HIGH COURT OF JUSTICIARY, SCOTLAND

UNTO THE RIGHT HONOURABLE

THE LORD JUSTICE GENERAL,

THE LORD JUSTICE CLERK AND LORDS COMMISSIONERS

OF JUSTICIARY

WRITTEN SUBMISSIONS

(as amended in terms of Corrigenda)

for the Hearing of Grounds of Appeal 1 and 2

on behalf of

ABDEL BASET ALI MOHMED AL MEGRAHI, currently a prisoner at HM Prison Gateside, Greenock

APPELLANT

CONTENTS

INTRODUCTION

The purpose of this document is to present a comprehensive submission that there has been a miscarriage of justice, based on the trial court having returned a verdict which no reasonable jury, properly directed, could have returned (section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995). The basis for the submission that the verdict is unreasonable relates primarily to there being insufficient evidence to entitle a reasonable jury to convict, but it also relates to aspects of defective reasoning by the trial court in reaching that verdict.

Accordingly, this submission addresses both Grounds of Appeal 1 and 2 (pages 4 to 6 and 7 to 41 respectively).

Ground 1 concerns the legal test of sufficiency applicable to a wholly circumstantial case – as is the case here. Shortly put this test is that the inference of guilt must be the only rational inference which can be drawn from the combined circumstances relied upon. If the evidence does not properly support the inference then it will not be a reasonable one. Equally, if the inference is not the only reasonable inference which can be drawn, if other reasonable inferences are available on the evidence, then there is insufficient evidence to entitle a conviction beyond a reasonable doubt. As is indicated in Ground 1, this test can be seen as a means of testing the sufficiency of the case. It is applied here in this way. As part of the assessment of sufficiency of the evidence relied upon, all the material inferences upon which the ultimate inference of guilt rests are tested in this way.

Accordingly, in the present submissions, the test set out in Ground 1 now forms part of the overall argument made in Ground 2 and is employed in support of the submission that there is insufficient evidence here to entitle the trial court to convict. It is otherwise not insisted upon. (The relationship of Grounds 1 and 2 is set out in more detail below in section 3.1.1)

It should also be noted that Ground 2.1.7 (pages 25 to 28) is not insisted upon a separate basis of challenge albeit that, in a number of cases, the examples given in

that section are relied upon as support for the other elements of Ground 2 addressed below.

Section 1 of the submission sets out the necessary background to arguments. First, the crown case at trial is rehearsed (section 1.2). This is followed by setting out the treatment of the Crown case by the trial court and the findings made (section 1.3). Section 1.3 also includes a a summary of the key inferences upon which the verdict rests. From this the evidence rejected by the trial court is identified (section 1.4). In this way both the differences between the crown case and 'the judges case' and the gaps in the evidence accepted by the trial court are demonstrated.

Section 2 of the submission proceeds to consider, in general terms, the relevant legal principles which fall to be applied. This seeks to set out the legal framework for the arguments made by the appellant. There are three different relevant areas considered – the principles of accessory liability (section 2.1); probative force and the principles of proof in a wholly circumstantial case (section 2.2); and, finally, what constitutes an unreasonable verdict and the relevant principles to be applied (section 3).

Finally these legal principles are applied to this case and the reasonableness of this verdict is addressed (section 4).

SECTION 1: BACKGROUND

1.1 INTRODUCTION

The Crown case, put short, was that the appellant and Fhimah were responsible for the introduction of the suitcase containing the improvised explosive device ("the primary suitcase") to flight KM 180, from where it was transferred to PA 103A at Frankfurt and onto PA 103 at Heathrow. The Crown case was that it was the appellant who bought the clothing which was placed in the primary suitcase. It was the appellant who accessed the components of the IED. The appellant, assisted by Fhimah, brought those components from Libya to Malta on 20 December, the day before the explosion. According to the Crown case, it was Fhimah who obtained luggage tags from the airport and gave them to the appellant to attach to the bag to enable it to be carried through the system to PA 103.

Much of the Crown case was rejected by the trial court. Fhimah was acquitted. The court did not find that the appellant was responsible for the primary suitcase being introduced to KM 180. The court rejected evidence that the appellant had access to explosives. It rejected the Crown's submission that the appellant brought components of the IED to Malta on 20 December.

In the end the appellant was convicted, not as the principal perpetrator of the crime, but on the basis of art and part guilt as an accessory. This section sets out the case which the Crown laid before the court for determination. It goes on to examine the findings made by the trial court on that case. It concludes by setting out the key differences between the two.

1.2 THE CROWN CASE AT TRIAL

1.2.1 Introduction

In its final submissions, the Crown presented its case under four broad heads. The first dealt with the evidence proving that the aircraft was destroyed by an improvised explosive device and the forensic investigation which followed. That is undisputed for the purposes of grounds 1 and 2 and therefore is not addressed here. The remaining submissions addressed the provenance of the primary suitcase, the special defence of incrimination, and the involvement of the two accused in the crime.

1.2.2 Provenance of the Primary Suitcase

In order to satisfy the court that the primary suitcase began its journey at Luqa Airport, Malta, the Crown relied on two main areas of evidence – the records and evidence of witnesses principally from Frankfurt and Heathrow Airports (Crown Final Submissions Day 78/9394-9407); and the evidence that the clothing in the primary suitcase was from Malta, and in particular from Mary's House.

The Crown asked the court to conclude that the Frankfurt records gave rise to an inference that an unaccompanied bag carried to Frankfurt on flight KM 180 from Luqa was transferred as an interline bag through the computerised baggage system to Pan Am 103A, a feeder flight for Pan Am 103 (Crown Final Submissions Day 78/9398, line 24 – 78/9399, line 2).

Turning to Heathrow, the Crown relied on the evidence that baggage from PA 103A had been loaded into container AVE4041 (which already contained some interline baggage from Heathrow). The container was then loaded onto PA 103. The scientific evidence established that the explosion which destroyed the aircraft had occurred within that container, in a position consistent with where the bags taken from PA103A had been placed within it. The Crown argued that, taking the evidence of the unaccompanied bag from KM 180 along with the evidence that the clothing in the primary suitcase came from Malta, it could be concluded that the suitcase containing

the improvised explosive device was placed on board KM 180 at Luqa (Crown Final Submissions Day 78/9406-07; 79/9486, line 20 – 79/9487, line 5).

1.2.3 The Special Defence

The Crown submitted that there was no evidence in support of the special defence of incrimination (Day 79/9524, line 15 – 79/9527, line 10).

First, the Crown argued that the components available to the PFLP-GC for making improvised explosive devices were different from those used in the device which destroyed Pan Am 103 (Day 79/9525, line 2-13).

Second, it was argued that MST-13 timers were not supplied to anyone except Libya, in particular not to the Stasi or the PFLP-GC; and that even if they were supplied to the Stasi, they were destroyed (Day 78/9419, line 5 - 78/9428, line 19; 79/9525, line 14-22).

Finally, the Crown argued that, while Abu Talb may have made an unusual trip in 1988, there was nothing to link him to the bombing of Pan Am 103. In particular, it was argued that the evidence ruled out the possibility of him being in Malta on 20-21 December 1988 (Day 79/9526, line 18-24). A similar argument was made in relation to the directors of the Miska Bakery and Parviz Taheri (Day 79/9526, line 25 – 79/9527, line 8).

1.2.4 Involvement of the Appellant and the co-accused Fhimah

The Crown's case against both accused was circumstantial (Crown Final Submissions Day 78/9408, line 3). For the purposes of its submissions, the Crown divided the evidence into the following chapters. These are examined in more detail below:

- Appellant's membership of the JSO (Day 78/9408, line 17 – 78/9417, line 10)

- MEBO and the order of MST-13 timers (Day 78/9417, line 11 – 78/9430, line 19)

- The conversation about putting a bomb on an aircraft (Day 78/9430, line 20 – 78/9435, line 15)

- Distribution of the RT-SF 16 radio cassette recorders (Day 78/9439, line 19 – 78/9440, line 24)

- Appellant's access to explosives (Day 78/9440, line 25 – 9444, line 21)

- The purchase of the clothing (Day 78/9444, line 22 – 78/9455, line 8)

- Relationship between appellant and Fhimah (Day 78/9455, line 9 - 78/9456, line 1)

- Events after 7 December 1988 (Day 78/9456, line 2 – 78/9466, line 12)

- Events of 20 December 1988 including credibility of Majid Giaka (Day 78/9466, line 20 – 78/9482, line 18)

- Bollier's visit to Tripoli in December 1988 (Day 79/9488, line 6 – 79/9495, line 4)

- Events of 21 December 1988 (Day 79/9492, line 13 – 79/9492, line 23; 79/9495, line 7 – 79/9510, line 8)

- Proof of concert between the two accused (Day 79/9511, line 17 – 79/9523, line 25).

<u>Appellant's membership of the JSO</u>

The Crown sought to establish that the appellant was a member of the JSO (Crown Final Submissions, Day 78/9408, line 17-20). Evidence about that principally came from Majid Giaka. In addition there was some evidence from Edwin Bollier about his impression of the appellant's role. It was not disputed by the defence at trial that the appellant had been a member of the JSO prior to the beginning of 1987.

Relying on Majid's evidence, the Crown also sought to establish a continuing involvement with the JSO based on the fact that the appellant was a high ranking officer in the JSO, his relationship with other high ranking JSO officers (namely Hinshiri, Rashid, Senussi, Ashur) and his use of a coded passport (Crown Final Submissions Day 78/9416, line 4-11).

Majid Giaka was a member of the JSO and from December 1985 through the time of the offence was assigned a cover job as assistant station manager for Libyan Arab Airlines at Luqa Airport in Malta (Majid Day 50/6754, 6756). He gave evidence about the structure of the JSO and various personnel. He testified that the appellant was a member and an officer of the JSO, and that when he first met him in 1985 the appellant was head of airline security (Day 50/6766). Airline security was, according to Majid, part of the operations administration, along with special operations and sea line security (Day 50/6759; see also Crown Productions 849 and 850). Its responsibility was to protect departing Libyan aircraft and provide security and secure conditions to passengers and crew at airports from which Libyan Arab Airlines operated (Majid Day 50/6759). During this time, the appellant's superior officer, according to Majid, was Said Rashid, who was the head of operations administration (Day 50/6773).

In early 1987 the appellant left airline security for the Centre for Strategic Studies in Tripoli (Majid Day 50/6774). There was no evidence about the work of the Centre for Strategic Studies but Majid said that it was a heavily guarded facility (Day 50/6774). At that time Said Rashid resigned from the JSO and moved to the General Electronic Company (Majid Day 50/6767, 6770).

Majid also testified that in 1985 Ezzadin Hinshiri was director of the central security administration of the JSO (Day 50/6764). Edwin Bollier gave evidence that when

there was trouble for his company, MEBO, in obtaining payment for goods ordered by and supplied to Hinshiri in 1987, it was the appellant who facilitated payment through a committee (Bollier Day 24/3724-30). Bollier and Erwin Meister gave evidence that Hinshiri wore military uniform occasionally (Bollier Day 24/3722; Meister Day 22/3462). Bollier thought that the appellant was a well-connected higher official (Bollier Day 24/3732). The Crown submitted that the appellant sometimes wore military clothes but provided no reference to the evidence for this (Crown Final Submissions Day 78/9411, line 7). There does not appear to have been any evidence to this effect from Majid, Bollier or Meister. Bollier denies seeing the appellant in military clothes (Day 24/3734). Meister says he is not sure (Day 22/3549). Majid is not asked.

In 1985, the head of the JSO was Ibrahim Bishari (Majid Day 50/6764). According to Edwin Bollier, Bishari was head of the security police secret service (Day 23/3717). In November 1987 MEBO supplied an antenna to the office where Bishari worked and it was during a visit by the appellant that the order was placed with MEBO (Bollier Day 24/3730). The Crown submitted that this piece of evidence demonstrated a continuing involvement with the JSO after the appellant ceased to be head of airline security (Crown Final Submissions Day 78/9410, line 23-25).

By late 1988, the head of operations administration was Abdullah Senussi, whom Majid said was a close friend of the appellant (Day 50/6773).

Another JSO member with whom the Crown sought to connect the appellant was Nassr Ashur. According to Majid, in 1985 Ashur was head of special operations (Majid Day 50/6767). Ashur at one time had been head of airline security and the operations division and held the military rank of colonel (Day 50/6771).

The appellant was issued with a coded passport in the name Abdusamad in 1987 (CP 1770) on the basis of a letter from the ESO (JSO). There was no evidence about the reason for the passport's issue but the Crown asked the court to conclude that, based on the appellant's history as a senior JSO officer and that the request was made by the JSO to the passport office, it could be inferred that it was for use in connection with ESO (JSO) duties (Crown Final Submissions Day 78/9414, line 2-8).

That passport was first used on a journey with Nassr Ashur, who was also using a coded passport in August 1987 to Malta. Although this was after the appellant's move to the Centre for Strategic Studies, the Crown sought the inference that the appellant and Ashur were engaged in ESO/JSO business on this trip (Crown Final Submissions Day 78/9415, line 21 – 78/9416, line 3).

The Crown contrasted the evidence, which it said demonstrated membership of and continuing involvement with the JSO, with an interview the appellant gave to Pierre Salinger. Asked whether he had ever worked for Libyan Intelligence Services, the appellant said no. The Crown submitted that this was simply not true. The Crown made no submissions as to how the appellant's denial could or should be used by the court in determining proof of the Crown case (Crown Final Submissions Day 78/9416, line 12 – 78/9417, line 10).

MEBO and the Order of MST-13 Timers

The forensic evidence established that the improvised explosive device was detonated by an MST-13 timer manufactured by a Swiss company called MEBO run by Edwin Bollier and Erwin Meister. For present purposes, it is not disputed that the improvised explosive device contained a MEBO MST-13 timer.

The Crown submitted that the appellant had dealings with MEBO. This was based on evidence from Bollier that MEBO leased premises to a company of which the appellant, and one Badri Hassan, were principals (Bollier Day 24/3744). Again the Crown contrasted this evidence with what was said by the appellant to Salinger, namely that he denied knowledge of MEBO. The Crown made no submission as to how this denial could or should be used by the court. It can probably be assumed that it was an invitation to prefer the evidence of Bollier and to find that the appellant's interview did not raise a reasonable doubt. (Crown Final Submissions Day 78/9417, line 11-15).

The Crown case was that in mid-1985 Ezzadin Hinshiri and Said Rashid ordered MST-13 timers from MEBO. That evidence came from Bollier (Day 24/3757).

Bollier's evidence was that twenty timers were delivered between 1985 and 1986 to Hinshiri in Libya (15 timers divided between two trips) and (5 timers) to the Libyan People's Bureau in East Berlin.

The Crown argued that the appellant and others would have had access to one of these MST-13 timers in December 1988 (Crown Final Submissions Day 78/9430, line 13-19).

Bollier gave evidence that he also supplied MST-13 timers to the Stasi in East Germany. The Crown's case was that supply of MST-13 timers was exclusive to Libya and it invited the court to reject the evidence of supply to the Stasi on the basis that such information had been provided belatedly by Bollier and only after he had a meeting with a Libyan lawyer representing the two accused from whom Bollier sought a loan of $1.8 million. In addition there were inconsistencies in the accounts given by Bollier, Meister and their employee Lumpert, and flaws in the documentary evidence Bollier provided (Crown Final Submissions Day 78/9419-78/9425). The Crown led evidence (Day 28) from "Mr Wenzel" (witness pseudonym), who was Bollier's Stasi handler. Wenzel testified that he had obtained timers from MEBO, including digital timers. Asked whether these included MST-3 timers, he stated that "the name rings a bell" (Day 28/4315). Wenzel also gave evidence that he retained any timers until after the fall of the Berlin Wall in 1989 and then he destroyed them (Day 28/4347-9). The Crown's *esto* position was that, even if the court accepted that MEBO had supplied MST-13 timers to the Stasi, they could not have been the one used to blow up Pan Am 103 since they were destroyed by Wenzel, and there was no evidence that the Stasi supplied any MST-13 timer on to a third party, in particular the PFLP-GC (Crown Final Submissions Day 78/9428, line 1-9).

The MST-13 timers supplied to Libya were tested at a military camp in Sabha. Bollier gave evidence of having attended (Day 24/3857-61). He testified that he believed it was Nassr Ashur who brought the timers to the tests (Day 24/3870), and he (Bollier) had then given instructions as to the way in which MST-13 timers could be used for detonating aerial bombs, and he demonstrated how to connect the timer to the command receiver (Bollier Day 24/3857-8; 24/3887-3993).

According to the Crown, Bollier's evidence demonstrated that timers were in the hands of the Libyan Intelligence Services and were being used in connection with explosives. The desert tests were also, according to the Crown, evidence of an occasion on which, although there were military experts to hand, Bollier was required to connect the MST-13 timers for the purposes of explosive devices. The Crown submitted that Bollier's evidence indicated that Nassr Ashur had custody of and access to these timers (Crown Final Submissions Day 78/9429, line 8-18).

The evidence about MST-13 timers, the Crown argued, led to the conclusion that from 1986 onwards, MST-13 timers would have been available to officers of the JSO. Given the appellant's relationships with the officers who ordered the timers, his relationship with the manufacturer of the timers and the officer involved in testing them, it may be concluded that the appellant and others would have had access to a timer in December 1988 (Crown Final Submissions Day 78/9430, line 10-19).

Conversation about putting a bomb on an aircraft

The Crown relied on the evidence of Majid Giaka that in 1986, a few months after the US bombing of Tripoli, Said Rashid had visited Malta and asked Majid about the possibility of placed an unaccompanied bag on board a British aircraft (Crown Final Submissions Day 78/9430-1). Majid sent a report that this was possible. The report was sent, he said, to the head of administration by way of the head of airline security, who was, at that stage, the appellant (Majid Day 50/6830). Majid testified that in October 1986, the appellant visited Malta and they discussed the report. The appellant responded "Don't rush things" (Majid Day 50/6831-3).

Were this evidence to have been accepted, although the Crown did not expressly say so, this would presumably have been evidence from which, the Crown would say, it could have been inferred that the appellant was involved in a plot to destroy a civil passenger aircraft.

Distribution of Toshiba RT-SF16 radio cassette recorders

There was evidence from an employee of Toshiba that in October 1988, 20000 black RT-SF16 radio cassette recorders were shipped to Libya (Yoshihiro Miura Day 35/5416). This was the type of radio cassette recorder, according to forensic evidence, which housed the IED. The contract for supply was with the Electric General Company (*sic*) and on one occasion, the Toshiba salesman responsible for the order, met Said Rashid, who was Electric General's chairman (Takuya Honda Day 35/5421-2).

From this evidence, the Crown submitted that "as at December 1987 (*sic*), it would have been available to the [appellant], through his former colleague and friend Said Rashid, a supply of the type of radio which was used in the IED" (Crown Final Submissions Day 78/9440, line 19-24).

Appellant's access to explosives

In seeking to establish that the appellant himself had access to explosives, the Crown relied on two sources of evidence – Bollier and Majid Giaka.

The Crown argued that Bollier's evidence about the desert tests and Ashur's involvement allowed the inference to be drawn that explosives were available to JSO officers (Crown Final Submissions Day 78/9441, line 2-5).

Majid testified that explosives were kept in the Libyan Arab Airlines office at Luqa Airport. Fhimah told him it had come from the appellant (Day 50/6801). He went on to say in evidence that towards the end of 1986 he travelled to Tripoli where he saw the appellant, who told him that when Fhimah's service was over, he, Majid, was to take custody of the explosives (Day 50/6805). When Fhimah was towards the end of his service at Luqa Airport, Majid told Fhimah he had given the explosives to the Libyan Consul (Majid Day 50/6807).

The Crown stated that this last piece of evidence was important because it indicated that Fhimah knew where the explosives were (Crown Final Submissions Day 78/9443, line 23-25).

The purchase of the clothing

The Crown submissions about the purchase of the clothing covered two areas – the date of purchase and the identity of the purchaser.

Date of purchase

The Crown case was that the purchase was made on 7 December 1988 (Crown Final Submissions Day 78/9445, line 3 – 78/9447, line 25). In making this submission, the Crown relied on Tony Gauci's evidence that he thought the purchase was about a fortnight before Christmas and on a Wednesday (Gauci Day 31/4730, 31/4820). Gauci believed that the Christmas decorations were being put up (Day 31/4740). Gauci earlier made a statement that there were no decorations up as he believed the purchase was at the end of November (CP 469). Despite that the Crown submitted that his evidence was clear that the purchase was on a Wednesday about a fortnight before Christmas (Crown Final Submissions Day 78/9446, line 19 – 9447, line 1). The 7 December was, according to the Crown, the "best candidate" (Day 78/9447, line 4). A joint minute identified that 23 November and 7 December were both days on which football was shown on television (see Joint Minute 7 Day 31/4830-2).

The defence led evidence from Major Mifsud, a meteorologist at Luqa airport (Joseph Mifsud Day 76/9187-9231). Gauci had testified that at the time of the purchase (between 1830 and 1900 hours) the weather was "dripping" and the purchaser had bought an umbrella (Gauci Day 31/4741). Mifsud testified about the weather on 23 November and 7 December. He testified that on 23 November there was light intermittent rain between noon and 1800 hours GMT (Malta is one hour ahead). Between 1800 and 1900 GMT hours at Sliema, he gave evidence that conditions would be the same (Mifsud Day 76/9209). He gave evidence that on 7 December 1988 there was a trace of rainfall caused by a light shower between 0844 and 0845 hours GMT (Day 76/9193). There were recordings of "nil rainfall" between 1245 and 1815 hours GMT and between 1845 and 2355 hours GMT (Day 76/9194-95). He concluded that apart from the trace of rainfall recorded at 0900, no rain was recorded at Luqa airport on 7 December 1988 (Day 76/9200-01). Asked about the weather in Sliema at the time of the purchase, it was Mifsud's position that he would expect the

situation to be the same as that observed at Luqa and that although there was no rain between 1800 and 1900, he would not exclude the possibility that there could have been "a drop of rain here and there" (Day 76/9202).

The Crown submitted to the court that this evidence was "relatively neutral" (Crown Final Submissions Day 78/9447, line 10-11), stating that there was rain on 23 November but also the prospect of light rain on 7 December at Sliema. Gauci had described drops of rain or drizzle and the Crown's position was that this was consistent with the possibility of light rain considered by Major Mifsud (Day 78/9447, line 14-19).

Identity of the purchaser

To establish that the appellant was the purchaser, the Crown relied on the evidence of Gauci and evidence that the appellant was in Malta on 7 December staying at the Holiday Inn near Mary's House. The Crown position was that Gauci's evidence amounted to a positive identification of the appellant as the purchaser (Crown Final Submissions Day 78/9453, line 16-19). This, taken together with the appellant's presence in Malta on 7 December, was "significant evidence" (Day 78/9453, line 20-22).

The Crown relied on evidence that, when asked if the purchaser was in court, Gauci pointed to the appellant stating "He is the man on this side. He resembles him a lot." (Crown Final Submissions Day 78/9448, line 13-15; Gauci Day 31/4777). In addition, the Crown relied on the following:

- Selection of the appellant by Gauci at an identification parade in Kamp van Zeist on 13 April 1999. In pointing out the appellant at the parade Gauci had stated "Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who looks a little bit like exactly is the number 5."

- The photoshow on 15 February 1991 when, according to his police statement, Gauci picked a photo of the appellant stating "number 8 is the only one really

similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me." (Gauci Day 31/4773; Bell Day 32/4865)

- An artist's impression and photofit prepared by Gauci were said by the Crown to bear a close resemblance to the photograph picked out by Gauci on 15 February (Crown Final Submissions Day 78/9450 line 24-25).

Gauci had given a description of the purchaser. The Crown invited the court to consider that on height Gauci was simply wrong – he had said the purchaser was 6 foot or more; the appellant was 5 foot 8 inches (Crown Final Submissions Day 78/9451, line 2-8). The Crown invited the court to consider that other aspects of the description given by Gauci matched the appearance of the appellant in the video interview with Pierre Salinger in November 1991 (Crown Final Submissions Day 78/9451, line 9-22).

Gauci estimated the age of the purchaser as being under 60 (in evidence) and about 50 (in police statement, CP 455). The Crown submitted that the court should consider these estimates in light of what happened when Gauci picked out the photograph on 15 February 1991 and referred to his statement, CP 470. In that statement Gauci said that the man in the photo was, in his view, "in his thirty years" and that if he were ten years or more older, he would look like the man. The Crown submitted that as the appellant was 38 in 1988 (which is incorrect), then based on that estimate, the appellant was rather closer to the actual age of the man (Crown Final Submissions Day 78/9452, line 3-14). In any event, the Crown said, Gauci said he had difficulties with height and age (Gauci Day 31/4753; Crown Final Submissions Day 78/9452, line 15-17).

When Gauci selected the appellant's photograph at the photoshow on 15 February 1991, he stated that he was the only one similar to the purchaser "other than the one my brother showed me" (Gauci Day 31/4773). The one his brother showed him was a photograph of Abu Talb from the newspaper. The Crown, in asking the court to rule out the possibility that Talb was the purchaser, relied on the fact that Gauci had failed to pick Talb's photograph out of other photoshows on 6 December 1989 and 10 September 1990, and on Talb's own evidence (supported by evidence that he was in

Sweden on 5 December and that he had an appointment on 9 December in Sweden) that he was not in Malta on 7 December, the date the Crown said was the date of purchase (Crown Final Submissions Day 78/9454, line 1 – 78/9455, line 8).

Relationship between the Appellant and Fhimah

The Crown case was that the two accused were friends and that Fhimah did things for the appellant. Majid gave evidence of their friendship (Majid Day 50/6776). The appellant told Salinger that they were close friends. Vassallo spoke of the links between the two. The Crown also relied on entries in Fhimah's diaries relating to tasks he was undertaking for the appellant (Crown Final Submissions Day 78/9455, line 16-24).

Events after 7 December 1988

The appellant travelled to Malta on 7 December and left on 9 December 1988. The Crown led evidence that another JSO officer, Abouagela Masud, also arrived on 7 December and left on 9 December (Andrew Seychell Day 36/5447 and 36/5448; CP 630 and 631). The Crown made no specific submission as to the significance or otherwise of that evidence in terms of proof of its case (Crown Final Submissions Day 78/9456, line 3-12). However presumably it related to the Crown's general submission that the appellant continued to be involved with the JSO and to engage in JSO activities.

The Crown also relied on evidence from Majid that the appellant made a number of trips to Malta towards the end of 1988 and on one occasion, the appellant arrived from Tripoli on a Wednesday morning LAA flight. He had cabin baggage, as opposed to checked luggage. This was, according to Majid, in December 1988 (Majid Day 50/6808-6809). The Crown made no submission to the court as to the significance or otherwise of this evidence (Crown Final Submissions Day 78/9456, line 13 – 9457, line 3).

In final submissions, the Crown also referred the court to evidence that the appellant travelled on 9 December to Zurich and on to Prague where he stayed until 16

December. The hotel registration card bore registration dates of 9-12 December and the Crown submitted that he stayed longer in Prague than he originally intended. The Crown submitted that the appellant's clear intention was to leave Prague on 12 December and travel to Switzerland (Crown Final Submissions Day 78/9458, line 2-4). In the event, the appellant stayed in Prague until 16 December, travelled to Zurich on 16 December, stayed overnight and flew back to Tripoli via Malta on 17 December. The Crown made no submissions as to the significance or otherwise of this trip in terms of proof of their case (Crown Final Submissions Day 78/9458, line 5-15).

The Crown case in respect of events after 7 December was that Fhimah was expecting the appellant to return to Malta on 15 December; that he was to take tags from Air Malta to give to the appellant; and that he did so (Crown Final Submissions Day 78/9459, line 3-10).

The evidence upon which the Crown relied in making these submissions came firstly from Fhimah's diary. The first was an entry for 28 November which stated "Take/collect tags from the airport (Abdelbaset/Abdusalam)"; the second was entries on 15 December stating "Abdelbaset arriving from Zurich" and "Take taggs from Air Malta. OK" (Djelloul Hamaz Day 56/7660-7664).

The Crown also relied on the evidence of witness Borg that a luggage tag entitled a bag to travel airside at Luqa airport (Crown Final Submissions Day 78/9459, line 23 – 9460, line 6). Borg testified that luggage tags were treated as a security item. They were kept in a locked cupboard and handed out to check-in staff for each flight, with unused tags being returned (Wilfred Borg Day 33/4984-4986). It was also his evidence that even when Air Malta staff handled flights for other airlines, they would use their own tags, and it would be of concern if a representative of another airline had an Air Malta tag (Borg Day 33/4986-4988). There was evidence that there was no means of knowing how many tags would be needed and whether all unused tags were handed back (Crown Final Submissions Day 78/9462, line 17-25, ref to Borg Day 33/4983-5; and Manuel Agius Day 39/5978-9). In light of that evidence, the Crown submitted that the only inference to be drawn was that the tag was to be obtained by

Fhimah in order to send an unaccompanied bag (Crown Final Submissions Day 78/9463, line 1-7).

The Crown pointed to the evidence about the components of the IED, including the MST-13 timer and RT-SF 16 radio cassette, and suggested that some if not all of the components of the IED would require to be brought from Libya to Malta and in this context the movements of the two accused became significant (Crown Final Submissions Day 78/9463, line 8-16).

The evidence was that on 18 December, Vassallo (Fhimah's business partner) told Fhimah that the appellant had been looking for him the day before as he passed through Malta on his way back to Tripoli. According to Fhimah, Vassallo had said that the appellant wanted to commission him with something. Fhimah then travelled to Tripoli on 18 December. The Crown argued that by this stage Fhimah had obtained the luggage tags and that his trip to Tripoli was because his "physical presence was required in association with Mr Megrahi in Tripoli" (Crown Final Submissions Day 78/9464, line 12-19; 78/9466, line 6-12).

Events of 20 December 1988 and Majid Giaka's Credibility

On 20 December the appellant and Fhimah travelled from Tripoli to Malta on an Air Malta flight. The appellant was travelling on a coded passport and the Crown's submission was that there must have been a reason, and that reason was related to the activities of the JSO (Crown Final Submissions Day 78/9467, line 12-16). The Crown referred to its earlier submissions concerning the appellant's membership of the JSO in support of this point (see paragraph [13] above).

The Crown submitted that it was significant to have regard to the occasions on which this passport was used – it was issued in June 1987; first used in August 1987 on a trip with Nassr Ashur; it was used a number of times in September, October, November and December 1987; and it was used on the trip to Malta on 20-21 December 1988. This was the last time it was used (Crown Final Submissions Day 78/9467, line 17-25).

Based on this evidence about use of the passport combined with "other evidence in relation to Mr Megrahi", the Crown invited the court to draw the inference that the journey to Malta on 20 December was in connection with the plan to place an unaccompanied bag on board an aircraft and that, because the components of the IED must have been in Libya and needed to be brought to Malta, the court should conclude that the purpose of this journey was to bring those components into Malta (Crown Final Submissions Day 78/9468, line 1-5 and 78/9469, line 2-9).

The Crown argued that if the purpose of this journey was to bring components for an IED into Malta, then it would be necessary to take steps to avoid the attention of Customs. This, it was said, was Fhimah's role (Crown Final Submissions Day 78/9470, line 17-22). In support of this the Crown relied on the evidence of Ciarlo that if an individual was well known to Customs as honest and reliable then they might not stop him. It was up to the Customs officers whether to let someone go through or not. He also testified that there were no means by which you were unlikely to be stopped, commenting that he himself had been stopped (Nicholas Ciarlo Day 34/5327-8).

However the principal evidence upon which the Crown relied in respect of the circumstances and purpose of the appellant's arrival in Malta on 20 December came from Majid Giaka (Crown Final Submissions Day 78/9470, line 23 – 78/9473, line 9).

Majid gave evidence that about two to three weeks after he saw the appellant arrive on 7 December, he went to the airport and met Vassallo (Majid Day 50/6815 and 50/6820). At the passport control area, he saw Fhimah accompanying the appellant to the baggage reclaim area (Day 50/6816). He then testified that Fhimah took a brown hardshell Samsonite suitcase off the luggage carousel and carried it through Customs (Day 50/6817-8). He said that the appellant introduced him (Majid) to Abouagela Masud outside the airport, telling him he (Masud) was in the JSO's technical department (Day 50/6819).

During the trial the credibility of Majid had been challenged by the defence. The Crown invited the court to find Majid credible and reliable (Crown Final Submissions

Day 78/9473, line 10 – 78/9482, line 18). The reasons given by the Crown for arguing he was credible were:

- His evidence on the appellant's membership of the JSO and details of the structure and personnel there was unchallenged (Day 78/9473, line 14-19);
- His evidence about the explosives in the LAA office was not contradicted by any other evidence, and he reported this to the CIA at the time (Day 78/9473, line 20-24);
- The cross-examination of Majid about his involvement with the CIA, the demands which he made and the extent to which he was regarded by them as being of use, did not give much assistance in assessing his credibility (Day 78/9474, line 1-7);
- His motivation in approaching US authorities was not mercenary and his worth was recognised (Day 78/9474, line 8 – 78/9475, line14);
- His account of the appellant's journey on 7 December was confirmed by other evidence (Day 78/9475, line 15-22);
- His failures to mention either the sighting with the Samsonite suitcase or Said Rashid's request about the possibility of putting an unaccompanied bag on an aircraft could be explained by the context of the interviews with US authorities (Day 78/9476, line 10 – 78/9477, line24);
- The arrival of the appellant and Fhimah on 20 December was confirmed by other evidence (Day 78/9477, line 25 – 78/9478, line 2);
- His evidence about Fhimah carrying the bag through Customs is consistent with the picture already there, namely that Fhimah's purpose was to ensure no unwanted attention from Customs – as seen above, there was no evidence of that and it was an inference the court was being asked to draw (Day 78/9478, line 5-10);
- His account was to be preferred to that of Vassallo (who had testified that he was not at the airport on 20 December and that the two accused came to his house to visit him) (Day 78/9478, line 11 – 78/9480, line 19);
- His account was supported by evidence that Abouagela Masud was a member of the JSO and was in Malta on 20 December (Day 78/9480, line 20 – 78/9482, line 4);

- Majid could have invented better and more damaging evidence against the accused, including that he saw events on 21 December and that Fhimah confessed, but he did not (Day 78/9482, line 5-14).

