1. SUFFICIENCY

There is a legal test of sufficiency, in a wholly circumstantial case, established both in Scots law and applied internationally. Shortly put this is, that the combined circumstances relied upon must be such that the inference of guilt is the only rational inference which can be drawn. Only on this view, objectively assessed, can it be said that proof has been established beyond a reasonable doubt.

It may be that this test can also be characterised as providing one way of measuring the reasonableness of the ultimate inference of guilt and whether that inference goes beyond the limits of reasonable inference from the combination of proven facts. As such it could be viewed as one aspect of the broader argument regarding sufficiency made in ground 2.2 below.

Application of this test would have resulted in a finding of insufficient evidence and an acquittal. The combined circumstances relied upon to convict are summarised by the Trial Court in the judgement at paragraph (89):-

> "(89) ....we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of the first accused (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with Mr. Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of the first accused,"

These combined circumstances do not compel the conclusion of guilt. That the appellant was involved in the commission of this offence is not the only rational inference which can be drawn from this combination of circumstances.

The Scottish Criminal Cases Review Commission ("SCCRC"), in considering the issue of sufficiency, has not considered whether or not the combined circumstances meet the application of this test (see chapter 19 of the Statement of Reasons).

Reference is made to:

Hume II 382-384; 509-515; 522-525
Burnett 522
Dickson paras (98); (1811)
Wills on Circumstantial Evidence 7th Edition p26
Best on Presumptions (1844)
Little v HMA 1983 JC 16; 1983 SCCR 56
Fox v HMA 1998 JC 94
Mack v HMA 1999 SCCR 181

England:

Hodges case (1838) 2 Lewin 227, 168 ER 1136
McGreevy v DPP 1973 1 WLR 276 at 285B

Northern Ireland:

The Queen v William McCluskey (2005) NICA 22

Australia:

Shepherd v The Queen (1990) 170 CLR 573
Chamberlaine (No. 2) 1984 153 CLR (HC)

Canada:

R v Comba (1938) S.C.R. 396
R v Yebes 1987 2 SCR 168; 1987 CanLII 17 (SCC)
R v Charemski 1998 1 S.C.R. 679

South Africa:

R v Blom 1939 AD 188
S v Reddy and Others 1996(2) SACR 1(A)

United States:

People v Sanchez, 61 NY2d 1022 at 1024 (1984);
People v Ford 66 NY2d 428 at 441-443 (1985)

2. UNREASONABLE VERDICT - Section 106(3)(b)

The verdict was one which no reasonable jury could have returned – having regard to the evidence relied upon by the trial court and the terms of the judgment and the reasons contained therein. The unreasonableness of the verdict is addressed in the sections below, in the following ways:-

- The verdict is unreasonable in that relies upon flawed or defective reasoning (section 2.1).

- The verdict is unreasonable in that, having regard to the evidence, no reasonable jury or trier of fact could convict or be satisfied beyond a reasonable doubt (section 2.2).

The first aspect of an unreasonable verdict (2.1) considers the terms and reasoning of the judgment - the process and basis, upon which, the verdict is reached. This challenge is made, in contra-distinction to criticisms made at the previous appeal, on the basis that the defects or self-misdirections made are unreasonable – beyond the limits of what is reasonable or judicial. And further, that these defects concern the crucial factual conclusions or inferences upon which the verdict rests. As such they render the verdict, the ultimate inference of guilt, unreasonable.

The second aspect (2.2) addresses unreasonableness with regard to the evidence relied upon and proposes that on this evidence, viewed as a whole, the verdict was one which no

reasonable jury could return. This is essentially a sufficiency argument.

There is sometimes a degree of overlap in both approaches, in that both may concern the drawing of the same unreasonable inferences. For example, some of these inferences are unreasonable in that they are too remote from the facts and circumstances or from proof of the facts in issue. On one view this remoteness renders the drawing of the inference by the trial court unreasonable and is demonstrative of flawed reasoning; another view is that such remoteness is demonstrative of the absence of probative force having regard to the evidence, whereby no reasonable jury could convict. In order to properly assess the reasonableness of the verdict reached, it is necessary to view the problematic inferences in both of these ways.

