



Neutral Citation Number: [2008] EWCA Crim 184

Case No: 200704347C2, 200704457C2, 200704452C2,  
200704444C2, 200704441C2, 200800259 C2

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CRIMINAL DIVISION)**

**ON APPEAL FROM**

**His Honour Judge Beaumont QC**

**The Recorder of London**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/02/2008

**Before :**

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**

**THE HONOURABLE MR JUSTICE OWEN**

and

**THE HONOURABLE MR JUSTICE BEAN**

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**Between :**

**Aitzaz Zafar**  
**Akbar Butt**  
**Awaab Iqbal**  
**Mohammed Raja**  
**Usman Malik**  
**- and -**  
**R**

**Appellants**

**Respondent**

**Mr J. Bennathan QC for the appellant Zafar**  
**Mr N.M. Peters QC for the appellant Butt**  
**Mr M. Massih QC for the appellant Iqbal**  
**Mr J. Sturman QC for the appellant Raja**  
**Mr D. Gottlieb for the appellant Malik**

**Mr A. Edis QC for the Respondent**

Hearing dates : 5th and 6th February 2008

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**Judgment Approved by the court**  
**for handing down**

**Lord Phillips of Worth Matravers CJ:**

1. On 24 July 2007 before the Recorder of London (His Honour Judge Beaumont QC) and a jury the appellants were convicted of offences of possessing articles for a purpose connected with the commission, preparation or instigation of an act of terrorism, contrary to section 57 of the Terrorism Act 2000 ('the 2000 Act'). The articles in question were documents, compact discs or computer hard drives on which material had been electronically stored. The material included ideological propaganda as well as communications between the appellants and others which the prosecution alleged showed a settled plan under which the appellants would travel to Pakistan to receive training and thereafter commit a terrorist act or acts in Afghanistan.
2. The case had an unusual pre-trial history. The appellants originally faced charges under section 58 of the 2000 Act. On the first day of the committal proceedings the prosecution added counts under section 57 reflecting the same particulars as those under section 58. At a preparatory hearing at the Central Criminal Court the Recorder ruled on 9 January 2007 that electronically stored information was capable of being an article for the purposes of section 57. The appellants appealed. That interlocutory appeal was heard on 6 February 2007 and in a judgment handed down the following day (*R v M and Others (No.1)* [2007] EWCA Crim 218) the court held that documents and records, including electronically stored information, could not be the subject of convictions under section 57.
3. The correctness of that decision was challenged within a matter of weeks before a five-judge constitution of this court in *R v Rowe* [2007] EWCA Crim 635; [2007] QB 975. Rowe had been convicted on two counts of possessing an article for terrorist purposes contrary to section 57 in respect of a notebook which contained mortar instructions and a substitution code which listed components of explosives and places of a type susceptible to terrorist bombing. On 15 March 2007 this court, dismissing his appeal, held that documents and records can be "articles" for the purposes of section 57 and that the decision in *R v M and Others (No.1)* had been *per incuriam*.
4. On 4 April 2007 the Recorder of London gave a further ruling in the present case that he would be bound by the decision in *Rowe*. That ruling was upheld in a second interlocutory appeal (*R v M and Others (No.2)* [2007] EWCA Crim 970; [2007] 3 All ER 53). The court, noting that a ruling made by a judge at a preparatory hearing on any question of law may be varied by him in the interests of justice pursuant to section 31 (11) of the Criminal Procedure and Investigations Act 1996, held that the Recorder was right to exercise that power in the present case so as to follow the law as set out in Rowe.
5. Thereafter the prosecution elected to proceed only in respect of the charges under section 57. The trial commenced on 16 May 2007.
6. The prosecution case may be summarised as follows. Four of the five appellants were students at Bradford University. The fifth, Raja, was a schoolboy in Ilford. Raja made contact with Iqbal through the internet messaging service MSN. On 24 February 2006 Raja left his home with his passport, leaving a martyrdom song on the family computer and a letter under his mattress stating that he had gone to take part in conventional warfare abroad. His family contacted the police, who search his and examined the contents of the computer. The hard drive of his computer revealed a significant amount of religious or political material, some of it of an extreme nature.