Bollier's visit to Tripoli in December 1988

The Crown submitted that an alteration was required to the MST-13 timer to allow it to be installed in the Toshiba radio and that Bollier was involved in that on his December visit to Tripoli (Crown Final Submissions Day 79/9491, line 18 – 79/9492, line 8). Indeed the Crown position was that Bollier in fact carried out a modification to the timer (Crown Final Submissions Day 79/9493, line 6 – 79/9494, line 9). The Crown also argued that Bollier's attendance during that trip at the appellant's office and the presence there of Nassr Ashur was additional evidence against the appellant (Day 79/9492, line 5-10).

The evidence relied upon by the Crown that an alteration to the MST-13 timer was necessary was that the housing of the circuitboard from which PT/35(b) originated had to be removed to install it in the Toshiba radio cassette. This would require disconnecting the wiring from the terminal block and soldering it to the detonator (Bollier Day 25/3981-2).

So far as Bollier being involved is concerned, the Crown relied on evidence that this alteration was similar to the work Bollier performed at the desert tests (Crown Final Submissions Day 79/9492, line 2-3). Bollier had denied seeing an MST-13 timer on his trip to Libya in December 1988 (Bollier Day 25/3981-2). In relation to the desert tests, Bollier stated only that it was possible the timers used at the desert tests had been taken out of their housing (Bollier Day 25/3982).

In relation to Bollier's visit providing additional evidence against the appellant, the Crown relied on evidence that Bollier arranged his trip on 16 December, the same day the appellant travelled from Prague to Zurich (Crown Final Submissions Day 79/9488, line 8-12). While in Tripoli (Bollier having met with Hinshiri and offered to sell him Olympus timers which Hinshiri rejected), he was told he could go to the appellant's office where he would receive payment (Bollier Day 25/3959). While

there Bollier saw a meeting taking place in another room of the building. One of those present might have been Nassr Ashur though Bollier was not sure (Day 25/3967-8). The Crown presented this evidence as an identification of Ashur (Crown Final Submissions Day 79/9488, line 19-25) and reiterated that it was Ashur (not that it could have been Ashur) when questioned by the court about what exactly the Crown said should be drawn from evidence about Bollier's visit (Crown Final Submissions Day 79/9494, line 10-17).

Finally the Crown argued that Bollier's ticket showed that he was due to return to Zurich via Malta on 20 December 1988, that this was the flight the two accused took from Tripoli to Malta and therefore that the expectation was that Bollier would travel on the same flight as them (Crown Final Submissions Day 79/9489, line 4-15). The court pointed out that this expectation was not put to Bollier for comment. The Crown conceded that and also, at the prompting of the court, that there was no evidence about how the flight was booked, nor any evidence of communication between either accused and Bollier (Crown Final Submissions Day 79/9489, line 25 – 79/9490, line 25). In the event, Bollier changed his ticket and did not fly back via Malta (Bollier Day 25/3977-8).

Events of 21 December 1988

The Crown case in relation to events of 21 December was that the appellant stayed overnight at the Holiday Inn in Malta. At 0711 hours, a telephone call was made from the room in which the appellant was staying to the number of the telephone at Fhimah's flat (Crown Final Submissions Day 79/9492, line 17-23, Joint Minute 9 (see Day 36/5424-5426) and Crown Production 725). From this record, combined with the fact that the accused had travelled together the previous day, the Crown asked the court to conclude that this record was of a telephone call in which the appellant was contacting Fhimah and the time of the call and its short duration allowed the inference that not much was said but that some communication was necessary (Crown Final Submissions Day 79/9495, line 11-13 and 79/9500, line 24 – 9501, line 5).

The Crown argued that as Fhimah still had his airside pass and continued to visit the airport, he continued to give assistance there. From that, the Crown submitted that it

was a reasonable inference that Fhimah would have continued his assistance to the appellant and driven him to the airport on the morning of 21 December (Crown Final Submissions Day 79/9501, line 6-13).

There had been evidence that the appellant was given special treatment while checking in for his flight to Tripoli on 21 December, specifically that he was checked in without luggage by an Air Malta staff member who was not dealing with his flight and that he was the only passenger dealt with by the agent for that flight. The agent gave evidence that sometimes she would be asked by a supervisor or the LAA station manager to check in a passenger for another flight. This might happen if there was a queue or the passenger had no luggage. The appellant was not the only passenger with no luggage for his flight (Anna Attard Day 36/5505-6; 36/5508 and 36/5510).

There was evidence from the immigration officer who dealt with the appellant. He confirmed that from time to time an individual got assistance from a station manager if he was a friend or VIP, to avoid waiting in a queue. He confirmed that the passenger would fill in his details on the embarkation card and the officer would fill in the reverse and stamp it (Carmel Montebello Day 42/6224-6).

The Crown argued that the appellant alone got special treatment (Crown Final Submissions Day 79/9499, line 8-9). They submitted that Fhimah was in a position to give the kind of assistance necessary for the appellant to get special treatment at check-in and immigration control (Crown Final Submissions Day 79/9501, line 13-16). If that were accepted, it could be inferred that it would be inevitable that the person rendering assistance (Fhimah) would see the name of the person being assisted. On that basis, the Crown said, Fhimah would be bound to have been aware that the appellant was travelling under a false name (Crown Final Submissions Day 79/9501, line 17 – 79/9502, line 1).

The check-in time for the appellant's flight to Tripoli was 0850-0950. This overlapped with the check-in time for KM 180 to Frankfurt between 0850 and 0915 hours. The appellant must have checked in during this overlapping period (Day 36/5495-6 and 36/5503-4). The Crown submitted from the evidence of the appellant's attendance at the airport, it could be concluded that he attended at the airport at a

suitable time to allow a suitcase to be introduced to flight KM180 and to allow him to leave Malta quickly (Crown Final Submissions Day 79/9499, line 23 – 79/9500, line 4).

The Crown accepted that it was not possible on the evidence to assert positively how the suitcase was actually introduced into the aircraft. However, the Crown said, it was not essential to the Crown case to do so. What the Crown accepted did require to be proved was that there was someone in a position to subvert the system (Crown Final Submissions Day 79/9502, line 2-10). Referring to the evidence from Borg about the measures in place at Luqa airport to prevent introduction of an unaccompanied bag and what might be required to circumvent those procedures, the Crown's position was "Mr Megrahi would not be able to achieve it alone. He would require assistance from someone in a position to render such assistance at Luqa Airport." (Crown Final Submissions Day 79/9502 line 11 – 9504, line 13). According to the Crown, that someone was Fhimah (Crown Final Submissions Day 79/9505, line 8-10). The Crown relied on evidence that Fhimah still had a valid airside pass and on the inference they had asked the court to draw that Fhimah continued to render assistance to the appellant – by driving him to the airport and getting him special treatment at check-in and immigration (Crown Final Submissions Day 79/9504, line 16 – 79/9505, line 10).

Concluding its submissions on the evidence, the Crown referred to the interview given to Pierre Salinger by the appellant in which he denied being in the JSO, denied knowing about MEBO, denied being in Malta on 20-21 December, and denied having more than one passport. The Crown made reference to these statements of the appellant but made no submission as to how the court could or should use them in determining its verdict (Crown Final Submissions Day 79/9510, line 1-8).

Summarising the case against the appellant, the Crown stated that he had been involved in the plot for some (unspecified) time; that he was a high ranking member of the JSO; he was close to other important members of the JSO; he had a coded passport in a false name supplied at the request of the JSO, which must have been for JSO purposes; he had access to the components of an IED, including the Toshiba RT-SF 16 radio cassette, MST-13 timer and explosives; and he was identified by Gauci as

the purchaser of the clothing which was within the IED suitcase (Crown Final Submissions Day 79/9511, line 4-16).

Proof of concert between the two accused

According to the Crown, the evidence demonstrated that there came a point where both accused became involved in the plan and were acting in concert (Crown Final Submissions Day 79/9511, line 17-20). The starting point for this was said to be the diary entries (Day 79/9515, line 22-25). The Crown argued that while this evidence starts out only as evidence against Fhimah, where it is shown that the accused are acting in concert, it becomes evidence against both (Day 79/9516, line 5-8).

Relying on *Hamill v HMA*, the Crown argued that it was clear from the diary that Fhimah was engaged in reminding himself, carrying out his task, and noting that he had carried it out (Day 79/9520, line 21 – 79/9521, line 3). According to the Crown the diary entry provided the name of the participants of the plan, the dating of the plan at 15 December, and the nature of the plan. The person who wrote the entry (Fhimah) and the person named in the entry (the appellant) are "constantly in each other's company" over the ensuing days and the tags were an essential part of the plan (Day 79/9521, line 3-12).

Fhimah's journey to Tripoli could, in the Crown's submission, only be seen as being in furtherance of the plan. His presence on the return trip to Malta, when it was necessary to bring in the components of the IED, was required to prevent unwanted attention of Customs (Day 79/9521, line 14-24).

The appellant was travelling under a false name with his JSO passport. Fhimah drove him from the airport. The following morning (21 December) there was a short telephone call from one to the other. The early timing suggested it was important and the briefness suggested a message. The telephone call may be seen as being in furtherance of the plan. The appellant went to the airport at a critical time in relation to the departure of KM180 and received special treatment at check-in and immigration. According to the Crown, this was sufficient to show Fhimah acting in concert with the appellant (Crown Final Submissions Day 79/9522, line 2-22). The

Crown also referred to Fhimah's experience of the airline industry giving him knowledge of the precautions taken against the danger of an unaccompanied bag. He was a trusted friend of the appellant and there could be no other explanation for him obtaining the tags apart from furtherance of the plan (Day 79/9522, line 23 – 79/9523, line 9).

The Crown further relied on the evidence of Majid who said he saw the two accused with a Samsonite suitcase on 20 December as proving concert between them (Day 79/9523, line 10-14).

Further evidence of concert was, according to the Crown, to be found in the inference that it was Fhimah who assisted the appellant at the airport on 21 December in relation to check-in and immigration, and that Fhimah provided his expertise to allow the introduction of the IED suitcase onto KM 180 (Day 79/9523, line 15-25).

1.3 THE TRIAL COURT'S JUDGMENT

1.3.1 Introduction

As seen above, the Crown's case was divided under four main heads. This section rehearses the parts of the Crown's case which the court accepted, the parts it did not rely upon or make findings about and the parts it simply rejected. Finally this section summarises the circumstances which the court said formed a "real and convincing pattern" leaving no reasonable doubt about the appellant's guilt.

1.3.2 Treatment of the Crown case by the Trial Court

Provenance of the Primary Suitcase

The court accepted the two main areas of evidence put forward by the Crown in support of its theory that an unaccompanied bag (which was the primary suitcase) originated at Luqa airport – namely the records and witnesses from Frankfurt (Trial Court Opinion [31]-[35]); and the evidence that clothing contained within the suitcase was purchased in Malta (Trial Court Opinion [12] and [15]). However from this evidence alone, the court was not prepared to conclude that the unaccompanied bag from Luqa was in fact the suitcase which contained the IED. Having reviewed and accepted this evidence, the court nonetheless stated that "If…an unaccompanied bag was launched from Luqa, the method by which that was done is not established, and the Crown accepted they could not point to any specific route by which the primary suitcase could have been loaded…The absence of any explanation of the method by which the primary suitcase might have been placed on board KM 180 is a major difficulty for the Crown case and one which has to be considered along with the other circumstantial evidence" (Trial Court Opinion [39]).

The court finally concludes that the inference that this unaccompanied bag was in fact the primary suitcase is irresistible at paragraph [82] of its Opinion. According to this paragraph, the other circumstantial evidence which makes that inference irresistible is

the evidence that the purchaser was a Libyan and the MST-13 timers (the type used in the IED) were supplied to Libya.

The Special Defence

The court agreed with the Crown submissions that the components available to the PFLP-GC for making IEDs were different to those used to destroy Pan Am 103, and in particular that there was no evidence the PFLP-GC had access to the means necessary to manufacture an explosive device of the type that destroyed PA 103. In particular: there was no evidence that they had an MST-13 timer; the principal bomb maker of the cell was an agent for Jordanian intelligence who had been instructed not to prime any bomb; the bomb maker never used twin speaker radio cassette players to convert into bombs (paragraphs [73]- [74]).

In relation to Abu Talb, the court did not reject the possibility of him having committed the offence on the basis put forward by the Crown, namely that the evidence ruled out the possibility that Talb was on Malta on 21 December 1988. Rather the court found that found that his activities gave rise to a great deal of suspicion, but there was no evidence that Talb and the PPSF had either the means or intention to destroy a civil passenger aircraft in December 1988 (Trial Court Opinion [81]).

Involvement of the Appellant and the co-accused Fhimah

Appellant's membership of the JSO

The court accepted Majid Giaka's evidence about the organisation of the JSO and the personnel involved there (Trial Court Opinion [43]). Based on that the court found that the appellant occupied posts of fairly high rank, including head of airline security (Trial Court Opinion [88]). From that the court found that it could be inferred that he would be aware at least in general terms of security precautions at airports from or to which LAA operated (Trial Court Opinion 88).

This was the only evidence from Majid Giaka which the court was prepared to accept. The court stated that it was quite unable to accept Majid as a credible or reliable witness on any matter except this. The reason why the court was prepared to accept his evidence on organisation and personnel in the JSO is not explained in the opinion.

The court accepted that the appellant had been issued with a coded passport at the request of the ESO/JSO and that it was used on a number of trips, including the first one with Nassr Ashur in 1987 (Trial Court Opinion [87]). However the court did not make the finding sought by the Crown that the appellant had a continuing involvement with the JSO after he moved to the Centre for Strategic Studies, nor that use of the coded passport meant being engaged on JSO duties. The highest the court was prepared to go was that the appellant had an "association" with members of the JSO and military who had purchased the MST-13 timers in 1985/86 (Trial Court Opinion [87]).

MEBO and the order of MST-13 timers

The court accepted that the appellant had an association with Bollier, though not specifically in connection with MST-13 timers, in that he rented office premises from MEBO. The court indicated it did not accept the appellant's denial in this regard (Trial Court Opinion [88]).

The court found that all the witnesses from MEBO, and in particular Bollier, were unreliable (Trial Court Opinion [45]). The court described Bollier as "at times an untruthful and at other time an unreliable witness" (Trial Court Opinion [49]). Nonetheless the court was prepared to accept parts of his evidence which was not challenged and appeared to have been accepted, or which was supported by acceptable evidence from some other source (Trial Court Opinion [49]).

On that basis, the court accepted that Bollier had military business dealings with the Libyan government from the early 1980s through Hinshiri and Rashid, including an order for electronic timers in 1985 (Trial Court Opinion [49]). It accepted that Bollier delivered 20 timers to Libya during 1985-86 (Trial Court Opinion [50]).

Contrary to the Crown's submissions, the court accepted that Bollier delivered two prototype MST-13 timers to the Stasi in East Berlin in 1985 (Trial Court Opinion [49]). Again, contrary to the Crown case, the court held that it could not exclude the possibility that more than two were delivered or that any MST-13 timers in the hands of the Stasi left their possession. The court found that it could not exclude the possiblity that at least one of the MST-13 timers recovered in Togo in 1986 was sourced from East Germany (Trial Court Opinion [51]). In addition, the court was not prepared to exclude the possibility that MEBO supplied MST-13 timers to other parties (Trial Court Opinion [49]).

So far as Bollier's evidence about the tests of MST-13 timers carried out in the desert is concerned, the court was prepared to accept that tests took place. However it was not prepared to conclude when that was or what the purpose of the tests was (Trial Court Opinion [53]). The court accordingly was not prepared to accede to the Crown submission that the tests demonstrated that the timers were in the hands of the Libyan Intelligence Services, were being used in connection with explosives and that Bollier's presence was required to connect the MST-13 timers for the purposes of explosive devices.

Conversation about putting a bomb on an aircraft

The Crown relied on evidence from Majid about a conversation with Said Rashid about the feasibility of placing an unaccompanied bag on board a British aircraft in Malta. Later he said the appellant told him "don't rush things."

The court, having found Majid to be incredible and unreliable (see below), stated "we are quite unable to accept this story" (Trial Court Opinion [43]).

Distribution of Toshiba RT-SF16 radio cassette recorders

The Crown led evidence about the supply of this model of radio to Libya, and in particular to the General Electric Company, in October 1988. The court made no findings, either that the radios were supplied, or that it was to the company of which Rashid was Chairman.

The Crown had submitted that this evidence meant that a radio of the type used to house the IED would have been available to the appellant through his friend, Rashid. The court made no finding on this. Indeed the only association which the court referred to was with those JSO or military personnel who purchased MST-13 timers (Trial Court Opinion [89]).

Appellant's access to explosives

The Crown urged the court to draw an inference from Bollier's evidence about the desert tests that explosives were available to officers of the JSO. Although the court does not expressly address this submission, it must have rejected it since it found that the purpose of the tests was unclear (Trial Court Opinion [53]).

The Crown also relied on evidence from Majid that explosives were kept in the LAA office in Malta. The court roundly rejected this evidence. They considered it "highly significant that the details only emerged at a stage when it had been made clear to [Majid] that unless he came up with some useful information, he was liable simply to be returned to Malta. Even taken at its best, the whole story sounds improbable, and…we are unable to place any reliance on this account" (Trial Court Opinion [43]).

Therefore nowhere in its Opinion does the court make a finding that the appellant had access to explosives. Indeed nowhere does the court make a finding about the source of the explosives which were used for the IED.

Purchase of the Clothing

The chapter on purchase of the clothing dealt with both the date of purchase and the identification of the purchaser.

First, as to the date of purchase. the court stated that the evidence that Paul Gauci was watching football at the time of the purchase narrowed the field to either 23 November or 7 December (Trial Court Opinion [67]). This was judged to be an error

by the appeal court. However it was found to be harmless (Appeal Court Opinion [319]).

The court found that there was "no doubt" that the weather on 23 November, as described by Major Mifsud, was "wholly consistent" with Tony Gauci's evidence of a light shower (Trial Court Opinion [67]). It also found that the possibility that there was a brief light shower on 7 December was not ruled out by the meteorological evidence (Trial Court Opinion [67]).

The court found that the evidence about the Christmas lights was unclear but that "it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas" (Trial Court Opinion [67]).

Therefore the court concluded the date of purchase was 7 December 1988 (Trial Court Opinion [67]).

Moving on to the identity of the purchaser, the court found Gauci's evidence that he sold the items found in the IED suitcase to a Libyan to be "entirely reliable" (Trial Court Opinion [12] and [67]).

The court found Gauci to be a credible and careful witness whose identification so far as it went of the appellant as the man who bought the clothing was reliable and should be treated as a highly important element in the case (Trial Court Opinion [69]). The court relied on Gauci's selection of the appellant's photograph at the 15 February photoshow, his selection of the appellant at an identification parade and the fact that he picked him out in court (Trial Court Opinion [68] and [55]).

The court refused to take up the Crown's invitation to compare for themselves the appearance of the appellant with the description, artist's impression or photofit from Gauci or the appearance of the appellant in the Salinger interview (Trial Court Opinion [69]).

The Crown had suggested that the court ignore the fact that the age and height given by Gauci were consistently different from those of the appellant on the basis that Gauci said he had no experience of such things. Addressing that issue, the court appeared to refuse to accept that suggestion, stating "Mr Gauci stated he did not have experience with height and age, but even so it has to be accepted that there was a substantial discrepancy" (Trial Court Opinion [68]). However, concluding that Gauci's identification was credible and reliable, the court, while claiming it did not overlook the discrepancies, nonetheless set them aside. The basis upon which it was able to do so is not explained in the Opinion (Trial Court Opinion [69]).

Relationship between the appellant and Fhimah

The court made no findings on the relationship between the two accused.

Events after 7 December 1988

The court accepted that the appellant travelled to Malta on 7 December and left on 9 December (Trial Court Opinion [87]).

The court did not find, as the Crown sought, that Abouagela Masud travelled to and from Malta on the same dates. Nor did it find that when the appellant left Malta on 21 December, Masud travelled with him (as alleged in the Indictment (2)(h)).

The court rejected the evidence which came from Majid about visits by the appellant to Malta in late 1988, including that on 7 December he brought cabin baggage with him.

The court made no findings about the significance of the appellant's trip to Prague on 9 December, returning to Malta via Zurich on 16/17 December, except to find that he travelled on his own passport (Trial Court Opinion [87]).

In relation to the Crown submissions about Fhimah's involvement by obtaining luggage tags for the appellant, the court accepted that Fhimah wrote the entries in his diary. It also found that the IED suitcase must have had an interline luggage tag

attached. However the court acquitted Fhimah of any involvement in the offence. In doing so the court rejected the Crown's submissions about Fhimah. In particular, the court disbelieved entirely the evidence of Majid that the two accused arrived in Malta with a Samsonite suitcase on 20 December. The court held that there was no evidence whatsoever that Fhimah was at Luqa airport on 21 December, let alone that he rendered the "final assistance" to the appellant by introducing the IED suitcase to KM 180. The Crown's argument that there was significance in the early morning phone call from the appellant's hotel to Fhimah's flat – that it was in furtherance of the plot and that Fhimah then drove the appellant to the airport – was described by the court as "wholly speculative". Finally the court held that there was insufficient evidence which showed that Fhimah knew of any common criminal purpose to destroy an aircraft (Trial Court Opinion [85]).

As a result of that, the court held that the diary entries were not evidence against the appellant. The court made no finding as to the source of the interline tag which it said must have been attached to the primary suitcase. The court did not therefore address the problem raised by the witness Borg, that luggage tags were treated as a security item.

In relation to the Crown's argument that the trip to Tripoli by Fhimah on 18-20 December was to hand over luggage tags to the appellant, the court found that, as Majid's evidence that the two came back with a suitcase was rejected, it was unlikely that his visit was to hand over tags as this could easily be done in Malta. The court found that the inference invited by the Crown that Fhimah's role was to escort the appellant through Customs was speculation rather than inference and they refused to draw it. The status of Fhimah's visit to Tripoli therefore could not be elevated beyond the realm of suspicion in the court's view (Trial Court Opinion [85]).

Events of 20 December and Majid Giaka's credibility

The court accepted that the appellant's visit to Malta on 20-21 December under a false name was a visit in connection with the planting of an explosive device (Trial Court Opinion [88]). The court stated that had there been any innocent explanation for this visit, that inference could not have been drawn. The court was not however

prepared to find that on 20 December the appellant brought components of the IED with him from Libya. Having rejected Majid's evidence, it found that there was no evidence that either the appellant or Fhimah had any luggage with them, let alone a brown Samsonite suitcase (Trial Court Opinion [85]). In the event, the court gave no indication as to the nature of the "connection" between this visit and the planting of the device.

The Crown relied on Majid's evidence that, in addition to seeing the accused with a Samsonite suitcase on 20 December, the appellant introduced him to Masud, stating that Masud was in the JSO technical department. The Crown urged the court to accept Majid Giaka as a credible and reliable witness. With the exception of Majid's evidence about the organisation and personnel of the JSO (for which no reason for acceptance was given by the court), the court entirely rejected the evidence of Majid. The court found that in his relationship with the CIA he "endeavoured from the outset to give a false impression". The court described his claims of relationships to senior figures as "at best grossly exaggerated, at worst simply untrue". He was, according to the court, largely motivated by financial considerations. The court's conclusion about Majid was that "Information provided by a paid informer is always open to the criticism that it may be invented in order to justify payment, and in our view, this is a case where such criticism is more than usually justified." (Trial Court Opinion [42])

Majid had been the only witness for the Crown who spoke to any connection between the appellant and explosives or the appellant and a Samsonite suitcase.

Bollier's visit to Tripoli in December 1988

The court accepted that Bollier travelled to Tripoli between 18 and 20 December 1988 in order to sell timers to the Libyan army because this was unchallenged and vouched by documentary evidence (Trial Court Opinion [46]).

This was the only evidence which the court recorded as being accepted in relation to this trip. The court refused to draw the inference sought by the Crown that the purpose of Bollier's trip was to make a modification to the MST-13 timer that was to be used in the bombing of Pan Am 103 (Trial Court Opinion [46]).

The court did not make any findings that Bollier attended at the appellant's office during this trip, nor that he may have seen Ashur there – both of which pieces of evidence the Crown relied upon in trying to establish a connection between the appellant and the MST-13 timers. Similarly the court did not make any finding that there was any significance in the coincidence of Bollier's original travel arrangements with those of the accused.

Events of 21 December 1988

The court rejected the inference that the phone call from the appellant's hotel room to Fhimah's flat was in furtherance of the plot and led to the conclusion that Fhimah went to the airport on 21 December to assist the appellant as "wholly speculative" (Trial Court Opinion 85). In fact the court found that there was no evidence that Fhimah was there at all and those witnesses who knew him and could have confirmed or denied his presence were not asked to do so by the Crown.

By acquitting Fhimah, the court entirely rejected the basis upon which the Crown argued the IED suitcase could be introduced to KM 180 – namely, through Fhimah's possession of an airside pass. The Crown's position did not depend on proving *how* the suitcase was introduced to KM 180, but it did depend on there being someone there who was capable of subverting the system. That, said the Crown, was Fhimah. The court found that the *how* was not proved. Rejecting Fhimah, the court eliminated the only means by which, on the evidence, subversion could have happened. The only finding about knowledge of security related to the appellant - that because of his former role as head of airport security "he would be aware at least in general terms of the nature of security precautions at airports" (Trial Court Opinion [88]). There was no explanation by the court as to how this general awareness would satisfy the essential requirement for proof of the Crown case that there was someone there *capable of subverting the security* nor how it would overcome the Crown's clear position that the appellant could not achieve the introduction of the bag by himself.

The court made no findings about the circumstances of the appellant's presence at Luqa airport on 21 December, except that he left for Tripoli on a flight scheduled to

depart at 1020 hours (Trial Court Opinion [87]). The court did not find that the appellant got special treatment at check-in and immigration on 21 December. The court did not find, as the Crown suggested, that the appellant was present during the time in which the check-in for his flight overlapped with the check-in for KM 180.

In relation to the Crown's summary of its case against the appellant, the court's findings were as follows:

- That the appellant had been involved in the plot for some time – no finding;
- That the appellant was a high ranking member of the JSO – found (Trial Court Opinion [88]);
- That the appellant was close to other important members of the JSO – found that he was associated with members of JSO or military who purchased MST-13 timers (Trial Court Opinion [89]);
- That the appellant had a coded passport in a false name which must have been for JSO purposes (with reference to trips on which the passport was used) – found that he had a passport in a false name (Trial Court Opinion [87]), but found that there was no evidence about the reason for its issue (Trial Court Opinion [87]). Referring to the trips when this passport was used, the court was significantly silent on reasons for them (Trial Court Opinion [87]);
- That the appellant had access to the components of an IED, including the Toshiba radio, MST-13 timers and explosives – the court made no findings that the appellant had access to these items. The court only found that the appellants had an association with those who purchased the MST-13 timers (Trial Court Opinion [89]);
- That the appellant was identified by Gauci as the purchaser of the clothing in the IED suitcase – found that he was identified "as far as it went" (Trial Court Opinion [69]).

Proof of concert between the two accused

The court rejected the Crown submission that the appellant and Fhimah acted in concert and acquitted Fhimah. The court held that the diary entries were therefore not evidence against the appellant. Large parts of the evidence upon which the Crown

relied to establish concert (with Fhimah) were also rejected by the court (as set out above).

The court made no findings as to any other individuals who may have shared the common criminal purpose with the appellant nor any findings of any acts carried out by others in furtherance of the criminal purpose.

1.3.3 Summary of Trial Court's findings against the two accused

Evidence against Fhimah

The court took the view that the principal piece of evidence against Fhimah was the diary entries (paragraph [84]). It stated that although there may be a sinister inference to be drawn from the diary, there was insufficient corroboration for any adverse inference (paragraph [85]). As seen above, the court refused to draw any of the inferences against Fhimah which had been sought by the Crown. They made no findings that he participated in any way (witting or unwitting) in the common criminal purpose.

Evidence against the appellant

The court found that the appellant's trip to Malta between 20 and 21 December was on a coded passport, issued at the request of the JSO, which was never used again (Trial Court Opinion [87]). It found that without an innocent explanation for this visit, it could (and did) draw the inference that this visit was in connection with the planting of the device (Trial Court Opinion 88). The nature of that connection was not specified. The court found that the appellant departed for Tripoli on 21 December on a flight scheduled to leave at 1020 am.

A "major factor" in the appellant's conviction was the identification of him as the purchaser of the clothing by Gauci (Trial Court Opinion [88]). The appellant was present in Malta, staying in a hotel close to Gauci's shop, on the date on which the court inferred the purchase had occurred – 7 December (Trial Court Opinion [88]).

The court infers that if the appellant was the purchaser, he must have been aware of the purpose for which they were being bought (Trial Court Opinion [88]). That purpose is not specifically identified. This is discussed in detail at 4.3 below.

The court accepted the appellant had been in the JSO and held fairly high rank, including head of airline security. This would have given him general awareness of security precautions at airport, according to the court (Trial Court Opinion [88]). Additionally, the court found that he was involved in military procurement and knew Bollier, though not in connection with the supply of MST-3 timers, and had formed a company which leased premises from him (Trial Court Opinion [88]).

The court concluded that a real and convincing pattern of the appellant's involvement in the crime was formed by the following (Trial Court Opinion [89]):

- the purchase of the 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 appellant, "albeit not absolute" as the purchaser of the clothing
- his movements under a false name at or around the material time; and
- "the other background circumstances" such as his association with Bollier and members of the JSO or Libyan military who purchased MST-13 timers.

The conviction and in particular proof of the *factum probandum* of the appellant's involvement in the offence rests upon a series of inferences drawn by the trial court. The reasonablenss of these inferences and the sufficiency of the evidence relied upon to draw these inferences, is the focus of the challenge made in these submissions and addressed in Section 4 below. They can be summarised here as follows: -

- That the primary suitcase was ingested at Luqa (section 4.4);
- That the clothing in the primary suitcase was purchased on 7th December 1988 (section 4.2)
- That the appellant was the purchaser of the clothing from Mary's house (section 4.2)

- That the purchaser knew the purpose of purchase (section 4.3)
- That the appellant's presence on Malta was in connection with the planting of the device (section 4.5);
- That there is any significance to proof of guilt in the appellant's association with those who purchased the timers or Bollier (section 4.6);
- That the origin of the plot was Libyan (section 4.7); and
- That the defence case can be excluded on the basis that there was no evidence the PFLP-GC had the means and intention to commit the offence (section 4.8).

1.4 REJECTED AND MISSING FINDINGS

1.4.1 Introduction

As has been demonstrated, there were significant discrepancies between the Crown's theory of the case as presented in its final submissions, and the basis upon which the court concluded that the appellant was guilty. This section summarises the evidence and invited inferences rejected by the court and lists the areas upon which the court made no findings where it would ordinarily have been expected to do so.

1.4.2 The existence of a common criminal purpose

The court rejected the evidence from Majid Giaka about conversations with Said Rashid and later the appellant about the possibility of introducing an unaccompanied bag on board an aircraft in Malta in 1986. This was the evidence upon which the Crown relied in proving that, at the date of purchase, there already existed a common criminal purpose to destroy a civil passenger aircraft and murder its occupants.

1.4.3 The Appellant's knowledge of a common criminal purpose

The evidence of Majid that the appellant told him – with reference to the possibility of placing an unaccompanied bag on a plane – "Don't rush things" was rejected by the court. This was the principal evidence upon which the Crown relied to allow the Court to draw the inference that at the date of purchase of the clothing, the appellant was aware of the common criminal purpose.

1.4.4 The JSO/Libyan origin of the common criminal purpose

The court rejected Majid's evidence that on 20 December 1988 (the day on which the Crown said the appellant introduced the components of the IED to Malta through

Luqa airport), while he was at the airport, he was introduced by the appellant to Abouagela Masud, a member of the JSO's technical department.

The court refused to accept the Crown's submission that when Bollier travelled to Tripoli in late December 1988, he went in order to make an alteration to the MST-13 timer used in the crime at the request of JSO/Libyan military officials.

1.4.5 The Appellant's involvement in the common criminal purpose

The court rejected the evidence from Majid that the appellant had access to high performance plastic explosives. It rejected the evidence that these were kept at the LAA offices or the consul in Malta. This was the only basis in evidence upon which the Crown argued the appellant had access to explosives.

As already stated above, the court rejected Majid's evidence that the appellant said "Don't rush things" in relation to possibly placing an unaccompanied bag on an aircraft.

The court rejected the evidence from Majid that the appellant arrived in Malta on 7 December (the date of purchase) with cabin baggage as opposed to checked baggage.

The court did not make the findings sought by the Crown as to the significance of the appellant's trip to Prague on 9 December and returning to Malta through Zurich on 16/17 December. The Crown had sought to connect this return trip with Bollier deciding to make arrangements to go to Tripoli. The court did not accept the Crown submission that the appellant, Fhimah and Bollier all intended to travel back from Tripoli to Malta on 20 December.

The court found that the appellant's association with Bollier was not in connection with MST-13 timers, but was that he rented office space from him and wished to do business with MEBO.

The court rejected the evidence of Majid that on 20 December, the appellant and Fhimah were at Luqa Airport with a brown hardshell Samsonite suitcase similar to the primary suitcase, finding instead that there was no evidence that they had luggage.

The court rejected the Crown submission that the purpose of this visit on 20 December was for the appellant to introduce the components of the IED to Malta.

The court rejected the Crown submission that the appellant's coded passport was issued to him for the purpose of engaging in JSO activities, finding instead that there was no evidence why it was issued to him. The court did not make the finding sought by the Crown that previous journeys made on this passport were in connection with JSO activities.

The court held that the entries in Fhimah's diary about obtaining luggage tags for Abdelbaset were not evidence against the appellant.

The court rejected the inference sought by the Crown that the phone call from the appellant's room to Fhimah's flat on 21 December was in furtherance of the common criminal purpose.

The court rejected the Crown's submission that the appellant was assisted by Fhimah in overcoming the security of Luqa airport to introduce the primary suitcase to KM 180.

The Crown invited the court to find that the appellant was present at Luqa airport during the crucial overlapping period of 0850 to 0915 when both KM 180 and the appellant's flight to Tripoli were checking-in. The court did not make such a finding. The court found only that the appellant departed on a flight to Tripoli at or about the time the device must have been planted.

The court did not make the findings sought by the Crown that on 21 December when the appellant left Malta for Tripoli, he travelled with Abouagela Masud, a JSO member.

1.4.6 The involvement of Fhimah in the common criminal purpose

The court rejected the Crown case that Fhimah was a participant in the common criminal purpose.

In doing so, the court rejected the means put forward by the Crown by which the security at Luqa airport was overcome to allow primary suitcase to be introduced to KM 180.