Reference is made to:

Section 106(3)(b) Criminal Procedure Act 1995
Section 2(1) of the Criminal Appeal (Scotland) Act 1926
Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures (June 1996 [C.3245]).
King v HMA 1984 SCCR 149
E v HMA 2002 JC 215; 2002 SCCR 341
Slater v HMA 1928 JC 94 at page 101-102
Metropolitan Railway Co. v. Jackson (1877), 3 App. Cas. 193 (H.L.), *per* Lord Cairns at p. 197:
R v Charemski 1998 1 S.C.R 679; 1998 CanLII 819(S.C.C.)
Colin Tapper, *Cross and Tapper on Evidence* (8th ed. 1995), at pp. 190-92.
Kurt John Owen v The Queen [2007] NZSC 102 at (11) and (12)

2.1 The Verdict is unreasonable in that relies it upon flawed or defective reasoning.

The flawed reasoning and any unreasonable inferences found are material to the verdict. There are a number of examples which apply here: –

- The verdict relies upon reasoning which is illogical or perverse;
- The verdict relies upon inferences which are unreasonable in that they are unsupported by – or too remote from – the evidence;
- The verdict relies upon inferences which are unreasonable in that they are incompatible with the evidence – such as where there are proven facts inconsistent with that inference, or it ignores or fails to take into account relevant facts; and
- In reaching its verdict, the trial court draws inferences which are contrary to the onus of proof.

These defects in reasoning can also be characterised as self-misdirections in fact and in law. These defects arise in respect of each and all of the intermediate and crucial factual conclusions made by the trial court. As these unreasonable inferences are relied upon in order to convict, the verdict itself is fundamentally undermined.

Reference is made to:

Appeal Court Opinion – paragraphs (7)- (8); (24)- (27)
R v Biniaris 2000 SCC 15 CanLII; 2000 1 S.C.R. 122 – Arbour J (37)

R v Beaudry [2007] 1 S.C.R. 190 (2007), 216 C.C.C. (3d) 353, *per* Binnie J (79) and Fish J (92)-(98)

Shepherd v The Queen 1990 170 CLR 573;

2.1.1 The identification of the appellant as the purchaser

The terms of the judgment, in drawing the inference that the appellant was identified as the purchaser consists of defective reasoning or self-misdirection in a number of important respects. The inference drawn is an unreasonable one having regard to the following:

(1) There is no actual identification of the appellant as the purchaser. Any inference drawn from the evidence of Gauci that the appellant is identified, is not compatible with the evidence and as such is unreasonable.

(2) The ambiguity in the judgment as to the identification found, what it consists of, or as to what it is that is relied upon, is not compatible with proper reasoning and is demonstrable of a defective evaluation of the evidence: Trial Court Opinion at paragraphs (69) and (88).

(3) Even if it were the case that the approach taken was to establish the identification as coming from the combination of circumstances, of resemblance “taken along with evidence as to the date of the purchase, when the appellant was proved to have been staying in Sliema” (Appeal Court Opinion at paragraph 293), this evidence falls short of what could properly support the inference. The identification of the appellant “as far as it went” did not go far enough to entitle the conclusion the appellant was the purchaser. The presence of the appellant in Sliema, does not transform the resemblance into a good identification. There is no

aptitude and coherence in the combination of facts here. The two items of evidence are too ambiguous in themselves and too remote, even when added together, to provide any proper basis to infer identification.

(4) The further inference drawn by the trial court, that if the appellant was the purchaser of the clothing "it is not difficult to infer that he must have been aware of the purpose for which they were being bought." (Trial Court Opinion at paragraph (88)) is irrational and not supported by the evidence. In particular it is not supported by the fact that the appellant was present at the airport at the time of flight KM180. (SCCRC Statement of Reasons at paragraph 19.29).

Reference is made to:

Trial Court Opinion at paragraphs (69) and (88)

Crown Submissions: Transcript Day 78/9449-9454[pdf-p84-89]

Appeal Court Opinion at paragraphs (292)-(297)

MacDonald v HMA 1998 SLT 37.

Gonshaw v Bamber 2004 SCCR 482

2.1.2 The Date of Purchase

The inference drawn by the trial court that the date of purchase was the 7th December 1988 consists of defective reasoning or self-misdirection in a number of respects. The inference drawn is an unreasonable one in that is not supported by nor is compatible with, the evidence. In that:

(1) There was insufficient in the confused and contradictory evidence of the witness Anthony Gauci (CW 595) to support the inference, notably regarding whether or not the Christmas lights were on;

(2) There was undisputed evidence inconsistent with the date of purchase being 7th December. The evidence, given by the meteorologist Mr. Misfud (DW 3), was that it was not raining on 7th December, but it was on the alternative date. This is contrary to the accepted recollection of the witness Gauci. This evidence, on any reasonable view, was inconsistent with the date of purchase being 7th December, when the appellant was present. Accordingly that date of purchase and hence the presence of the appellant was in doubt.