7. Raja had in fact gone to Bradford using a bus ticket paid for by Iqbal. He stayed in Bradford for a few days at the house at which Iqbal and Zafar lived, and brought with him three discs he had made containing selected material from the computer and labelled as 'philosophy discs'. During his stay he was in contact with his family who prevailed upon him to return home. On his return he was arrested.
8. Subsequent police enquiries led them to arrest and search the other appellants, which revealed that they too were in possession of radical Islamic material and other material such as a USA military manual downloaded from the internet. Further MSN communications were found. These included an MSN discussion between all four of the Bradford appellants and a cousin of Malik, Imran, who lived in Pakistan, on 1 March 2006. It was the prosecution case that Imran was a foreign based terrorist. In the course of that discussion Butt asked about how to travel without raising suspicion.
9. Early in the trial Mr David Gottlieb, on behalf of Malik, asked the judge to rule on the meaning and scope of section 57. His concise written submissions in support of the application argued that the phrase "a purpose connected with" required the connection to be direct, not merely remote; and that the purpose had to be connected with the immediate commission, preparation or instigation of terrorist acts, at least in the sense of something that was to happen within a "relatively short" time. The judge declined to give such a ruling during the prosecution evidence.  
At the conclusion of the prosecution case submissions were made on behalf of each defendant that there was no case to answer. The Recorder rejected the submission. The trial accordingly proceeded. Iqbal, Zafir and Butt gave evidence. Raja and Malik did not.
10. The jury acquitted Zafar and Iqbal on one count, count 3, which charged them with possession of three 'philosophy disks'. These contained material emanating from Raja. The juries returned unanimous verdicts of guilty in respect of all the other charges.
11. The Recorder imposed sentences of 3 years' imprisonment on Malik, 3 years' detention in a young offenders' institution on Zafar and Iqbal, 27 months' detention on Butt, and 2 years' detention on Raja.
12. Each defendant appeals against conviction with the permission of the single judge except Iqbal, to whom we granted permission at the outset of the hearing.
13. A number of different grounds of appeal were advanced, some particular to individual appellants, others of general application. We do not need to consider all of these, for the result of this appeal turns on the principal issue raised on behalf of the appellants, which is the scope of section 57 of the 2000 Act. It was submitted on behalf of the appellants that an offence could only be committed under that section if there was a direct connection between the article possessed by the defendant and an intended act of terrorism. There was no such connection in this case, nor could there be having regard to the nature of the relevant articles. There was no case that should have been allowed to go to the jury. Furthermore, the Recorder did not adequately direct the jury as to the necessary connection between the articles in the appellants' possession and the acts of terrorism with which the prosecution alleged they were connected.
14. We propose first to consider the construction of section 57, secondly to consider whether, having regard to the scope of section 57 there was a case that should have

been left to the jury at the close of the prosecution case and finally to consider whether the directions given by the Recorder to the jury adequately reflected the law as we have found it to be.

### **The scope of section 57**

15. Section 57 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”

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 appellants 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.

17. ‘Terrorism’ is defined by section 1 of the 2000 Act as including the use of firearms or explosives that endangers life for the purpose of advancing a political, religious or ideological cause.

18. The articles that the Crown allege that the appellants possessed in breach of article 57 were for the most part computer discs or drives on which information was stored. The intended acts of terrorism with which the Crown allege these articles were connected consisted of fighting against the government in Afghanistan. The critical issue that arises on the facts of this case is whether there existed between the articles and the acts of terrorism a connection that satisfied the requirements of section 57.

19. There was placed before us a report delivered by Lord Lloyd of Berwick dated 4 September 1996 to the Secretaries of State for the Home Department and for Northern Ireland in relation to legislation against terrorism. This recommended the incorporation into legislation of the provision that became section 57 of the 2000 Act. Lord Lloyd explained the purpose of this provision as follows:

“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 in 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 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.”