The court found that Fhimah wrote the entries in his diary about obtaining luggage tags for the appellant. However the court did not make a finding that Fhimah in fact carried that out (even without knowing of the common criminal purpose). The court rejected the Crown submission that Fhimah's trip to Libya on 18 December 1988 was to give tags to the appellant. The court found that the primary suitcase was tagged, but failed to make any findings as to how the tag became attached to the suitcase. The court heard evidence of no other individual in a position to access luggage tags for the appellant. The court failed to make any findings about how the security procedure for luggage tags – described by Borg – was overcome or whether it was overcome at all.

The court rejected the evidence of Majid that Fhimah assisted the appellant in carrying a Samsonite suitcase through Customs on 20 December.

The court rejected the suggestion of the Crown that Fhimah went to the airport on 21 December and rendered the final assistance to the appellant by using his airside pass to overcome security and allow introduction of the primary suitcase.

This left the court with no evidence which could explain how or by whose hand the primary suitcase was introduced to KM 180.

<u>Other potential participants</u>

The court made no findings that any other named individual was involved in the common criminal purpose.

The court rejected evidence that would have implicated Said Rashid in the common criminal purpose (Majid's evidence about their 1986 conversation).

The court found the appellant had an association with those who purchased MST-13 timers. The purchaser was either Hinshiri or Rashid. The court made no finding as to which, though the court found some of the timers were delivered to Hinshiri.

The Crown sought to infer that because the appellant and Rashid knew each other from the JSO, that Rashid's role as chairman of the company to which RT-SF16 radios were supplied allowed the inference that the appellant had access to such a radio for the purposes of the IED. The court made no finding that the appellant had access or potential to access an RT-SF16 by this route. Indeed there had been no evidence that Rashid ever had possession of such a radio. The court had of course rejected Majid's evidence that Rashid was involved in the conversation in 1986 about placing an unaccompanied bag on an aircraft.

1.4.7 Supply, use and possession of timers

The court found that MST-13 timers were supplied to "JSO or Libyan military" personnel. The court made no findings as to what happened to the timers after they were delivered in 1985-1986. The court made no finding as to who had possession of MST-13 timers in December 1988.

The Crown sought to infer from Bollier's evidence about what happened at the desert tests that Nassr Ashur had possession of the timers and that they were accessible to JSO officers, including the appellant. The court made no such finding.

The Crown had urged the court to find that the nature of the desert tests showed that MST-13 timers were being used in connection with explosives. The court rejected that, finding instead that the purpose of the tests was unclear.

The Crown urged the court to find that MST-13 timers were supplied only to Libya. The court rejected that and found that MST-13 timers were also supplied to the Stasi.

The Crown urged the court to find that even if timers were supplied to the Stasi, they were destroyed by them (and therefore could not be in the hands of third parties). The court rejected that and found that it could not exclude the possibility that others had MST-13 timers, in particular it found that one such timer recovered in Togo was likely of East German origin.

1.4.8 Supply or availability of explosives

The court rejected both tranches of the Crown case in relation to the availability of explosives. It rejected the inference sought by the Crown from Bollier's evidence about desert tests that this showed the MST-13 timers were being used in connection with explosives. It also rejected the evidence of Majid that explosives were accessible in Malta via the LAA offices.

The court made no findings on the source of the explosive which was found to have been used in the IED.

1.5 CONCLUSION

In addition to setting out the full context of the judgment here, this section has sought to demonstrate the significant degree of difference between the evidence led by the Crown and the inferences they sought to have drawn from that evidence on the one hand and on the other the evidence the trial court accepted and relied upon in convicting the appellant. The basis for conviction in the crown case and the basis for conviction in the 'judges case' are very different.

This is important because it demonstrates that major planks of the Crown case were removed – for example, the evidence of two out of the three main witnesses for the Crown was almost wholly rejected (Majid and Bollier). It also shows that there are significant gaps and difficulties in what is left in the evidence to entitle a conviction – in for example the absence of evidence as to concert or the shared criminal purpose and the appellant's participation in same. These gaps and the weakness of the remaining evidence are addressed at 4.1.4 below and in the examination of the individual inferences drawn by the trial court at 4.2-4.8 below.

2. LEGAL FRAMEWORK –WHAT IS REQUIRED FOR PROOF

2.1 WHAT IS NECESSARY FOR ACCESSORY LIABILITY

2.1.1 Was this a collective crime?

The Crown alleged that this murder was committed by the appellant, Fhimah and others engaged in a common criminal purpose. The indictment identified that purpose as being "to destroy a civil passenger aircraft and murder the occupants." It is not disputed that this crime must have involved more than one person acting together in pursuance of this purpose. This can be inferred from the nature of the crime itself and the steps which would require to have been taken in order to carry it out.

2.1.2 Legal requirements for liability for collective crime

Scots law attaches the same degree of liability, namely full responsibility for the commission of the crime, to both principal actors (those who physically perpetrate the crime) and to accessories (e.g. Hume, II 227, fn 1; MacDonald, Criminal Law of Scotland, (5^{th} ed.), 4).

However the law does differentiate between what is required on the part of a principal actor to attract criminal liability, and what is required on the part of an accessory. There are different requirements in respect of both the physical act, and the state of mind with which that act is carried out.

Requirements for liability as a principal

Physical act of principal

The principal actor must carry out the act which constitutes the *actus reus* of the crime. He must do this personally, or through the use of an innocent agent or "tool" (Hume I 281, including reference to the case of Bisset, 15 June 1705).

The act which caused the destruction of PA 103 and the death of its passengers and crew, and residents of Lockerbie was the placing of the improvised explosive device onto KM 180, tagged to be carried, eventually, on PA 103. The court found that the Crown failed to prove how this had occurred (Trial Court Opinion paragraph [39]). The court rejected the Crown's invitation to find that Fhimah rendered the necessary assistance to the appellant to overcome security and allow the bag to be ingested, describing it as speculation based on no evidence (Trial Court Opinion [85]). In other words, the court rejected the only basis upon which the Crown had tried to prove that the appellant "placed or caused [the primary suitcase] to be placed" on board (Indictment (as amended), Charge (2)(g)).

Thus, it is clear, that the appellant was not convicted as the principal actor.

State of mind of principal

The principal actor must have the "full" *mens rea* for the crime. That is to say, he must intend the crime in the same way as if he were committing it alone.

For example, if A shoots C, he will be guilty of murder if it is proved either that he intended to kill C, or that he was wickedly reckless as to the consequences of shooting him. Similarly, if A tells B he wants to kill C later that day, and B lends him a gun to do so, then if A shoots C, in order for A to be found guilty of murder, it will still need to be proved either he that intended to kill or that he was wickedly reckless as to the consequences.

Requirements for liability as an accessory

Physical act of accessory

In order to attract criminal liability on an art and part basis, the accessory must carry out an act which assists the commission of the crime or (put it another way) furthers the common criminal purpose.

The ways in which such assistance can be rendered can be categorised under three broad heads (see e.g. Gordon, *Criminal Law*, (3rd ed.), 5.19; MacDonald, *supra*, at 3):

- Counsel or instigation;
- Supply of materials for the commission of the crime; or
- Assistance in the physical perpetration of the crime.

The accessory's act must be of material assistance to the commission of the crime or to the realisation of the common criminal purpose. This is true of all forms of accession:

- in relation to acts of assistance before the fact (such as supply of materials) - "the assistance rendered must be material to the ultimate issue of the enterprise, such as substantially forwards and encourages the actor" (Alison, *Principles of the Criminal Law of Scotland*, I 60);
- in relation to counsel or instigation - "It is truly a most substantial assistance" (Hume I 278);
- in relation to assistance with physical perpetration – "they are all present…lending effectual aid to the perpetration of the deed", Alison, *supra*, I 62).

That the accessory's act must in some way assist the commission of the crime is confirmed by the fact that mere presence at the scene of the crime is not sufficient to attract liability for the acts of others. While the circumstance of the accused's presence may allow an inference to be drawn that he is a participant in the crime,

there needs to be some evidential basis upon which it can be inferred that he is not a mere bystander (see e.g. *Stillie v HMA* 1990 SCCR 719 – where the accused ran away with the robber; *White v McPhail* 1990 SCCR 578 – where the accused was in an entirely secured area and found crouching down). That is not to say an accused cannot be convicted even if he does not carry out an overt act of assistance. Mere presence is sufficient to infer participation if it is shown that the accessory is ready and willing to give assistance if necessary – this being considered a substantial assistance (Hume, I 264). However such readiness needs to be demonstrated on the evidence (*George Kerr & Others* (1871) 2 Couper 334, 337, *per* Lord Ardmillan).

In the event that an alleged accessory is present at the scene of the crime but does not in any way assist and the evidence does not bear the inference that he is prepared to assist if necessary, the only use which can be made of his presence at the scene is to infer his prior concert (*Speirs v HMA* 1980 JC 36). In these circumstances, it is not his presence which attracts liability, but his earlier act of assistance (whatever that may be proved to have been).

State of mind of accessory

As a matter of law, the accessory need not possess the "full" *mens rea* for the crime - although he may as a matter of fact. It is sufficient to attract criminal liability as an accessory that he knows of the intention to commit a specific crime and carries out his act of assistance in that knowledge.

As in the example above, where B supplies a gun to A who uses it to kill C. For B to be guilty art and part of murder, he need only know of A's murderous intent towards C when he gives him the gun. It matters not whether B himself would wish C dead.

The knowledge must be of a particular crime, rather than of some generalised evil intent on the part of the principal actor. Hume states that in order to attract liability, the accused providing assistance before the fact must be "in knowledge of the mortal purpose". Whereas, "if the assistance is indirect and remote, this, though accompanied with knowledge in general of the actor's malice and evil design, is not a warrantable

ground of conviction…He has not…had the deed made present to his imagination, by a knowledge of the manner in which is it likely to be done." (Hume, I 274).

The reasoning behind this is that, in order to attach liability for the acts of others (contrary to the usual principle of criminal law that an individual is responsible only for his own acts), the law requires a "common" criminal purpose. That is, both accessory and principal must be "aiming at" the same crime. In the absence of that, the accessory cannot be said to be a "partaker of the distinguishing character of the crime" (Hume, I 274), and the criminal purpose is not "common" to the participants (see also Gordon, *supra*, 5.31).

2.1.3 Conclusion

The appellant was convicted on the basis of his being an accessory in the common criminal purpose to plant an improvised explosive device on PA 103 and to murder the passengers and crew. The principles and requirements of accessory liability are important in this case in comprehending whether the verdict was reasonable and was properly and sufficiently supported by the evidence.

As is set out in detail in this submission, Grounds 1 and 2 challenge the reasonableness of the findings made and the inferences drawn on the evidence and also challenge the sufficiency of the evidence on which a conviction was based. Within these grounds, a specific challenge is made that neither the evidence nor the inferences drawn by the trial court were such as to fulfil the requirements for establishing accessory liability (see Ground of Appeal 2.2.6 at page 39).

This challenge and the application of these principles to this case, is addressed at section 4.1.4 below.

2.2 A CIRCUMSTANTIAL CASE AND PROBATIVE FORCE

2.2.1 The nature of circumstantial evidence

Introduction

Circumstantial evidence is the evidence of facts from which, in conjunction with other such facts, the crucial facts in issue– the *facta probanda* – may be inferred. It is the crucial facts which give rise to the ultimate inference of guilt.

Classic kinds of circumstantial evidence include evidence of preparation of the crime or destruction of evidence; statements or acts indicative of guilt or guilty intention; evidence of opportunity; evidence of motive and /or means to commit the crime.

Direct evidence is evidence which applies directly to the *facta probanda*; circumstantial evidence is evidence which applies directly to minor facts and indirectly to the *facta probanda*. When circumstantial evidence is combined it may be of such a nature that the mind is led by reasoning to the crucial fact which may be inferred.

Most commonly, circumstantial evidence provides corroboration of direct evidence. However it has long been recognised that proof can be established in a wholly circumstantial case, where there is a "train of circumstances by themselves as leave no reasonable doubt in the mind that the panel was guilty". (Alison I 73)

It is the combination of the various circumstances which is important. The individual facts or circumstances established in evidence need not be incriminatory in themselves or bear upon or be connected to the facts in issue, but they must in combination support and confirm the facts in issue.

> "In judging of circumstantial evidence, it is the united effect of the whole that is taken into view, and which produces conviction on the mind. Many circumstances which taken separately appear trifling and inconclusive, operate strongly when combined with others; and this combination gives to an

apparently minute circumstance an importance which is decisive." (Burnett *Treatise* 524)

The nature of the circumstantial case as recognised by the institutional writers is one which is well understood and relatively straightforward. Individual facts are combined and produce compelling evidence from which the inference of guilt can be inferred. In a simple circumstantial case the facts inferred are the facts in issue.

More complex circumstantial cases

However there may be cases which are less straightforward and where there is no such direct connection between the combined circumstantial evidence and the facts in issue. This is where basic facts combined give rise to an inference which in turn is combined either with other basic facts or perhaps with other inferences to provide the basis from which the crucial facts in issue can be inferred.

This involves deriving the crucial facts from an intermediate inference which in turn rests upon the proven evidence. In these circumstances, the ultimate inference of guilt is therefore one step removed from the evidence directly spoken to.

This may be a legitimate basis to establish a circumstantial case, but it is inherently weaker as the connection between the facts proved and the facts in issue is more remote.

The position becomes even more complicated and remote where, as in the present case not only are the intermediate inferences drawn from other inferences or a combination of circumstantial facts and inferences; but also the crucial facts are derived entirely from intermediate inferences. This is addressed in detail below.

2.2.2 The dangers of circumstantial evidence

The distinction between direct evidence and circumstantial evidence is that in the latter case there is no necessary connection between the facts and the inferences. It is

only by comparison with experience that we can be confident of the connection. The danger is always that the connection may be apparent and not real.

> "…in any case of pure circumstantial evidence, it is always possible the prisoner may be innocent, though all the witnesses have sworn to nothing but the truth; a thing which cannot happen, where they swear directly to a deed done in their presence." (Hume II 385)

In this way while it is the aptitude and coherence, the formation of a convincing pattern which is required in a wholly circumstantial case, the very real danger is the tendency to see a pattern where none properly exists – the mind has the distorting power of the uneven mirror:

> "There is another source of fallacy and danger to which, as already intimated, circumstantial evidence is particularly liable and of which it is necessary to be especially mindful. Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, -frequently of a delicate and perplexing character, - liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature to the true nature of things"*;* (Wills on Circumstantial Evidence (7th Edition) at pp 44-45; also referring to Best *Treatise on Presumptions of Law and Fact* at 255; and Bacon *Novum Organum* Aphor. at 45)

The potential for distortion is greater where the mirror is not only uneven but contains blanks. A pattern is all the more likely to be discerned where none properly exists, from a picture which has parts missing.

In view of such dangers Dickson states :

> "But highly important as [circumstantial] evidence … is, considerable caution is required in estimating it. The conclusiveness of the inference up to a certain point tends to make us overlook the want of a sufficiently strong connection between that inference and the fact in issue" Vol. 1 61 at paragraph 72.

There is a need to take care not because the circumstantial case is not capable of producing the same degree of assurance as direct evidence, "but that in the application of presumptive proof tribunals should be on their guard against the peculiar tendency in the human mind… to support greater order and conformity in things than really exist and a sort of pride or vanity in drawing conclusions from an isolated number of facts which is apt to deceive the judgment." (*Best, supra,* 255-256*)*

To a degree this danger is acknowledged by the trial court (paragraph [89]) – yet it is nonetheless a problem which lies at the heart of its decision.

> "Unfortunately, however, for the interests of justice, the true principles on which presumptive proof rests have not always been understood by those appointed to administer it; and the judicial histories of every country supply melancholy instances, where the safety of individuals has been sacrificed to the ignorance, haste or misdirected zeal of judges and jurymen, dealing with this peculiar mode of proof" (Best, *supra,* 250-251)

In the present case, which relies upon inferences built upon inferences, there is of course an additional stage of presumption or inference and as such the dangers are doubled.

2.2.3 Probative force and sufficiency

General principles in Scots law

(1) Scots law sets a minimum requirement of proof in a criminal cause – namely the requirement of more than one witness, for sufficient proof in law:

> "…still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty or the fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty escape." Hume II 383

This principle has been established since Roman law (see Burnett *Treatise* 509; Lord Rodger in *Fox v HMA* 1998 JC 94 at 98; and Best, *supra,* 13(f)

(2) Sufficiency of evidence is a matter of law - "that everything is not sufficient proof that makes faith to the judge" (Stair IV.43.2**)**. This is an objective test and it is not then a matter for choice by the jury. In this context, rules of law apply such as the requirement for corroboration or in all cases that the evidence is such as to entitle a reasonable jury to convict.

(3) The legal requirement of sufficiency is based on the concurrence of testimonies – more than one witness is required. It is the concurrence of testimonies which is at the heart of proof in any criminal case. What is often referred to as "full proof" means proof on corroborated evidence.

(4) The standard of proof is proof beyond a reasonable doubt – a standard which was once called "moral certainty". The minimum requirement in any case is that the essential facts or *facta probanda* require to be proved beyond a reasonable doubt on corroborated or sufficient evidence.

Source of probative force in a circumstantial case

Proof in a circumstantial case is based upon the concurrence of testimonies or evidentiary facts.

This is not to say that the individual facts must be connected to the facts in issue but they must in combination support and confirm same. Indeed individual circumstances remote from the substance of the offence can when combined provide a more compelling coincidence (see Hume II at 384; Burnett *supra* at 515; Dickson *supra* at 989 at paragraph 1811).

Sufficient proof of the essential facts is achieved by the mutual interlacing or concurrence of the various circumstances. Putting together the facts and circumstances must involve their having the effect of confirming and supporting each other – having aptitude and coherence, on the one hand and combining toward the same conclusion on the other. As such they are mutually corroborative. This means that the combination of the basic facts must incorporate not merely an adding up or

aggregation of same, but an aptitude and coherence which multiplies the effect - which effect must be connected to and have a bearing upon proof of the facts in issue. The cogency of proof is not an arithmetical but a geometric process.

Import of the individual circumstances

The hallmark of a circumstantial case is that the aptitude and coherence of the combined circumstances are such that they confirm and support each other toward the same conclusion. However, as with direct evidence, the character, cogency and independence of the various individual circumstances is also relevant to probative force.

Whilst an individual circumstance need not be incriminatory in itself, logic dictates that where an individual circumstance or basic fact is of an incriminatory nature or is directly connected to the facts in issue then the greater the probative force.

> "When each of the probative facts contributes immediately its own inference to the common conclusion, their compound strength is multiplied as their number is increased; and they may jointly establish the fact in issue, although all of them when viewed independently may be explicable upon other hypotheses." (Dickson, *supra,* at I 99 paragraph 108)

So too, the more independent individual facts which are combined which then confirm and support each other, the greater the probative force.

> "In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes and the more secure becomes our conviction of the moral certainty of the fact they are alleged to prove, as the intensity of light is increased by the concentration of the number of rays on a common focus" (Wills, *supra,* at 434)

The probative force of the whole depends upon the number, weight, independence as well as consistency of the individual circumstances.

Analogies: cables, chains or networks

Dickson uses both the well known analogies of the circumstantial chain and the cable.

> "One circumstance may be of slight moment; another, tending to the same result, increases by its consistency with the first, the probability of the inference to be drawn from existence and co-existence; another is added and another, all pointing in the same direction; giving added and increased strength to the cable, of which it forms a (component) part...The cable gains increased strength by each strand added. The failure of proof as to one circumstance is but one strand from the cable." (Dickson, *supra,* at 74-75 paragraph 95 and see also Walker and Walker, *The Law of Evidence in Scotland* (3rd ed.) at 80-82)

However it should be noted that in using this analogy the "but one strand" may in some circumstances unravel the cable. Removal of one strand of a cable may not destroy the case, but it might. Removal of strands results in a weaker case. The question then becomes is the remaining cable of sufficient strength to bear an inference of guilt beyond a reasonable doubt.

Elsewhere Dickson uses the chain metaphor:

> "When each of the probative facts contributes immediately its own inference to the common conclusion, their compound strength is multiplied as their number is increased; and they may jointly establish the fact in issue, although all of them when viewed independently may be explicable upon other hypotheses. When the proof of each of a series of facts raised an inference of the existence of another fact in the series – only the last of them inferring the existence of the fact in issue – the probability of the truth of the issue…diminishes as the number of facts increase and the conclusiveness of any one inference in the series is fatal to the whole. In this sense a circumstantial case is like a chain, which cannot be stronger than its weakest link and which becomes continually weaker as each link is added, till it breaks with its own weight" Dickson, *supra,* 90-2 paragraph (108).

This may, at least in part, be apt here. This circumstantial case – as detailed below – involves, at its most simple, the combination of basic facts to yield intermediate inferences, which in turn are combined and from which the ultimate inference of guilt is drawn. As such it could be said, that in the present case the proof of a series of facts is combined to raise an inference which in turn is combined with other facts and inferences to raise a further inference and it is only this last inference or conclusion which bears upon the facts in issue – as such the chain analogy and its consequences apply.

An important example here is where a series of facts are relied upon to infer the date of purchase. This inference is then combined with another series of facts to infer that the appellant was the purchaser of the clothing. This intermediate inference is then crucial to the ultimate inference of guilt. Each inference is dependant upon the former and is an indispensable step in reaching the fact in issue. However, only the last inference bears upon the fact in issue. As such this aspect of the case is analogous to the chain – which cannot be stronger than its weakest link. This inference is considered in detail below at section 4.2.8 and those following.

A separate but helpful analogy is provided by Lord Coleridge in a charge to a jury in *R v Dickman* (Newcastle Summer Assizes, 1910 - referred to in Wills, *supra*, at 46 and 452-60):

> 'It is perfectly true that this is a case of circumstantial evidence and circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength in proportion to the character, the variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. That network may be a mere gossamer thread, as light and as unsubstantial as the air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves great gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture, that no efforts on the part of the accused can break through. It may come to nothing - on the other hand it may be absolutely convincing… The law does not demand that you should act

> upon certainties alone…. In our lives, in our acts, in our thoughts we do not deal with certainties; we ought to act upon just and reasonable convictions founded upon just and reasonable grounds.... The law asks for no more and the law demands no less." (emphasis added).

Similarly in the charge in the case of *Re Regina v. Truscott* (1967) R.C.S. 309

> "The circumstantial evidence is built piece by piece until the final evidentiary structure completely entraps the prisoner in a situation from which he cannot escape. There may be missing from that structure a piece here and there and certain imperfections may be discernible, but the entrapping mesh taken as a whole must be continuous and consistent."

These analogies demonstrate the need for a connection or interlacing of the various circumstances.

Remoteness can arise either from the absence of any real connection or weave between the various circumstances or in respect of the distance from the evidence relied upon and the facts in issue. In regard to the latter, this arises where in order to connect the circumstantial evidence with the facts in issue a process of inference is necessarily involved. The more complicated such a process is, the more remote the facts are from proof of the crime.

2.2.4 Assessment of sufficiency in a wholly circumstantial case

The issue of sufficiency here is whether there is sufficient evidence to entitle a jury to convict beyond a reasonable doubt. The *factum probandum* in issue is whether the appellant has been proved to be involved in the commission of the crime.

Assessment of sufficiency here is made by regard to the following:

Quality

As with any case this requires assessment of the probative force of the evidence relied upon to convict and involves assessment of the quality of the evidence.

Exceptionally the quality of the material evidence may be such that the court concludes no reasonable jury could convict beyond a reasonable doubt based upon that poor evidence. For example the credibility and/or reliability of witness speaking to an important basic fact or circumstance may be such that no reasonable jury would be entitled to convict in reliance upon that basic fact. So just as in a case relying upon direct evidence, the quality of identification evidence may be such that it cannot be reasonably accepted. Or, as in this case, a witness (Majid Giaka) might, on any view, be so incredible and unreliable that his evidence must be taken out of the picture.

Concurrence and remoteness

Assessment is made as to the corroborative nature of the evidence and the connection of that evidence to proving the essential facts. In other words applying the principles set out above .

First the aptitude and coherence of the individual circumstances with each other – do they tend to support and confirm each other as to the specific fact charged? Are they mutually corroborative? If not then, viewed objectively, they may be too weak to carry conviction.

Secondly, do the proven circumstances when combined bear upon the facts in issue, to the extent rendering the ultimate inference of guilt beyond a reasonable doubt? Is there a sufficient connection? If not then there will be insufficient to establish proof of the essential facts in issue beyond a reasonable doubt.

Put shortly this is an assessment of the concurrence and the remoteness of the evidence.

Reasonable inferences

In a complex circumstantial case as here where the inference of guilt is derived not simply from a combination of circumstances but rests upon other inferences drawn from the circumstantial evidence, then those inferences must be reasonable ones – that is reasonable in that they are properly supported by the evidence (overlapping with the issue of sufficiency and remoteness) and also in respect of the reasoning involved in drawing the inference.

In a wholly circumstantial case in order to assess whether a jury or trier of fact was entitled to (or could reasonably) convict, a trial judge must determine whether it would be reasonable to make the inferences necessary to establish the facts in issue.

In assessing the reasonableness of any inference drawn, the concurrence of the circumstances when combined and the reality or strength of the connection to the facts in issue is relevant. The mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with innocence as with the guilt of the accused, cannot have any probative force and cannot yield a reasonable inference of guilt.

In a simple circumstantial case an inference would be unreasonable where it is not properly supported by or sufficiently connected to the evidence. An unreasonable inference of guilt is an unreasonable verdict.

In a more complex case as here, where the inference of guilt is drawn from a series and combination of intermediate inferences, those intermediate inferences fall to be examined in this way when they are material to conviction. The intermediate inferences require to be reasonable having regard to both the evidence relied upon and in respect of the reasoning itself. An inference of guilt built upon and arising from unreasonable inferences cannot be sustained as a reasonable verdict.

The importance of inconsistent facts

In this context where the reasonableness of inferences drawn are being considered, the importance of inconsistent facts should be noted.

Inference of guilt

Where there are facts proved which are inconsistent with guilt then the conclusion of guilt cannot be made. Logic demands that the inference drawn must be consistent with all the proved facts. And if it is not then the inference cannot be drawn.

> "The existence of a single probative fact absolutely incompatible with a hypothesis deducible from all the other probative facts necessarily excludes that hypothesis; for as the whole of the actual facts must have been consistent, some other hypothesis must exist, with which all the probative facts will coincide." (Dickson, *supra,* at 91, paragraph 108)

> "It is, therefore, a necessary consequence, that, if any of the circumstances established in evidence be absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true" (Best, *supra,* at 288 citing 1 Stark. Ev.560-561)

For example, whatever the strength of evidence pointing to the guilt of the accused, it cannot overcome undisputed evidence that he was in prison at the time.

The importance of inconsistent facts in a circumstantial case has been described in this way :

> "the proneness of the human mind to look for – and often to slightly distort the facts in order to establish such a proposition – forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest inasmuch as it destroys the hypothesis of guilt" *(*Baron Alderson in *Hodges Case (1838)* 2 Lewin 227 at 228*)*

It follows, generally speaking, where there exists a fact inconsistent with the drawing of any other inference, then that inference cannot be so drawn. Accordingly, inferences sought to be drawn from individual circumstances or a combination of same, cannot be drawn and relied upon where there remains an accepted or proven fact inconsistent with that inference. Where, in turn, that inference is material and is relied upon to convict then the verdict is rendered unreasonable.

Materiality of the inferences

If an inference is considered to be unreasonable then the materiality of the inference requires to be considered. If the inference of guilt is materially dependant upon the inference then there will be insufficient to entitle a conviction.

This can be illustrated by reference to the analogies set out above.

- Cable: The removal of such a strand from the case may be such as to leave the cable intact or it may be at the core weakening the strength of the cable to such an extent that it is no longer strong enough to bear an inference of guilt beyond a reasonable doubt.

- Chain - To adopt the chain analogy an unreasonable inference undermines the whole case because the weak link breaks the chain.

- Network – it may be a central part of the net which, upon removal, leaves a significant gap.

2.2.5 A specific test or formula of sufficiency

Finally, there is another established way of testing sufficiency in a wholly circumstantial case. A test recognised both in Scots law, internationally and throughout comparable jurisdictions.

This is that in a circumstantial case the inference of guilt must be the only rational inference which the combined circumstances can bear. The aptitude and coherence of the combined circumstances must be such that the only reasonable conclusion is guilt. The proved facts should be such that they exclude every reasonable inference drawn from them, save the one sought to be drawn. If they do not exclude any other reasonable inferences then there must be a reasonable doubt as to whether the inference sought to be drawn is correct.

Traditional test:

The position is stated clearly by Dickson:

> "With regard to the sufficiency of circumstantial proofs, there is manifestly a great difference between civil and criminal causes.... But in criminal cases the verdict ought always to be on the side of mercy unless the jury are perfectly satisfied of the prisoner's guilt. It is not enough that his guilt be a rational and probable inference, as well as the most probable of several inferences, from the circumstances. It must be the only rational hypothesis which they will bear. The evidence must be so clear satisfactory and conclusive as to leave no rational doubt in the minds of the jury…" (Dickson, *supra*, at Vol I 77 at paragraph 98 (emphasis added); see also 77 footnote (b))

Burnett expresses the same position in slightly different language:

> "What those circumstances are which will amount to sufficient evidence in any given case, or rather what modification of circumstances as ought to mark the line between that *legal certainty* which in such cases ought to warrant a finding of guilt, and that *suspicion* merely, which is not ground to warrant conviction, it is impossible to ascertain. They must lie on the breasts and in the consciences of those who are to judge of them; and are in their nature so various and complicated, as to be beyond the reach of precise legal rules. This, at least may be said, that the same evidence which might find warrant a finding in regard to mere civil rights will not authorise a verdict of guilty in a criminal prosecution; that what may create an impression merely on the mind,

> or an inference "of its being more probable that the party is guilty than that he is innocent" will not sanction a conviction for a crime; on the contrary, that the evidence be such as to produce nearly the same degree of certainty which arises from direct testimony and to exclude a rational probability of innocence." (Burnett, *supra,* 522-523 emphasis added)

What is relied upon here is the reference to the evidence being such as to exclude any rational probability of innocence. Burnett's language is somewhat loose. Reference is made to "nearly the same degree of certainty" – but it is difficult to see why there should be any less certainty involved in a circumstantial case. "Moral certainty" equates to being beyond a reasonable doubt. Further it is important to note that it is a "probability" of innocence which is excluded – this suggests not a mere theoretical possibility but rather a real alternative conclusion.

Application of the test

Applying this test means that the case must establish that there is a real connection between the *factum probandum* (here that the accused committed the crime) and the facts which are adduced in proof of it. This connection requires to be either necessary or so highly probable as to admit of no other reasonable explanation.

For example, where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. In this way the force of circumstantial evidence has been described as consisting in its negative character in excluding any other hypothesis or inference (see Sibley *Criminal Appeals and Evidence* (1908) at 123).

It is accepted that there is no requirement to exclude any abstract or theoretically possible inference but only one that is a reasonable inference or probable inference that arises from the combined circumstances.

Considered logically the necessity for this compulsion to the one answer can be understood. If there are other solutions or explanations to the pattern of circumstances which can be seen then the "pattern" ceases to exist.

It is difficult to comprehend the concept of the cumulative effect of circumstantial evidence, or the frequently employed cable analogy, if there are a variety of conclusions which can be drawn at the end of the day. There cannot be any cumulative effect achieved not at least to the required standard, where different interpretations are possible. In these circumstances, there is no cable, only different unconnected strands.

This test is coherent not only with the standard but also the onus of proof. Where there are competing hypotheses arising from the accepted evidence the matter is not one of choice for the jury. The Crown has the onus to disprove any reasonable hypothesis consistent with innocence.

Examples

Moorov v HMA 1930 JC 68: Lord Justice General Clyde at 72

> "The question in the present case belongs to the department of circumstantial evidence. This consideration is vital to the whole matter; and I do not think the real question in the case can be understood or appreciated otherwise. In a case of pure circumstantial evidence there may be no direct proof at all of the *factum probandum*; yet each circumstance is held to be sufficiently supported by the evidence of a single credible witness. The explanation is that "the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts" Hume on Crimes, vol. ii., p. 384. The *factum probandum* starts as a simple hypothesis; but it becomes a *factum probatum* as soon as it is seen to coincide with the conclusion to which the several circumstances (when collated) **necessarily lead** according to human knowledge and experience.....
>
> But what is the test of sufficiency? The test I think is whether the evidence of

> the single witnesses as a whole although each of them speaks to a different charge leads **by necessary inference** to the establishment of some circumstances or state of fact underlying and connecting the several charges, which if it had been independently established, would have afforded corroboration of the evidence given by the single witnesses in support of the separate charges. If such a circumstances or state of fact was actually established by independent evidence, it would not occur to anyone to doubt that it might be properly used to corroborate the evidence of each single witness. The case is the same, when such a circumstance is established by an inference necessarily arising on the evidence of the single witnesses, as a whole." (emphasis added)

Recent Possession

Even where there are well established presumptions from certain circumstances, such as the presumption from recent possession of stolen articles, sufficient proof requires (a) possession in criminative circumstances i.e. circumstances which suggest possession is not innocent and, tied to this, (b) the absence of an innocent explanation. Where there is an explanation proffered it is for the Crown to displace it.

An example is shown in the English case of *R v Exall & Or* (1866) Kingston Crown Court; 4 F&F 922 which involved a charge of burglary where proof was reliant upon recent possession of the stolen goods. The principle, as here, was that recent possession in the absence of a reasonable explanation was sufficient. The Court emphasised that in recent possession cases the presumption which arises is in proportion to the shortness of the interval of time which has elapsed and approved the fundamental principle that "the evidence is not sufficient if it is equally consistent with the affirmative as the negative of the fact to be established, or with either of two different states of fact". Where there was an account given for the possession, "if the account is not unreasonable and the truth of it not improbable, the burden is cast upon the prosecution of disproving its truth." (at 924 to 927)

More recent consideration

First Appeal Decision in the present case:

This test or rule of sufficiency has not been addressed by the court in recent decisions. In particular, it was not addressed in the first appeal in this case.

Consideration is given in both the Court opinion (see paragraphs [31] to [36]) and the Crown submission (see Day 95/15 and written submissions paragraph 1.17 at page 8) to the approach to circumstantial evidence and to the role of the trial court in drawing inferences from circumstantial evidence, where that evidence is capable of giving rise to more than one inference. In particular reference is made to passages in *Little v HMA* 1983 JC 16, *Mack v HMA* 1999 SCCR 181 and *Fox v HMA* 1998 JC 94 to the effect that it was for the jury to determine which inferences to draw. This is uncontroversial in so far as it goes.