The inference that the appellant was the purchaser was crucial to the conviction.

<u>Reference is made to:</u>

Trial Court Opinion at paragraph [67]

SCCRC Statement of Reasons at paragraph: 21.74; 21.93 & 21.97

Evidence of Anthony Gauci (Transcript: Day 31/4741; 4789; 4814-18)

Evidence of Joseph Mifsud (Transcript: Day 76/9201-03; 9217-18)

2.1.3 Provenance of the Primary Suitcase: Ingestion at Malta

The inference drawn by the trial court, that the primary suitcase was ingested at Malta, rests upon defective reasoning, or self-misdirection in a number of important respects.

The inference drawn is an unreasonable one having regard to the following:

(1) The statement in the judgement, that "The documentary evidence as a whole therefore clearly gives rise to the inference" (Trial Court Opinion at paragraph 31) of an unaccompanied bag coming from Luqa does not properly reflect the evidence and is a misdirection.

(2) The approach taken to the evidence from the Frankfurt records demonstrates defective analysis or misdirection. The inference is apparently drawn without having regard to the context of the whole evidence and in particular to the evidence relating to the position at Luqa. (Trial Court Opinion at paragraph (35))

(3) There is no rational or good reason to prefer the interpretation of the Frankfurt records. The trial court failed to provide any rationale or reasons for rejecting the other possibilities and for reaching its conclusions. Narration of arguments and facts

does not of itself provide a reasoned justification for the conclusions reached by the trier of fact, nor does such a narration necessarily demonstrate that there were justifiable reasons for the conclusions reached. The only rational explanation that can be given for the preference, reflected in the approach taken in the judgement, is a determination to convict.

(4) The evidence from the Frankfurt records is the starting point for the inference of ingestion at Luqa. This piece of evidence is too weak and of insufficient probative value to support the inference and too remote from the conclusion made, in that:

(a) At best, the evidence of the Frankfurt records did no more than demonstrate the possibility that there was an unaccompanied bag from Luqa. Yet there were a number of unaccompanied bags on board PA103 from other sources. The bag was not identified as the primary suitcase. The mere fact of an unaccompanied bag is insufficient to infer it was the bag containing the IED.

(b) This piece of evidence arose in a vacuum, where there was no evidence, of any kind, which suggested where the primary suitcase had been ingested, or how this could be achieved.

(c) The Crown case that ingestion was achieved by deliberate circumvention was no more than an assertion and had no basis in evidence.

(5) There is no other evidence which properly bears upon ingestion at Malta or supports the selection from the Frankfurt records. None of the other circumstances such as the clothing purchase, the purchaser and the timer have any bearing on the issue of ingestion. The fact that the clothing came from Malta is not "capable of vouching the proposition of Maltese ingestion". These circumstances do not combine in a way which yields the inference of Luqa ingestion. There is no aptitude or coherence between them. They are remote from each other and too remote from the inference drawn. The inference is thus not properly supported by the evidence and as such is unreasonable.

(6) In any event, most importantly, there was evidence which was inconsistent with the inference of ingestion at Luqa. This was evidence which was accepted. It consisted of positive evidence which suggested that ingestion at Luqa did not happen. This was the only reasonable inference from this evidence. That being so the inconsistency is established. This was not 'overcome' by other evidence. Accordingly, there was not only no evidence of how the suitcase could have been put on board at Luqa, but there was undisputed evidence which suggested it could not have been. This evidence, being accepted, establishes facts inconsistent with the inference drawn and thereby renders the inference an unreasonable one..

Error in Approach

The Crown submitted that the problem of the inconsistent facts can be resolved as a matter of

simple choice by the trier of fact. That "a tribunal is capable of rejecting such evidence, simply because it is not consistent with other evidence that it chooses to accept"

This submission is flawed in analysis and wrong in law, in that:

- It does not have proper regard to the nature of the evidence here;
- It cannot correspond to the reasoning inherent to drawing inferences from facts;
- It fails to have proper regard to the onus of proof; and
- It purports to rely upon the opinion of the Lord Justice General in *King v HMA* which has no application to the circumstances presented here. In any event such an interpretation of *King* is erroneous and contrary to the legal principles regarding the onus and standard of proof.

