Protestant area in which he lived and told to move out of the district. The appellant acquired a pistol and live ammunition, maintaining that he did so to protect himself and his family. He was charged with a number of offences and was convicted at trial on three counts: possession of the pistol without holding a firearm certificate; possession of the ammunition without holding a firearm certificate; and

possession of explosive substances (the pistol and the ammunition) under such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession for a lawful object, contrary to section 4(1). He appealed against his conviction on the section 4(1) count. His appeal was allowed. The Court of Appeal found that the jury had clearly been entitled to find that limb (1) of the offence had been made out by the prosecution, but there had been a misdirection because the trial judge had not properly directed them regarding the possibility of a defence under limb (2), in relation to which there was evidence on which the jury could have found for the appellant.

21. The court made it clear that a person may have a lawful object for the purposes of section 4(1) even though his possession of the explosive substances in question is in breach of regulatory offences (p 194):

> "A, for example, borrows a shot-gun to shoot birds despoiling his orchard. He has no certificate or other authority for possessing the gun and his possession is unlawful. To say that his object cannot be lawful is to confuse possession and purpose … A firearm in lawful possession may undoubtedly be possessed for an unlawful object and there seems to be no good reason why the converse should not be true."

The court also explained that the words "… possession … for a lawful object" in limb (2) should be construed as meaning possession for a lawful object and no other:

> "The defence … cannot have been meant to exonerate the possessor of a firearm for a lawful object if his possession was also for an unlawful object. Again, as a matter of construction, a defence under the second limb of section 4(1) cannot be made by the possessor proving that he had no unlawful object. The onus resting on him is specific and positive. He has to show possession for a lawful object." (p 194)

Finally, the court gave guidance regarding the limits of the concept of "lawful object" in a case where self-defence is relied upon as the relevant object:

> "Possession of a firearm for the purpose of protecting the possessor or his wife or family from acts of violence *may* be possession for a lawful object. But the lawfulness of such a purpose cannot be founded on a mere fancy, or on some aggressive motive. The threatened danger must be reasonably

> and genuinely anticipated, must appear reasonably imminent, and must be of a nature which could not reasonably be met by more pacific means. A lawful object in this particular field therefore falls within a strictly limited category and cannot be such as to justify going beyond what the law may allow in meeting the situation of danger which the possessor of the firearm reasonably and genuinely apprehends. One does not, for example, possess a firearm for a lawful object if the true purpose is merely to stop threats or insults or the like." (p 194)

22. Accordingly, possession with the general object of using the items for self-defence should the need arise was capable of being possession "for a lawful object" for the purposes of limb (2) of section 4(1). This was so, even though the availability of a defence of self-defence, should the pistol ever be used by the appellant, would depend upon the particular circumstances in which it was so used, including consideration whether use of it was a proportionate reaction to the specific threat experienced at the time and whether there were other means of avoiding that threat. No one could know in advance whether those conditions would be satisfied or not.

23. There was no challenge to the correctness of any part of this reasoning.

24. *Fegan* was followed by the Criminal Division of the Court of Appeal of England and Wales (Lord Lane CJ, McCowan and Leggatt JJ) in *Attorney General's Reference (No 2 of 1983)* [1984] QB 456. The accused, whose property had been attacked and damaged by rioters, and fearing that it would be attacked again, made some petrol bombs, which he intended to use purely to repulse raiders from his property. A prosecution submission that self-defence could not constitute a defence to an offence under section 4(1) was dismissed by the trial judge, and the jury acquitted the accused. The Attorney General referred for the court's opinion the question whether self-defence could be a defence to an offence under that provision. The court endorsed the reasoning in *Fegan's* case and held that self-defence could constitute a lawful object for the purposes of section 4(1). It noted that, as was common ground, the accused had committed offences contrary to provisions of the 1875 Act by making and possessing explosive substances. However, the court held that a person in danger "may … arm himself for his own protection, if the exigency arises, although in so doing he may commit other offences" (p 471). The court said,

> "In our judgment, approaching a priori the words 'lawful object' it might well seem open to a defendant to say, 'My lawful object is self-defence'. … The fact that in manufacturing and storing the petrol bombs the respondent committed offences under the Act of 1875 did not necessarily involve that when he made them his object in doing so was not lawful …