None of these decisions (including the appeal court in this case) suggest that that determination is incapable of review and that the jury or trial court holds absolute discretion. Nor could they because in terms of section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 such a determination is subject to an objective test. The circumstantial evidence must be capable of supporting a verdict beyond a reasonable doubt. Accordingly the choice of inference is subject to a test of what is reasonably available in the circumstances relied upon. In addition this means that for a jury to be entitled to draw an inference of guilt beyond reasonable doubt, the evidence must be the only reasonable inference open.

This requirement is not addressed in these decisions. This is unsurprising in this case where at appeal the defence expressly disavowed reliance upon section 106(3)(b) of the 1995 Act.

Smith v HMA 2008 HCJAC 7

More recently the Appeal Court appears to have interpreted *Fox* and *Megrahi* wrongly as a basis for the view that there is a sufficiency of evidence when a guilty

inference can be possibly (and perhaps reasonably) drawn from the evidence. In *Smith v HMA*, the appeal concerned whether there was sufficient evidence to entitle the jury to infer knowledge on the part of the appellant that monies possessed by him were the product of or were connected to drug dealing. Such an inference was crucial to prove *mens rea.* There was no evidence of any supply of drugs. Lady Paton in the opinion of the court at paragraphs [15], [16] and [19] suggested all that was needed was that a guilty inference was one possible inference that could be drawn -

> "...if it were possible in the present case to draw the inference from the circumstantial evidence that the appellant knew that the bank-notes which he had secreted in his home were the product of, or associated with or used for the purposes of, an enterprise which had as its objective the supplying of a material or substance (ultimately proved by the Crown to be heroin) to another or others, there would in our view be sufficient corroborated evidence in law to have allowed the case to go to the jury. <u>It would not matter that competing inferences could be drawn, suggestive of innocence</u> or of involvement in crimes other than that charged. It would be the jury's function to decide what interpretation of the evidence to adopt, and whether they were satisfied beyond reasonable doubt of the appellant's guilt of the crime charged."

This is inconsistent with the principles rehearsed above and inconsistent with the standard of proof – in that if there are other equally probable inferences which can be drawn, then the guilty inference cannot be found proved beyond a reasonable doubt.

<u>Other Jurisdictions</u>

England:

England has the same general approach to a circumstantial case (see, for example, *Best on Evidence* (12th ed) paragraph 293 at 261 and Cross and Tapper (11th ed) at 31-32)**.** However, it also important to bear in mind that the English law of evidence does not contain an equivalent of the Scottish rules relating to corroboration. Although this does affect the underlying test, this difference does manifest itself particularly when cases dealing with submissions of no case to answer are considered.

The specific test of sufficiency is also long established in the often cited *Hodge's Case* (1838) 2 Lewin 227, 168 ER 1136 which established what was called "Hodge's Rule" that to convict on circumstantial evidence, the evidence must not permit any other rational conclusion but that the accused is guilty.

This position is reflected in both Wills and Best:

> "The distinct and specific proving power of circumstantial evidence,.. depends upon its incompatibility with any reasonable hypothesis other than that of the truth of the principal fact in proof of which it is adduced" (Wills *supra* at 428; and at 320 at rule 4)

Best, the author of *Treatise on presumptions of law and fact,* put the rule less clearly:

> "The true principle of criminal jurisprudence is that, whatever the nature of the evidence against an accused party, his guilt must be essentially connected with the facts proved, so as to flow from them by a species of moral necessity. In other words, conviction must not be grounded on suspicion, or even on a preponderance or probability on the side of delinquency in the accused, <u>but must be based on such a moral certainty of his guilt, as, if not sufficient to destroy all contrary hypotheses, shall at least reduce them within the limits of physical possibility"</u> (Best, *supra,* 257 – emphasis added; see also at 282: 3rd rule of presumptive proof))

The 'rule' has developed such that it has become viewed more as a descriptive principle or useful formula for testing the evidence – but not a rule which necessarily requires directions to the jury. Thus in *Teper v R* [1952] AC 480 (PC) the "rule" became viewed as an unnecessary direction (in that it fell to be equated with reasonable doubt and the directions on reasonable doubt were sufficient) and later not only an unnecessary but an undesirable direction *McGreevy v DPP* [1973] All ER 503 (HL); 1973 1 WLR 276.

More recently, in the case of *R v Moore* (unreported, 92/2101/Y3, 20 August 1992) Lord Steyn viewed the "rule" as a means of testing sufficiency by the trial judge. First

he approved the speech of Lord Morris of Borth-y-Gest in *McGreevy v DPP supra* at 285B

> "It requires no more than ordinary common sense for a jury to understand if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion."

But in consideration of testing sufficiency applied the rule:

> "If the proved facts do not exclude all other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct." (cited in *R v Danells* [2006] EWCA Crim 628 at paragraphs 10 to 12)

Most recently, the Court of Appeal appears to have taken the view that the rule is no more than an approach or test which may be helpful to a trial judge (see *R v P* [2008] 2 CR App R 6).

Northern Ireland

In Northern Ireland in *The Queen v William McCluskey* (2005) NICA 22 it was made clear that in a case which depends entirely upon circumstantial evidence the court or jury must have at the forefront of its mind four matters:-

First, the court must consider all the evidence.

Secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition;

Thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances; and

It must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together.

Australia

In Australia, juries are customarily directed that where the jury relies upon circumstantial evidence, guilt should not only be a rational inference but it should be the only rational inference that could be drawn from the circumstances – *Peacock v King* (1911) 13 CLR 619*; Plomp v The Queen* (1963) 110 CLR 234.

In *Chamberlain v The Queen (No2)* 1984 153 CLR 521 at 536 it was stated –

> "Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence".

This passage was explained in *Shepherd v The Queen* (1990) 170 CLR 573 by Chief Justice Mason at 575-576

“In this first sentence in that passage [above] it would have been more accurate to refer to “an intermediate fact as an indispensable basis for an inference of guilt” (see also in the opinion of CJ Dawson at 579-581)

However as, in England, it appears that juries need not always be directed to this effect provided they are directed fully on reasonable doubt – *Knight v R* 1992 66 ALJR 860.

South Africa

The South African test for drawing inferences from circumstantial evidence is set out in *R v Blom* 1939 AD 188 at 202-203.

More recently in *S v Reddy and Others* 1996(2) SACR 1(A) at 8c–9e, Zulman AJA (as he then was) re-stated the test as follows:

> "In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn'. The matter is well put in the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9:
>
> 'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'"

Canada

In Canada the same test of sufficiency is well established (*McLean v The King* 1933 S.C.R. 688; *The King v Comba* 1938 S.C.R 396 at 397*).* In *R v Yebes* 1987 2 SCR

168; 1987 Can LII 17 (SCC) the court applied the rule to a case concerning opportunity –

> "It may be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily that of opportunity, the guilt of the accused is not the only rational inference which can be drawn, unless the accused has exclusive opportunity. In a case however where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice."

In Canada too, the application of the rule developed to being one of principle to test sufficiency rather than a rule upon which the jury required to be directed, the general directions on reasonable doubt being sufficient and clearer.

The rule has been applied by the appellate courts in determination of whether or not the verdict is reasonable and is viewed as useful test in that regard. However, here it is important to note there is dispute in Canada as to whether the application of the test is simply left to the jury or whether it can and should be applied by the judge. This is the debate over whether the judge should remove a case from the jury where he considers no reasonable jury could convict – or more specifically no jury could conclude that guilt was the only rational hypotheses on the evidence. It is important to bear in mind in consideration of this aspect of Canadian jurisprudence that, as in England but in contrast to the Scottish position, there are no equivalent legal rules relating to corroboration.

The leading decision in *Regina v Charemski* 1998 1 S.C.R 679; 1998 Can LII 819 (S.C.C.) made clear that the rule of sufficiency applied. The dispute in the case was whether its application was simply a matter for the jury on directions, or whether the trial judge had any role in assessing sufficiency. In essence the case was therefore about the role of the judges in assessing the reasonableness of any conviction and in so doing making an evaluation of the evidence.

The majority view was that whether or not rule applied was a matter for the jury (Cory, Iacobucci and Bastarache JJ). The dissenting and persuasive view (McLachlin

and Major JJ) was that the test for a directed verdict in Canada remains whether a properly instructed jury acting reasonably could find guilt beyond a reasonable doubt. This may involve engagement in a limited evaluation of inferences in order to answer this question, as in cases based on circumstantial evidence. Trial judges may get so involved and indeed, they cannot do otherwise in order to discharge their obligation of determining whether the Crown has established a case.

USA

Historically the rule applied and was put in directions until *Holland v U.S.* 348 US 121 (1954) decided that it was confusing to the jury in directions and directions on reasonable doubt sufficed.

> "While it is not necessary that the words 'moral certainty' be used, when the evidence is circumstantial the jury should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence"

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

International Courts

This approach has also been followed in the international courts and tribunals:

The Prosecutor v Delalic et al Case No IT-96-21-A, Appeals Judgment 20 February 2001, para 458; *The Prosecutor v Stakie* Case No IT-97-24-A, Appeals Judgment 22 March 2006, para 219*; The Prosecutor v Hadzihasanovic and Kubura* Case No IT-01-47-Trial Judgment, 15 March 2006, para 311

Application of test to a complex circumstantial case

In the context of the present case, the application of the test becomes more complicated. This is because the nature of the circumstantial case is such that the ultimate inference of guilt is drawn entirely from the combination of certain crucial inferences. As indicated above, this means that the inferences so relied upon require to be reasonable. But in addition they may also require to be established by sufficient corroborated evidence.

In any case, the essential facts must be proved beyond a reasonable doubt on corroborated evidence. These always consist of the *facta probanda* - that the offence was committed and that the accused committed it. However there are many cases where there are identifiable essential facts which are necessary to be able to conclude either that the crime was committed or that the accused was the perpetrator. This depends upon the nature of the crime or the nature of the evidence relied upon for proof (see Walker & Walker, *supra*, at paragraphs 5.4.3 and 5.4.8; Renton and Brown, *Criminal Procedure* (6th Edition) paragraphs 24-69 to 24-77).

For example, there are many kinds of cases in which proof of the crime committed involves certain necessary findings: such as the crime of rape where both penetration and the absence of consent require to be proved on sufficient or corroborated evidence beyond a reasonable doubt. This is the standard which applies to evidence necessary to establish the facts in issue.

In some cases the nature of the evidence is such that certain facts require to be found in order to establish the facts in issue, such as that the accused is responsible for the commission of the crime. This often involves, for example, evidence identifying the accused either at the locus or involved in acts directly connected to commission of the crime. Such identification evidence, if essential, requires to be proved on sufficient evidence to the required standard.

These are cases where as a matter of logic to find one of the basic essentials proved it is necessary that the jury be satisfied beyond a reasonable doubt on a particular fact. The crucial facts are dependant upon the nature of the crime and the particular case.

This may apply in a circumstantial case where the ultimate inference of guilt relies upon intermediate inferences drawn. There may be intermediate inferences which are essential to allow the drawing of the inference of guilt. As such these intermediate inferences must be proved on sufficient evidence to entitle a finding of proof beyond a reasonable doubt.

In these circumstances, the application of the specific test or formula of sufficiency discussed above can be applied – the intermediate inference drawn must not only be reasonable but it must be the only reasonable inference that can be drawn from the circumstances. They must be such as to exclude any other reasonable or probable hypothesis or inference.

This involves viewing proof of that crucial intermediate fact in the context of the whole and not in isolation. And it does not detract from the general premise that individual facts relied upon to found factual conclusions or intermediate facts, need not be incriminatory in themselves.

These issues are discussed in the passage from the opinion of Lord Justice General Clyde in *Moorov* (*supra)* quoted above.

The opinions of Chief Justices Mason and Dawson in the Canadian case of *Shepherd v The Queen, supra,* discussing the earlier case of *Chamberlain v The Queen (No2),* also make this point clearly:

> "In *Chamberlain v The Queen (No2)* 1984 153 CLR 521 at 536 it was stated –
>
> > 'Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence'

In this first sentence in that passage (above) it would have been more accurate to refer to “an intermediate fact as an indispensable basis for an inference of guilt.” (CJ Mason at 575-576)

And in the opinion of CJ Dawson at 581-582 (emphasis added):-

“It is, I think, quite plain that, in saying that a "fact as a basis for an inference of guilt" must be proved beyond reasonable doubt, their Honours [in *Chamberlain*] are referring to an intermediate fact which is a necessary basis for the ultimate inference. They must be doing so, for it is otherwise not possible to say, as they do previously, that the jury can draw an inference of guilt from a combination of facts, none of which viewed alone would support the inference. <u>And of course it is quite correct to say that an intermediate fact which is an indispensable step upon the way to an inference of guilt, whether it be a fact derived from a single piece of evidence or a conclusion of fact drawn from a body of evidence, must be proved beyond reasonable doubt if the ultimate inference is to be the only reasonable hypothesis.</u> To take the same example I gave previously, the presence of the accused when the crime was committed is in many cases an intermediate fact which is essential before an ultimate inference of guilt can be drawn. Often it may be unnecessary to identify it as an intermediate fact, but if it is necessary to do so then it is clearly correct to say that it must be proved beyond reasonable doubt before an inference of guilt can be drawn consistently with the criminal standard of proof. Viewed in that light, the remainder of their Honours' comments made on p 536 does not support the applicant's submission. They add:

‘It seems to us an inescapable consequence that in a criminal case the circumstances from which the inference should be drawn must be established beyond reasonable doubt.

We agree with the statement in *Reg.v. Van Beelen* (1973) 4 SASR 353, at 379 that it is <u>'an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt.</u>’

> The inference referred to is clearly the ultimate inference of guilt and "the circumstances from which the inference should be drawn" cannot, having regard to the first passage which I have set out, refer to each individual fact going to support the inference and must be a reference to any intermediate conclusion of fact required to be established before the ultimate inference can be drawn.
>
> Again, in saying that a jury may not draw "an inference of guilt from a fact which is not proved beyond reasonable doubt", their Honours must, in the light of the passage which they cite from *Reg. v Van Beelen*, be referring to a conclusion of fact upon which the ultimate inference is based and in doing so are not referring to the basic facts - the individual items of evidence - which are employed in reaching that conclusion."

In a complex circumstantial case, such as the present one, where the conclusion of guilt rests exclusively upon a number of intermediate inferences, then this test or formula is properly applied to those inferences crucial to guilt

It is of course for the trial court to determine which inferences it chooses to draw, particularly where there is circumstantial evidence capable of supporting different inferences pointing to innocence as well as guilt.

But an assessment of the sufficiency of evidence in a wholly circumstantial case must include the objective tests of:

(a) whether there is sufficient evidence to entitle a jury to convict (applicable to all cases); and
(b) whether the ultimate inference of guilt and any crucial inferences upon which that guilty inference depends, are the only reasonable inferences to be drawn from the evidence (applicable in wholly circumstantial cases).

This is addressed in more detail below in consideration of the reasonableness of the verdict under section 106(b) and the sufficiency of evidence.

2.2.6 Conclusion

1. In a wholly circumstantial case probative force is related to the aptitude and coherence of individual circumstances with each other. There must be sufficient coherence or concurrence between the various strands relied upon to prove the case. Where the strands can be viewed as mutually corroborative – there is the necessary concurrence of testimony.

2. This aptitude and coherence incorporates the idea that the various facts cohere or concur in that they support and confirm each other on the one hand and at the same time point toward the same conclusion. Probative force is related not just to the concurrence of the individual facts with each other, but also to their connection to the facts in issue. The closer the concurrence with each other and connection to the facts in issue, the stronger the proof; the more remote the weaker the proof.

3. In this context the import or character of any individual facts is relevant in that where each of the individual facts contribute immediately to the inference of guilt or have a direct bearing upon the facts in issue, so their compound or combined strength is increased as their number is increased.

4. Where the combination of facts relied upon only lead to an inference, which in turn is combined with other facts or inferences to establish proof of the facts in issue, then the probability of the truth in issue, the probative force, diminishes as the number of inferences increase. The probative force depends upon the conclusiveness of the inferences relied upon.

5. It is of course for the fact finder (in this case the trial court) to determine which inferences it chooses to draw, particularly where there is circumstantial evidence with different possible inferences, capable of pointing to innocence as well as guilt.

6. An assessment of the sufficiency of evidence in a wholly circumstantial case includes the objective tests of:

   (a) whether there is sufficient to entitle a conviction (applicable to all cases); and

   (b) whether the ultimate inference of guilt and any crucial inferences upon which that guilty inference depends, are the only reasonable inferences to be drawn from the evidence.

SECTION 3. GROUNDS OF APPEAL 1 AND 2

3.1 ANALYSIS OF AN UNREASONABLE VERDICT

3.1.1 Introduction

Grounds of appeal 1 & 2 constitute two separate challenges to the verdict of the trial court.

Ground 1, on pages 4 to 6 of the Grounds, seeks to challenge the legal sufficiency of the evidence on which the appellant was convicted.

Ground 2, on pages 7 to 41 of the Grounds, advances a challenge based upon section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 that, in a number of respects, the verdict reached by the trial court was unreasonable. Within Ground 2, two kinds of unreasonableness have been distinguished and are challenged: first, defective reasoning (addressed in Ground 2.1 on pages 9 to 28); and, secondly, unreasonableness with regard to the evidence (addressed in Ground 2.2 on pages 29 to 41).

Both of Grounds 1 and 2 are separately insisted in.

However, as is recognised within the Grounds of Appeal, there is a degree of overlap between Ground 1 and Ground 2, because, simply put, a verdict based on insufficient evidence would not be one which a reasonable jury, properly directed, could reach (see pages 7 -8 and 29-30). As such, all of the arguments advanced in support of Ground 1 will also be advanced in support of Ground 2.2.

Accordingly, for presentational purposes and to avoid unnecessary repetition, the sufficiency arguments, which are relevant both to Ground 1 and Ground 2.2, are set out below in the context of the challenge based upon section 106(3)(b) of the 1995 Act.

3.1.2 What constitutes an unreasonable verdict

As noted in the Grounds of Appeal (pages 8 and 9) the verdict of a jury or trial court may be unreasonable in two respects: first, defective reasoning (addressed in Ground 2.1 on pages 9 to 28); and, secondly, unreasonableness with regard to the evidence (addressed in Ground 2.2 on pages 29 to 41.

Defective reasoning

A verdict may be rendered unreasonable where it relies upon or incorporates flawed or defective reasoning. Here the focus is the process of reaching the verdict. This kind of unreasonableness can be seen from a number of examples of this:

- 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 the trial court ignores or fails to take into account relevant facts
- The verdict 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.

As noted above, in this case the appeal court has the advantage of knowing the evidence relied upon and the reasons for the verdict as set out in the judgment of the trial court (see section 2.3.1 above and paragraph [8] of the Appeal Court's opinion). This does not change the role or function of the appeal court but has the practical effect of allowing review of the basis upon which the verdict was determined.

Such defects in reasoning can overlap with deficiencies in the evidence. Where the trial court has drawn an inference upon the evidence which is not properly supported by or justified by the evidence, then that inference is not a reasonable one. As such this can be characterised as defective reasoning or an insufficiency in the evidence. Generally speaking here such failures are addressed as unreasonable inferences in the context of the broad assessment of the sufficiency of the evidence.

A verdict unsupported by the evidence – Sufficiency

A verdict is rendered unreasonable where in having regard to the whole evidence it can be said that no reasonable jury or trial court could convict or be satisfied beyond a reasonable doubt. This is a broad test of sufficiency which has regard to the quality as well as quantity of the evidence. It looks to the conclusion itself rather than the process by which it was reached. There may be no error in reasoning but simply that the evidence falls short of being able to support a conviction beyond a reasonable doubt. It involves the objective assessment of whether the circumstances relied upon are so ambiguous or so lacking in probative force that no reasonable jury could convict. It also involves assessment of 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.

Characterisation of the defect

There may be here a degree of overlap between the two kinds of unreasonableness. The characterisation of defective reasoning is not always straightforward. Some kinds of problems can fit easily within each. For example, issues of sufficiency where evidence falls short of what would entitle a reasonable jury to convict – evidence which does not have sufficient probative value either due to the quality of the evidence or where the facts relied upon do not have sufficient "aptitude and coherence" to carry conviction. Or defects in reasoning which are patently illogical and which are material and undermine the verdict irrespective of the evidence.

However, often the same problem can appear to be characterised in either way. This is a particular issue in the present case, where the circumstantial case rests entirely upon

inferences drawn upon a combination of facts or indeed other inferences from facts. A combination of facts which are relied upon to draw an inference which is central to the drawing of the ultimate inference of guilt can be seen as both

- a problem of the probative value of the evidence – the combined facts being too remote to entitle the inference being drawn, or
- a drawing of an unreasonable inference, that is an inference which is unreasonable as it is not supported by the evidence and thereby a problem or defect in the reasoning leading to the verdict.

Of course, either way, the verdict is rendered unreasonable.

3.1.3 Section 106(3)(b): History of the Statutory Provision

The relevant statutory provision is Section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995:-

> "(3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—
>
> ...
>
> (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."

<u>The Sutherland Committee</u>

The current statutory provision in s106(3)(b) of the 1995 Act was inserted in the light of the Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures chaired by Sir Stewart Sutherland (June 1996 [C.3245]).

There was, in fact, a precedent for a provision of this kind in Scots law. Section 2(1) of the Criminal Appeal (Scotland) Act 1926 required the court to allow an appeal if they considered that the verdict of the jury should be set aside 'on the ground that it is unreasonable or cannot be supported having regard to the evidence'. The wording was similar to that in section 4(1) of the Criminal Appeal Act 1907 which applied in

England and Wales at that time. Section 2(1) of the 1926 Act was re-enacted as section 254(1) of the Criminal Procedure (Scotland) Act 1975 and remained on the statute book until the appeal provisions were altered by the Criminal Justice (Scotland) Act 1980 under which the miscarriage of justice test was inserted in section 228 and the reference to an unreasonable verdict in section 254(1) was removed. The effect of the change in the wording was to introduce an element of uncertainty as to the court's power to find a miscarriage of justice in cases previously covered by the legislation.

The Sutherland Committee considered the situation and concluded that:

> "There could well be exceptional cases where, even allowing for the advantages enjoyed by the jury, it would be difficult to understand how any reasonable jury could not have entertained at least a reasonable doubt" (Paragraph 2.67)

They therefore recommended that the power to find that a miscarriage of justice had occurred in such circumstances should be specifically stated in statute in the form which can now be found in section 106(3)(b) (see paragraphs 2.68 and 2.70). In so doing they noted:

> "We recognise that what we propose is very similar to the test applied by the Appeal Court under the 1926 legislation. Although we would expect the test to be successfully applied only in exceptional cases, we would expect a broader recognition of the potential of such cases." (Paragraph 2.71)

The focus of the Sutherland Committee was to broaden the approach of the appeal court toward recognition that a verdict may be unreasonable or not supported by the evidence even where there was a technical sufficiency. The focus was verdicts based upon tenuous or poor quality evidence and upon conclusions not really supported by the evidence. In this sense the statutory exemplification was innovative and designed to encourage broader review by the court away from the sense that a jury verdict was inviolable. In particular, the Committee sought to move away from the preceding restrictive approach of *Webb v HMA* 1927 JC 92.

Interpretation of Section 106(3)(b)

There are two leading cases which examine this provision, namely *King v HMA* 1999 JC 226 and *E v HMA* 2002 JC 215.

In *King v HMA* Lord Justice General Rodger, giving the opinion of the court, starting at 227G set out a detailed analysis of the background of the provision (emphasis added):

> "It is common knowledge that the provision was introduced by section 17 of the Crime and Punishment (Scotland) Act 1997. That section came into force during the running of the appeal and so made this ground available to the appellant, although it had not been open to him when his appeal was lodged shortly after his trial…. At the hearing we were not referred to the old provision or to any cases interpreting it. The principal authority on its interpretation was *Webb v H.M. Advocate*. In that case the judges appear to have assimilated review of jury verdicts in criminal cases to the established jurisdiction to review the verdicts of juries in civil cases. Each of the judges formulated the test to be applied in his own words. We refer to the versions given by two of them. Lord Justice-Clerk Alness said (at p.95 [quoting Lord Kinnear in *Campbell v Scottish Educational News Co. Ltd* (1906) 8F. 691 at p.698]) that the court would set the verdict aside if 'the jury have not duly performed their functions, and have given a verdict which no reasonable jury, properly instructed, would have given'. Lord Ormidale asked (at p.97) whether the verdict before the court was 'so flagrantly wrong that no reasonable jury discharging their duty honestly could have returned it'. It is therefore not perhaps difficult to see why the Sutherland Committee acknowledged that the test which they were proposing would be very similar to that enshrined in the 1926 Act (Report, paragraph 2.71).
>
> All the judges in *Webb* emphasise that the court should pay due regard to the function of the jury in our system of criminal justice. In that system decisions on guilt or innocence in serious cases are taken- and are intended to be taken-

by juries. This court has therefore respected those decisions and has tended to consider that it should not question them where there was sufficient evidence upon which the jury would have been entitled to convict. By adopting the recommendation of the Sutherland Committee and enacting section 106(3)(b) Parliament has required the court to modify that approach in the circumstances defined in the provision, for it envisages that- as under the legislation of 1926- there can be a miscarriage of justice even though there is, technically, sufficient evidence to convict.

…The miscarriage of justice therefore arises where the jury return a guilty verdict which no reasonable jury, properly directed, could have returned. The test is objective: the court must be able to say that no reasonable jury *could* have returned a guilty verdict on the evidence before them. Since in any case where the provision is invoked the jury will *ex hypothesi* have returned a guilty verdict, their verdict will have implied that they were satisfied beyond reasonable doubt that the appellant was guilty. What the appellant must establish therefore is that, on the evidence led at the trial, no reasonable jury could have been satisfied beyond reasonable doubt that the appellant was guilty. That formulation is not indeed dissimilar to the approach adopted in *Webb*. The application in later cases of the test set out in *Webb* has been criticised as unduly restrictive (cf., Renton and Brown's Criminal Procedure, paragraph 29-03). It will be for the court in future to determine on a case-by-case basis the proper application of the test now stated in section 106(3)(b).

We find confirmation of that approach in what has been said by courts in other countries where they have exercised a similar jurisdiction, though the wording of the statutory provisions is inevitably different. We were referred to two cases from the High Court of Australia, *Chidiac v The Queen* and *M v The Queen*, dealing with appeals under the common appeal provisions enacted by the states. Section 6(1) of the Criminal Appeal Act 1912 (N.S.W.) obliges the Court of Criminal Appeal to allow an appeal against conviction if it is of the opinion 'that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence'. This is identical with the test in the English Act of 1907 and the Scottish Act of 1926.

Since the opinion of the majority (Mason C.J., Dean, Dawson and Toohey J.J.) in *M* includes a passage (at p.493) which is intended to clear up certain ambiguities in earlier cases and to give authoritative guidance, it is sufficient for the present purposes if we quote the test as formulated there.

'Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.'

Later in the judgment (at pp.494-495) their Honours refer to this as 'the ultimate question'. We find that particular guidance of assistance, even though their Honours formulated the overall test as being whether the verdict was discussed [sic] as being unsafe or unsatisfactory- a test which the Sutherland Committee rejected for Scots law (Report, paragraph 2.25).

We were also referred to the decision of the Supreme Court of Canada in *R. v François*. In that case and in the earlier authorities to which reference is made, the Supreme Court were interpreting a provision of the Criminal Code under which the appeal court may allow an appeal 'where it is of the opinion that (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence'. The statutory test is very like that in the Australian and earlier Scottish and English legislation. As can be seen from the judgment of McLachlin J., the authoritative guidance on the approach which an appeal court should follow is to be found in a passage from the judgment of Pigeon J. in *Corbett v The Queen* at p.282.

'As previously noted, the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.'

> That test was affirmed in *R. v Yebes*. When McLachlin J. came to deal with the appeal in *François*, she referred to the issue as being, in short, whether a reasonable and reasoning jury, considering the victim's testimony, would be bound to have a reasonable doubt about the appellant's guilt (p.838).
>
> It follows from what we have said about the approach which this court should adopt that, although we require to examine the evidence which was before the jury, it is not for us simply to substitute our view of that evidence for the view which the jury took. In particular, a miscarriage of justice is not identified simply because, in any given case, the members of this court might have entertained a reasonable doubt on the evidence. If that were all that was required, Parliament would have gone far towards replacing trial by jury with trial by the judges of this court. The words in the provision were clearly chosen to avoid any risk of that. Applying the words which Parliament has enacted, we can quash the verdict of a jury only if we are satisfied that, <u>on the evidence led at the trial, no reasonable jury could have been satisfied beyond a reasonable doubt that the appellant was guilty.</u>"

In *E v HMA* 2002 JC 215, the Lord Justice Clerk, Lord Gill set out a further detailed analysis of the section (emphasis added).

> "[19] In my view, the appeal should also be allowed under section 106(3)(b). In this case there was evidence before the jury that was technically sufficient to entitle them to convict on both charges. The defence did not submit that there was no case to answer. The trial judge's charge was accurate. Fifteen randomly selected jurors, having taken a solemn oath, convicted the appellant unanimously on both charges. The question is whether, despite all of that, we should hold that the jury could not reasonably have held the charges proved beyond reasonable doubt. In my opinion, we should.
>
> [20] The statutory test that we have to apply in this appeal is the third that has been enacted on the point. The Criminal Appeal (Scotland) Act 1926 gave a right of appeal to persons convicted on indictment. Section 2(1) provided inter alia that

'the court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable …'.

Soon after the 1926 Act came into force, in an appeal in which the appellant sought to prove that certain Crown witnesses had committed perjury, the court in refusing the appeal suggested that all questions relating to credibility were for the jury (*Macmillan v HM Advocate*). That could have implied that even if the appellant had conclusive proof of perjury, the conviction would none the less stand. Soon after that decision, in *Webb v HM Advocate*, the appellants challenged the verdict of the jury on the basis that it was unreasonable for the jury to have disregarded the alibis of the appellants, to have accepted the evidence of certain Crown witnesses and not to have accepted the evidence of a witness who said that he alone had committed the crime. In that case the court followed its own well-established approach to the verdicts of civil juries. Although the judges expressed themselves in different ways, the essence of the decision was that the court in such a case would not substitute its own view of the evidence for that of the jury. Lord Justice Clerk Alness was of the view that the court should interfere with the verdict of a criminal jury only where the verdict was unreasonable in the sense that it was so flagrantly wrong that no reasonable jury acting honestly under proper direction could have given it (at p 95). In *Slater v HM Advocate* at pp 101–102 the court took a similar approach, again in an appeal based *inter alia* on the reliability of certain witnesses and their identification evidence.

[21] In the context of those appeals it was understandable that the court should regard the verdict of the jury as being inviolable, whatever view the court itself might have taken from a reading of the transcript.

[22] Section 2(1) of the 1926 Act became section 254(1)(a) in the consolidating Criminal Procedure (Scotland) Act 1975. In 1980 that provision was superseded by the amendment made by the Criminal Justice (Scotland) Act 1980, which replaced the previous grounds of appeal with a new single ground, namely miscarriage of justice (cf 1975 Act, section 228(2)).

[23] After that change, the question of an allegedly unreasonable verdict arose in different circumstances in *Rubin v HM Advocate*. This was a case in which the crucial eyewitness was a man of whom the Lord Justice General said:

'[I]t is clear from the notes that he was a quite extraordinary witness. He was a man who lived in a fantasy world, much given to recording his rambling “thoughts” on tape. He was verbose, bombastic and discursive, and found it difficult to give straight answers to simple questions. His use of the English language was bizarre, and his vocabulary included words which find no place in any dictionary. His capacity for self-deception was illustrated in many ways, all detailed in the note of counsel's speeches to the jury. Upon points of detail in his evidence, generally, he was contradicted by the weight of the other evidence led at the trial. (at p 102)'

[24] This therefore was not a case involving a contest in credibility between witnesses for the Crown and the defence, or a judgment on the cogency of the identification evidence. This was a case in which, although there was some exiguous supporting evidence, the prosecution depended on the evidence of a witness whom the court plainly regarded as unsatisfactory. Nevertheless the court refused to intervene. The Lord Justice General expressed the reason for that as follows.

'Questions of the reliability and credibility of witnesses are essentially, in our view, questions for the jury, and we know of no case in which this court has interfered with any conviction upon the ground that, in its opinion, a jury had been perverse in treating a key witness as both reliable and credible. (at p 103)'

[25] This last comment was true, but only because the point had never been raised before.

[26] The result of this approach was that, in line with its decisions under the 1926 Act (cf *Young v HM Advocate*; *Hamilton v HM Advocate*), the court set aside jury verdicts on the ground of unreasonableness only where those verdicts were patently illogical (*White v HM Advocate*; *Ainsworth v HM*

Advocate). Such decisions did not depend on a consideration of the question of reasonable doubt on the facts of the case.

[27] It is unnecessary for us to consider the decision in *Rubin* in the context of the 1980 Act, because it is overtaken by legislation. Section 228(2) of the 1975 Act became section 106(3) in the 1995 consolidation; but that provision was superseded by section 17 of the Crime and Punishment (Scotland) Act 1997 which inter alia substituted the present section 106(3)(b), with which we are now concerned.

[28] Whatever may have been the law before the 1997 Act, we have to interpret section 106(3)(b), in my opinion, on the basis that it effected a change. The new provision sets an objective test. The court has to decide whether the jury's verdict on the question of reasonable doubt was reasonable (*King v HM Advocate* at p 333E–G). That is incompatible with the idea of the respective provinces of court and jury set out in *Rubin*. Section 106(3)(b), in my view, acknowledges that even in a well-run legal system, unreasonable verdicts can happen from time to time.

[29] While this is not a court of review and while we are not at liberty under this provision to disturb a jury verdict merely because we disagree with it, we cannot now regard the issue of reasonable doubt as being at all times within the exclusive preserve of the jury.

[30] It is an oversimplification to say that in applying section 106(3)(b) the court is substituting its own view on the question of reasonable doubt for that of the jury. The court has to go further. It has to decide whether it can say that, on any view, a verdict of guilty beyond reasonable doubt was one that no jury could reasonably have returned. The court has to make a judgment on the evidence that the jury heard and assess the reasonableness of the verdict with the benefit of its collective knowledge and experience."