20. No problem arises in respect of the phrase “possession for a purpose connected with the commission, preparation or instigation of an act of terrorism” where the article possessed is an article such as those referred to by Lord Lloyd. An article that is intended to be incorporated in a bomb, or used as an ingredient of explosives designed for an act of terrorism, will be held for the purpose of bringing about the act of terrorism. There is a direct and obvious connection between the article and the intended act of terrorism. The purpose for which the article is held will plainly fall within section 57.
21. In this case the articles possessed by the appellants stored literature. The prosecution proceeded on the basis that the purpose for which the articles were possessed depended upon the use that the appellants intended to make of the literature stored on them. Literature may be stored in a book on a bookshelf, or on a computer drive, without any intention on the part of the possessor to make any future use of it at all. Alternatively it may be stored for a number of different purposes:
- i) To be read by the possessor for his own enjoyment or education or inspiration.
  - ii) To be transferred by the possessor to others for their enjoyment or education or inspiration.
  - iii) To be transferred by the possessor to others by way of instruction or encouragement to act in a particular way.
  - iv) To provide information or instruction to the possessor or to others as to how to carry out a particular activity.
22. Where a computer drive contains different items of information that are being stored for different purposes a question arises as to whether one can equate the purpose for which the computer drive is possessed with the purpose for which a particular item of literature is stored on it. To take a simple example, if the drive contains a recipe for making a cake, can one properly say that the computer drive is possessed for the purpose of making cakes? That question might have been raised in respect of some of the counts in this case, but was not. The case proceeded on the basis that the purpose for which the relevant computer drive or disc was possessed by each appellant could be equated with the purpose for which he intended to use those items of literature on it upon which the prosecution relied. Because of the conclusions that we have reached

in these appeals we have found it possible to proceed upon that basis. Our judgment should not, however, be relied upon for the proposition that, for the purpose of section 57, a general purpose article such as a computer, or a telephone, or a vehicle can be said to be “possessed for the purpose of” any single use that is intended to be made of the article. We shall leave the problem of how you define the purpose of possession of a general purpose article for resolution on another occasion.

23. One way in which Mr Edis QC for the prosecution sought to justify those verdicts which related to computer drives was that the computers had been and were to be used as a means of communication in relation to the forming and implementation of a plan that would culminate in acts of terrorism. That was not, however, the basis, or certainly not the sole basis, upon which those counts were left to the jury. The jury were invited to focus on the use that was to be made of the material on the computers – not on the computers themselves.
24. It was necessary for the prosecution to prove first the purpose for which each appellant held the stored material and then to prove that this purpose was “connected with the commission, preparation or instigation” of the prospective acts of terrorism relied on by the prosecution, namely fighting against the government in Afghanistan.
25. There is no conceptual problem in relation to establishing a direct connection between literature held for the fourth purpose that we have set out in paragraph 21 above and the commission of an act of terrorism. Thus in *Rowe* [2007] EWCA Crim 635 this court upheld a conviction under section 57 in respect of a notebook containing instructions on how to assemble and operate a mortar and an encrypted list of potential targets for terrorist bombing. The literature in the present case did not however fall within the fourth category.
26. Counsel for the appellants described the relevant literature as “of a theological and/or philosophical nature”; “propaganda or ideological material”. Counsel for the prosecution described it as “extremist material” “Al Qaida recruiting material”. In argument it was accepted on behalf of the appellants that much of the material was extremist.
27. There was considerable debate at the hearing of the appeal as to the effect of the words “connected with” in section 57. Did those words give the section a wider ambit than if it had provided that ‘a person commits an offence if he possesses an article...for the purpose of the commission, preparation or instigation of an act of terrorism’? Mr Edis submitted that in the present case the prosecution had proceeded on the basis that they had to prove that the possession of the articles was “for the purpose of the commission, preparation or instigation of acts of terrorism” and the jury had been directed on that basis. None the less, he submitted that the addition of the words “connected with” did enlarge the ambit of the section. This is a matter that we must address, for an issue has been raised as to whether the ambit of the section is too uncertain to satisfy the requirements of legality.
28. We can exemplify the problem in this way. It was the prosecution case that the appellants were party to a plan that involved the following three stages:
  - i. travelling to Pakistan;
  - ii. training in Pakistan;

iii. fighting against the government in Afghanistan.

Only the third stage would amount to ‘acts of terrorism’. One could, however, say that travelling to Pakistan and training were “connected with the commission of acts of terrorism”. We asked Mr Edis whether possession of an air ticket for travel to Pakistan would constitute “possession of an article for a purpose connected with the commission of acts of terrorism”. He answered that it would. What then, we asked, of the cheque book that was to be used to pay for the air ticket? Mr Edis conceded that we were getting into difficult territory. The reality is that the phrase “for a purpose in connection with” is so imprecise as to give rise to uncertainty unless defined in a manner that constrains it.