> The object or purpose or end for which the petrol bombs were made was not itself rendered unlawful by the fact that it could not be fulfilled except by unlawful means. The fact that the commission of other offences was unavoidable did not result in any of them becoming one of the respondent's objects." (p 470)

25. The court answered the point of law referred to it by saying that the defence under limb (2) of section 4(1) is available if the accused "can satisfy the jury on the balance of probabilities that his object was to protect himself or his family or his property against imminent apprehended attack and to do so by means which he believed were no more than reasonably necessary to meet the force used by the attackers" (p 471). The court so concluded, even though the question whether the defence of self-defence would eventually be available if the accused happened to make use of the petrol bombs would depend upon the particular circumstances in which they were used. Thus, as in *Fegan's* case, the court's ruling was based on the idea of self-defence as a general object of the accused, even though a defence of self-defence might not in fact be made out if the accused ever came to be charged with offences arising from actual use of the petrol bombs.

26. In *R v Riding* [2009] EWCA Crim 892; 2009 WL 1096 171, the Criminal Division of the Court of Appeal of England and Wales (Hughes LJ, King J and Judge Radford) again considered section 4(1). The appellant made a pipe bomb and kept it at his home. He was convicted of the offence of making an explosive substance, contrary to section 4(1). He appealed against his conviction on grounds which included that the trial judge was wrong to hold that it could not be a lawful object to make the pipe bomb that he did out of no more than curiosity to see whether he could do it. The contention of the appellant was that for the purposes of section 4(1) "a lawful object is the absence of any object which is criminal" (para 8). The Court of Appeal rejected that submission. It rightly held that section 4(1) provides that if a person is found in possession of or has 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" (para 10); "lawful object" in limb (2) of section 4(1) does not mean "the absence of criminal purpose", but rather requires the accused to identify "a positive object which is lawful" (para 12). The court followed what Lord MacDermott CJ said about this in *Fegan's* case: the onus resting on the accused is "specific but positive. He has to show possession for a lawful object" (para 12, quoting from the passage set out above).

Discussion

27. In my view, the structure of section 4(1) is clear. If, under limb (1), the prosecution proves circumstances as to give rise to reasonable suspicion that the

making or possession/control of an explosive substance which is in issue is not for a lawful object, that gives rise to a specific onus on the accused under limb (2) to identify the specific object or purpose for which he made the substance or had it in his possession/control. The burden of proof at the limb (2) stage is on the accused, and the standard of proof is the balance of probabilities.

28. The object or purpose so identified by the accused under limb (2) has to be "lawful" in the place in which it is to be carried into effect: see *R v Berry* [1985] AC 246. In the present case, that was in England and "lawful" has the usual sense of that term in English law, namely that the object in question is not an object or purpose which is made unlawful by the common law or statute. As it was put by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 357: "England … is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden." There is no other sensible criterion of lawfulness to be applied. Nothing said in any of the authorities referred to above suggests otherwise. Moreover, the general requirement that the criminal law should be clear and give fair notice to an individual of the boundaries of what he may do without attracting criminal liability supports this interpretation: "a person should not be penalised except under clear law", sometimes called the "principle against doubtful penalisation": see *Bennion on Statutory Interpretation*, 7th ed (2019) (D Bailey and L Norbury, eds), section 27.1. As explained in *Fegan's* case and *Attorney General's Reference (No 2 of 1983)*, the fact that the making or possession of the substance may involve the commission of regulatory offences does not prevent an accused who seeks to make out a defence under limb (2) of section 4(1) from relying on an object at a more general level which is lawful.

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.

30. In *Riding's* case at para 12 the Court of Appeal, having approved and adopted what had been said by Lord MacDermott CJ, continued by saying "Mere curiosity simply could not be a lawful object in the making of a lethal pipe bomb" and observed that the appellant did not have a lawful object for making the bomb. The court therefore dismissed the appellant's appeal against conviction in relation to the section 4(1) offence.