3.1.4 Conclusion

These cases interpreting the scope of section 106(3)(b) naturally focussed on the new and broader potential for review and this includes the most controversial aspect of this kind of appeal namely the need for and scope of the assessment of the evidence to be made by the court.

The approach is essentially one of sufficiency, not merely as a technical issue, but also by having regard to whether the verdict reached is one properly supported by the evidence. This in turn can involve consideration of the quality of the evidence and whether the findings on the credibility and reliability of the evidence are reasonable.

The approach to be taken is to assess whether the jury acting judicially reached a verdict which is one that could reasonably have been rendered. Within this approach the court makes a judgment based upon judicial experience.

The two differing ways in which a verdict can be rendered unreasonable are now examined in greater detail.

3.2 INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT

3.2.1 Test – whole evidence /accepted evidence

Normally in addressing this issue the court has regard to the whole of the evidence before a jury. But here there is a judgment and from this we know the evidence that was relied upon. Accordingly, as noted above, unusually, here the assessment is made by having regard to the evidence relied upon in reaching the verdict. That this is appropriate was made clear at the first appeal –

> "[8]… In the present case it is clear that the trial court included in its judgment not only factual findings and reasoning leading to conviction of the appellant, but also an account of evidence which it had accepted or rejected, the weight attached to certain evidence and the submissions made to it. It is thus possible for this court to know the basis on which the conviction of the appellant was arrived at, and hence it can determine, for example, whether or not the trial court has misdirected itself by misinterpreting evidence or failing to take evidence into account in arriving at its conclusions.
>
> [24] …If that provision [section 106(3)(b)] were invoked it would be for the appeal court to consider whether, having regard to the evidence which was not rejected by the trial court, the verdict was one which no reasonable trial court, properly directing itself, could have returned."

Accordingly the assessment is made here by reference to the whole evidence which was not rejected by the trial court. Whether the accepted evidence is sufficient to entitle a jury to convict is a matter of law and of objective assessment.

This assessment is the one most clearly envisaged under section 106(3)(b) of the 1995 Act.

3.2.2 Assessment in a wholly circumstantial case

Section 106(3)(b) of course applies equally to a wholly circumstantial case. The task involved in its application however may be more complex. In order to determine whether a properly instructed jury could reasonably convict, the court must determine whether, assuming the circumstantial facts are proved, it would be reasonable to make the inference necessary to establish the facts in issue and to conclude guilt established beyond a reasonable doubt.

In a wholly circumstantial case such an assessment can be complicated. For example, the court requires to consider whether it can be said that the combined circumstances are so ambiguous or lacking in probative force, that no reasonable jury could have convicted; or whether an inference drawn from the evidence is a reasonable one.

In this particular case the task is all the more complicated because the verdict is based wholly upon inferences drawn from other inferences as well as the basic facts and circumstances. These difficulties are addressed in detail below.

3.2.3 Respective roles of Judge and Jury: weight and sufficiency

Sufficiency of evidence is and must always be a legal and objective test. The legal requirements of 'full proof' from the concurrence of testimonies and for proof to the set standard, means that there must be an objective test which can be applied. It cannot be a purely subjective matter for the jury or trial court to decide whether they consider all the circumstances amount to a case against the applicant. As indicated the test - as reflected in the statutory provision – is whether a reasonable jury could convict.

Any such assessment can be described as a matter of weight. But the legal or judicial process of weighing up the evidence is restricted to weighing up whether the evidence is capable of being found to be proved to the requisite standard. The evidence may fall short of what could reasonably render a conclusion of guilt. As such it would be insufficient in law. It is this assessment which is addressed in s106(3)(b). As noted

above (see section 3.1.1), this aspect of argument under s106(3)(b) overlaps with the question of sufficiency.

Otherwise it is exclusively for the trier in fact to weigh the evidence and decide whether it has met the required standard or is sufficiently strong to carry conviction.

As set out in a civil context by Lord Cairns in *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193 (H.L.), at 197:

> "The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. [Emphasis in original.]"

<u>The Canadian case law</u>:

As suggested by Lord Rodger in *King (supra* at section 3.1.3) assistance on the respective roles of the appeal court and jury may be found from the approach taken in Canada.

In *R. v. Yebes (supra)*, McIntyre J stated as follows:

> "The function of a court of appeal, under s. 613(1)(*a*)(i) of the Code, goes beyond merely finding that there is evidence to support a conviction. The

court must determine on the whole of the evidence "whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered". While the court of appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process is the same whether the case is based on circumstantial or direct evidence." (paragraph 25)

Following upon *Corbett* and *Yebes*, a helpful and modern description identifying the respective roles of the judge and jury is found in opinions (dissenting) from McClachlin J and Major J in the case of *R v Charemski (supra)* in the context of a "directed acquittal" which appears to be the equivalent of a no case to answer submission (emphasis added):

> "21 ... The question on a motion for a directed acquittal always relates to the ability of the evidence to support a verdict of guilt, that is, whether there is sufficient evidence to permit a properly instructed jury to reasonably convict…. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge... is... not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.
>
> As Professor Delisle puts it in *Evidence: Principles and Problems* (3rd ed. 1993), at p. 178, "[l]ogically . . . it would seem to be wrong to let a case go to the jury if the trial judge believed that no reasonable jury could be satisfied beyond a reasonable doubt" (as cited in Tanovich ["Monteleone's Legacy: Confusing Sufficiency with Weight" (1994), 27 C.R. (4th) 174] at p. 176).
>
> 22 If the evidence is all direct evidence, the trial judge's task on a motion for a directed verdict is quite simple. An absence of evidence on an essential element will result in a directed acquittal. The existence of evidence on every essential element will result in dismissal of the motion. It remains only for the jury to decide who it chooses to believe and what evidence it decides to accept

or reject. Where the case is based on circumstantial evidence, i.e., where any of the elements are not established by direct evidence, the task of the trial judge is more complicated. The Crown adduces evidence from which it submits facts in issue can be inferred from facts not in issue. In order to determine whether a properly instructed jury could reasonably convict, the judge must determine whether, assuming the circumstantial facts are proved, it would be reasonable to make the inference necessary to establish the facts in issue.

23 On any motion for a directed verdict, whether the evidence is direct or circumstantial, the judge, in assessing the sufficiency of the evidence must, by definition, weigh it. There is no way the judge can avoid this task of limited weighing, since the judge cannot answer the question of whether a properly instructed jury could reasonably convict without determining whether it is rationally possible to find that the fact in issue has been proved. In the case of circumstantial evidence, the issue is the reasonableness of the inference the Crown seeks to have drawn. As stated by Professor Delisle, in "Tests for Sufficiency of Evidence", *supra*, at p. 392, "[i]t is in evaluating the rationality of the necessary derivative inference, in testing its legitimacy, that the judge, either at preliminary, at trial or on appeal, performs the necessary weighing function". But weighing the evidence for this purpose is a very limited exercise. The judge does not ask him- or herself whether he or she is personally satisfied by the evidence. Rather, the judge asks whether a jury, acting reasonably, could be satisfied by the evidence. Nor is the judge permitted to assess the credibility of the witnesses: see *Mezzo*, *supra*. It is for the jury to determine the credibility of the witnesses, to decide what evidence it accepts and what evidence it rejects, and ultimately, to determine if the evidence establishes guilt beyond a reasonable doubt. The difference between the judge's function on a motion for a directed verdict and the jury's function at the end of the trial is simply this: the judge assesses whether, hypothetically, a guilty verdict is possible; the jury determines whether guilt has actually been proved beyond a reasonable doubt.

This is the test that still prevails in England: see Colin Tapper, *Cross and Tapper on Evidence* (8th ed. 1995), at pp. 190-92. It is the test that prevails in Australia: see Peter Gillies, *Law of Evidence in Australia* (2nd ed. 1991), at pp. 206-8. And it is the test that prevails in the United States: see Clifford S. Fishman, *Jones on Evidence: Civil and Criminal* (7th ed. 1992), at p. 447, and John William Strong, ed., *McCormick on Evidence* (4th ed. 1992). In *Curley v. United States*, 160 F.2d 229 (D.C. Cir. 1947), Prettyman A.J. formulated the test in this way (at p. 232):

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

Prettyman A.J.'s statement of the test was adopted by the Second Circuit in *United States v. Taylor*, 464 F.2d 240 (1972)"

Fox v HMA (supra)

During the course of submissions on sufficiency at the first appeal (Day 95/17-19) (which did not proceed on the basis of any claim under section 106(3)(b)) reliance appeared to be placed by the Crown on a passage from *Fox v HMA* by Lord Coulsfield (at 117) in respect of a no case to answer submission, where he states regarding corroboration (emphasis added):

"First, the reason for the rule is that a person should not be placed in jeopardy on the basis of a single testimony, whether that testimony comes from a witness speaking to a fact directly within his knowledge or whether it comes from a circumstance or circumstances: there must be a concurrence of testimonies. Secondly, the question whether there is sufficient concurrence of testimonies to carry conviction is a question for the jury and it would be extremely difficult, if not impossible, to set out detailed rules prescribing how the jury should exercise their function in all the variety of circumstances which may arise. Thirdly, the

need for concurrence of testimonies from different sources remains whether the proof attempted depends on direct evidence, circumstantial evidence or a combination of the two. There is no distinction in the principle of the rule in these different situations, although its detailed application may be different. Fourthly, the rule is not a direction to the jury, or the judge, as to how the process of weighing evidence should be carried out or in what order. That is a matter for the jury or the judge in weighing the evidence himself."

These remarks are *obiter,* there was no debate on this issue and the import of these remarks is unclear. Properly read, it says no more than the jury must decide if there is no reasonable doubt. It does not preclude the judge making a finding of insufficiency where the evidence could not, on any reasonable view, carry the conviction beyond a reasonable doubt. However, insofar as it is contended that this passage is authority for the proposition that the test of sufficiency is a jury question then, for the reasons set above, this would be in error.

3.2.4 The application of judicial experience

It is perhaps obvious that where a court has to decide whether or not a reasonable jury could convict on the evidence, the appraisal of that evidence must involve the court in applying collective judicial wisdom. It has been recognised here and in other jurisdictions engaged in the same process that judicial experience falls to be applied.

It was recognised by the Lord justice Clerk in *E v HMA (supra)* that in the assessment required to be made of the evidence the appeal judges should apply their own collective judicial experience.

> "[30] It is an oversimplification to say that in applying section 106(3)(b) the court is substituting its own view on the question of reasonable doubt for that of the jury. The court has to go further. It has to decide whether it can say that, on any view, a verdict of guilty beyond reasonable doubt was one that no jury could reasonably have returned. The court has to make a judgment on the

evidence that the jury heard and assess the reasonableness of the verdict with the benefit of its collective knowledge and experience.

[31] In making this assessment the court must certainly keep in mind that the jury heard and saw the witnesses, and that the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in these respects.

[34] The advocate depute submitted that in this case the jury were better placed than this court (a) to assess the reliability and credibility of the complainers and (b) to apply the criterion of reasonable doubt. I do not accept this submission in either of its branches. Even if the reliability and credibility of the complainers had been the only issue, I would have felt that we were at no significant disadvantage to the jury. One does not need to have seen and heard the complainers in this case in order to appreciate the significance of the inconsistencies and contradictions in their evidence and in their statements at interview, particularly when these are looked at against the wider background of the case.

[35] Nor should the question of reasonable doubt present the court with any great difficulty in this case. The standard direction to juries on the subject is to the effect that a reasonable doubt is one that would cause an individual juror to hesitate before taking an important decision in the conduct of his own affairs (*MacDonald v HM Advocate*). We are experienced in the application of that test in everyday criminal practice. We have many years of experience of criminal jury trials as advocates depute, as defence counsel and as presiding judges. In deciding whether the verdict is reasonable, we should bring all of that experience to bear. We should do that with confidence rather than interpret section 106(3)(b) out of existence by excessive deference to the judgment of the jury."

The application of judicial experience is recognised elsewhere as a useful tool. For example, in Canada, the position was set out by Arbour J in *R v Biniaris* 2000 1 SCR 381 (emphasis added)

> "39 When a jury which was admittedly properly instructed returns what the appeal court perceives to be an unreasonable conviction, the only rational inference, if the test in *Yebes* is followed, is that the jury, in arriving at that guilty verdict, was not acting judicially. This conclusion does not imply an impeachment of the integrity of the jury. It may be that the jury reached its verdict pursuant to an analytical flaw similar to the errors occasionally incurred in the analysis of trial judges and revealed in their reasons for judgment. Such error would of course not be apparent on the face of the verdict by a jury. But the unreasonableness itself of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury. Judicial appreciation of the evidence is governed by rules that dictate the required content of the charge to the jury. These rules are sometimes expressed in terms of warnings, mandatory or discretionary sets of instructions by which a trial judge will convey the product of accumulated judicial experience to the jury, who, by definition, is new to the exercise. For instance, a judge may need to warn the jury about the frailties of eye-witness identification evidence. Similarly, years of judicial experience has revealed the possible need for special caution in evaluating the evidence of certain witnesses, such as accomplices, who may, to the uninitiated, seem particularly knowledgeable and therefore credible. Finally, judicial warnings may be required when the jury has heard about the criminal record of the accused, or about similar fact evidence. But these rules of caution cannot be exhaustive, they cannot capture every situation, and cannot be formulated in every case as a requirement of the charge. Rather, after the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the unreasonable result that it produced.

40 When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

41 It is not particularly significant to describe this judicial oversight as either objective or subjective. It is exercised by an appeal court and therefore it will invariably draw on a collection of judicial experiences. Because of its judicial character, and because it purports to identify features of a case that will give experienced jurists cause for concern, it is imperative that the reviewing court articulate as precisely as possible what features of the case suggest that the verdict reached by the jury was unreasonable, despite the fact that it was not tainted by any erroneous instructions as to the applicable law. In some cases, the articulation of the grounds upon which an appellate court concludes that a conviction was unreasonable may elucidate previously unidentified dangers in evidence and give rise to additional warnings to the jury in subsequent cases. Most of the time, it will simply point to a case that presented itself with several causes for concern, none of which, in isolation, might have required that the jury be warned in any particular way. There are many illustrations from the case law of verdicts having been found unreasonable essentially on the strength of accumulated judicial experience. Concerns about various aspects of the frailty of identification evidence have been a recurrent basis, by itself or together with other considerations, for overturning verdicts as unreasonable. See, e.g., *Burke*, *supra*; *Reitsma*, *supra*; *R. v. Keeper* (reflex-

logo) reflex, (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.); *R. v. Tat* 1997 CanLII 2234 (ON C.A.), (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); *R. v. N.D.*, [1993] O.J. No. 2139 (QL) (C.A.). Judicial experience has also been relied upon to question the reasonableness of verdicts in cases of sexual misconduct presenting troubling features such as allegations of sexual touching of a bizarre nature ...or the possibility of collusion between witnesses (see, e.g., *Burke*, *supra*). Finally, the experience of the courts has occasionally been brought to bear, although not always explicitly, on the assessment of verdicts rejecting a defence with respect to which there may be unjustified skepticism or even prejudice because those relying on such justifications or excuses may be viewed as simply trying to avoid responsibility for their actions..

42 It follows from the above that the test in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention."

3.3 SECTION 106(3)(b) AND DEFECTIVE REASONING

3.3.1 Context

The other form or application of unreasonableness in a verdict is one which was recognised in the 1926 Act provision (which mirrors comparative English and Commonwealth provisions). That is where the court was required to allow an appeal, if it considered that the verdict of the jury should be set aside 'on the ground that it is unreasonable or cannot be supported having regard to the evidence' (see *Slater v HMA* 1928 JC 94 at 101-102*).*

The provision was disjunctive. The reticence of the court to interfere with jury verdicts and make any assessment of the evidence, meant that the historically the focus was on the former form of verdict. That is verdicts which were manifestly illogical or perverse. Or as the Lord Justice Clerk described them in *E v HMA* (*supra*):

> "the court set aside jury verdicts on the ground of unreasonableness only where those verdicts were patently illogical… Such decisions did not depend on a consideration of the question of reasonable doubt on the facts of the case." (at paragraph [26])

Given the practical difficulty in not knowing the reasons for, or basis for, the verdict reached, the application of this ground was limited. It tended to arise only where it was obvious that there was illogicality. For example where there were a number of verdicts which were inconsistent logically with another or where there were deletions of acts from the libel indicating the view of the jury, which were inconsistent with the conclusion of guilt.

Within this approach there is recognition that a verdict (leaving aside the evidential basis for it) which appears illogical or unreasonable, should be set aside. Another

way of describing some of these kinds of miscarriage is to describe the jury as having misdirected itself.

3.3.2 Section 106(3)(b): Defective Reasoning

The current statutory provision has not been examined on this basis. However it does appear to encompass this traditional basis for interference with a verdict. The provision simply refers to a "verdict which no reasonable jury, properly directed, could have returned."

The words "properly directed" are interesting in their application here. Perhaps it could be said that, as the court assumes the jury follow the directions given, then, if properly directed, the only scope for unreasonableness is by having regard to the evidence rather than by having regard to the reasonableness of the verdict on any other ground. However, the assumption of following directions can be misplaced – such as in cases where the terms of an amended verdict demonstrate the contrary – and where it is known that the jury did not follow those directions (or misdirected itself). Where there appear to be material errors of law or fact or unreasonable conclusions reached, then the court will interfere with that verdict. Accordingly the words "properly directed" do not preclude such a review but merely reflect the usual assumption.

In addition there are a number of reasons which support the view that the current position allows for review of the reasonableness of the verdict, on the basis of both the fact that it was not supported by the evidence and/or that it was simply unreasonable:-

- It is quite clear from the history of the statutory provision (discussed above in section 3.1.3), that it was intended to broaden the scope of the appeals;
- the statutory provision only provides examples of a miscarriage of justice; and
- the summary ground of appeal in the statute – section 175 – does not exemplify reasonableness, that is because the basis of any such appeal is characterised as misdirection by the judge on matters of law or fact. Any

flawed reasoning which renders the verdict an unreasonable one is thus addressed.

Indeed the statutory provision does not restrict the bases upon which a verdict may be challenged provided it can be shown that the verdict was one which no reasonable jury, properly directed, could have returned.

Normally again there is no information about any such misdirection by a jury. However, uniquely in the present case, it can be seen what the basis for the verdict was – what reasoning led to making factual conclusions underpinning the verdict – and there is therefore wider scope for such review of reasonableness. Where, for example, it can be shown that the inference of guilt rests upon flawed reasoning, which can often equate to error in law or fact, then the court can again conclude that no reasonable jury could have returned a verdict on that basis.

3.3.3 Nature Of Review: The First Appeal

It is important here to distinguish the nature of the review advanced here from that employed by the defence at the first appeal.

At the first appeal, whilst disavowing an appeal based on section 106(3)(b), the defence submitted that the court had greater scope for review of the trial court's decision because the trial court had produced written reasons.

The appeal court rejected the suggestion that there was a difference in the role of the court or that there was a wider scope for review.

However, this arose in the context of a confused defence position which consisted of, *inter alia*, the following arguments –

<u>Submissions regarding the provision of inadequate reasons</u>

The defence argued that there was an inadequacy of reasons provided in the judgment which could be reviewed – this was rejected by the appeal court on principle and on the merits –

> "[9] … At the outset, Mr Taylor submitted that a miscarriage of justice could be based on the failure of the trial court to give adequate reasons for its conclusions, including reasons of adequate clarity. This appeared to be without regard to whether or not the failure was a failure to comply with article 5 (6) of the Order in Council…
>
> [10] In our opinion this submission was misconceived. It is not sound in principle or supported by authority. There is no ground for thinking that the perceived inadequacy of the reasons expressed by the trial court, whether performing its duty under Article 5 (6) or otherwise, is to be regarded as of itself establishing that it was not entitled to come to a particular conclusion…
>
> …
>
> [14] We consider that the Advocate depute was well-founded in submitting that inadequacy of reasons, of itself, did not constitute a misdirection and hence potentially extend the scope of section 106(3). It might, on the other hand, provide the means by which a misdirection was detected, as in *Petrovich v Jessop*."

Submissions regarding the review of reasons in the judgment

The defence argued that the court should assess the conclusions reached in the judgment – whilst not suggesting the verdict was an unreasonable one. The legal basis for and scope of such a review were not made clear by the defence. They appeared to be suggesting that because there was no jury but judges providing a written judgment, this was somehow akin to summary procedure and therefore the reasoning and conclusions in the judgment were open to review. At the same time, and this is vital, the defence expressly disavowed reliance upon s106(3)(b) and specifically eschewed suggesting the judgment was not reasonable.

This approach was firmly rejected by the appeal court:

"[20] The second matter of general importance is the proper function of an appeal court in a criminal appeal, particularly where, as in the present case, the decision was that of a court of judges which has provided a written judgment giving the reasons for the conviction.

…

[22] … [The argument advanced by the defence] raises a fundamental point in regard to the role of the appeal court in criminal cases. It is plain that in the past the appeal court has never taken upon itself the role of resolving issues of fact, any more than the determination of guilt. In *Webb v HM Advocate* 1927 JC 92, more fully reported in 1927 SLT 631 to which we will refer, the Lord Justice-Clerk (Alness) stated at page 631:

> "This is not a court of review. Review, in the ordinary sense of that word, lies outside our province. We have neither a duty nor a right, because we might not have reached the same conclusion as the jury, to upset their verdict."

At page 636 Lord Anderson said:

> "I express my first general observation in negative form to the effect that this Court will not re-try a case of this nature in the sense in which, in a civil process, a court of review deals with the decision of a judge of first instance. It is not the function of this court, but of the jury, to weigh and balance testimony in an endeavour to ascertain, on quantitative or qualitative grounds, how it ought to preponderate. This court, it is true, in an appeal on fact, is bound to read the evidence, but only for the purpose of deciding whether or not the verdict is unreasonable, or to use a term familiar in civil procedure, perverse."

It cannot be doubted that in the case of an appeal against a jury's verdict of guilty the same applies today. The alterations which have been made in the terms in which the right of appeal is expressed have not changed the role of the appeal court. It is not without significance that what is brought under review by means of a criminal appeal against the jury's verdict is "any alleged miscarriage of justice", and that if the appellant has satisfied the court that there has been such an injustice the court may exercise its power to quash the

conviction. So far, this would not be in conflict with Mr Taylor's submission. However, his argument was that the fact that the decision to convict had been taken by a trial court which had supplied a written account of its reasons for convicting the appellant changed the position.

[23] In our opinion this argument is not well founded. The respective roles of the appeal court and the court by which issues of fact are resolved and guilt is determined are not changed by the fact that the normal arrangements have been modified by the Order in Council, and in particular by the requirement that the trial court should deliver a reasoned judgment. While accepting that this court is not a court of review in the sense in which that expression is used in regard to civil cases Mr Taylor failed to recognise the full implications of that acceptance. Putting the matter the other way round, if he were correct that it was, for example, open to this court to review the inferences drawn by the trial court it would not be possible to stop short of the conclusion that this court could in effect substitute its own view of the evidence which was before the trial court, which is plainly wrong."

The appeal court arguably placed too much emphasis on the restrictive approach taken before the amended legislation introducing section 106(3)(b) (*cf* the more detailed analysis of the background to this provision in *King* and *E (supra))*. The defence however expressly disavowed any reliance upon section 106(3)(b). The issue being addressed in the opinion was the defence submission that the provision of written reasons in itself somehow changed the scope of review.

It has to be accepted that the role of the court has not changed for this reason and, as such, there can be no general review of the reasons such as is found in civil review on appeal from a single judge. However there is still, as *Webb* established, a basis for review akin to a civil jury trial based on reasonableness.

Import of the Appeal Court decision

The potential for review of defective reasons as leading to an unreasonable verdict under section 106(3)(b), is also assisted by the observations of the appeal court at the

first appeal. Whilst the opinion firmly rejects undertaking a review equivalent to a civil court and arguably suggests too narrow an approach to the role of the court of appeal in general, it establishes a number of points.

1. It would appear indisputable that section 106(3)(b) applies to the present case.

2. If section 106(3)(b) were invoked it would be for the appeal court to decide whether 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 (paragraph [24]). This is important because it puts paid to any suggestion that the test of section 106(3)(b) is effected by reference to the whole evidence and whether it was open to any reasonable jury to convict. Rather it acknowledges the reality that the test is applied by reference to the evidence relied upon by the trial court.

3. The written judgment allows the appeal court to know the basis upon which the conviction was arrived at and hence it can determine whether or not the trial court has misdirected itself by for example misinterpreting evidence or failing to take evidence into account (paragraph [8]).

4. There is scope for a conclusion that there has been a miscarriage of justice arising out of a misdirection of law or a misdirection of fact by the trial court, that is to say a self-misdirection gathered from the written judgment (paragraph [7]). This is helpful, for what can be described as an unreasonable approach or conclusion, could often equally be described as a self-misdirection.

5. Where inferences drawn are unreasonable or “not possible” inferences then these fall to be reviewed and constitute misdirections (paragraph [25]). It also recognises that failure to take material into account may constitute a misdirection.

3.3.4 Real effect of written reasons

The provision of written reasons by the trial court does make a difference but only in the practical sense. As was recognised by the appeal court, there is a real practical difference which results because the court now has the reasons for the verdict (see paragraphs [8] and [24]).

As such, the appeal court is now in a better position to assess the reasonableness of the verdict. The court also knows the evidence which was relied upon in reaching that verdict. Accordingly, whilst it cannot review the judgment in a general sense, it can review it on a test of reasonableness. So too it can review inferences drawn, not on the basis of whether it would have drawn the same inferences, but on the basis that the inferences were not reasonable and were conclusions which no reasonable trier of fact would be entitled to reach.

Accordingly whilst the mode of review and the role of the court are not altered, the scope for review is wider simply as a result of knowing the reasons for the verdict.

In short, the real effect here is a practical one – the task of the court in a review under section 106(3)(b) is made easier by the simple fact that there are reasons provided for reaching the verdict.

This advantage is one which has been recognised in Canada in *R v Biniaris (supra)* in which the opinion of the court was given by Arbour J.

> "(37) …The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

> ... [I]n trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law."

The Canadian Supreme Court wrestled further with the basis upon which a verdict can be found unreasonable arising from the reasons provided by the trial judge in the case of *R v Beaudry* [2007] SCC 5. In this case the differing opinions are helpful in the examination of the degree to which such a review should go. The majority view (Binnie, LeBel, Abella, Charron, Rothstein JJ) was that the flaws in the reasons given were not such as to vitiate the verdict – but all for differing reasons. The following passages are referred to:

First, from the opinion of Binnie J who concurred with the majority but gave a separate concurring opinion:

> "77 Quite apart from the merits of the appeal, however, Justice Fish urges the Court to reconsider the traditional scope of s. 686(l)(*a*)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46. In particular Fish J. contends that an appellate court's finding that a verdict is "unreasonable or cannot be supported by the evidence" should be available in a case where the verdict is dependent on findings of fact made by the trial judge "that are demonstrably incompatible . . . with evidence that is neither contradicted by other evidence nor rejected by the judge" (para. 98); in other words, in cases where on examination the substratum of findings on which the verdict rests disappears.
>
> 78 As Charron J. points out, the law has traditionally focussed on the reasonableness of the verdict, not on the quality of the reasons given for reaching it. Nevertheless, Charron J. accepts that "there may be a connection

between an error made in interpreting evidence and an unreasonable verdict" (para. 59).

79 In *R. v. Sheppard*, we held that a trial judge's failure to deliver reasons sufficient to permit meaningful appellate review was an "error of law" within the scope of s. 686(1)(*a*)(ii). The dissent in this case of Chamberland J.A. was not based on an "error of law" (2005 QCCA 966 (IIJCan), [2005] R.J.Q. 2536, 2005, QCCA 966); accordingly, s. 686(1)(*a*)(ii), is not available to the appellant/accused here, even if it was thought to be applicable. However, it is useful to recall that in *Sheppard* we observed more broadly that:

…the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. . . . Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be. [para. 24] As a practical matter, these functional concerns are equally applicable to an appellate court's consideration of an appeal based on the allegations of unreasonable verdict or a verdict that cannot be supported by the evidence. In the eyes of the litigants and the public, where the findings of facts essential to the verdict are "demonstrably incompatible" with evidence that is neither contradicted by other evidence nor rejected by the trial judge, such a verdict would lack legitimacy and would properly, I think, be treated as "unreasonable".

80 My disagreement with Fish J., therefore, is with his conclusion that the circumstances of this case meet the test he has proposed. The key issue, as stated, is credibility. In my view, with respect, the faults he has identified in the trial judge's reasons have neither the centrality to the verdict nor the incompatibility with the record sufficient to justify a reversal. For that reason I concur with Charron J. in the dismissal of the appeal."

Secondly, from the opinion of Fish J who dissented (along with McLachlin CJ, Bastarache and Deschamps JJ):

"87 In *R. v. Gagnon*, 2006 SCC 17 (CanLII), [2006] 1 S.C.R. 621, 2006 SCC 17, Justice Deschamps and I, dissenting in the result, held that "[t]he duty of an appellate court is not limited to ensuring that 'the verdict was available on the record'" (para. 36). This is because s. 686(1)(*a*) (i) of the *Criminal Code* specifically provides that a verdict may be set aside on appeal if it is "unreasonable *or* cannot be supported by the evidence".

88 The majority in *Gagnon* did not address this issue and I find it necessary and appropriate to revisit it here before proceeding to apply what I believe to be the appropriate test.

89 Section 686(1)(*a*)(i) empowers a court of appeal to allow the appeal "where it is of the opinion that ... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence". In my view, the disjunctive "or" indicates a clear Parliamentary intention to differentiate between verdicts that cannot be supported by the evidence and verdicts that may properly be characterized as unreasonable *on some other ground.* To construe the test otherwise would be to permit for appeals, including appeals *as of right*, a narrower scope of curial review than for intervention by way of prerogative writ — where no appeal lies, with or without leave.

90 It is important to remember that the unreasonable verdict test has more often than not been described and explained in cases involving jury trials, where particular considerations govern: See, for example, *R. v. Yebes*, 1987 CanLII 17 (S.C.C.), [1987] 2 S.C.R. 168.

…

97 In Justice Charron's view, a verdict based on unreasonable reasons is not unreasonable if there is evidence upon which another trier of fact could have reached the same conclusion by a different and proper route. With respect, I do not share that view. No one should stand convicted on the strength of manifestly bad reasons — reasons that are illogical on their face, or contrary to the evidence — on the ground that another judge (who never did and never will try the case) could *but might not necessarily* have reached the same conclusion for *other reasons*. A verdict that was reached illogically or

> irrationally is hardly made reasonable by the fact that another judge could reasonably have convicted *or acquitted* the accused. I think it preferable by far, where there is evidence capable of supporting a conviction, to order a new trial so that a fresh and proper determination can be made by a real and not hypothetical "other judge".
>
> 98 I hasten to add that appellate courts, in determining whether a trial judge's verdict is unreasonable, cannot substitute their own view of the facts for that of the judge or intervene on the ground that the judge's reasons ought to have been more fully or more clearly expressed. That is beyond the purview of an appellate court: *R. v. W. (R.)*, 1992 CanLII 56 (S.C.C.), [1992] 2 S.C.R. 122; *Burke*; *Biniaris*; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005]S.C.R. 401, 2005 SCC 25; *R. v. Kerr* 2004 MBCA 30 (CanLII), (2004), 48 M.V.R. (4th) 201, 2004 MBCA 30. But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(*a*)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.
>
> …
>
> 101 In my respectful view, this is a case where the trial judge's reasons suffer, in the language of *Biniaris*, from flaws in the evaluation and analysis of the evidence that justify reversal (para. 37). This is particularly true with regard to the only real issue in the case – whether the appellant had acted corruptly or dishonestly, with the requisite intent to obstruct justice."

This approach recognises the practical reality of the difference where there is a written judgment. These opinions point to the type of assessment that can and should be made.

The view of Fish J that a verdict which is demonstrably incompatible with the evidence, or consists of bad reasons, must undermine the verdict, is persuasive. Such a verdict offends what we would call justice being seen to be done and the fairness of the trial process. However the materiality of the flawed reasoning to the ultimate conclusion or verdict must be demonstrated.

3.3.5 Effect of flawed reasoning

Where defective reasoning relates to facts or inferences which underpin or are connected to the verdict, then this can have the effect of rendering the ultimate inference or verdict unreasonable.

Just as other errors of law or misdirections may result in a miscarriage of justice depending upon the materiality of those errors.

3.4 CONCLUSION TO SECTIONS 3.2 & 3.3

1. An unreasonable verdict under section 106(3)(b) of the 1995 Act can be established in two ways: either satisfying the court that having regard to the evidence the verdict was one which no reasonable jury could have returned or where the verdict materially relies upon defective reasoning.

2. Both apply to any case including a wholly circumstantial case.

3. A verdict which is unreasonable in that it is not properly supported by the evidence – where the evidence is insufficient to entitle a jury to convict – is tested here by having regard to the evidence which has not been rejected by the trial court.

4. The role of the judge is to assess whether the evidence is capable of supporting the verdict and this can extend to assessment of the credibility or reliability of the evidence.

5. Any such assessment of the evidence must ensure that the decision made does not conflict with the bulk of judicial experience.

6. Assessment of the verdict as unreasonable in that it incorporates defective reasoning involves here having regard to the reasoning contained in the judgment.

7. Reasoning is defective where it is incompatible with the evidence, is illogical or irrational or where it is contrary to established legal principles.

8. Any such defective reasoning will render the verdict unreasonable where it is material to reaching the decision to convict.

SECTION 4. THE UNREASONABLE VERDICT IN THIS CASE

4.1 INTRODUCTION

The application of the principles outlined in the previous sections is now made to this case.

Both ways of rendering a verdict unreasonable are considered. That is by considering whether the verdict is properly supported by the evidence (the sufficiency question) such that reasonable jury was entitled to convict; and also whether any material parts of the verdict or decision rest upon defective reasoning. But the emphasis here is upon the question of sufficiency. The vast majority of criticisms of defective reasoning arise in respect of individual inferences drawn from the evidence and such criticisms are accordingly made in the course of examination of those inferences.

This section starts with looking at the overall picture and the inherent weaknesses which apply throughout the case. Thereafter a detailed examination is made of the crucial intermediate inferences drawn and upon which the verdict rests. This examination involves anlaysis of the reasonableness of the inferences drawn and in respect of the crucial inferences whether here is sufficient to entitle a finding beyond reasonable doubt – in other words to test sufficiency by the application of the specific test or rule of sufficiency outlined above. In this way the probative force of the case is assessed.