It was conceded by the Crown, at the previous appeal, that the inference that ingestion of the bag containing the bomb was at Luqa was "an essential part of the Crown case".

<u>Reference is made to :</u>

Trial Court Opinion at paragraphs: (20-(35); (38)-(39) (43) (82)-(89)
Appeal Court Opinion at paragraphs: (272)-(275)
Evidence of W Borg (Transcript Day 33/5032-5039)
Dickson paragraph (108) at p91
Best at p 288; 1
Walker & Walker on Evidence; 1st edition – p9
Kane v Friel 1997 JC 69
SCCRC Statement of Reasons at paragraph 19.36
King v HMA 1999 SCCR 330

2.1.4 A Libyan Plot

In reaching its verdict the trial court appears to place some emphasis on the conclusion it draws, that the offence was part of a "Libyan plot" -

> "The clear inference which we draw from this evidence is that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin." Trial Court Opinion at paragraph (82)

This inference appears to be that this was a concerted plan by persons who were all Libyan or by the Libyan government. This inference, on any reasonable view of the evidence, is not justified. A connection to Libya between different pieces of evidence does not in itself create a connection which would entitle this inference. No distinction is made here between the general circumstances and circumstances specific to the appellant - between "all things Libyan" and the appellant. There are too many gaps in the evidence and insufficient aptitude and coherence of the various circumstances proved, to allow the inference. For example:-

- The identification of the purchaser as Libyan cannot suggest the involvement of the Libyan government. There was no evidence of the purchaser acting on behalf of same, or being a member of an organisation involved and intent in the commission of such an offence.

- The supply of MST-13 timers to Libya or the JSO does not provide a basis for

reasonably inferring that the Libyan government or the JSO was involved in the offence. Such an inference would require evidence of either exclusive possession or circumstances allowing the further inference that the purchase of these timers was intended for nefarious or terrorist purposes.

- A geographical connection between Malta and Libya does not yield any link to the offence

Accordingly, even where all these connections are taken together, it goes too far to suggest that there is a basis for a conclusion of a "plot" or a concerted plan by persons who were Libyan nationals or by the Libyan government. The unreasonable assumption that all things Libyan are nefarious runs throughout the judgment.

Reference is made to:

Trial Court Opinion at paragraph (82)

Crown Submissions on Appeal: grounds 8.1 - 8.9

Appeal Court Opinion at paragraphs (252); (254)-(257)

2.1.5. Presence in Malta with the False Passport

The trial court concluded that:

> "(88)… On 20 December 1988 he (the appellant) entered Malta using his passport in the name of Abdusamad. There is no apparent reason for this visit, so far as the evidence discloses….. It is possible to infer that this visit under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device. Had there been any innocent explanation for this visit, obviously this inference could not be drawn."

There is no proper evidential basis to make such an inference. Here the evidence of use of the passport is used not simply to draw an inference of JSO involvement but, even further removed, to infer that its use on the day in question inferred involvement in the offence. There was no evidence that this was why the passport was issued or used – for example being used to circumvent security. The mere fact that it meant the appellant travelled under a false name, cannot in itself bear the inference of participation – not least in a context where the evidence showed previous use unconnected to anything nefarious. This inference is unreasonable in that it is not supported by the evidence.

In any event, the basis upon which the court appears to draw this inference is illogical and contrary to the onus of proof. There was, as the court accepts, no evidence of the purpose of the appellant's visit. There was also no evidence of how the device was planted or any

evidence connecting the appellant to the device or the suitcase. The absence of an explanation for the visit has no bearing upon proof of the purpose of the visit. It certainly does not assist proof that the appellant was involved in the commission of the offence.

Reference is made to ;

Trial Court Opinion at paragraph (88)

Crown Submissions Day 78/9414-9469; Day 79/9487

Defence Submissions Day 82/9871

2.1.6 Rejection of the Defence Case

The trial court's reasoning as to why it rejected the defence case where it relied upon the incrimination of the PFLP-GC and the evidence relating to Khaled Jafaar is fundamentally flawed. Notably in that the court's conclusions are unsupported by the evidence. In that –

(1) PFLP-GC

The trial court concluded that after 26th October 1988 the Autumn Leaves suspects did not have the capacity to commit the offence -

> "There was no evidence that the cell had the materials necessary to manufacture an explosive device of the type that destroyed PA103. In particular there was no evidence that they had an MST-13 timer" Trial Court Opinion at paragraph (74)

This is an unreasonable conclusion in that:-

(a) There was evidence before the court to demonstrate that the PFLP-GC had the personnel, skills and materials necessary to commit the offence.