31. This conclusion was correct on the facts of the case. The trial judge and the Court of Appeal explained that there was no need for the appellant to use an explosive substance to satisfy his curiosity whether he could successfully construct a pipe bomb: instead of filling it with gunpowder, he could have used an inert substance such as sand, "which would equally have demonstrated whether or not he was capable of constructing it" (para 3). He had constructed the pipe bomb in the spring of 2006, a considerable time before it was found in his possession, and had not attempted to detonate it (para 3). It was not part of his case that he had made the pipe bomb in order to see if he could make it explode. The court's statement that "[m]ere curiosity simply could not be a lawful object in the making of a lethal pipe bomb" has to be read in this context.

32. Unfortunately, however, that statement was taken as having wider significance by Judge Wall QC and the Court of Appeal in the judgments below in the present case. The critical part of the reasoning of the Court of Appeal is at paras 42 and 43:

> "42. In summary, we conclude that *Riding* was not decided per incuriam the various cases relied on by the applicant. The outcome in *Riding* would have been the same, even if the court had been shown those cases. In any event, 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, section 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."

33. With respect, I consider that the court fell into error in its reasoning in the latter part of para 42 and in para 43. Experimentation and self-education, including to satisfy one's curiosity in relation to the subject of investigation, are lawful objects. As a matter of ordinary language, they are "objects" every bit as much as self-defence is an "object". That is true as a general proposition. It is particularly true in relation to section 4(1), enacted against the background of the 1875 Act, which in sections 4 and 5 recognised the lawfulness and legitimacy of individuals making or possessing quantities of explosives for the purposes of private experimentation and other "private use".

34. In the first part of para 42, the Court of Appeal rehearsed the analysis correctly set out in *Riding's* case. But in the latter part of para 42, the court set the bar to be cleared by an accused under limb (2) of section 4(1) rather too high, when it said that he must "show that the way in which [the explosives in his possession] will be used is itself lawful". In my judgment, the accused does not have to identify precisely how the explosives will be used in future and that this will be lawful. To require that would be inconsistent with *Fegan's* case and *Attorney General's Reference (No 2 of 1983)*, in which it was held that the accused only had to identify a relatively general object for which the explosive substances were to be used, which object was lawful (ie self-defence), and that it was in the reasonable contemplation of the accused that the explosive substances might be required for that purpose and could lawfully be used for that purpose. As noted above, the defendants in those cases could not demonstrate precisely how the substances might come to be used; nor could it be guaranteed that if and when they were used, such use would necessarily be lawful.

35. In my view, in para 43 the Court of Appeal erred by treating the statement in *Riding's* case that "[m]ere curiosity simply could not be a lawful object in the making of a lethal pipe bomb" as, in effect, a proposition of law rather than a

statement regarding the position on the facts in that case; and in rejecting the idea that experimentation or self-education can be objects for the purposes of section 4(1). In my judgment, they clearly can be "objects" for the purposes of that provision, as a matter of the ordinary use of language. The word "object" is synonymous with purpose, and similarly has a relatively general meaning. The object or purpose for which something is done is distinct from the precise conditions under which it might be done. Moreover, Parliament must have contemplated that that is how an accused or their spouse, speaking naturally when giving evidence pursuant to section 4(2) of the 1883 Act, would be likely to express themselves when giving an explanation in the witness box of the kind which it considered they should have the opportunity to present by way of defence under limb (2) of section 4(1).

36. In line with the approach in *Attorney General's Reference (No 2 of 1983)*, the word "object" is to be given its natural meaning as a matter of ordinary language. In *Berry's* case, Lord Roskill, in giving the only substantive speech in the appellate committee, emphasised that the term "object" as used in section 4(1) is "an ordinary English word", and accordingly was to be given its ordinary meaning so that unlawful "object" is "synonymous with an unlawful purpose or an unlawful intent" ([1985] AC 246, 254).

37. There is nothing unlawful about experimentation and self-education as objects, in themselves, so they are capable of being "lawful objects" within the meaning of section 4(1). Further examples can be given to illustrate the intended meaning of "lawful object" in section 4(1): see para 40 below.