4.1.1 The Judges' case: Structure of the Trial Court's Opinion

The reasoning of the trial court in reaching its decision is not always clear. It is necessary to look at the whole evidence (setting aside the evidence which was rejected) and then to determine the crucial inferences drawn which led the court to reach their verdict.

It is accepted here that there is sufficient evidence to find that the crime was committed. The fact in issue here is whether on the accepted evidence the trial court

could properly or reasonably find that the appellant was responsible for the commission of the crime.

The inferences relied upon in the decision to convict and much of the relevant evidence has been rehearsed above (at section 1.3) regarding the judges' treatment of the Crown case. For present purposes, the structure of the opinion can be summarised as follows:

Destruction of the aircraft

First the court made findings concerning the immediate cause of the disaster based on evidence from the Air Accidents Investigation Board and forensic evidence. It concluded in particular that the cause of the disaster was an explosion caused by the detonation of an improvised explosive device contained in an RT-SF16 Toshiba radio cassette recorder, inside a brown hard shell Samsonite suitcase, placed within luggage container AVE 4041 (paragraphs [4], [5], [9], [11] and [15]). The suitcase contained 12 items of clothing and an umbrella (paragraphs [10] and [15]). None of this is challenged here.

Origin of clothing in the primary suitcase

Next, the court considered the evidence of Tony Gauci relating to the purchase of the items found within the Primary Suitcase. The court concluded that the items were sold by Tony Gauci to a Libyan at his shop, Mary's House, in Malta (paragraphs [12], [15] and [67]). This was not challenged at trial by the defence and is not challenged within grounds of appeal 1 and 2 (this is the subject of the fresh evidence Ground 3.5).

The trigger for the explosion

Having reviewed the evidence relating to finding of and subsequent investigation into fragment PT/35(b) evidence, the trial court concluded that the IED was triggered by the use of an MST-13 timer manufactured by a Swiss company MEBO AG (paragraphs [13] to [15]). This is not challenged here.

Interim summary of findings

At this point in the opinion, the court summarised its findings so far:

> "[15] The evidence which we have considered up to this stage satisfies us beyond reasonable doubt that the cause of the disaster was the explosion of an improvised explosive device, that that device was contained within a Toshiba radio cassette player in a brown Samsonite suitcase along with various items of clothing, that that clothing had been purchased in Mary's House, Sliema, Malta, and that the initiation of the explosion was triggered by the use of an MST-13 timer."

Ingestion of the Primary Suitcase

The next topic dealt with by the opinion is the evidence relating to the ingestion of the primary suitcase. This covered:

- General baggage handling procedures (paragraphs [18] and [19])
- Heathrow (paragraphs [20] to [25])
- Frankfurt airport (paragraphs [26] to [35])
- Luqa airport (paragraph [36] to [39])

For present purposes, the critical findings made following review of these chapters of evidence were that the Frankfurt evidence, viewed in isolation, gave rise to the inference that an unidentified and unaccompanied bag travelled on flight KM 180 form Luqa to Frankfurt and there was loaded on to flight PA 103A (paragraphs [31] and [35]); and that there was no explanation by the Crown as to the method by which the Primary suitcase might have been placed aboard flight KM 180 (paragraph [39]).

Involvement of the two accused – important witnesses

The court next considered the evidence relating to the involvement of the two accused. First of all it considered what it said were the three important witnesses for

the Crown case, particularly in respect of the appellant – Majid Giaka; Edwin Bollier; and Tony Gauci (paragraph [41]).

First the court looked at the evidence of Majid Giaka (paragraphs [42] and [43]). The court rejected Majid as incredible and unreliable on every matter except his description of the organisation of the JSO and the personnel involved there (paragraph [42]).

Looking at the evidence of the MEBO witnesses – Bollier, Meister and Lumpert - the court found problems with the reliability of the evidence of all three, and in particular that of Bollier (paragraphs [44]-[54]). The court stated it was only prepared to accept Bollier's evidence where it was unchallenged and appeared to have been accepted, or where it was supported from by evidence from another acceptable source (paragraph [49]). For present purposes, the critical findings were:

- Bollier supplied twenty MST-13 timers to the Libyan government in three batches in 1985 and 1986 (paragraphs [48]-[50]);
- Bollier supplied two timers to the Stasi in East Germany in 1985 (paragraphs [49]);
- Although there was no positive evidence, the court stated it could not exclude:
    - the possibility that more MST-13 timers were supplied to the Stasi;
    - the possibility that other MST-13 timers may have been made by MEBO and supplied to others; and
    - the possibility that the timers in the possession of the Stasi were supplied to others (paragraph [49]);
- Bollier attended Libyan military testing of the timers in the Libyan desert. The timing and purpose of this testing was not clear (paragraph [53]);
- In 1988 Bollier rented office premises to ABH, a company whose principals included the appellant (paragraph [53]).

The third witness the court considered was Tony Gauci (paragraphs [55]-[69]). Its key conclusions in respect of this witness were as follows:

- Tony Gauci was entirely credible (paragraph [67]);

- Paul Gauci was watching football on the date on which the sale of clothes took place – accordingly the date of purchase was either 23 November or 7 December (paragraph [67]);
- The evidence of the weather from Major Mifsud, is wholly consistent with 23 November, but did not rule out 7 December (paragraph [67]);
- The position about the Christmas decorations at the date of purchase was unclear, but would seem consistent with Mr Gauci's recollection that the purchase was about the time the decorations were going up, which was in turn consistent with his recollection that the purchase was about two weeks before Christmas (paragraph [67]);
- The date of purchase was Wednesday 7/12/88 (paragraph [67]);
- Gauci's identification of the appellant was reliable (paragraph [69]).

Involvement of the two accused - Special Defence

The court then considered the evidence relating to the special defence of incrimination lodged by the appellant and his co-accused (paragraph [70] to [81]). The court noted that there was no evidence that Parviz Taheri may have been responsible (paragraph [72]).

In relation to the PFLP-GC the critical findings of the court were:

- A cell of the PFLP-GC was operating in what was then West Germany at least up until October 1988 and at least at that time the cell had both the means and the intention to manufacture bombs which could be used to destroy civil aircraft (paragraph [73]);
- On 26 October 1988, after a period of surveillance, the German police made a series of raids and arrested a number of individuals, in the PFLP-GC cell (paragraph [73]);
- It is possible that the cell could have re-grouped and re-stocked with necessary materials (paragraph [73]);
- There was no evidence that the cell had the materials necessary to manufacture an explosive device of the type that destroyed PA 103, in

particular: there was no evidence that they had an MST-13 timer; the principal bomb maker of the cell was an agent for Jordanian intelligence who had been instructed not to prime any bomb; the bomb maker never used twin speaker radio cassette players (like the RT SF-16 to convert into bombs (paragraph [74]).

In relation to Khaled Jaafar, the court concluded that he boarded flight PA 103A with only two bags. These bags were both checked in and were found after the crash without explosion damage. The court concludes that neither of his bags contained an explosive device (paragraph [75]).

In relation to Abo Talb, the court concluded that there was no evidence that Abo Talb and his associates had either the means or intention to destroy a civil aircraft in December 1988 (paragraph [81]).

Second interim summary of findings and inferences

The court then summarised the evidence it had discussed thus far:

"[82] From the evidence which we have discussed so far, we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA 103 at Heathrow. It is, as we have said, clear that with one exception the clothing in the primary suitcase was the clothing purchased in Mr Gauci's shop on 7 December 1988. The purchaser was, on Mr Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer of the single solder mask variety. A substantial quantity of such timers had been supplied to Libya. We cannot say that it is impossible that the clothing might have been taken from Malta, united somewhere with a timer from some source other than Libya and introduced into the airline baggage system at Frankfurt or Heathrow. When, however, the evidence regarding the clothing, the purchaser and the timer is taken with the evidence that an unaccompanied bag was taken from KM 180 to PA 103A, the inference that that was the primary suitcase becomes, in our view, irresistible. As we have also said, the absence of an explanation as to how the

> suitcase was taken into the system at Luqa is a major difficulty for the Crown case but after taking full account of that difficulty, we remain of the view that the primary suitcase began its journey at Luqa. 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. While no doubt organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities does not create a reasonable doubt in our minds about the Libyan origin of this crime."

Involvement of Fhimah

The court then considered the evidence against the co-accused (paragraphs [84] to [85]). The court took the view that the principal piece of evidence against the co-accused was the diary entries (paragraph [84]). The court stated that although there may be a sinister inference to be drawn from the diary, there was insufficient corroboration for any adverse inference (paragraph [85]). The court emphasised that the diary entries could not form part of the case against the appellant.

Involvement of the appellant

Finally the court considered the case against the appellant (paragraphs [86] to [88]). The principal findings here were as follows:

The appellant had a "coded" passport in a false name issued at the request of the Libyan security services (paragraph [87]). There was no evidence why this passport was issued to him (paragraph [87]). He used this passport on several occasions but the last occasion it was used was for an overnight visit to Malta on 20-21 December 1988 for which the appellant had no innocent explanation (paragraphs [87]-[88]).

On 21 December 1988 the appellant departed from Luqa airport on a flight to Tripoli scheduled to leave at 1020 (paragraph [87]), which left at or about the time that the device must have been planted (paragraph [88]).

The appellant travelled on his own passport to Malta on 7 December 1988 where he stayed until 9 December 1988 (paragraph [87]).

A "major factor" in the appellant's conviction was the identification of him as the purchaser of the clothing by Gauci (paragraph [88]). The appellant was present in Malta, staying in a hotel close to Gauci's shop, on the date on which the court inferred the purchase had occurred – 7 December (paragraph [88]). The court inferred that if the appellant was the purchaser, he must have been aware of the purpose for which they were being bought (paragraph [88]).

The court found the appellant had been in the JSO and held fairly high rank, including head of airline security. The court inferred that this would have given him general awareness of security precautions at airport (paragraph [88]). The court also found that he appeared to have been involved in military procurement. It found that he knew Bollier, though not in connection with the supply of MST-3 timers, and had formed a company which leased premises from him (paragraph [88]).

Court's conclusion on the circumstantial case

The court concluded that a real and convincing pattern of the appellant's involvement in the crime was formed by the following (paragraph [89]):

- the purchase of the 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 appellant, "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 Bollier and members of the JSO or Libyan military who purchased MST-13 timers.

For completeness, the trial court's conclusions on the involvement of the appellant are here quoted in full:

"[88] A major factor in the case against the first accused is the identification evidence of Mr Gauci. For the reasons we have already given, we accept the reliability of Mr Gauci on this matter, while recognising that this is not an unequivocal identification. From his evidence it could be inferred that the first accused was the person who bought the clothing which surrounded the explosive device. We have already accepted that the date of purchase of the clothing was 7 December 1988, and on that day the first accused arrived in Malta where he stayed until 9 December. He was staying at the Holiday Inn, Sliema, which is close to Mary's House. If he was the purchaser of this miscellaneous collection of garments, it is not difficult to infer that he must have been aware of the purpose for which they were being bought. We accept the evidence that he was a member of the JSO, occupying posts of fairly high rank. One of these posts was head of airline security, from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA operated. He also appears to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO. In his interview with Mr Salinger he denied any connection with MEBO, but we do not accept his denial. On 20 December 1988 he entered Malta using his passport in the name of Abdusamad. There is no apparent reason for this visit, so far as the evidence discloses. All that was revealed by acceptable evidence was that the first accused and the second accused together paid a brief visit to the house of Mr Vassallo at some time in the evening, and that the first accused made or attempted to make a phone call to the second accused at 7.11am the following morning. 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. The only explanation that appeared in the evidence was contained in his interview with Mr Salinger, when he denied visiting Malta at that time and denied using the name Abdusamad or having had a passport in that name. Again, we do not accept his denial.

[89] We are aware that in relation to certain aspects of the case there are a number of uncertainties and qualifications. We are also aware that there is a danger that by selecting parts of the evidence which seem to fit together and ignoring parts which might not fit, it is possible to read into a mass of conflicting evidence a pattern or conclusion which is not really justified. However, having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, 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, and accordingly we find him guilty of the remaining charge in the Indictment as amended."

4.1.2 Inherent weaknesses of this circumstantial case

Key Features

The present case – that is the case as decided upon by the trial court – is exceptional in a number of respects.

First, an extraordinary feature of this case is the absence of evidence of certain circumstances relating to the crime – the missing pieces. Although the circumstantial evidence relied upon to conclude that the crime of murder was committed was relatively straightforward and is not challenged, how the crime was committed is in many essential respects unknown. There is an extraordinary gap in the evidence of evidence of concert – not just the identity of those acting in concert (which is not unusual) but as to what were the concerted acts or actions involved (which is unusual). The *factum probandum* in issue is the finding that the appellant was

involved and, therefore, was responsible. This is peculiarly difficult without the knowledge of the starting point of and scope of the common criminal purpose or of the actions involved in furthering same.

Secondly, outlined above in section 1, the difference and complexity of the decision reached by the trial court is very different from the basis upon which a verdict was sought by the Crown and the evidence it relied upon.

Thirdly, at every stage of the decision made here there is a process of inference. This is a wholly inferential case. As such the actual circumstances established in the evidence are far removed from the conclusion of guilt. There is an extraordinary degree of abstraction and circumlocution involved in reaching the verdict.

Finally, this case is also exceptional because of the form of the trial court's judgment. It contains not only factual findings and the reasoning leading to conviction of the appellant, but also an account of evidence which it had accepted or rejected, the weight attached to certain evidence and the submissions made to it. As a result, in present case, the appeal court is uniquely able to analyse the approach taken by the trial court to the circumstantial case (see paragraph 8 of the opinion of the Appeal Court).

Missing Evidence

In the assessment of whether there is a reasonable relationship between the facts found and the inference of guilt it is important to appreciate what is missing. The assessment of the probative force of what is proved must be made in the context of the whole, viewing the facts and inferences drawn in combination, but this also includes having regard to what has not been proven.

It is also an important part of any assessment of sufficiency is to appreciate the missing pieces of the picture. Otherwise there is a real danger of distortion in review of the evidence that is presented.

An example of the importance of considering what evidence is missing is *Broadley v HMA* 2005 SCCR 620 where the missing piece of evidence was the means by which the appellant was supposed to have committed the offence. The deceased fell from a window and the question became did she jump or was she pushed? The Crown relied, *inter alia*, upon circumstances of prior violence and threats, presence and a somewhat equivocal admission (see paragraphs 4 and 7). The appeal court concluded there was no evidence of the means whereby the appellant caused the deceased to go out the window and no evidence of his involvement in her death (see paragraph 8) and accordingly it was unclear whether there was an offence. There was no consideration given to the appropriate legal test of sufficiency (discussed above), it was simply submitted that there was insufficient evidence. Properly it should be said that there was insufficient to entitle a jury to convict.

Using the network analogy (above at section 2.2.3) the question arises whether the various threads or strands are sufficiently substantial and sufficiently woven together to entrap the accused. Alternatively, whether, viewed as a cable, the combination is strong enough to carry the case beyond a reasonable doubt.

The classic examples of circumstantial evidence being led and relied upon daily in the criminal courts include forensic evidence or finds (such as blood on clothes or DNA etc), evidence of presence at the locus or a confession after the event. Such circumstances can be compelling.

Circumstantial evidence is sometimes described as categories such as:

(a) evidence of opportunity;
(b) evidence of motive or intention;
(c) evidence of means;
(d) evidence indicative of a plan; and
(e) evidence of prior conduct or previous convictions or similar facts (in England)

However none of these "classic" kinds of circumstantial pieces of evidence were to be found and relied upon here. The circumstantial case here is unusual in that the facts

relied upon were all indirect and far removed from the material event- examination here suggests they are too remote.

The missing pieces make it very difficult to be properly satisfied of the appellant's participation in or furtherance of the common criminal purpose. Without knowing the acts of others involved to achieve commission of the offence it is very difficult to connect the appellant's alleged actions to a concerted plan and to be satisfied that any such acts were committed in the knowledge of the shared criminal purpose and directed towards that end. Such difficulties are addressed below (in sections 4.2 to 4.9) in the examination of the various inferences.

The important missing pieces here can be identified as follows:

Absence of evidence of concert

It is accepted that the nature of the offence here yields the inference that there was a concerted plan with a number of persons involved "to destroy a civilian passenger aircraft and murder the occupants". There was no evidence, as found by the judges, of whom the appellant is supposed to have been acting in concert with, although in itself 'acting with persons unknown' is not unusual.
What is extraordinary is the absence of any evidence of the conception, planning and execution of the concerted plan and in particular the acts necessary to achieve the commission of the crime.
The missing pieces include the following :

- No evidence to entitle a finding as to who shared the common criminal purpose;
- No evidence to entitle a finding, in particular, that the purchasers of MST-13 timers shared the common criminal purpose;
- No evidence to entitle finding as to when the common criminal purpose was formed;
- No evidence of any specific act carried out in furtherance of the common criminal purpose, except for the appellant's purchase of the clothing;

- No evidence to entitle the finding that the "purposes of the Libyan Intelligence Services" were being furthered by the common criminal purpose, nor any evidence as to what the Libyan Intelligence Services purposes were;
- No evidence to entitle the finding that anyone who shared the common criminal purpose had the necessary skills to construct this IED;
- No evidence as to when or where the IED was constructed;
- No evidence as to how the IED was introduced to Malta, or whether it originated in Malta;
- No evidence as to the source of the Samsonite suitcase;
- No evidence to entitle the finding as to who packed the suitcase;
- No evidence to entitle a finding as to how the suitcase came to be tagged with an interline tag; and
- No evidence to entitle a finding as to how, or through whom, the primary suitcase was introduced to KM 180.

Absence of evidence as to when the common criminal purpose was formed

The Crown relied on the evidence of Majid Giaka about two conversations he had in 1986 in order to infer the existence of a common criminal purpose. These conversations were with Said Rashid – who asked about the possibility of placing an unaccompanied bag on an aircraft in Malta; and with the appellant – who told Majid in relation to this possibility "Don't rush things". The Court rejected that evidence in its entirety (see paragraph [43]).

In order to convict the appellant as an accessory, the court needed to be satisfied that at the date of the purchase (which was the appellant's contribution to the crime), the common criminal purpose existed. There were no findings in the Opinion to that effect, nor any evidence to entitle the trial court to reach such a conclusion.

There was evidence, of course, that by the date of purchase of the clothing, a quantity of MST-13 timers had been bought by members of the JSO or Libyan military – in particular Hinshiri. However this does not allow the inference that the common criminal purpose had been formed by the date of purchase of the clothing, particularly

when there was no evidence that the MST-13 timers were purchased for a nefarious purpose; and there was no evidence or finding that the purchasers of the timers were involved in a criminal gang or in an organisation with nefarious intentions.

In addition, the Court rejected the evidence that prior to the purchase of the clothing, the appellant and Fhimah were keeping explosives at the LAA office in Malta. Had that evidence been accepted, it would perhaps have been capable of bearing the inference that there was a common criminal purpose in existence at the date of purchase. Not only did the trial court reject that evidence, it rejected the only other evidence about explosives which might have provided the basis for such an inference. The Crown had submitted that Bollier's evidence about the nature and conduct of tests of MST-13 timers in the desert allowed the inference that members of the JSO had access to explosives. This was rejected by the trial court. All the court was prepared to accept was that tests occurred. It specifically found that their purpose was unclear.

Albeit the appellant's purchase of the clothing would amount to assistance in the commission of the crime, it can only do so if, at the time of the purchase, there existed a common criminal purpose. There was no proof that this was so. This is considered further at section 4.3 below.

Absence of evidence of a group acting in concert

The trial court infers that the "conception, planning and execution of the crime was of Libyan origin" (see paragraph [82]) but there is no evidence of any such conception, plan or execution. Nor is it clear what is meant by "Libyan". This is addressed at 4.7 below.

The evidence purportedly relied upon by the Crown here either collapsed or was rejected. Namely:-

- The Crown sought to suggest that another JSO officer was involved in a "dummy run" of the primary suitcase's journey. This was Nassr Ashur. However, part-way through the trial, the Crown disclosed cables which

revealed that the coincidence of route was a result, not of an intended dummy run, but of bad weather which necessitated a change from a different intended route. The Crown consequently withdrew that part of the indictment (Charge 2(i)). This eliminated one of the bases upon which the Crown were intending to submit this was a JSO plot.

- The court rejected another of those bases when it refused to accept the evidence of Majid Giaka that the appellant was in the company of JSO technical officer, Abouagela Masud, at Luqa airport on 20 December (when, according to the Crown case, the appellant introduced the components of the IED to Malta). In addition, contrary to the Crown's submission, the court did not find that when he left Malta on 21 December, the appellant was travelling in the company of Masud.

- Finally the court rejected the Crown's argument that travelling on a JSO passport meant being engaged in JSO activities when it found that there was no evidence as to the reason such a passport was issued to the appellant (paragraph [87]). The Crown had sought to prove that the appellant's use of the passport to visit Malta on 20-21 December supported the inference that the crime was a JSO plot. The court's conclusion prevented this inference of a JSO plot being made.

The absence of any identifiable group and the absence of any information as to how this group achieved the making of and planting of the IED is a serious gap. Not least in the ability to discern the necessary common purpose.

Absence of evidence of intention or motive

There was no evidence of intention or motive. There was no evidence of a "Libyan" interest in carrying out such crimes or terrorist actions. There was no evidence that the JSO or other Libyan intelligence service were involved in or had an interest in anything nefarious not least the carrying out this crime. There was no evidence to

suggest that the JSO was anything other than a legitimate government intelligence agency.

Although proving motive is not normally essential, the absence of any proof of intention or motive makes it more difficult to infer that any common purpose existed among the alleged conspirators.

Absence of the Co-Accused

A major part of this problem is the acquittal of the co-accused. The trial court properly rejected the evidence led in respect of the alleged involvement of Fhimah (see paragraphs [84] and [85] of the Trial Court Opinion).

However, the Crown case relied crucially upon the participation of the co-accused. The Crown contended in submission that:

> "…it's clear that whatever means was used to introduce the suitcase comprising -- containing the improvised explosive device, it seems clear that Mr. Megrahi would not be able to achieve it alone. He would require assistance from someone in a position to render such assistance at Luqa Airport." (Day 79/9504)

That assistance, the Crown said, was rendered by Fhimah in three stages: first by obtaining the luggage tags; second by helping avoid the attention of Customs on 20 December when, according to the Crown, the appellant and Fhimah brought components of the IED to Malta; and third by using his airside pass to overcome security at Luqa Airport and allow the primary suitcase to be ingested onto KM 180. The court did not find that Fhimah supplied the luggage tags; it rejected the entire evidential basis for the Crown's submission that components of the IED were brought to Malta on 20 December and consequently rejected the only evidence which might have connected the appellant (and Fhimah) to the primary suitcase; and finally it found that there was no evidence Fhimah was even at Luqa airport on 21 December and it made no findings that the appellant in any way facilitated the ingestion of the primary suitcase.

Absence of evidence of ingestion

Clearly an IED was put onto the plane. However, even assuming that this started with the planting of the device at Luqa onto KM 180, how this was achieved is unknown. The only clear finding by the trial court was that the suitcase must have been tagged to overcome security. How this was achieved is also unknown. Having rejected the Crown's argument that the tagging of the bag was achieved because Fhimah was a participant in the common criminal purpose, the court did not explain how the bag came to be tagged. Nor did it explain whether and, if so, how, the security measures in place in respect of luggage tags were overcome. How the suitcase was placed on board is unknown. The absence of any information – or even theory – as to how the IED and primary suitcase was ingested at Luqa is acknowledged by the trial court to be a "major difficulty" (paragraph [82] of the trial court judgment). By acquitting Fhimah, the court removed the only available means of overcoming the security at the airport for which the Crown had laid a foundation in evidence – through the evidence that Fhimah had retained his airside pass and still used it for identification, in spite of having left his employment at the airport.

Absence of conduct by the Appellant

The purchase of the clothing can be characterised as an act of assistance by the appellant. This was the only act for which criminal liability might attach.

The only other conduct by the appellant which the court found proved as that he visited Malta between 20 and 21 December, travelling on a coded passport with a false name. The court concluded that this visit was "in connection with the planting of the explosive device". It suffices to say at this stage that without any further explanation or findings by the court of the nature of the "connection" of the appellant's visit to the planting of the device, it is clear that the appellant attracted liability for the crime by virtue only of his purchase of the clothing. In any event, for the reasons set out below at section 4.5, it is submitted that there is no basis in the accepted evidence upon which it could be said that the appellant's visit to Malta was in itself an act of assistance in the commission of the crime by which he might (separately from the purchase) attract liability.

That act – the purchase of the clothing - was not in itself criminal. It was necessary therefore to have proof of concert in the crime of murder (there being no basis otherwise for him to attract liability for any crime). As stated above, there is no difficulty with inferring from the crime itself that there was a common criminal purpose here to commit murder.

Based on the principles of accessory liability discussed above in section 2.1, what had to be proved in order for the appellant to attract liability was:

- that at the date of purchase there existed a criminal purpose to destroy an aircraft;
- that the appellant "shared" that purpose – at the least that he knew of it;
- that, with that knowledge, he carried out an act which he intended would materially assist in the crime or further the criminal purpose – he is "aiming at" the same crime; and
- that his act in fact did so assist or further the crime.

The trial court did not address these specific legal requirements anywhere in its Opinion. Assuming the trial court did properly consider same, there is no proper evidential basis to draw the inferences of the requisite knowledge on the part of the appellant or that at the date of purchase the common criminal purpose existed. This is addressed in detail in section 4.3. below.

A Wholly Inferential Case

The decision in this case is peculiar and complex because it relied entirely upon inferences drawn upon inferences. That is inferences which rely upon other intermediate inferences being found before these further inferences can be drawn. Furthermore, the ultimate inference of guilt drawn by the trial court is itself wholly based upon a series of intermediate inferences. There is no direct connection between the basic facts proved by evidence, on the one hand, and the facts in issue and the conclusion of guilt, on the other.

As such this case is more accurately described as a wholly inferential case than merely a wholly circumstantial one.

As stated above, circumstantial evidence normally consists of basic facts from which a further essential fact is inferred. But here the further fact so inferred has in turn to be combined with other further inferences to draw a connection to the essential facts in issue at the trial. This process involves taking two steps - two inferences - from the same basic facts.

The process is further complicated where, as most often here, in the first step the individual facts are individually insufficient and it is a combination of basic facts which are relied upon to draw the intermediate inference. And then again from the intermediate stage it is only by a combination of the intermediate inferences that the ultimate inference of guilt is sought to be drawn.

The process that applies here in respect of the circumstances relied upon can be seen in the following illustrations:

First illustration

Step 1: basic fact + another basic fact → **allows**
Step 2: drawing of intermediate inference
Step 3: intermediate inference + another intermediate inference(s) → **allows**
Step 4: drawing of ultimate inference of guilt.

The danger here, apart from the obvious potential for distortion and remoteness, is the potential for circular and defective reasoning. A recurring feature of the trial court's decision is the circularity of the connections made and the inferences drawn.

Second illustration

Step 1: basic fact + inference → **allows**
Step 2: drawing of intermediate inference

Step 3: intermediate inference + further intermediate inference(s) → **allows**

Step 4: drawing of ultimate inference of guilt.

In the second illustration an inference is built upon an inference, which is built upon an inference. The remoteness from the fact in issue is obvious. The circularity here consists of combining an initial inference built on basic fact (a), with basic fact (b) to draw the intermediate inference. That intermediate inference is then combined with other inferences which are also built on basic fact (a) or basic fact (b). The same basic facts are relied upon at different stages and are used to draw different inferences.

It is entirely intermediate inferences that are combined together to infer guilt – the circular process of the combination is all at least one step removed and remains rooted in the same evidence.

For example, the date of purchase is inferred from the combination of inferences derived from evidence:

(i) from Tony Gauci;

(ii) relating to the weather;

(iii) regarding the times football was shown on television; and

(iv) regarding the putting up and illumination of the Christmas lights.

This date of purchase is then combined with

(i) the proven circumstances of the appellant's presence in Malta on this date; and

(ii) the resemblance identification made by Tony Gauci

to enable the drawing of the inference that the appellant was the purchaser of the clothing.

The identification of the appellant as purchaser is then combined with other intermediate inferences such as the inference that the purchaser knew the purpose of the purchase in order to infer the fact in issue that the appellant was the perpetrator (acting with others). This is a convoluted process and its many failings are addressed below in section 4.2.

Accordingly on some – important occasions – the inference of guilt is based upon inferences built on inferences.

The potential dangers of remoteness and distortion are obviously very real in this kind of process. This structure or process of inferential reasoning carries with it important consequences.

Inherent weakness

This case is inherently weaker than one based, at least in part, on direct evidence in that:

- the basic facts relied upon are remote from the facts in issue;
- where two stages of inferences have the same evidential base, the same facts are stretched out in order to seek connection to the facts in issue;
- where two steps or more of inference are involved there is necessarily an increased danger of distortion; and
- where two steps or more of inference are involved, the probability of the truth in issue, the probative force, diminishes as the number of inferences increases.

The more complicated the process, the more there is a combination of basic facts needed to make inferences and the more reliance is placed upon other inferences to make further inferences, the more the probative force of the case is diminished. In short, the essential strands of the cable are loose and the length of the cable is long.

Import of intermediate inferences

Being wholly inferential, the ultimate inference of guilt or the verdict rests entirely upon certain of the intermediate inferences drawn. Accordingly, those intermediate inferences are crucial to the conviction.

The crucial inferences can be identified here as:

- The date of purchase was 7th December 1988;
- The appellant was the purchaser of the clothing;
- The purchaser knew the purpose of the purchase; and
- The ingestion of the IED was at Luqa.

For the verdict to be a reasonable one these intermediate inferences must, on the one hand, be reasonable in that they are soundly made and properly supported by the evidence; and, on the other, they must be capable of being sufficiently established beyond a reasonable doubt. In other words the intermediate inferences must be not just reasonable but the only reasonable inference to be drawn from the combined circumstances relied upon.

This consequence is akin to that which arises in cases of direct evidence where crucial evidence which underpins the conviction must be found established by corroborated evidence and found proved beyond a reasonable doubt.

If one does not submit these inferences to such scrutiny then one cannot properly test the inference of guilt which is based upon them. All that would be examined is the series of incriminatory inferences already in place, without any examination of the actual evidence.

Where such facts even when combined are inconclusive in the sense that they are quite as consistent with innocence as with the guilt of the accused, they cannot have any probative force. As such intermediate facts must be based on facts which, when taken together, concur toward the one conclusion.

Remoteness of the evidence

A so-called circumstantial case may amount to nothing. The cumulative effect of adding together ambiguous circumstances or pieces of evidence which amount to nothing may be nothing. This is not to be confused with the fact that in any circumstantial case each individual circumstance on its own may mean little, but when added to other circumstances is transformed into an incriminatory case which

has the required probative force. Rather it is to examine the pieces of evidence relied upon in the context of the whole, having made that combination with having regard to all the evidence, and to discover that nonetheless the circumstances relied upon still amount to nothing – or too little.

Again, as indicated, in this case the ultimate inference of guilt is wholly based on a series of inferential facts or intermediate inferences and there is no direct connection between evidence – evidential facts and the crucial facts - the *facta probanda*.

The mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with innocence as with the guilt of the accused, cannot have any probative force. As such intermediate facts must be based on facts which, when taken together, cohere and combine to support the one conclusion.

It is important here not to confuse a series of coincidences with aptitude and coherence. Coincidence does not necessarily produce the effect of combining circumstances such that they 'support and confirm' each other as to the truth of the fact at issue. Coincidence in itself is not enough – the coincidences must be sufficiently connected to the fact in issue. Coincidence may be just that.

One way of testing sufficiency – of reviewing remoteness - is to compare the combined circumstances relied upon, the actual evidence, with the fact in issue which it is contended they prove. So, for example, taking the fact in issue as proof that the appellant was involved in the commission of the offence, the relevant evidence is:

- The appellant looks like the purchaser of the clothing;
- Assuming the inference as to the date of purchase, the appellant could have bought the clothing as he was in Sliema;
- The device was placed in a radio in a suitcase;
- The timer used in the device was one supplied to the Libyan government
- Clothing from purchased from Mary's House was also in the suitcase
- The purchaser was Libyan

- Records from Frankfurt airport suggested there was an unaccompanied bag on the flight KM 180 from Malta
- The appellant was at Luqa airport on the morning that flight KM 180 departed
- The appellant was generally associated with both the supplier and the purchasers of the timers used and with military procurement;
- The appellant is Libyan

Just taking all the relevant evidence relied upon, without drawing any intermediate inferences, allows comprehension of the remoteness of the evidentiary facts from the facts in issue. Put another way, looking at the combined facts alone it can be seen that guilt is not the only rational explanation which they bear.

Case Examples:

The inherent weaknesses of wholly circumstantial can be seen from an examination of the cases.

Generally, examples of wholly circumstantial cases where the circumstances have been considered as lacking the necessary probative force tend to concern cases reliant upon the circumstances of opportunity where the Crown require to prove exclusive opportunity to carry conviction. Other examples are the finding of DNA or fingerprints at the locus. The circumstances of the finding are often crucial. So for example where fingerprints are inside a locked building there may be sufficient, but not where there is public access. (See examples in Walker & Walker, *supra*, at paragraphs 6.5.2 and also 6.2.2).

Slater v Vannet 1997 JC 226

In this case a break-in occurred at a market-place in Aberdeen from which the items were stolen from a number of units at the market. In one of these units the pannel's palmprints were found on a bag. The bag had no particular association with the unit. The pannel had been at the market on occasion and had been in premises from which items had been stolen but denied at the police interview that he had been within the

premises at which the plastic bag was found. Members of the public ordinarily had access to the market premises. On appeal Lord Cameron of Lochbroom in delivering the opinion of the court observed at 229D-E:

> "The mere identification of the appellant's palmprints on one of the plastic bags did not fix either the time or the place at which the prints came to be there. Nor did the evidence that the plastic bag was found within Unit 14 immediately after the break-in fix those premises as having necessarily been the premises in which the bag had been when the appellant's palmprints were placed on it. The premises were within a market to which members of the public ordinarily had access and which the appellant himself claimed to have visited prior to the break-in. In those circumstances it could not be suggested that there was no possibility of the palmprints having come to be on the plastic bag at some time other than that at which the crime was committed. That being so, the evidence at the conclusion of the Crown case was insufficient in law to identify the appellant as having been the intruder who broke into the units and hence the thief on the occasion charged."