(b) On the evidence the PFLP-GC had not only the means but also the intention to commit the offence. The trial court accepted that the Autumn Leaves suspects had the intention to destroy U.S. civilian aircraft: Trial Court Opinion at paragraph (73).

(c) The fact that there was no evidence that the PFLP-GC had possession of an MST-13 timer is not inconsistent with the incrimination and is not a reasonable basis to reject the evidence, where the Crown did not exclude supply of such timers to others. Indeed the evidence showed that:

(i) There was positive evidence of supply having been made to others (namely the Stasi)

(ii) The trial court had accepted that there were potentially 18 MST-13 timers with a single sided PCB out of a total of 22 MST-13 timers supplied to Libya which were unaccounted for.

(iii) MST13 timers had been found "at large" in Togo and Senegal which on the evidence had no link to MEBO or any other source of supply

(iv) There was nothing to suggest that the PFLP-GC could not have obtained MST-13 timers

Reference is made to :

Trial Court Opinion at paragraphs (49) (50), (52), (73) and (74).
Joint Minute 16
Evidence of Edward Marshman (Transcript Day 76)
FD302 of Marwan Khreesat
Evidence of Pierre Salinger (Transcript Day 72/8884);
Evidence of Anton Van Treek (Transcript Day 71/8726).

(2) Khaled Jafaar

There was evidence which pointed to the possible involvement of the passenger Khaled Jafaar. The defence relied upon same as raising a reasonable doubt. The basis for the trial court's conclusion that this passenger had no involvement in the offence is incompatible with and unsupported by the evidence. In particular, the trial court misdirected itself in overstating the evidence it relied upon and in failing to take account of evidence inconsistent with its conclusion. In this way the trial court's treatment of this part of the defence case was unreasonable.

Reference is made to:

Trial Court Opinion paragraphs (75) and (18)
Joint Minute 13
Evidence of Yasmin Siddique (Transcript Day 67/8193-94; 8205-06);
Evidence concerning luggage tags: John Kolossy (Transcript Day 65/7936) and George Brown (Transcript Day 65/7973)
Evidence concerning travel documents Ian Howatson (Transcript Day 65/7945) & CP197/PD1043
Evidence concerning travel schedule: Jonathan French (Transcript Day 67/8188) and Peter Jenkin (Transcript Day 43/6240);
Evidence concerning PH695 : William Williamson (Transcript Day 65/7984-88) & LPS329
Defence Submissions (Transcript Day 82/9770-71)

2.1.7 Flawed Reasoning: Absence of Balance

Overall this ground of appeal (2.1) addresses the flawed reasoning in the verdict reached. A further way of demonstrating this is to consider the apparent absence of balance or judicial approach by the trial court. At various instances within the judgement there are indications of a flawed approach whereby the trial court appears to have misdirected itself on the onus of proof and demonstrated a determination to convict. Examples include:

(1) Viewed overall the Court demonstrated a tendency toward conviction in repeatedly drawing problematic inferences used to support the guilty verdict. These unreasonable inferences have been addressed above and include the examples that:-

(a) On repeated occasions the Court drew an inference which was not properly supported by the evidence and which strained the interpretation of circumstances, 'too far' towards support of a conviction. Examples include:

(i) the inference that the presence of the appellant at Luqa on 21st December as a visit connected with the commission of the offence, in the absence of any innocent explanation for it. This is in contrast to the approach taken to the visit by the co-accused which could not be elevated "beyond the realm of suspicion". Trial Court Opinion paragraphs (87)-(88)

(ii) the inference that the purchaser of the clothing must have been aware

of the purpose of the purchase. This is in contrast to the difficulty acknowledged by the court in respect of the Crown invitation to draw a "sinister inference" from the diary entries regarding luggage tags, made by the co-accused. Trial Court Opinion paragraphs (85) and (88)

(b) On repeated occasions the Court drew an incriminatory inference where the only apparent rationale for doing so was in order to convict. Examples are:-

(i) In the selection of the evidence from the Frankfurt records, relied upon by the Crown. There are no proper reasons provided for this selection, and the terms of the judgement indicate that the selection is made without reference to all of the relevant evidence. In this way the purported choice between competing bodies of evidence appears to have been made prematurely;

(ii) In the unexplained selection of the evidence from Majid regarding the JSO, where the witness is otherwise rejected as incredible and unreliable.