38. In the penultimate sentence of para 43 of its judgment the Court of Appeal called attention to a case of mixed objects. In my view, contrary to that of the Court of Appeal, the example given does not show that experimentation cannot be an "object" for the purposes of section 4(1). Rather it provides an illustration that, as contemplated in *Fegan's* case, in a case of mixed objects where one of the objects is unlawful or in a case where unlawfulness taints the potentially lawful object on which the accused seeks to rely in his defence, the defence under limb (2) will fail. Whether that is so in a particular case will usually be a matter to be determined on the evidence at trial.

39. Mr Mably sought to supplement the reasoning of the Court of Appeal. He submitted that Judge Wall QC was right at the preparatory hearing to disallow presentation by the appellant at trial of his proposed defence under limb (2) of section 4(1) by reference to the objects of experimentation and self-education, because in his defence statement he had not given a detailed account of how he proposed to use the HMTD such as would demonstrate that his detonation of it in his back garden would not cause harm to other people or damage to their property. I do not accept that submission.

40. Section 4(1) has general application. It can apply in the case of a teacher in the chemistry department of a school or university, or a person in a commercial research laboratory, who makes explosive substances or has them in his possession. If a charge were brought against such a person under section 4(1) and the prosecution was able to surmount the relatively low hurdle in limb (1) of the provision, the accused would be entitled to defend himself under limb (2) by proving that his object in making or keeping the substances was experimentation, education or research. It is apt to describe each of those as an "object", as a matter of ordinary use of language. It might be the case that the accused had no developed and precise plan in mind as to how he proposed using the substance for those purposes, but that would not disable him from presenting a defence under limb (2). The absence of a precise plan as to how the substance was to be used in the course of pursuing those purposes might be a relevant matter to be taken into account at trial. But it would be for the jury to assess, on the evidence at trial, whether the defence was made out despite the absence of precise details as to proposed use. That view is supported by the approach taken to the lawful object of self-defence in *Fegan's* case and *Attorney General's Reference (No 2 of 1983)*, as explained above.

41. For his defence under limb (2), the appellant only had to establish that he proposed using the HMTD in his possession for the lawful objects of experimentation and self-education. The term "lawful object" in limb (2) does not require specification of the precise way in which the substance in question will be used by the accused. The appellant's proposed defence was that he intended to use the HMTD in small amounts to produce insignificant detonations of the order to be expected from a simple domestic firework, ie at a level which was lawful. It was possible that he could have achieved this, or that he genuinely believed that he could, as he had done using other explosive substances on previous occasions. Therefore his defence under limb (2) should have been allowed to be presented at trial, rather than being ruled out at the preliminary hearing.

42. In parts of his submissions, Mr Mably appeared to be taking what amounted to a pleading point. He said that the appellant's defence statement did not give sufficient details of how he proposed using the HMTD in his experiments. As I understood the submission, this point was made by Mr Mably in support of his general argument regarding the meaning of "lawful object" in section 4(1), which I have addressed above. However, to the extent that he was seeking to make a different point, as a distinct complaint about a want of particularity in the defence statement, that is not within the scope of the issues which arise on this appeal. In any event, in my view the defence statement gave fair notice to the prosecution of the defence which the appellant proposed to present at trial, in accordance with the requirements of section 6A of the Criminal Procedure and Investigations Act 1996.

Conclusion

43. For the reasons given above, I would allow the appeal. I would answer the question certified by the Court of Appeal in the affirmative.

LORD LLOYD-JONES AND LORD HAMBLEN: (dissenting)

44. We regret that we are unable to agree with the decision of the majority.

45. Counts 1 and 2 of the indictment charge the appellant with the offence of making or possession of an explosive under suspicious circumstances contrary to section 4(1) of the Explosive Substances Act 1883. During the course of argument before this court, a defect in the drafting of the particulars of offence having been identified, the parties agreed that we should approach this appeal on the basis that the particulars of the offence on each count allege that the appellant knowingly had in his possession or under his control an explosive substance in such circumstances as to give rise to a reasonable suspicion that it was not in his possession for a lawful object. Mr Mably QC for the respondent told us that an application will be made to the Crown Court to amend the particulars of offence in each count accordingly. Mr Bogan QC for the appellant was also content that we should proceed on the basis of the defence statement as presently drafted because it would still reflect the substance of the defence. We will do so and we will limit our discussion to the offence committed in cases of possession.