Gilmour v HMA 1993 JC 15

This was a case of direct evidence and circumstantial evidence, where the direct evidence of rape by the complainer was sought to be corroborated by her torn pants which she said had been torn in the course of the assault. Lord Hope at p18A concluded:

> "I am not persuaded that any inference as to timing could be drawn merely from the damaged condition of the pants by being ripped sideways or the fact that the complainer was wearing them when she was seen by the police. An inference must be based on something if it is not to be just speculation. It is only if this requirement is satisfied that the matter can be left to the jury to decide on the quality of the evidence. An inference that the tearing of the pants occurred when the appellant was alone with her, if based on some independent evidence and not merely on speculation by the jury, would have sufficed to corroborate the complainer's evidence that it was the appellant who tore them.

> But the forensic evidence was neutral on this point, and there was no other evidence on which an inference as to the time of the damage could be based. In these circumstances the damaged condition of the pants could not be attributed, by inference from any independent evidence, to the appellant's actions when he had intercourse with the complainer. (Emphasis added).

Smith v HMA (*supra)*

This case is instructive here for two reasons:

First, it provides an example of a case involving a crucial intermediate inference which required to be found fully proved beyond a reasonable doubt. The crucial intermediate inference was, in a charge of being involved in the supply of drugs, that the appellant knew that the money he possessed was connected to such a supply. Whilst the court, wrongly (as discussed above), left this to the jury, it was clear that this inference was necessary to prove the accused's involvement in the commission of the crime.

Secondly, the Crown submissions at the appeal on how the circumstances could be interpreted as incriminatory through the drawing various inferences, which in turn would allow the inference of guilt to be drawn, is a good example of the distortion that can occur (see paragraph [11). The court found that there was no evidence to enable the inference to be possibly drawn. Yet the contortions of the inferences suggested by the Crown were used to suggest a sufficiency.

4.1.3 Examination of the intermediate inferences drawn

As noted, the relevant evidence which concerned the commission of the offence included the findings that the device or IED which caused the explosion had been concealed in a radio cassette player packed into a Samsonite suitcase (the primary suitcase). The trial court also found that in the primary suitcase was a quantity of clothing which had been purchased at Mr Gauci's shop. This was unchallenged at trial and is not challenged in this ground of appeal.

The process of reasoning which leads the trial court to the conviction of the appellant is set out in their opinion which is rehearsed at section 4.1.1 above.

Quality of Evidence

Separate to, but along with an assessment that the inference drawn is not properly supported by the evidence, can arise problems with the quality of the evidence. It is accepted that any assessment of the quality of the evidence is objective and must be such to conclude that no reasonable jury could have convicted on such evidence.

Unreasonable inferences

The intermediate inferences drawn by the trial court fall to be examined as to whether they are reasonable and properly or sufficiently supported on the evidence because they consist of the crucial intermediate findings made which are necessary to prove the facts in issue and from which the inference is guilt is directly derived. In this context the intermediate findings require to be reasonable and supported by evidence.

For the reasons set out fully below, it is submitted that some of the intermediate inferences drawn and relied upon were unreasonable having regard to the evidence for the following reasons:

1. There is absent from the circumstances sufficient aptitude and coherence between each other to entitle the inference to be drawn.

2. The combination of circumstances relied upon are too remote from each other or from the fact in issue to render the inference reasonable.

3. There is defective reasoning employed, which along with an absence of support from the evidence renders the inference drawn unreasonable.

4. There are proven and undisputed facts inconsistent with the inference drawn.

Insufficient proof of the intermediate inferences

In addition, it is submitted that having regard to the circumstances relied upon there is insufficient to find the crucial inferences established beyond a reasonable doubt. These are the material inferences necessary to reach the decision to convict. They consist of the inferences of the identification of the purchaser; the inference that the purchaser knew the purpose of the purchase, and the inference of ingestion of the primary suitcase at Luqa.

In other words,in each case, the (intermediate) inference drawn is not the only rational inference open on the evidence.

It is submitted these crucial inferences need to be not only reasonable or justifiable but also further require to be established or supported by sufficient evidence. That is, based on facts and circumstances which are corroborated or mutually corroborative – which taken together establish the intermediate evidence to the standard beyond a reasonable doubt.

In order to test that this standard is met, the specific test of sufficiency can be applied, namely that the inference drawn is the only rational one on the evidence. Not just reasonable but the only reasonable conclusion. The combined circumstances relied upon must compel the inference sought and exclude any other reasonable hypotheses.

4.2 THE APPELLANT WAS THE PURCHASER OF THE CLOTHING

4.2.1 Circumstances relied upon / Evidential base

The trial court's inference that the appellant was the purchaser rests upon the following:

- Acceptance of Gauci's resemblance identification;
- The inference drawn that the date of purchase was 7th December 1988; and
- The fact that the appellant was in Sliema, staying at the Holiday Inn, near to the Tower Road shops.

(see paragraph [88] of the Trial Court Opinion)

This last basic fact, that the appellant was in Sliema on 7th December 1988 was proved on documentary evidence (from hotel registration in his name and from travel documents) and was not disputed.

It is necessary here to examine:

- First the evidence of identification and the key findings made by the trial court on that evidence;
- Secondly, the nature and quality of that evidence;
- Thirdly, the evidential basis for the inference drawn as to the date of purchase and the reasonableness of that inference is considered;
- Finally, the combined effect of this evidence is considered and the reasonableness of the crucial inference that the appellant was the purchaser is considered.

4.2.2 The identification evidence of Tony Gauci

In general terms, the witness gave evidence that his recollection of events as reflected in police statements given at the time was better than in court (Day 31/4740).

DCI Bell gave evidence that the witness statements were taken in the normal manner, written by the police officer to accurately reflect what the witness was saying, read back to the witness and he signed to confirm his agreement (Day 31/4874-5).

Description

Evidence was led from Gauci that he was of opinion that the purchaser was Libyan (Day 31/4731). This view was based upon the language.

At trial in chief he described the purchaser as having a blue suit, being below 6ft, with normal stature, aged under 60, with black hair (Day 31/4752-3). He said in evidence that he had always said the purchaser was 6ft, not more than 6ft (Day 31/4789) which does not correspond to the prior statements **(**see below). He also gave evidence that the man bought size 16½ and 17 inch shirts (Day 31/4797).

In cross his prior statements which recorded his descriptions were led in evidence – although not specifically adopted. Namely:-

His first police statement (CP452) made on 1st September 1989 in which he described the purchaser as:

> ".... about six foot or more in height. He had a big chest and a large head. He was well-built but he was not fat or with a big stomach His hair was very black. He was speaking Libyan to me. He was clearly from Libya. He had an Arab appearance and I would say he was in fact a Libyan.... He was clean-shaven with no facial hair. He had dark coloured skin."

And in subsequent statements made on 13th September 1989 (CP 455) and 26th September 1989 (CP 459) he stated that the purchaser was aged about 50 years old (Day 31/4797).

Photo Shows & Procedures

Evidence was led regarding the conduct of a number of photoshows or identification procedures with Mr Gauci as follows :

Evidence was led regarding a photo fit (CP 430) and an artist's impression (CP427) the witness had made on 13th September 1989 and he confirmed the photo fit was a "very close" likeness and the artist's impression resembled the purchaser a lot (Day 31/4754).

On 14th September 1989, Gauci was shown photospreads (CP 425 & 426) consisting of two cards of photographs with a total of 19 photographs thereon. He selected a photo No 12 of (Mohammed Salem) in the terms that he 'is similar to the man who bought the clothing' but 'too young': 'If the man in the photograph was older by about 20 years he would look like the man who bought the clothing'. His statement also records that on being asked in what way the man was similar he said,

> "The photograph looks like the man's features at the eyes, nose, mouth and shape of face. The hair of the customer was similar but shorter to that in the photograph." (Day 31/4756 to 4758 and CP 458)

On 26th September 1989 Gauci was shown photospread (CP 431) and selected a photo of (Shukri Mohamed, 1.2.42) as 'a man who has the same hair style', but notes that 'this is not the man I sold the clothing to as the man in the photograph is too young' (Day 31/4760 and CP 461). The age of the person selected was 47 years.

On 31st August 1990 (Statement CP468) he was shown 2 photospreads. In respect of the first (CP438) he selected 4 photos from 2 sets of 12; one on the basis that No 9 was 'similar in the shape of the face and style of hair, but it was not the photograph of the man I have described' and that 3 others Nos 5, 6 and 7 were 'of men the correct age of the man I have described' (Day 31/4760-62 and CP468). The ages of the persons in photos Nos 5-7 is unknown. In respect of the second (CP437) Gauci did not select anyone.

In evidence Gauci accepted that it "could be" that he was shown photos on 10th September 1990 (CP 1244 album of 39 photographs with Talb at No 30) and that he did not pick anyone (Day 31/4764.) There was no statement produced. DCI Bell confirmed that P1244 was shown, excepting the photo of Saber, the copy photofit and copy artist's impression contained within the album. (Day 31/4876) and that no selection made (Day 31/4861). The other photographs shown on this date were not led in evidence. However the Crown established in evidence the passage in the statement of 10th September 1990 (CP 469) that Gauci stated that he had been shown many photographs over the last year, but he had never seen a photograph of the purchaser (Days 31/4770 and 32/4869).

Identification of Abu Talb - Incriminee

The following evidence was led:

First, as noted above, that on 10th September 1990, Gauci made no identification of anyone from an album photographs (CP1244) which included a photograph of Abo Talb. There was no statement produced.

Secondly, that on 6th December 1989, Gauci had been shown a selection of photographs which included a photograph of Abo Talb, but he made no identification of anyone from these photographs. There was no statement produced (Day 31/4765-4766).

At about the end of 1989 or the beginning of 1990 his brother showed him an article in a newspaper about the Lockerbie disaster (CP 1833). As he recalled, there were photographs of two people in the article. Across the photograph of the wreckage of Pan Am 103 there was printed the word "Bomber". In the top right corner of the article there was a photograph of a man (Talb) with the word "Bomber" also across it. Gauci stated that

> "I thought it was the one on this side, I thought. That was the man who bought articles from me." (Day 31/4767)

When the Advocate Depute put to Mr Gauci in evidence at the trial that the man in the photograph looked 'similar' to the man who had bought the clothes, Mr Gauci replied that it resembled him and he explained that the man's face and hair resembled the person who had bought the clothes from him (Day 31/4769).

Focus Photo

It was put in evidence to Gauci that he had been shown, towards the end of 1998 or the beginning of 1999, by another shopkeeper, an article from the Focus magazine containing a photo of the appellant (CP 451). Gauci stated that at the time he thought the photo looked like the man who bought from him, but his hair was much shorter and he didn't wear glasses (Day 31/4774). He showed the photograph to Inspector Scicluna and told him that he looked like the purchaser (Day 31/4775).

Photoshow of 15th February 1991

In February 1991, the Scottish police compiled a photospread (CP 436) of 12 photographs, which included a passport copy photo of the appellant (at No 8), supplied by FBI Agent Philip Reid. There was evidence that the photograph was the same as the photograph in the appellant's 1986 passport (see Appeal Court Opinion at paragraph 294). This photo was dull and DCI Bell stated that the brightness of the other photos were reduced to the same quality for fairness (see evidence of Bell Day 32/4877-8). Sight of the photospread demonstrates it is of a different size (much larger) and quality than other photospreads previously shown. The defence criticism that the police failed in the attempt to make the quality of all the photographs in the photospread (CP 436) similar (Day 83/9941) was rejected by the trial court as without validity (see Trial Court Opinion [62]). The Appeal Court observed that the trial court were fully justified to conclude the criticism had no validity (Appeal Court Opinion at paragraph [295]).

On 15th February 1991 Gauci attended police HQ to be shown the photospread (CP436) and his statement (CP 470) was put in evidence regarding the event (Day 31/4770). Present were DCI Bell, DC Crawford, Inspector Scicluna and FBI agent Reid (see evidence of Bell: Day 32/4863; 32/4877).

In his statement (CP 470) Gauci said:

> "The first impression I had was that the photographs were of men younger than the man who bought the clothing. I told Mr Bell this. I was asked to look at all the photographs carefully and try to allow for any age difference. I then pointed out one of the photographs. He said of the photograph selected "number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same. And his chin and shape of face are the same. The man in the photograph number 8 is in my opinion about 30 years. He would perhaps have to look about 10 years or more older, and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph resembles the man who bought the clothing but it is younger." (Day 31/4771-2)

Gauci identified the photo of the appellant as the one which he referred to in the statement (Day 31/4773). He also suggested in evidence that his statement that "He didn't have such long hair either. His hair wasn't so large" was true (Day 31/4773).

Gauci further specifically adopted the passage of the statement that "of all the photographs that I have been shown, this photo No 8 is the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me." (Day 31/4773).

<u>Identification Parade</u>

On 13th April 1999 the Scottish police arranged an identification parade to be held at Camp Zeist. The report of the conduct of the parade (CP 1324)) was produced and put in evidence. The appellant's solicitor attended the parade.
The original line up consisted of 2 stand ins obtained from the Netherlands and the other 9 stand ins came from the Metropolitan police (Day 32/4902).

The defence made a number of objections to the line up at the ID Parade, namely

1. Objections by reason of age to four stand ins

2. The incident to which the witness' evidence relates happened more than 10 years ago. In these circumstances a witness acting in good faith and genuinely trying to recall the event is likely to be guessing rather than making a true and reliable identification

3. In November 1991, when Mr. Megrahi was named as an accused in this case, his photograph was released to the press either by the police or the prosecution along with details of the alleged evidence in the case. Since November 1991, the photograph of Mr. Megrahi has appeared thousands of times in the printed and electronic media with the acquiescence or connivance of the Lord Advocate, who has failed to take any action under the Contempt of Court Act when it was applicable and, despite requests to do so, has failed to make any effort to restrain the media. Publication of the photograph has continued right up to the day the accused left Libya for the Netherlands. It is inconceivable that the witness will not have seen the photograph on many occasions. To ask the witness to make an identification now, or even at the trial, is grossly unfair and liable to lead to a miscarriage of justice.

4. The stand-ins available in the original pool of 11 are not sufficiently similar to the accused, particularly in terms of age and ethnic background. There is a difference in appearance between someone of Libyan background and someone from Algeria, let alone Holland or Italy.

These objections were noted in the report (CP 1324) and set out in the evidence of Inspector Brian Wilson (Day 32/4898- 4900). In response to the objections regarding the age of the stand ins, Inspector Wilson discarded them from the line up (Day 32/4901). In response to the other objections (2-3) acting on the instructions of Crown Office he took no further action and simply noted them (Day 32/ 4901).

The final line up consisted of the appellant and 7 stand ins (Day 32/4907). The details of the line up were recorded (CP 1324 p6/6) as follows:

a. Appellant (47) 5'8", stocky build, dark to grey curly hair,
b. Van Nijk (47) navy blue jeans black shirt and waistcoat : 6' medium build dark hair
c. Abdel Laiche (33) light top dark trousers : 5' 8" stocky build short dark hair
d. Jendoobi (38) light coloured casual top dark trousers : 5'9" stocky build short dark hair
e. Mhd Bousanguar: (49) light suit white shirt : 5' 3 " stocky build dark curly hair - greying and receding
f. Mhd Lezoul : (44**)** dark suit white shirt dark jacket & tie : 5' 7" stocky build short dark hair
g. Khacef (32)dark suit dark shirt : 5' 9" stocky build short dark hair
h. Zouggar (33) 5'8" stocky build dark curly hair

At the parade all the line up was noted as wearing track suits and casual outdoor footwear.

There were no other Libyans on the parade (Day 32/4902).

In evidence Gauci recalled attending the identification parade. He stated that he looked at the line up and told the police this case was 11 years ago and that he believed the man who came in my shop is No5 (Day 31/4776). He then accepted the statement recorded at the time that he said:

> "Not exactly the man I saw in the shop 10 years ago. I saw him, but the man who look a little bit like exactly is the No 5" (Day 31/4777 and CP 1324).

<u>Dock Identification</u>

Toward the end of evidence in chief, after leading evidence related to the prior procedures (including the photo show on 15th February 1991) and immediately after showing the witness the Focus Photograph, the Advocate Depute asked Gauci if he could see the purchaser. Gauci pointed to the appellant and stated:

"He is the man on this side. He resembles him a lot. On this side, my side… [N]ot the dark one, the one next to him. That is the man I see resembles the man who came.

Q You can see that of the two gentlemen sitting between the police officers, one is wearing glasses and one is not wearing glasses. Which is the man you are talking about?

A The one -- the man without glasses." (Day:31/4777-8).

4.2.3 Findings of the Trial Court

The trial court reviewed the identification evidence and paid particular regard not just to the content but the manner in which the witness gave evidence in reaching the conclusion that in respect of his identification Gauci was reliable. The key findings by the Trial Court made in respect of Gauci's identification evidence were:

- The purchaser was a Libyan (paragraph [67]).

- The evidence of Tony Gauci regarding the list of clothing that he sold was reliable (paragraph [67]).

- The identification of the appellant by Tony Gauci "as far as it went" was reliable and highly important (paragraph [69])

- Tony Gauci was a credible and careful witness regarding the identification (paragraphs [67] and [69]).

- Tony Gauci was genuine in his belief of the correctness of his selection of the appellant as having a close resemblance (paragraph [69]).

Nature of the Identification Evidence

However it is not at all clear from the judgment what exactly the identification evidence amounted to. The trial court's conclusion as to what that identification consisted of is variously expressed, as " so far as it went", "not unequivocal" and "not absolute" (paragraphs [69], [88] and [89]).

> "[69] We accept of course that he never made what could be described as an absolutely positive identification, but having regard to the lapse of time it would have been surprising if he had been able to do so. We have also not overlooked the difficulties in relation to his description of height and age. We are nevertheless satisfied that his identification so far as it went of the first accused as the purchaser was reliable and should be treated as a highly important element in this case." (Emphasis added)

This appears to suggest that although "not absolutely positive" the evidence of Gauci was of a positive identification of sorts. The qualification of the terms of the identification is explained by reference to the lapse in time which suggests that without this, there would have been no qualification. This reads as if the evidence is being treated as a positive identification – that is evidence which identifies the appellant as the purchaser, not that he resembled him. If so this is incompatible with the evidence.

> "[88] A major factor in the case against the first accused is the identification evidence of Mr Gauci. For the reasons we have already given, we accept the reliability of Mr Gauci on this matter, while recognising that this is not an unequivocal identification. From his evidence it could be inferred that the first accused was the person who bought the clothing which surrounded the explosive device. We have already accepted that the date of purchase of the clothing was 7 December 1988, and on that day the first accused arrived in Malta where he stayed until 9 December. He was staying at the Holiday Inn, Sliema, which is close to Mary's House." (Emphasis added)

Again the identification whilst not "unequivocal" is viewed here as a positive identification. If the passage "from his evidence it could be inferred the appellant was

the purchaser" is interpreted as a reference only to his identification evidence, then this plainly wrong.

Finally in listing the combination of circumstances relied upon in convicting in paragraph [89] reference is made to " the identification of the first accused (albeit not absolute)". Again this appears to view the identification evidence of Gauci as amounting to a positive identification.

4.2.4 Appeal Court Decision

At the first appeal, the Crown's primary submission, as at trial, was that the evidence of Gauci should be viewed as a positive identification of the appellant as the purchaser. Alternatively, the trial court was entitled to take Mr Gauci's identification by resemblance as far as it went, and add to it the evidence as to the date of purchase and the evidence that the appellant was in Malta on that particular date (see Appeal Court Opinion at paragraph 285). The primary submission was expressly rejected by the appeal court which found that the evidence was of a resemblance identification only.

The appeal court interpreted the trial court opinion as having found that the appellant was the purchaser based on the resemblance identification together with the evidence that the appellant was in Sliema on the date of purchase. This follows the prior inference drawn that the date of purchase was the 7th December 1988.

> "[293] In para [88] the trial court, while recognising that there had been no unequivocal identification of the appellant by Mr Gauci, states: "From his evidence it could be inferred that the first accused was the person who bought the clothing which surrounded the explosive device." Mr Taylor submitted that an identification by resemblance could not, on its own, justify the inference that the appellant was the purchaser. The Advocate depute sought to justify the statement by suggesting that, while Mr Gauci's identification was not absolutely positive, it could nevertheless be regarded as a positive identification (*Gracie v Allan*, *supra*). In our opinion, that submission is

misconceived. It is clear, and the trial court recognises, that Mr Gauci did not make a positive identification of the appellant. However, the trial court refers, in the next sentence of para [88], to the fact that it has already accepted that the date of purchase was 7 December 1988 when the appellant was shown to have been in Malta. The evidence of the date of the purchase was based primarily on Mr Gauci's evidence. In the circumstances it seems to us that the trial court was simply saying that Mr Gauci's evidence of identification by resemblance taken along with evidence as to the date of the purchase, when the appellant was proved to have been staying in Sliema, enabled the inference to be drawn that he was the purchaser." (Emphasis added).

Accordingly, it is clear from the Appeal Court Opinion that, notwithstanding the apparent position of the trial court, the inference that the appellant was the purchaser drawn by the trial court required to rest upon the resemblance identification, the inference that the date of purchase was 7th December 1988 and the fact that the appellant was in Sliema, staying at the Holiday Inn, near to the Tower Road shops.

4.2.5 Nature and Quality of the Identification Evidence

Within the Grounds of Appeal (Ground 2.1.1(1) (page 11) and Ground 2.2.1 (page 31)), the appellant makes a challenge based on the fact that the evidence of identification only amounted, properly construed, to a resemblance identification. This issue is raised both under the heading of defective reasoning and on the basis that it was unreasonable on the evidence.

Resemblance identification evidence

A positive identification is where the witness selects the target as the perpetrator. This can be expressed in terms which convey more or less confidence in that selection. For example – from "that is the man" to "I think he may be the man" or " I am not sure but I think he is the man."

In distinction to this kind of positive identification, a witness may make a resemblance identification where he selects the target as looking like or being similar to the perpetrator. This is not evidence that the target is the perpetrator but only that he (and no doubt many others) looks like or has similar features to the perpetrator. This too may be expressed in terms which express varying strengths of resemblance. If the feature of resemblance relied upon is very unusual and distinctive then it can considerably strengthen the effect of the resemblance identification.

Where a witness is asked if he can identify the perpetrator and does not do so, expressly or otherwise and even where he thereafter responds with a resemblance selection, the starting point is a non-identification.

Terms of this Identification Evidence

It is necessary to consider carefully the actual terms of the selections of identifications made.

The Photo Show on 15th February 1991

At the photo show on 15th February 1991 the witness initially rejected all of the photos on the basis of age and upon instruction to set aside that criterion he selected the appellants photo as similar to the purchaser, but too young.

> "The first impression I had was that all of the photographs were of men younger than the man who had bought the clothing. I told Mr. Bell this. I was asked to look at all the photographs very carefully and to try and allow for any age difference.... I then pointed out one of the photographs (#8). I would say that the photograph at number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same, and his chin and shape of face are the same. The man in the photograph ... is in my opinion in his thirty years. He would perhaps have to look about ten years or more older, and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph

umber 8 resembles the man who bought the clothing, but it is younger." (Day 31/4771-2 emphasis added)

Accordingly here the witness not merely qualified his resemblance selection but made it on the basis that the man in the photo selected (the appellant) was not that the purchaser because he was too young. But he then went on to identify the features of resemblance.

The witness also adopted the passage in his police statement (above) that:

> "…of all the photographs that I have been shown, this photo No8 is the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me." (Day 31/4773)

This latter statement does no more than suggest that in a comparison or relative judgment of all the photos shown previously, the appellant's photo was 'the only one really similar". This does not enhance any similarity found between the appellant and the purchaser. There is no departure from the earlier negative and qualifications made regarding the photo compared to the purchaser.

The Identification Parade

At the parade the witness selected the appellant on the basis that he was "Not exactly the man I saw in the shop 10 years ago. I saw him, but the man who look a little bit like exactly is the No 5" (Day 31/4777). The words 'not exactly the man' can only mean that he is not the purchaser. The suggestion that he "look a little bit like exactly" can only mean evidence of resemblance. This is a selection on the basis that he is not the purchaser but looks like him. The starting point is exculpatory.

Dock Identification

In court a resemblance selection was made in the terms that - "He is the man on this side. He resembles him a lot." And "On this side, my side… not the dark one, the one next to him…. That is the man I see resembles the man who came." (Day 31/4777-8)

This is not qualified or does not involve the negative given previously where the target is first excluded as being the purchaser. It is also however given without any specification.

Non-Identification Response

From the evidence led it is clear that Mr. Gauci gave unambiguous non-identification responses to each of photospreads he was shown and which were led in evidence, including the photospread containing the appellant's photograph shown to him on 15th February, 1991.

For example, as rehearsed above:

- On 14th September 1989, Mr. Gauci selected a photo of Mohammed Salem on the basis that " the photo is similar... the man in the photograph is too young to be the man who bought the clothing. If the man was older by about 20 years, he would look like the man…" (Day 31/4756 to 4758 – emphasis added)

- On 26th September 1989 he selected a photo of Shukri Mohamed (aged 47 years) as 'a man who has the same hair style', but notes that 'this is not the man I sold the clothing to as the man in the photograph is too young'. (Day 31/4760 – emphasis added)

- Hence in September 1990, by which time he had been shown a large number of photographs, he had stated that he had never seen a photograph of the man who had bought the clothing. (Days 31/4770 and 32/4869 and CP 469 at 7)

- On 15th February 1991 again very similar terms were used, as rehearsed above (Day 31/4771-2).

In addition, at the identification parade, his response to the question whether he saw the man began with the statement "Not exactly the man" – another non-identification response.

Generality of Resemblance

At the appeal the defence sought to undermine the resemblance selection of the photo on 15th February on the basis that it was made in similar terms to the resemblance selections made of M. Salem and of Talb. The appeal court rejected this –

> "[292].... In any event, the fact that the witness had stated that two other men, in addition to the appellant, resembled the purchaser does not, in our opinion, detract from the evidence relating to the appellant. The evidence that the appellant resembled the purchaser was simply one of the circumstances founded on by the Crown as forming part of the circumstantial case against the appellant and, of course, all the other circumstances had to be taken into account as well."

But the real point, which is not addressed, is that these prior selections were made in almost identical terms about different men. This goes to show how little the value of resemblance identification is. Many people could be so selected. It does not in itself point to the appellant being the purchaser.

Any resemblance identification is of a very limited value. Unspecified descriptions of close resemblance or "looks very like" do not take a resemblance any further. Only where the features relied upon in making the resemblance are obviously rare or separately identified as unique can this amount to evidence which can be properly called an identification of the accused. Otherwise all the witness has said is that the target looks like the perpetrator. In the present case, the Crown did not seek to establish any basis or specification of the resemblance made in court. At best all the evidence amounts to is that the appellant looked like the purchaser.

Legal treatment of resemblance identification

In Scottish courts resemblance identification has traditionally only been relied upon as circumstantial support or corroboration for a separate positive identification (see for

example *Ralston v HMA* 1987 S.C.C.R. 467, *Nelson v HMA* 1988 S.C.C.R. 536 and *MacDonald v HMA* 1997 SCCR 116).

In *MacDonald v HMA (supra)* there was circumstantial evidence from a witness, Brian Hill, to the effect that the appellant was "not unlike" the driver of the white car. The defence submitted that this was so weak as not to amount to identification at all. The use of a double negative by the witness demonstrated that what he was speaking to was not in any sense a positive identification. And that even if this evidence could be regarded as a statement that the appellant resembled the driver of the white car, and therefore as evidence that the appellant resembled the perpetrator, there was no positive identification from any other source which Brian Hill's evidence could corroborate. This was different to previous cases.

The Lord Justice Clerk, Lord Ross concluded at 120 –

> "We recognise that there have been a number of cases where evidence from a witness to the effect that the accused resembled the perpetrator was held to be sufficient to corroborate a positive identification of the accused provided by another witness. But in the present case there was no positive identification of the accused. We are satisfied that Brian Hill's statement that the appellant 'doesn't look unlike him' cannot amount to a good identification of the appellant. It cannot be treated as a positive identification of the appellant as the perpetrator. Even though the witness explained that he made that statement having regard to the build and facial appearance of the accused, we are satisfied that his evidence fell short of amounting to a positive identification. Accordingly, in the present case we are not in the position of having a positive identification by one witness for which corroboration is required. <u>In the present case there is a total lack of any positive evidence of identification, and even if Brian Hill's evidence should be treated as the equivalent of a statement that the appellant looked like the driver, it is insufficient to constitute positive identification of the accused as the driver.</u>" (Emphasis added).

In *Ballantyne v MacKinnon* 1983 S.C.C.R. 97 regard was had to the quality of the identification evidence. The Sheriff found one witness had identified the accused

because she knew someone similar and the second witness had said the accused resembled one of the group of perpetrators. This was regarded as insufficient by the court. This view was fortified when the appeal court examined the adjustments in the stated case and found that the evidence of the first witness was that she had only seen the accused from behind and the second witness had failed to identify the accused at a parade. Therefore, despite the first witness selecting the accused as the perpetrator, the terms of that selection suggested a weak identification (later reinforced by discovery of the conditions of the identification) and this coupled with a resemblance identification was insufficient.

The point here is addressed in the Australian case of *Pitkin v R* [1995] HCA 30 69 ALJR 612; (1995) 130 ALR 35 where the identification evidence consisted of a resemblance identification from photographs and what the appeal court viewed as a 'coincidence' of descriptions from the two witnesses. That coincidence was found on appeal only to be that of very generalised descriptions, which did not identify the offender. The court emphasised that where the Crown case relied upon identification evidence that evidence must be positive, clear and unambiguous. Resemblance is "nothing more than the person depicted in the ...photographs looked like the offender" and " the plain fact remains that the words (looks like) were consistent with an absence of positive identification". As such the evidence was incapable of sustaining a finding of identification by a reasonable jury and it could not be said that the evidentiary circumstances bore no other reasonable explanation.

Conclusion

Accordingly Gauci's evidence is a series of non-identification responses – where the starting point is the purchaser is not there. This negative, the ruling out of the presence of the purchaser, is usually made on the basis of age. The response of the witness on the 15th February 1991 was that a photo of the purchaser was not there – all of the photos were of men too young. Even although on that occasion there was a subsequent selection made under instruction to exclude the basis given for non-identification, this has to be viewed from this exculpatory starting point. The resemblance selection made on the 15th February was not properly a selection at all. The exculpatory starting point undermines any selection made.

Mr. Gauci's identification evidence was consistent in noting, in varying degrees, that the appellant resembled the man who bought the clothing and consistent as well in that he never asserted that the appellant *was* the man who bought the clothing. This latter aspect was not recognised by the trial court.

At appeal the Crown submitted that while this identification had been qualified by Mr Gauci's comment that the man in the photograph would need to be 10 years or more older to look like the purchaser, "that qualification lost its significance once it was appreciated that there was no evidence as to the age of the appellant at the time when the photograph was taken." (Appeal Court Opinion at paragraph 287). This fails to appreciate the significance and exculpatory nature of the negative response.

First, it should be appreciated that the Crown submissions here are predicated on the view that the witness had estimated the age of the person depicted in the photo as 30 years old whereas this is not what was said. The witness stated the person depicted was "in his thirties". Accordingly the evidence properly takes the qualification closer to his usual estimate of age.

Secondly, it fails to take into account the totality of Gauci's evidence as to the age of the purchaser. It is clear from the whole evidence given regarding age that Gauci consistently identified the purchaser as being considerably older than the appellant. When the witness initially stated that the photo of the appellant was too young this was consistent with his description of the purchaser.

The Appeal Court were not properly addressed on this issue and concluded there was "little force" in criticisms about the 'qualifications' made about age at this procedure in the absence of information as to the age in the photograph (Appeal Court Opinion at paragraph [294]). Accordingly the negative nature of the response made– pointing away from the appellant - and the limited value of the selection made at this procedure, has not been addressed.

The terms of the "identifications" made at the procedures prior to court do not amount to any proper identification at all. Even if viewed individually as evidence of

resemblance “so far as it went” their value is essentially negative because the selections made are couched in terms which distinguish and exclude the target selected from the purchaser. If the dock identification here had also been made in such terms then arguably there would no proper identification of any kind.

It is only the dock identification made that can carry the resemblance any distance. This is significant in consideration of the very poor quality of that evidence.

Standing alone, in the sense that there is no other evidence positively identifying the accused, then it is essentially worthless.

4.2.6 Reliability of the identification evidence

Within the Grounds of Appeal (Ground 2.2.1 page 31), the appellant challenges the reasonableness of the identification inference on the basis that the quality of the resemblance identification evidence was so poor that no reasonable jury could rely upon it to convict. There were significant inconsistencies in Gauci’s evidence which undermine the reliability of the resemblance identification made. The appellant also highlights that there were a number of factors which exacerbated the serious risks attached to eye witness evidence and which significantly increase the risk of mistaken identification (these are set out in detail in grounds 3.1 and 3.2).

Description

The trial court acknowledged that the description did not match the appellant and that there was a substantial discrepancy in respect of height and age (Trial Court Opinion paragraph [68]). It also noted that when making the dock identification Gauci referred to “Not the dark one, the other one” when in his initial description he described the purchaser as having dark coloured skin. (also at paragraph [68]).

In fact the inconsistency as to age was persisted in and it was a view strongly held by the witness. He repeatedly placed the purchaser in an age range of 45-60 years or more. He gave an emphasis to the question of age, beyond other features – in that, for

example, he repeatedly rejected photospreads on the basis of age (see, for example, 14/9/89, (Day 31/4756 to 4758); 26/9/89 (Day 31/4760); 15/2/91 (Day 31/4771-2).

As such this discrepancy, in the context of the negative and qualified selections made, has considerable force.

Passage of time

The passage of time involved here is on any view extraordinary. The witness Tony Gauci was first interviewed, and first provided a description, on 1st September 1989 regarding an event which he suggested took place in about November or December 1988. There was a gap of at least 27 months between purchase and the 15th February 1991 photo show. The identification parade took place well over 10 years later and the identification of the appellant in court took place more than 12 years after the event.

It has long been recognised that the passage of time undermines the reliability of identification evidence. Scots law has long recognised the importance of the proximity between the event and the identification made by giving preference to the earlier identification (see Alison (*supra*) Volume 2, 627-9; Dickson (s*upra*) Vol I at para 263; The Thomson Committee Report – Criminal Procedure in Scotland: Cmnd 6218 (1975) at 46.10; *Holland v HMA* 2003 SCCR 616 per Lord Justice Clerk, Lord Gill, at [30]).