(c) On repeated occasions the Court drew an incriminatory inference in the face of stronger evidence inconsistent with such an inference. Examples include:-

(i) The evidence of Major Misfud that the weather was inconsistent

with date of purchase as 7th December as on that date "90% was no rain" whereas the court purported to rely on the possibility "not ruled out" that there may have been light rain on that date.

(ii) The evidence of records and witnesses that there could not have been ingestion of the primary suitcase at Luqa, whereas the court relied upon the evidence of the Frankfurt records and the Crown submission that ingestion at Luqa, had not been shown to be impossible and was therefore somehow overcome.

(iii) From the evidence of the witness Majid Giaka that the appellant had been head of airline security the court inferred that he "would be aware at least in general terms of the nature of security precautions at airports". Whereas there was separate evidence that within the JSO airline security and airport security were separate and unrelated departments.

(2) In the comparative treatment of the defence case whereby the court rejects the special defences of incrimination against the PFLP-GC and PPSF as raising any reasonable doubt, on the basis of gaps in the evidence; and in the failure to rehearse or address defence submissions in the judgement.

(a) The court rejected the defence of incrimination against the PFLP-GC, on

the basis that there was no evidence that the cell had, at the material time, the materials necessary to manufacture an IED. Whereas the numerous gaps in the Crown case, such as the absence of any link between the appellant and the IED or to terrorist activity, did not prevent an inference of guilt being drawn.

(b) The court rejects the incrimination of the "suspicious" Talb, as raising a reasonable doubt, on the basis that there was no evidence that he had the means or intention to commit the offence. Whereas the glaring omission of "means and intention" in the Crown case was not addressed and did not prevent an inference of guilt being drawn.

Reference is made to:

Defence Submissions (Trial Transcript Day 82/9871

2.2 Unreasonable verdict on the evidence

Having regard to the evidence which was not rejected by the trial court, the verdict was one which no reasonable trial court, properly directed, could have returned.

There must be sufficient "aptitude and coherence" of the various circumstances relied upon to provide the necessary probative force to entitle the trial court to find the Crown case proved beyond a reasonable doubt. In this case there is insufficient aptitude and coherence -or concurrence of testimonies - to entitle the trial court to convict.

This is a broader test of sufficiency which has regard to the quality as well as quantity of the evidence. It involves the objective assessment of whether the combined circumstances relied upon are so ambiguous, or so lacking in probative force, that no reasonable jury could convict.

There are two ways in which the sufficiency of the evidence is assessed here:

(1) There is examination of the quality and strength of the various crucial strands which support the verdict of the trial court. That is, to examine the reasonableness of the crucial and intermediate factual conclusions upon which the verdict is based. To use the cable analogy, removal of a central strand of the cable causes it to unravel or leaves it without sufficient weight to carry the conviction. Removal of a crucial intermediate fact

fatally undermines the verdict.

(2) Then there is examination of the combination of the various strands of evidence relied upon – as to whether there is sufficient "aptitude and coherence" between them to carry proof beyond a reasonable doubt. There must be sufficient concurrence as between each of the various factual conclusions relied upon, as well as sufficient concurrence between those factual conclusions and the *facta probanda*.

Reference is made to:

Appeal Court Opinion at paragraph (24)
King v HMA 1999 S.C.C.R. 330
M v The Queen (1994) 181 C.L.R. 487
Ratten v The Queen (1974) 131 CLR 516
Broadley v HMA 1991 SCCR 416
Slater v Vannet 1997 JC 226
Gilmour v HMA 1993 JC 15
R v Biniaris 2000 SCC 15 CanLII
R v Gagnon [2006] 1 S.C.R. 621, 2006 SCC 17

The problems of probative force can be demonstrated in respect of each of the intermediate and crucial factual inferences upon which the trial court rely in order to convict. These require to be assessed in the context of all the evidence which was relied upon. These are set out below.

2.2.1 Identification Evidence

The quality of the resemblance identification evidence here is so poor no reasonable jury could rely upon it to convict. Such reliance is contrary to judicial experience. In the first place the identification was at best only by resemblance. In itself this has no probative value. There was no other evidence which supported or advanced the resemblance evidence. In particular, as indicated above, the presence of the appellant at the Holiday Inn in Malta at the time of the purchase, adds nothing. In addition, there were numerous factors here, which exacerbated the serious risks attached to such evidence and rendered reliance upon the identification "as far as it went" unreasonable. These factors and the consequential risks of error are addressed in detail in grounds 3.1 and 3.2 below.