46. The scheme of the offence created by section 4(1) is that the prosecution is required to prove that the defendant was in possession of an explosive in circumstances giving rise to a reasonable suspicion that the defendant did not have the explosive in his possession for a lawful object. If that is established, it is for the defendant to prove that he had it in his possession for an object which was lawful. In the present case the Court of Appeal noted (at para 37) that a reasonable suspicion is enough for the offence to be made out and continued:

> "This accords with common sense, because possessing or controlling explosives is dangerous (see *Riding* at para 10) and so it is understandable that the criminal law should be engaged in cases of reasonable suspicion, it not necessarily being possible for the prosecution to establish the precise object. The obvious purpose of the statute is to protect human life and property from harm by explosions."

47. In the present case, each count alleges the possession by the appellant of HMTD, a sensitive primary high explosive that can easily be detonated from a spark, friction or impact and which has no commercial applications. The respondent contends that the circumstances give rise to a reasonable suspicion that he did not possess it for a lawful object. The appellant contends that he can rely on the statutory defence under section 4(1) as he "can show that … he had it in his possession … for a lawful object". In particular, he maintains that, he was in possession as a result of an obsessional interest in the armed forces and a need to understand how explosives work and that his object or objects encompassed interest, education and experimentation. This is summarised in the certified question which asks:

> "For the purposes of section 4(1) of the Explosive Substances Act 1883 can personal experimentation or own private education, absent some ulterior unlawful purpose, be regarded as a lawful object?"

48. Whether the appellant's possession of HMTD may have been, quite independently of section 4(1), unlawful, for example under the Explosives Regulations 2014, is irrelevant for present purposes. A person in possession of an explosive in suspicious circumstances does not commit an offence contrary to section 4(1) if he can show on the balance of probabilities that he was in possession for a lawful object. The defence may be available even if the possession is otherwise unlawful. In *R v Fegan* (1971) 78 Cr App R 189, Court of Appeal of Northern Ireland, Lord MacDermott CJ accepted as correct a concession that a firearm held without certificate, permit or other authority might be possessed for a lawful object for the purposes of section 4(1). The Lord Chief Justice observed (at p 194):

> "A firearm in lawful possession may undoubtedly be possessed for an unlawful object and there seems no good reason why the converse should not be equally true."

The defence turns on the defendant's object in having the explosive in his possession.

49. It would be insufficient, in order to make out a defence under section 4(1), for a defendant to establish that he was not in possession of an explosive for a purpose which was unlawful. He must show that he was in possession for a lawful purpose. That is the natural meaning of the words in the statute and it was the interpretation adopted by the Court of Appeal of Northern Ireland in *Fegan* where Lord MacDermott observed, at p 194:

> "as a matter of construction, a defence under the second limb of section 4(1) cannot be made by the possessor proving that he had no unlawful object. The onus resting on him is specific but positive. He has to show possession for a lawful object."

Similarly, in *R v Riding* [2009] EWCA Crim 892 the Court of Appeal Criminal Division held that "lawful object" does not mean the absence of a criminal purpose. It is necessary to identify a positive object which is lawful. Hughes LJ referred in this regard to *Attorney General's Reference (No 2 of 1983)* [1984] QB 456, where the defendant had made petrol bombs. The Court of Appeal in that case had been prepared to accept that self-defence against rioters was capable of amounting to a lawful object, at least if the defendant could demonstrate that that was his sole object and that the means adopted were no more than he believed to be reasonably necessary. However, as Hughes LJ observed in *Riding* (at para 12),

> "It is plain that the court took the view that the defendant could only be within the defence if the necessary immediacy of danger and reasonableness of the response was present. There was no question of the possession of the petrol bombs being lawful unless some criminal purpose for them existed."

50. In the present case it has been made clear on behalf of the appellant, both in the defence statement and in the appellant's written case, that it was never his case that the mere absence of an unlawful object could suffice to establish the statutory defence. Indeed, Mr Bogan on behalf of the appellant has accepted that a generic and unspecified plea or a passive plea of having no unlawful object could not succeed as it would rob the tribunal of the ability to make findings as to what was the true object and whether it was lawful or unlawful.