29. We have concluded that, if section 57 is to have the certainty of meaning that the law requires, it must be interpreted in a way that requires a direct connection between the object possessed and the act of terrorism. The section should be interpreted as if it reads:

“A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that he intends it to be used for the purpose of the commission, preparation or instigation of an act of terrorism.”

30. As we have said, Mr Edis told us that, at the trial, the prosecution had set out to prove that each appellant intended to use the information that he possessed for the purpose of the commission, preparation or instigation of an act of terrorism. He submitted that this was the case advanced before the jury and that the jury properly found it proved. One way that he put the prosecution case to us in oral argument can be summarised as follows. The instigation of an act of terrorism embraces incitement to commit an act of terrorism. Each appellant had used and intended to use the literature in his possession to incite both himself and his fellow planners to commit acts of terrorism. Thus the requirements of section 57 were satisfied.
31. Not without hesitation we have concluded that possessing a document for the purpose of inciting a person to commit an act of terrorism falls within the ambit of section 57. We have considered the definition of ‘instigate’ in a number of dictionaries and, in each case, have found the word ‘incite’ as a synonym. Black’s Law Dictionary, 7<sup>th</sup> Ed, defines ‘instigate’ as ‘to goad or incite (someone) to take some action or course.’ We have concluded that section 57 must be construed having regard to the normal meaning of instigate. Our hesitation comes from our belief, founded on a body of material drawn to our attention that was not strictly admissible as an aid to statutory construction, that those responsible for section 57, including Parliament, did not envisage that it would extend to possessing propaganda for the purpose of incitement to terrorist acts. That belief is strengthened by the fact that Parliament considered it desirable to legislate in relation to possessing propaganda with the intention of inducing acts of terrorism by section 2 (2)(f) of the Terrorism Act 2006.
32. The skeleton argument submitted to us by Mr Edis had not, however, suggested to us that it was the prosecution’s case that there had to be a direct connection between the articles possessed and the acts of terrorism. The first passage dealing with the purpose of possessing the material stated:

“The prosecution alleged that the extremist material was collected and possessed by each defendant in order to guide,

inspire and sustain the group which they had formed by using the material and which had, because of the material, become indoctrinated.”

33. A little later the skeleton argument said this:

“25. The Prosecution case, proved to the satisfaction of the jury and amply supported by evidence, was that these defendants were each members of a group which intended to travel to Pakistan; to train at Al Qaeda or similar training camps; to join the foreign fighters on the North West Frontier and in Afghanistan; and to carry out such acts of terrorism as were required of them. This would include fighting against British Forces which have been deployed to support the lawful government of Afghanistan as part of a UN mandated intervention. They therefore had an intention, individually and collectively, to do three things, namely to instigate AND prepare AND commit acts of terrorism. The question asked in some of the appeal documents, namely whether one can instigate oneself does not arise in this case. This case was not solely about instigation. Neither was it only about training. They were not only going to train. They were going to put that training into effect.

26. Each defendant denied membership of any such group or having any such intention and gave or called evidence in support of that denial.

27. If the prosecution could prove that any defendant possessed any article for a purpose connected with the execution of the plan identified at 25 above, then it would be open to the jury to conclude that the possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism. They did so conclude.”

34. This passage suggested to us that it was the prosecution’s case that a much looser connection between the material possessed by the appellants and the terrorist act of fighting against government forces in Afghanistan would suffice to establish the appellants’ guilt. Thus, for instance, it would suffice if the material was ‘for a purpose connected with’ the travel to Pakistan. For the reasons that we have given, we do not accept that such a connection would satisfy the requirements of section 57.

#### **Was there a case to go to the jury?**

35. At the close of the prosecution case the Recorder ruled on submissions that there was no case to answer. In considering the evidence he focussed on what we suspect appeared to be the most significant issues raised by the defence in the case of each defendant. This tended to be whether the defendant ‘possessed’ the article in question and whether the defendant was party to a concluded plan to travel to Pakistan, to train there and then to go to fight in Afghanistan.