Reference is made to:

Anthony Gauci Evidence – Transcript Day 32
Trial Court Opinion paragraph (68)
Appeal Court Opinion paragraphs 275 - 310
SCCRC Statement of Reasons at paragraph 21.32; 21.100-101
R v Turnbull [1977] QB 224 – at 228-231
R v Tat 1997 CanLII 2234 (ONCA)
R v Burke 1996 CanLII 229(SCC);
Reitsma, 1998 CanLII 825 (S.C.C.), [1998] 1 S.C.R. 769,
R. v. Keeper (1993), 88 Man. R. (2d)156 (C.A.);
R. v. Malcolm 1993 CanLII 3425 (ON C.A.), (1993), 81 C.C.C. (3d) 196 (Ont. C. A.);
Mezzo v. The Queen, [1986] 1 S.C.R. 802

2.2.2 The Date of Purchase

There was insufficient evidence to properly infer that the date of purchase was at a time when the appellant was proved to be in Malta. The only direct evidence of same came from Tony Gauci and in this respect his evidence was of such poor quality – confused, contradictory and factually incorrect– that no reasonable jury would be entitled to infer from his evidence that the date of purchase as 7th December 1988. There was no other evidence which properly or reasonably supported this date or supported the evidence of Gauci. The only reasonable inference to be drawn from the evidence of the weather conditions at the time was that it contradicted the date being the 7th December 1988.

Reference is made to:

Trial Court Opinion at paragraph (12) (64)(67)

Anthony Gauci evidence –Transcript Day 31/4730; 4757; 4779; 4786; 4802; 4815

SCCRC Statement of Reasons at paras.21.87 & 21.96

2.2.3 Ingestion at Luqa

On the whole evidence relied upon by the trial court, no reasonable jury could rely upon the evidence of the provenance of the primary suitcase in order to convict. In particular having regard to the following:-

(1) Reliance is placed upon a single entry to a record which emanates from a complicated automated system at Frankfurt airport. There was no direct or positive evidence to support same. The author of the entry in the record was not called as a witness. The picture is left unclear. In particular there was nothing to establish or vouchsafe the accuracy of the critical record and there was too, a proper basis upon which the accuracy of the records generally was in doubt. This consisted of –

(a) inaccuracy in relation to the time of the computer print out and the coders worksheets.

(b) Evidence that some coders worksheets entries were not always done contemporaneously – a situation which corresponds to common sense and judicial experience.

(c) Entries which suggested that baggage from one flight might have been encoded at the same time at the same coding station – which undermines

the Crowns interpretation of the printouts that the baggage was only delivered to a coding station one flight at a time

(2) In any event, as rehearsed above at 2.1.3 the fact of an unaccompanied bag on the flight from Luqa, is too remote from the fact in issue - the fact of ingestion of the primary suitcase at Luqa – and is too insubstantial to found same. Notably there is

(a) No connection made between the unaccompanied bag and the primary suitcase – there is for example no case of exclusion, there being other such bags on PA103;

(b) There is no evidence of how the unaccompanied bag came to be on the flight or indeed how the primary suitcase was ingested;

(c) The Crown case was stated to be that of deliberate circumvention of security at Luqa but there was no evidence of same;

(d) The Crown case also relied upon the ingestion being necessarily facilitated by the co-accused, but there was no evidence of same and Fhimah was acquitted.

(3) There were no other facts and circumstances which could support reliance on this

record. There is no coherent relationship between the facts of the purchase of the clothing in Malta, the identification of the appellant as the purchaser, the presence of the appellant at the airport, the purchase of timers by the Libyan Secret service and ingestion at Luqa. There is no concurrence of testimony here leading to the conclusion of ingestion. Any connection or coincidence between the appellant between the various factors relied upon does not add up to providing sufficient connection between the appellant and ingestion at Malta, or indeed with the commission of the offence. These other facts and circumstances do not create or support any such connection. For example -

(a) The purchase of clothing in Malta does not infer ingestion at Malta. There is no real connection.

(b) There is no real connection between the purchase of the clothing and the purchase of the timer.

(c) There is no connection between the appellant and the primary suitcase or the IED.

(d) The fact of a connection or "association" between the Libyan Secret Service and the appellant does not create a connection between the appellant and the IED.

(4) That reliance upon this evidence to infer ingestion at Luqa, falls short of what is reasonable, is demonstrated by the accepted evidence which is inconsistent with that inference. Having regard to the nature of that contradictory evidence and its

comparative strength, no reasonable jury could rely upon the inference of ingestion at Luqa in order to convict.