51. Against this background, the central issue in this appeal is whether the explanation provided in the defence statement ie that the appellant had explosives in his possession for the purpose of personal experimentation or private education, is capable of being a sufficient lawful object within section 4(1). The trial judge and the Court of Appeal held that it was not. We agree with them.

52. The statutory defence requires proof, on the balance of probabilities, of both (1) the object of the possession of the explosive substance and (2) that that object is lawful. The natural meaning of the word "object" is "a reason for doing something, or the result you wish to achieve by doing it" (Cambridge English Dictionary). It involves identification of what you wish to do and why. We agree with the Court of Appeal (at para 42) that in the present context that means showing the use to which

the explosives will be put. It also necessarily involves identifying that use with sufficient particularity to show that the use may be lawful.

53. In our view, to say that something is done for one's own private education is not a sufficient object for the purposes of the section 4(1) defence, as it does not identify the use to which the explosives will be put in order to provide such education. Similarly, personal experimentation is not a sufficient object for this purpose as, although it identifies in very general terms what is to be done with the explosives, it does not identify any purpose for so doing.

54. This accords with the decision of the Court of Appeal in *Riding*. There, the defendant had made a pipe bomb which he kept in his home. He was convicted of making an explosive substance contrary to section 4(1). He appealed on the ground that the trial judge had been wrong to hold that it could not be a lawful object that, as he claimed, he made the pipe bomb out of no more than curiosity to see whether he could do it. Dismissing the appeal, Hughes LJ observed (at para 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. [Counsel for the appellant] 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."

55. Furthermore, as the Court of Appeal pointed out in the present case (at para 42), the defence is only made out when the person in possession of the explosives can show that the way in which those explosives was intended to be used is itself lawful. It is not enough to show that it may be lawful. Even if it were accepted that personal experimentation for the purpose of one's own private education may be an object, this does not describe with any particularity how the experimentation is to be carried out in a manner which is lawful. At the defence statement stage, it is necessary to identify a use which could be found to be lawful. This requires, at the very least, some details to be provided of the nature of the proposed experimentation or use. In this case, for example, it was apparently envisaged that experimentation would take the form of detonations of the explosives in the appellant's back garden. (It is the prosecution case that over the months prior to his arrest the appellant 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. For such experimentation to be capable of being lawful it would be necessary to particularise how it was to be carried out so as to avoid any such risk or how it would otherwise be lawful. Defence statements are meant to set out particulars of the matters of fact intended to be relied upon for the purposes of a defence (section 6A of the Criminal Procedure and Investigations Act 1996). We consider that the vague and generalised statements referring to personal experimentation and private education, whether considered individually or taken together, fail to provide sufficient particularity of how these claimed objects were to be carried out lawfully.

56. The self-defence cases, *Fegan* and *Attorney General's Reference (No 2 of 1983)*, referred to above are distinguishable. In those cases what was accepted as capable of constituting a lawful object was use for purposes of self-defence in circumstances where the necessary immediacy of danger and reasonableness of the response were present (see *Riding* per Hughes LJ at para 12, cited above). In *Fegan* and in *Attorney General's Reference (No 2 of 1983)* the claimed object was intended use to meet a future contingency which use could be sufficiently defined by reference to the limits of lawful self-defence. That necessarily involved the assertion that the explosive substances would only be used in circumstances where the defendant believed that it was necessary to use force and that the amount of force used was reasonable. In the present case, by contrast, no lawful use of the explosives within the statutory provision is identified. Reliance on personal experimentation and own private education gives no sufficient indication of the use to which it was intended the explosives should be put, nor does it permit any assessment of its lawfulness.

57. For these reasons we consider that the judge was correct in his conclusion that the explanation set out in the defence statement was not capable of amounting to a lawful object within section 4(1). We would answer the certified point of law as follows:

> "For the purposes of section 4(1) of the Explosive Substances Act 1883, personal experimentation or own private education, absent some ulterior unlawful purpose, cannot be regarded as a lawful object."

58. We would accordingly dismiss the appeal.