36. In analysing what the prosecution had to prove, the Recorder dealt with the nexus between the article and the act of terrorism in this way:



“Moving on, “for the purpose” means for the purpose of the defendant in question. *He*, my emphasis, must have the purpose of possessing the article in connection with the commission, preparation or instigation of an act of terrorism”

This was a less than satisfactory alternative to “for the purpose of the commission, preparation or instigation of an act of terrorism”. We consider that the Recorder may well, quite understandably, have concluded from the words “connected with” that a less than direct connection between the article possessed and the act or terrorism would suffice to bring the possession within section 57. He may have concluded that if the appellants were exchanging the material on their drives and discs before or at their meetings and they were using those meetings to plan terrorist acts, the purpose of possessing the information was ‘in connection with the commission, preparation or instigation of terrorist acts’.

37. Was there evidence before the jury that left it open to them to conclude that the appellants possessed the drives and discs for the purpose of instigating acts of terrorism? Without considering in detail the extremist literature and the evidence given in relation to it and the MSN communications we are unable to answer this question with certainty. Mr Edis took us through those communications at some length. While they lent support to the prosecution case that the appellants had formed a plan to go to Pakistan to train and then to Afghanistan to fight, there was nothing that evidenced expressly the use, or intention to use, the extremist literature to incite each other to do this. We think it doubtful whether there was a case of infringement of section 57, as we have interpreted it, that could properly have been left to the jury.

### **The directions to the jury**

38. We turn to consider the directions given by the Recorder to the jury to see whether he conveyed to them the need, if they were to convict, to be sure that the appellants had the intention of using the material on their computer discs or drives in order to incite one another to perform acts of terrorism, namely fighting against the government in Afghanistan.
39. The most material passages in the Recorder’s summing up appear in the transcript for 6 July 2007. He gave, and then repeated, the following direction:

“Let us turn from that to the second thing that the prosecution have to prove, that provided possession of each article or articles is proved, that his possession, that is to say the possession of the defendant whose case you are considering, 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, namely by travelling to Pakistan and there joining those persons currently engaged in violence, the mujahidin waging violent jihad (shorthand that we have used in this case), joining those persons currently engaged in violence against the forces of the government of Afghanistan and those of the governments, whether of the United States of America, Great Britain, Australia or, for that matter, any other in that country at the invitation of and in support of the Government of

Afghanistan by training for and, if necessary, actively participating in such violence.”

40. This direction was unsatisfactory in three respects. First it included the words “connected with” albeit that it was the prosecution’s case that the articles had to be possessed directly for the purpose of instigating acts of terrorism. Secondly it rolled up the three different stages of the plan, travelling, training and fighting against the government as constituting the ‘act of terrorism’, whereas only the fighting was capable of constituting such an act. Thirdly, it qualified the ‘act of terrorism’ by the words ‘if necessary’. This further diminished the connection that the jury were instructed that they needed to find between the possession of the articles and the act of terrorism.
41. At the end of his summing up, counsel raised with the Recorder the question of whether it had been appropriate to include in his direction the words ‘if necessary’. In consequence, he then repeated, in somewhat different language, his direction, omitting the words ‘if necessary’.
42. In the passage that we have quoted the Recorder spoke of possessing the articles “for a purpose connected with committing” etc. without specifying what that purpose was. He went on to deal with how the prosecution proposed to prove this. In the course of doing so he said:

“To that end, the prosecution have nailed their colours to the mast. That is what they seek to prove against each defendant and if they do you will not have to concern yourself with the words in section 57, ‘possession in circumstances which give rise to reasonable suspicion that the purpose for which the article is possessed is connected with an act of terrorism’, because the prosecution seek to prove that it is connected, directly connected.

...

Finally, if they do succeed in proving that, there is no question that the purpose proved was for an act of terrorism, as defined by the Terrorism Act 2000, because it would involve the use of firearms or explosives, it is serious violence against the person, it endangers life and it involves serious damage to the property, if nothing else.”

In this passage the Recorder tells the jury that the prosecution intend to prove that the possession of the articles were “directly connected” with the acts of terrorism. He does not at that point deal with the nature of the ‘direct connection’.