Reference is made to :

Trial Court Opinion at paragraph (35)-(39)
Appeal Court Opinion at paragraph (263)-(274)
Crown submissions at trial: Transcript Day 78/9406-7; Day 79/9486-9; Day 79/9502
Crown submissions at Appeal: Transcript Day 95/51-74; 108; 111-121; 96/11-43; 91-93)
Defence Submissions at Trial: Transcript Day 80/9673; Day 81/9699; 9703; 9711-43; 9755
CP 1060
Evidence Wilfred Borg (Transcript Day 33/4594 at 5032-39)
Evidence of Andreas Shreiner (Transcript Day 37)
Evidence of Bogomira Erac (Transcript Day 47)
Evidence of Mehmet Candar (Transcript Day 37)
Evidence of Gunther Kasteleiner (Transcript Day 38)

2.2.4 Reliance upon Evidence of Association with the JSO

The two main sources of evidence relied upon in respect of drawing a link between the appellant and the JSO were Majid and Bollier. Yet, in the extraordinary circumstances of this case, these witnesses were so incredible and so unreliable that no reasonable jury or trier of fact could rely upon their evidence in order to convict.

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In any event there is a further problem or gap in the evidence as to what is the import of any such association. There is no proper connection between this unspecified and ambiguous association to "involvement" in the commission of the offence.

Reference is made to :

E v HMA 2002 JC 215; 2002 SCCR 341

Rubin v HMA 1984 SCCR 96

Dow v McKnight 1949 J.C. 38; 1949 S.L.T. 95

R v Burke [1996] 1 S.C.R. 474

2.2.5 Presence in Malta with the False Passport

There is too much missing in this evidence to allow any proper inference that the presence of the appellant at Luqa in possession of the false passport was connected to the commission of the offence. Reliance upon this presence is insufficient. In particular having regard to the absence of any evidence as to the purpose of the visit by the appellant, of evidence of any actions by the appellant on the visit which can be connected to the offence and in view of the acquittal of the co-accused.

Comparison can be made to the Court's approach to the Crown case against the co-accused in this regard - see Trial Court Opinion at paragraph (85)

Each of the above are crucial intermediate inferences upon which the verdict rests. Removal of any of these inferences leaves insufficient to entitle a conviction.

2.2.6 Gaps in the Evidence

The absence of probative force of this evidence and the inferences relied upon, is further demonstrated by reference to what is missing. The danger of distortion in a circumstantial case is enhanced where the only focus is on what evidence is presented. Here the very substantial gaps which include the absence of -

(1) Evidence of means, motive or intention of the appellant;

(2) Evidence of motive or intention of the JSO;

(3) Direct evidence of where and any evidence of how the primary suitcase was ingested;

(4) Evidence linking the appellant to the primary suitcase or IED or ingestion of same;

(5) Evidence of opportunity on the part of the appellant;

(6) Evidence of a concerted plan, of the actions of others and the appellants knowing participation in same;

(7) Evidence of the involvement of the co-accused. It was the Crown position at trial

> that the participation of the co-accused was essential for ingestion of the primary suitcase and to enable the commission of the offence. The acquittal of the co-accused and the rejection by the trial court of the evidence related to him, removed a crucial strand of evidence: Trial Transcript Day79/9502

When all of the evidence relied upon is put together, there is insufficient to entitle a reasonable jury to find proof beyond a reasonable doubt. There are too many gaps in the evidence. The combination of all of the circumstances does not form, on objective assessment, “a real and convincing pattern” (Trial Court Opinion at paragraph (89)) but rather, consists merely of a string of circumstances being added together only by the most superficial and remote connections. The ‘adding together’ or purported combination of these circumstances does not enhance the reasonableness of the various inferences drawn from each. They do not ‘tend to support and confirm each other as to the specific fact charged’. These various inferences have no real aptitude and coherence with each other, or with the facts in issue. The purported coincidence of the appellant to each of the various strands relied upon – his “association” with the JSO, his presence at the airport and the purchase of the clothing – are too remote to create a sufficient connection to the commission of the offence.

Even if the various inferences can be viewed as a forming a combination, the verdict goes beyond the limits of reasonable inference from the combination of proven facts.

Reference is made to:

Trial Court Opinion at paragraph (89)

Hume II 384; 515

Dickson at (108)

Shepherd v The Queen (1990) 170 CLR 573