43. The Recorder went on to direct the jury as to how it was that the prosecution intended to prove the various elements of the offence. He said:

“The prosecution argue that the evidence proves that each defendant possessed the article or articles in question because he had joined a group, embracing all five defendants certainly, but possibly more, who intended, when each could, to travel to Pakistan for that purpose. That was the plan.”

44. The Recorder went on to speak of the group having the shared intention:

“...to go to Pakistan when he could and there to train to fight if called upon and to die if necessary, violent death being the theme that runs through the extremist material that each of these five had collected, say the prosecution, death as a martyr and death as a suicide bomber in particular, extreme material, as the prosecution point to, ‘Join the Caravan’ by Abdullah Azzam possessed by all five defendants, extreme material collected, possessed and in some instances, shared by all whose purpose was to guide, inspire and sustain although the possession of every single item is not in itself illegal, but as a collection [it] provided the material that they fed off, watching the videos of attack. It is the oxygen that kept them going. The choice of MSN user names is not accidental, say the prosecution. Abu Dharr by Iqbal, Abu Musab by Butt, are both suicide bombers, are they not. Juhayman al Utaybi, Zafar’s choice was, as you will see from Admission 4 in your Admissions, the leader of the group who stormed the Grand Mosque in Mecca and was there captured and beheaded by the forces of the Government of Saudi Arabia. The photos of the 9/11 bombers are not there for decoration, say the prosecution, with the images of some of the defendants superimposed, the posturing for photographs in the clothing of the terrorist, it is all the result of the collecting and the sharing of the material that they possessed and the glorification of the suicide bombers that is the theme that runs through it.”

45. It is not possible to spell out from these passages a direction to the jury that they had to be satisfied that each appellant possessed the relevant articles for the purpose of inciting the others to commit acts of terrorism, namely fighting against government forces in Afghanistan. The impression that the summing up gives is that the most critical issue was whether each appellant was party to a plan to travel to Pakistan, there to train and thereafter *if necessary* to fight (we do not think that the omission at the end of the summing up of the words in *parenthesis* can safely be taken to have expunged them from the jury’s mind). Once the plan was proved the summing-up suggested that the jury had to be satisfied that the planners intended to use the extremist material to sustain their enthusiasm and resolve – to ‘hype each other up’ in modern parlance. If they were so satisfied, the infringement of section 57 was proved.
46. These directions were not adequate. They did not tell the jury that they had to be satisfied that each appellant intended to use the relevant articles to incite his fellow planners to fight in Afghanistan.
47. In the course of argument we suggested to Mr Edis was that an unusual feature of this case was that the appellants had already used the relevant articles for the purpose for which they possessed them. The alleged infringement of section 57 consisted of an intention to continue, in the future, to use the extremist material in the same way that they had already been using it. We understood Mr Edis to accept this. We suggested to Mr Edis that, in these circumstances it would have been open to the prosecution to charge the appellants with inciting terrorism overseas, contrary to section 59 of the 2000 Act. He agreed. On reflection, he has written to us to correct the position:

“The prosecution position is that there are a few utterances on the MSN which were arguably capable of falling within section 59 but they did not reflect the totality of the conduct of the defendants. Not every defendant had made such an utterance. These utterances also do not focus on the particular crimes mentioned in section 59 but are of a general nature. There is an inference that there must have been other such utterances on occasions in the past, and a further inference that there would be others in the future which would be more and more proximate to an act of terrorism as time passed if the plan succeeded. The prosecution case was that the material was possessed for future use in inciting and so instigating acts of terrorism. In these circumstances charges under section 57 were preferred. The prosecution considered that the totality of the conduct of the defendants could not have been caught within charges brought under section 59. Otherwise, such charges would have been brought.”

48. We do not consider that it was made plain to the jury, whether by the prosecution or by the Recorder, that the case that the appellants had to face was that they possessed the extremist material for use in the future to incite the commission of terrorist acts. We doubt whether the evidence supported such a case.
49. Difficult questions of interpretation have been raised in this case by the attempt by the prosecution to use section 57 for a purpose for which it was not intended. The Recorder understandably sought to apply that section in accordance with the wide scope suggested by its wording. We have ruled that this wording must be given a more restricted meaning. The consequence of this is that the basis upon which the appellants were convicted is shown to have been unsound. Their appeals are allowed and their convictions must be quashed.