Other circumstances exacerbate the effect of this passage of time:

First, this was a stranger identification. Whilst this is not a "fleeting glance" situation, the identification relied upon is that of a complete stranger.

Secondly, whilst Mr Gauci explained (in his first statement to the police CP452) his ability to recall this particular sale on the basis that

> "There was something odd about the man's behaviour. He was looking at things. It wasn't important for him what he was buying" (Day 31/4732).

Nonetheless, it cannot be suggested that this event is all that remarkable. In the 12 years between giving evidence and the transaction in question the witness continued to work in the shop and continued to make countless other sales and transactions. This has to increase the risk of the reliability to recall the particular event in question.

Thirdly, there was within the passage of time significant exposure of the witness to post-event information. Although this was not raised as such nor explored in any detail at the trial, there is an obvious risk to be inferred from the general circumstantial evidence that within this 12 year period the witness was exposed to 'post-event' information likely to interfere with his recall of the event, such as discussions related to the offence with neighbours, other shopkeepers and within the family. Or from prejudicial publicity, where it is known that he had seen at least one prior photo of the appellant (in the Focus magazine CP 451 -Day: 31/4773-75).

The extreme nature of the gap between the event and the identification is such as wholly to undermine the value of the evidence. So much so that it is not simply a matter of weight. Rather it is such that it is unreasonable to rely upon any kind of identification made, in the face of this gap in time.

<u>Conduct of the Procedures</u>

There were significant factors which undermined the reliability of the evidence arising from the conduct of the identification procedures. Again these were not raised or examined in detail at trial but nonetheless were obvious from the evidence led.

The Photo Show on 15th February 1991

(a) The difference in quality of the photograph of the appellant.

The defence criticisms of this at trial involved a concession that this was a matter of subjective opinion (Day 83/9938) and no evidence was led to support this submission.

Notwithstanding the rejection of this criticism by the trial court (paragraph 62) and the appeal court (at 295) it is submitted that on examination of the actual production (CP 436), on any view the appellant's photograph was distinct from the others shown.

(b) Use of Investigating Officers

It is well recognised and best practice that the officers who conduct identification procedures do not themselves know the position of the target in any line up – whether it be photographs or at a parade. This is because of the known risk of inadvertent cues being communicated to the witness – what you do not know you cannot leak. In this procedure there were at least 4 officers present and conducting the procedure who all knew the position of the target photograph.

(c) Irregular Conduct

After the witness told DCI Bell that all of the photographs were of persons too young to be the purchaser, he was told to discount his objection and to look again carefully and try to allow for any age difference. This conduct is irregular and introduced a significant risk to the reliability of any subsequent identification in that it could reasonably be viewed as a prompt or suggestion that the man was there. The witness's negative response was not accepted and he was told to try again. This was likely to be all the more forceful in that similar responses on prior occasions had not been met with this rejection. It is noticeable that the response to trying again in the selection of No 8 was couched in terms of a relative judgment being made – "It's been a long time now, and I can only say that this photograph resembles the man who bought the clothing but it is younger." (Day 31/4771-2). Accordingly the circumstances in the way DCI Bell conducted the procedure were both irregular and liable to induce error.

The Identification Parade

(a) Prior Photographs

The witness had already selected the appellant from the photo show and in addition and closer to the parade, the witness had seen and selected the Focus magazine

photograph of the appellant. This in itself substantially undermines the value of any subsequent identification procedure.

(b) Line Up Composition

It is perhaps obvious that the composition of any line up with an accused must bear a reasonably similar relationship to the features or appearance of that accused to enable a fair and more reliable procedure.

In this regard the SHHD Guidelines (*supra*) require that stand-ins should be "persons of similar age, height, dress and general appearance" and provide for accurate recording of details of the stand ins to allow scrutiny of the comparison (see paragraphs 10 and 28). By way of comparison, in England a video is required.

Here, although there was nothing made of it by the defence at trial, the objections to the composition of the line up were led in evidence as was the Report (CP1324) providing the details. It can be seen that

(i) The first objections made at the parade are to four specific stand-ins on grounds of age. The age of these four men ranges from 25 – 35. The appellant was 47 at the time of the parade. These stand-ins would have been aged 15 – 25 years of age when the purchaser visited Mr Gauci's shop. Therefore these stand-ins cannot be considered to be plausible foils. The response to the objection was to simply remove the 4 men from the line up which left 7 stand ins.

(ii) The remaining and final line up was objected to on the basis that the persons involved did not sufficiently resemble the appellant particularly regarding age and nationality. Nothing was done in response to this objection. There are serious discrepancies in that:

Age: The ages in the final line up were : 32, 33, 33, 38, 44, 47 & 49 years respectively. Four of these stand-ins are implausibly young when considered in similarity to the appellant (47) or in their match to the

witness description of the culprit as about 50 in 1988 (i.e. about 61 at the time of the parade)

Race: There were no other Libyans on the parade. Only six out of the twelve original stand ins could be described as being of Arabic extraction.

Height: One of the stand ins could be easily discounted at a height of 5' 3".

As a result it would be easy for the witness quickly to rule out at least 5 of the stand ins on the grounds of age and height. In other words there were only two plausible possibilities. This renders the selection of the appellant much more likely and far less reliable.

Dock Identification

Dock identification is a highly suggestive procedure. It is usually obvious who it is the witness is expected to identify. In this case nothing was left to doubt. Prior to asking the witness if he saw the purchaser, the Crown had led the witness through all the prior procedures and in particular shown him the photos of the appellant he had previously selected. The Focus photo was shown immediately before the dock identification was sought (Day 31/4774 and 4777).

Accordingly the unlikely possibility of confusion with the other accused (who had a moustache) was effectively removed. This identification in the way it was led and in view of the fact it was preceded by the prompts of photographs was essentially worthless.

In *Holland v HMA* 2005 1 SC (PC) 3 Lord Rodger recognised the drawbacks of dock identification –

> "[47]....Similarly, the Advocate Depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the

> dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification.
>
> [48]. These criticisms are at their most compelling in a case like the present where a witness who has failed to pick out the accused at an identification parade is invited to try to identify him in court. The prosecutor is then seeking to use evidence obtained in circumstances which carry a heightened risk of a false identification, when he knows that the witness was unable to identify under the controlled conditions of an identification parade. By leading and relying on such evidence, the prosecutor is introducing into the trial this particular element of risk. "

Here the Advocate Depute courted that risk. Whilst there had been here a prior parade, there was no positive identification at it.

Useful observations on dock identification were made by Justice Rowles in Court of Appeal in British Colombia in *R v Reitsma* 1997 CanLII 3607 – which comments were approved on appeal by the Supreme Court *R. v. Reitsma,* [1998] 1 S.C.R. 769.

> "[59] The identification of an accused person for the first time "in the dock" is generally regarded as having little weight. In a dock identification the witness is obviously not required to pick out the person whom he claims to have seen from among a number of other persons of similar age and size and general physical appearance. In a courtroom identification there is also the danger of the witness anticipating that the offender will be present. That danger is accentuated when an accused is readily identifiable in the courtroom as the person accused of the crime. Identification of an accused for the first time in the dock is analogous to a police "show up" in which the only person shown to

> the identifying witness is the suspect, and for that reason it is open to the same criticism. Generally, anything which tends to convey to a witness that a person is suspected by the police or is charged with the offence has the effect of reducing or destroying the value of the identification evidence."

(See also Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases Chairman: Rt. Hon. Lord Devlin (1976) at 8.7)

In these circumstances no reasonable trier of fact could properly attach any weight to this dock identification.

4.2.7 Conclusion on the nature, quality and reliability of the identification evidence

The quality of the identification is fatally undermined by each and all of these factors - i.e. the non-identification responses and the qualified terms of the resemblance selections made at these procedures; the risks introduced in the conduct of the procedures; the witness' prior exposure to photographs of the appellant; the substantial discrepancy in his description given at the outset and the wholly exceptional length of time involved. Each of these factors is somewhat extraordinary – such as the length of time and the negative terms of the selections made. The combination of these factors is exceptional. Taken together they necessarily undermine the probative value of the evidence to such an extent as to render reliance upon it unreasonable.

This issue, the quality of the resemblance identification is one which is appropriately addressed in assessing the reasonableness of the verdict. A good example of this can be seen from the Canadian case of *R. v. Tat* 1997 CanLII 2234 (ON C.A) in which Justice Doherty states:

> "[98] The review directed by s. 686(1)(a)(i) is a limited one for very good reasons. The appellate process is not well suited to the assessment of the

> cogency of evidence led at trial. Appellate courts can claim no particular expertise in the second hand evaluation of evidence. Appellate assessment of the factual merits of a case is not likely to be more reliable or accurate than the judgment made at first instance. Consequently, it is only in the clearest cases where the result at trial can be said to be unreasonable that appellate intervention is warranted. A verdict is unreasonable only where the appellate court is satisfied that the verdict is one that a properly instructed trier of fact acting judicially could not reasonably have rendered: *R. v. Corbett* (1973), 14 C.C.C. (2d) 385 at 389 (S.C.C.); *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 at 430 (S.C.C.); *R. v. S. (P.L.)* (1991), 64C.C.C. (3d) 193 at 197 (S.C.C.).
>
> [99] While recognizing the limited review permitted under s. 686 (1)(a)(i), convictions based on eyewitness identification evidence are particularly well suited to review under that section. This is so because of the well recognized potential for injustice in such cases and the suitability of the appellate review process to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness: e.g. see *R. v. Miaponoose, supra*; *R. v. Biddle* (1993), 84 C.C.C. (3d) 430 at 434-5 (Ont. C.A.), rev. On other grounds (1995), 96 (3d) C.C.C. 321 (S.C.C.); *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.).
>
> [100] The extensive case law arising out of the review of convictions based on eyewitness identification reveals that the concerns about the reasonableness of such verdicts are particularly high where the person identified is a stranger to the witness, the circumstances of the identification are not conducive to an accurate identification, pretrial identification processes are flawed and where there is no other evidence tending to confirm or support the identification evidence. All four factors exist here."

Here too the same factors apply. Here it can also be said the reliance upon this quality of identification evidence conflicts with the bulk of judicial experience (*E v HMA supra* at [30] *and R v Biniaris supra* at [39]-[40] – above at 3.2.4).

4.2.8 Date of Purchase: Circumstances Relied Upon / Evidential base

As noted above (in section 4.2.4), the appeal court concluded that the trial court's finding of the identity of the purchaser was dependent upon, *inter alia*, its conclusion relating to the date of purchase.

The circumstances relied upon by the Trial Court were a diffuse collection of a series of facts which can be grouped in the following way:

1. Evidence of supply of Yorkie Trousers on 18th November 1988
2. Day of the Week
3. Gauci's Evidence: that the date of purchase must have been about a fortnight before Christmas
4. Evidence regarding the Christmas Lights
5. Evidence Regarding Paul Gauci Watching Football
6. Evidence of Football Matches
7. Evidence of the Weather

<u>Evidence of supply of Yorkie Trousers on 18th November 1988</u>

The undisputed evidence was that the clothing found in the primary suitcase included a pair of tartan patterned Yorkie brand trousers, size 34 (Evidence of Thomas Hayes - Day 16/2465-6; 2475; 2499; FEL Joint Report section 5.1.2 and Trial Court Opinion at paragraph [10]). A fragment of the tartan Yorkie trousers that was found contained an order number (1705). That order was delivered to Tony Gauci's shop in Sliema, Malta on 18 November 1988 (Armstrong Day 14/2195-2202; and Trial Court Opinion at paragraph [12]). Gauci gave evidence that this pair of trousers was sold to the purchaser along with the other clothing and umbrella identified as having been found in the primary suitcase (See evidence of Gauci 31/4732-8 and Trial Court Opinion at paragraph [12]).

From this evidence the trial court concluded that the date of purchase must have been sometime after 18th November 1988.

Day of the Week

In evidence Mr Gauci clearly stated that he had no idea what day of the week it was (Day 31/4779). In cross he was reluctant to agree even that he had told the police that the date of purchase was a weekday (Day 31/4803). He then agreed (under reference to his police statement dated 19th September 1989 (CP 454)) that he had said that he was sure it was midweek when the purchaser called. When asked what he meant by "midweek" he responded "Certainly not a Saturday", and immediately sought to qualify this further by adding "I don't want to give you a date or say it was a Friday" (Day 31/4810-11). Under reference to the same statement, he was then asked what he would have in mind when using the word "midweek". Mr Gauci responded "Wednesday, I think. That's how I see it" However this was immediately qualified with the statement "But I stress the point, I don't know dates. I don't know the dates." (Day 31/4819-20). In response to the suggestion that "midweek" could be narrowed down to Tuesday, Wednesday or Thursday, he then responded "I think that Wednesday is midweek." (Day 31/4821)

Prior Statements

From the prior statements put to Mr Gauci, the following was clear to the trial court:

In his first statement (dated 1st September 1989 (CP 452), Gauci had told the police that he could not remember the day of the week on which the transaction took place, although he thought it would have been a weekday (Day 31/4793).

In a subsequent statement (dated 19th September 1989 (CP454)), Gauci said he was "sure it was midweek when the purchaser called" (Day 31/4810).

In his later "review" statement (dated 10th September 1990 (CP469)) Gauci, when asked "to again try to pinpoint the day and date" of the purchase, again told the police he could only say it was a weekday (Day 31/4802).

Evidence about the date being about a fortnight before Christmas

In general terms the witness gave evidence that his recollection of events as reflected in his police statements was better than it was in court (Day 31/4740).

In evidence Mr Gauci stated that he couldn't remember the date of purchase but could remember all the clothes he had sold. He then immediately stated – for the first time - "slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas, but I can't remember the date." (Day 31/4730).

Subsequently, after consideration of various delivery notes, Mr Gauci was asked again about the sale being a fortnight before Christmas. He responded :"Something like that, yes. Not exactly, because I did not have -- possibly did not have the system we have today... We didn't know exactly when you sold an item." (Day 31/4738-9).

Prior Statements

From the prior statements put to Mr Gauci, the following was clear to the trial court:

In his first statement (dated 1st September 1989 (CP 452)), Gauci had told the police that the transaction took place some time in the winter of 1988 (Day 31/4786) and that he could not remember the date (Day 31/4793).

In a subsequent statement (dated 19th September 1989 (CP 454), Gauci said "we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes" (Day 31/4809).

In a subsequent statement (dated 21st February 1990 (CP 466)), Gauci referred to the man who bought the clothing in "November or December 1988" (Day 31/4815).

In his later "review" statement (dated 10th September 1990 (CP 469)) Gauci, when asked "to again try to pinpoint the day and date" of the purchase, told the police he believed "it was at the end of November" (Day 31/4802).

Evidence regarding the Christmas Lights

The date of purchase was then explored with the witness by relation to the putting up of the Christmas lights or decorations. To comprehend properly the nature of this evidence it is necessary to examine all that was said:

Mr Gauci was asked how long before Christmas the lights were put up and he responded by saying he did not know – but he thought the Christmas lights "were on already" (Day 31/4739).

Having agreed that his recollection at the time of giving police statements was better than it was now, he was then asked if it might be correct that he had told the police, in one of his interviews, that the sale was made before the Christmas decorations went up. He responded again that he did not know but he believed they were "putting up the lights, though, in those times" (Day 31/ 4740).

Mr Gauci's subsequent evidence (in cross-examination) about Christmas lights tended to suggest a degree of confusion between the date of purchase and the date(s) when he was seen by police officers investigating the crime:

> "I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did." (Day 31/4803)

When it was suggested that his police statement would be more accurate Gauci stated:

> " Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies.... I remember that there were Christmas lights." (Day 31/4804).

Under reference to his police statement dated 19th September 1989 (CP 454), Gauci stated:

> "... but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that…Because if I knew what was going to happen, I would have taken note of it, but I knew nothing. I don't know anything about dates and things like that." (Day 31/4809-10)

It was put to the witness in cross that at the time of his statement of 19th September 1989 he believed that there were no Christmas decorations up when the man bought the clothes. He responded "Maybe." (Day 31/4810)

Prior Statements

From the prior statements put to Mr Gauci, the following was clear to the trial court:

Gauci told the police (dated 19th September 1989 (CP454)) that "we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes" (Day 31/4809).

In his later "review" statement (dated 10th September 1990 (CP 469)) Gauci, when asked "to again try to pinpoint the day and date" of the purchase, told the police that "there were no Christmas decorations up, as I have already said" (Day 31/4802)

Evidence Regarding Paul Gauci Watching Football

In evidence, Mr Gauci was asked if he had been alone or with anyone else at time of the purchase. He responded –

> "Not at that moment, but when he went to get the taxi, my brother came in, and I told my brother to keep an eye on the shop till I took the stuff to the taxi....He must have been watching football, and when he comes late, that is what usually happens, so I think that was what happened that day." (Day 31/4779)

This was the first time Tony Gauci had suggested that his brother had arrived during the purchase, and his description of his brother's arrival was contradicted by his previous statements.

In the course of cross examination, Mr Gauci's statement dated 1st September 1989 (CP 452) was put to him including the statement:

> "I cannot remember the day or date that I met this man. I would think it was a weekday, as I was alone in the shop. My brother Paul did not work in the shop that afternoon, as he had gone home to watch a football match on television. He may be able to recall the game, and this could identify the day and date that I dealt with the man in the shop." (Day 31/4793)

Paul Gauci was not led in evidence**.** There was no evidence about any televised football match(es) watched by Paul during the period 18th November to 21st December 1988.

Evidence of Football Matches

A joint minute (no.7) was entered into, agreeing the details (including timings) of football matches broadcast by Italian television channels RAI1, RAI2 & RAI3 on 23rd November 1988 and 7th December 1988 (Day 31/4830). There was no evidence that any person had watched these matches, nor was there any evidence as to whether or not other matches had been broadcast during the period 18th November 1988 to 21st December 1988.

Evidence of the Weather

In evidence Mr Gauci stated that when the purchaser first came to the shop, about 6.30 pm (Day 31/4731), it wasn't raining but then it started dripping. It wasn't raining heavily, but the man bought an umbrella (Day 31/4741).

Under reference to his first police statement dated 1st September 1989 (CP 452)), Gauci agreed that the man opened the umbrella as he left the shop because it was raining. (Day 31/4814-5) Under reference to his later statement dated 21st February 1990 (CP 466), Gauci agreed that when the man returned, the umbrella was down because it had almost stopped raining. There were just a few drops coming down (Day 31/4816).

Major Joseph Mifsud, a meteorologist, spoke to records he had compiled of the weather conditions (DP 7 & additional pages lodged as supplementary defence production: Day 76/9161)) and gave evidence that there was a light shower of rain, light rain between 08.44 and 08.45am (Day 76/9193) and no rain in Sliema between 6-7pm on 7th December 1988. His evidence was as follows:

> "I do not either exclude the possibility that there could have been a drop of rain here and there. I do not exclude that possibility." (Day 76/9202)
>
> "Well, if you ask for a percentage, if -- if I have to talk about a percentage, probability, I would say that 90 per cent was no rain. And there was always

that possibility that there could be some drops of rain, about ten per cent probability…" (Day 76/9203)

"I do not exclude it [the possibility of rain] , yeah. Because there was cloud around, you know, a type of cloud.... but I would say only very short -- very short interval. You know, a few drops".

Mifsud went on to say that this rain would be insufficient to wet the ground. (Day76/9206)

On Wednesday 23rd November 1988 the conditions observed at Sliema were that there was light intermittent rain going on from noon onwards. At 18.00 there was rainfall. The measurement made at 18.00 GMT was of 0.6 millimetres of rain. (Day 76/9207-9)

Prior statements

In addition to the statements referred to above, it was also put to Mr Gauci (although not specifically adopted) that, in his statement dated 10th September 1990 (CP 469), he had said that just before the man left the shop there was a light shower of rain just beginning. As the man left the shop he opened up the umbrella which he had just purchased. There was very little rain on the ground, no running water, just damp (Day 31/4817).

4.2.9 Date of Purchase: Findings and inferences drawn by the Trial Court

From this evidence the trial court drew a number of inferences:

1. That the date of purchase must have been sometime after 18th November 1988.

2. That Paul Gauci was watching football at the material time and that it having been agreed by joint minute that whichever football matches had been

watched would have been those broadcast on 23rd November or 7th December, that narrows the field to the date of purchase being either 23rd November or 7th December 1988 (Trial Court Opinion at paragraphs [64] and [67]).

3. The date of purchase was midweek by which Mr Gauci meant a Wednesday.

4. That in view of the following accepted evidence :
   (a) that there was a 10% possibility of rain at Sliema on 7th December 1988 (Trial Court Opinion at paragraph [65])
   (b) that there was a short spell of rain or drizzle at around the time the purchaser left the shop (Trial Court Opinion at paragraph [67]).

   the evidence did not rule out 7th December as the date of purchase (Trial Court Opinion at paragraph [67])

5. That it was unclear whether or not the Christmas lights were up or not on the date of purchase but that -
   (a) It was consistent with Mr Gauci's " rather confused" recollection that the date of purchase was about the time the Christmas lights were being put up (Trial Court Opinion at paragraph [67]); and
   (b) That in turn would be consistent with Mr Gauci's recollection in evidence that the date of purchase was about two weeks before Christmas (Trial Court Opinion at paragraph [67])

6. That the date of purchase was 7th December 1988. (Trial Court Opinion at paragraph [67])

4.2.10 Date of Purchase: Appeal Court decision

At the first appeal the defence argued that their position at trial was that there was no reliable evidence that the purchase had taken place on 7 December 1988, the only date on which the purchaser could have been the applicant. The defence had not treated 23 November as the only alternative but, as there was a body of evidence supporting that date, this had been pointed out to the trial court. The trial court had erred in

misconstrued the terms of joint minute number 7 in respect that it agreed only that football matches were broadcast by RAI at certain times on 23 November and 7 December 1988. It was submitted that there was no basis in the evidence for inferring that these were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988. The most it was said the trial court would have been entitled to draw from the joint minute was that both dates were consistent with Mr Gauci's evidence that his brother might have been watching football on television. However, other dates had not been ruled out.
(Defence submissions Day 88/114-128 & 89/123-125 – under reference to trial submissions Day 82/9893 & 9931)

The Crown argued that the prosecution case at trial was that the following evidence pointed to the date of purchase being 7th December:

- The date must have been between 18 November – 21 December
- It was a Wednesday
- It was about a fortnight before Christmas
- Football was broadcast on TV in the late afternoon of 7 December and Paul Gauci had gone home to watch football
- The evidence re the possibility of a light shower at the relevant time on 7 December was consistent with Tony Gauci's description of the weather conditions

The Crown also argued that Gauci's confusion about the Christmas lights was consistent with the date being around the time the lights went up. Further, the Crown argued that the effect of the defence position at trial was to put in place the competition between 23rd November and 7th December (Crown submissions Day 97/90-105).

A number of points can be taken from the Appeal Court decision on this issue:

First, it agreed with the defence that the trial court had misconstrued the joint minute which could only be read as agreement that football was broadcast on those dates – not that these were the agreed dates when Paul could have watching football.

However it concluded “In our opinion, however, the trial court’s misinterpretation of the terms of the joint minute was, in the particular circumstances of this case, of no real materiality. “ (Appeal Court Opinion at paragraph [319])

Secondly, at the same time the court agreed with the Crown that “having regard to the way the case was presented” the only real competing date was 23rd November. (Appeal Court Opinion at paragraph [319])

Thirdly, however it also emphasised that the critical issue was whether the trial court were satisfied that the date of purchase was 7 December. If it had not been so satisfied then in the appeal court’s view one of the important circumstances relied upon by the Crown would not have been established. (Appeal Court Opinion at paragraph [319])

4.2.11 Date of Purchase: Nature and quality of the evidence

Within the Grounds of Appeal (Grounds 2.1.2 (page 13) and 2.2.2 (page 32)), the appellant challenges the quality of the evidence from which the trial court inferred the date of purchase. This issue is raised both under the heading of defective reasoning and on the basis that it was unreasonable on the evidence.

Day of the Week

The trial court’s finding that the purchase was on a Wednesday is based upon equivocal evidence. Although there was evidence that Mr Gauci’s use of the expression “midweek” could be taken as a reference to Wednesday, the witness repeatedly said both in his evidence and his prior police statements that he was unable to identify the day of the week on which the purchase took place (See the SCCRC Statement of Reasons 21.95).

Watching Football

It is clear the trial court placed considerable emphasis on the evidence relating to Paul Gauci watching football at the material time, referring to this evidence first in setting out its conclusion re the date of purchase:

> "We are satisfied with Mr Gauci's recollection, which he has maintained throughout, that his brother was watching football on the material date, and that narrows the field to 23 November or 7 December…"

After referring to other adminicles, the trial court asserts:

> "Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December" (Trial Court Opinion at paragraph [67]).

Yet the starting point here is evidence from the witness that Paul must have been watching football because that was what usually happened (see Day 31/4779). There was no evidence from Paul Gauci to clarify this hypothetical suggestion, nor indeed even any hearsay that Tony Gauci had been told this by his brother.

It is difficult to understand the trial court's view that Gauci's recollection on this matter "was maintained throughout" as the only other evidence before them was a reference in a previous police statement (Crown Production 452) which was not explored.

The actual basis for this finding is an uncertain inference based on the witness' recollection of his brother's usual habits. As such, the trial court's finding was an unreasonable one.

Football Matches

From this the trial court then went on to misinterpret the joint minute to "narrow down" the possible dates to either 23 November or 7th December. This was an important component of the trial court's conclusion that the latter date was the date of purchase. As such it was material.

The appeal court recognised that it was the Crown case that the date was 7th December and that had the court not been so satisfied then "one of the important circumstances relied upon by the Crown would not have been established." (Appeal Court Opinion at paragraph [319]).

It was necessary for the Crown to prove this date. The onus was upon the Crown to do so – otherwise it would not be possible to draw any link to the appellant. He was not resident in Malta. Insufficient attention was paid to the onus of proof here.

Even if the defence concentrated on leading evidence to shore up 23rd November as an alternative date, this did not alleviate the onus on the Crown to prove its case. In order to do so the Crown had to lead satisfactory evidence that the correct date was 7th December and to exclude any other possibilities. The fact that there was no defence argument directed to, for example, Wednesday 30th November or 14th December is irrelevant. It was for the Crown to prove the date of the transaction. The question is not how the parties chose to present their arguments, but whether the evidence entitled the trial court to reach the factual conclusion that 7th December was the date of purchase. The court erred in approaching the matter as a straight choice between two dates. A further possibility has been ignored – i.e. that the evidence was insufficiently persuasive to enable the court to find that *any* date had been proved to be the date of purchase.

The problem with the Crown approach is demonstrated in the following exchange at the appeal:

> "LORD KIRKWOOD: Advocate Depute, the Trial Court appears to have been satisfied that Paul Gauci was, in fact, watching football.
>
> MR. CAMPBELL: Yes.
>
> LORD KIRKWOOD: What evidence was there that he was, in fact, watching football in the absence – in his absence as a witness?
>
> MR. CAMPBELL: <u>It would be an inference from the evidence from his brother, Mr. Gauci, that he had gone home to watch football, that not being in any way disputed, together with a Joint Minute that football was being shown at these times and submissions made upon that evidence to the Trial Court that that's what that evidence amounted to.</u>

LORD KIRKWOOD: Did it go any further than an assumption by Mr. Gauci that Paul had gone to watch football?

MR. CAMPBELL: It went further than that, My Lord because he was able to say that was the practice, that was what happened always, and that's when he came late to the shop, that's what he was doing. So he was recalling a specific occasion and measuring it by what he might call the standard practice.

LORD KIRKWOOD: And on page 64, where the Trial Court says, "We are satisfied with Mr. Gauci's recollection that his brother was watching football," that narrows the field to 23rd November or 7th December, now, does that mean that Mr. Gauci's recollection together with the Joint Minute narrowed it to these two dates?

MR. CAMPBELL: Yes, that's right. It's the package of evidence that I've just analysed.

LORD KIRKWOOD: Do you agree that there is nothing in the Joint Minute to say that football was not shown on other dates between the 18th of November and the 20th of December?

MR. CAMPBELL: That's undoubtedly correct, but one has to remember the way in which a Joint Minute comes about. It comes about because parties have interest in proving particular matters from a witness who is not going to be called for convenience.

(Day 97/101-02)

A number of points can be taken from this:

First, the finding that Paul Gauci was watching football at the time of the purchase was portrayed by the Crown as an “inference “ - it was drawn

- From the evidence of Tony Gauci – whereas in fact it can only be the acceptance of the assumption made by the witness;
- From the fact it was not disputed by the defence – whereas evidence or an interpretation of evidence is not created by the absence of dispute by the defence;

- From the joint minute of football times – which has no bearing upon the issue and does not address the question of whether or not Paul Gauci was watching the matches listed.

Secondly, the suggestion made that this was not an assumption by the witness but the application of some kind of measurement of standard practice, merely underlines the absence of direct knowledge held by the witness. In that regard, it should be noted that the Crown's response to Lord Kirkwood overstated the evidence in two regards:

- Tony Gauci, in describing his brother's practice, did not say "that was what happened *always*, and that's when he came late to the shop, that's what he was doing". As narrated above, Tony's evidence was that his brother "…must have been watching football, and when he comes late, that is what *usually* happens, so *I think* that was what happened that day" (Day 31/4779).

- (As Lord Kirkwood clearly appreciated) Tony Gauci's evidence together with the joint minute, did *not* narrow the date of purchase down to one of two dates.

- The suggestion that the joint minute narrowed the issue due to the fact that "It comes about because parties have interest in proving particular matters from a witness who is not going to be called for convenience" is incomprehensible.

It should also be noted that the approach of the appeal court to this issue did not adequately deal with it for the following reasons:

First, even if the defence left the trial court with the impression that the only alternative date was 23 November this did not entitle the trial court to focus only upon the two dates identified by the parties. Other dates remained open on the evidence.

Secondly, it was for the Crown to prove the date of purchase and for the trial court to draw reasonable inferences justified by the evidence.

Thirdly, the trial court erred in its approach by failing to properly recognise the onus of proof and by misinterpreting the joint minute and "narrowing" down the choice to competing dates.

Fourthly, there was no proper basis in the evidence regarding the football to entitle the trial court to rely upon it as supportive of the date of purchase being 7th December.

Fifthly, these errors in approach were clearly material and underpin the trial court's decision to draw the inference as to the date of purchase. For the appeal court to describe the error as to the joint minute as immaterial – without giving any reason for doing so – was wrong.

The Weather

The appellant highlights the issue of the trial court's treatment of the weather evidence in reaching its conclusion as to the date of purchase in Ground 2.1.2(2) (page 13).

It is clear that the evidence of the weather was one of the factors taken into account by the trial court (see Appeal Court Opinion at paragraph [327]). However, surprisingly, the trial court found that the evidence of the weather was "consistent" with the date 7th December. It is not clear whether this was "consistent" in that it was viewed as supporting the inference of that date.

Viewed as a whole, the evidence was to the effect that the weather supported the inference that the date of purchase was 23rd November and not 7th December - albeit the evidence did not wholly exclude the possibility of the weather being compatible with 7th December. A more accurate assessment of this evidence would be to find that it did not exclude or absolutely contradict the date being 7th December. To describe this evidence as consistent with that date does not properly reflect this.

But in any event it is clear that, on any view, the evidence of the weather could not assist the trial court in drawing the inference that the date of purchase was 7th December.

This problem was raised at the appeal:

> "LORD KIRKWOOD: .... but what I am looking for is the reasons for the conclusion that the date of purchase was the 7th of December. And do you say that the weather evidence assists in - assisted the Trial Court to reach that conclusion?
> MR. CAMPBELL: Well, the Crown never led the evidence of the weather, because it's not something that was considered that would be of much assistance. And it's clear that the position that the Trial Court has taken in relation to the weather is simply to state the position, but noted that the first bit of rain on the 7th was there but they don't make a judgment as between the two simply on the weather." (Day 97/121)

It is noteworthy that at trial the Crown had submitted (Day 78/9447) that the weather evidence was "relatively neutral" insofar as it favoured neither 23rd November nor 7th December. However, in the appeal the Crown resisted Lord Kirkwood's invitation to adopt that position again, maintaining instead that "…the weather on the 7th was such that the Trial Court, in taking it into account along with other aspects of evidence relating to the date was entitled to do so" (Day 97/119). This appears to be a tacit acknowledgment that the weather evidence tended to favour 23rd November over 7th December.

Accordingly the evidence of the weather does not support the inference drawn.

Christmas Lights

This is highly confused evidence and as such does not provide a reasonable basis for the inference of the date.

Even if the trial court was entitled to treat the date of purchase as having been narrowed to a choice between 23rd November or 7th December, this was one of only two aspects of the evidence which could, on any view, favour the latter over the

former date. (The other aspect is Gauci's reference to the sale being "a fortnight before Christmas" – see below).

When Mr Gauci stated in evidence that "I believe they were putting up the lights, though, in those times" (Day 31/4740), it is clear that he did so only because he had been confronted (by the Crown) with the fact that his first position in evidence (i.e. that the lights were on) was flatly contradicted by his position in a prior police statement. The trial court's acceptance of this (changed) evidence was unreasonable, because it failed to take into account the existence of the contradiction.

This is particularly so given the court's awareness of the context of the contrast between Gauci's position as expressed in the witness box and in prior statements: i.e.

- that he was clear and consistent in prior statements that the Christmas lights were not up at the relevant time;
- that he had never previously suggested that the lights were being put up on the date of purchase
- that he was clear also that his recollection of the event at the time of giving his statements was better than it was by the time of the trial; and
- that in giving evidence about Christmas lights at the trial he was patently confused and wholly unable to distinguish between the date of purchase and occasion(s) on which he was speaking to police officers about it.

Although the appeal court considered that the trial court had placed little weight on Gauci's evidence about Christmas lights (Appeal Court Opinion at paragraph [332]), this is hard to reconcile with the trial court's use of its conclusion to provide support for Gauci's evidence about the date of purchase being about a fortnight before Christmas (see below). As such, and as pointed out by the SCCRC (see Statement of Reasons at paragraph 21.94), it clearly played some part in the court's determination of the date of purchase.

It is noteworthy that the trial court's finding of consistency between Gauci's evidence that the lights were going up and his evidence that the sale was about a fortnight

before Christmas also flies in the face of the source of the latter evidence – i.e. Gauci's prior statement (19th September 1989 (CP 454). In that statement Gauci was clear *both* that the decorations were put up about 15 days before Christmas *and* that they were *not* up on the date of purchase. This further demonstrates the unreasonableness of the trial court's approach (see also SCCRC statement of reasons 21.97).

Fortnight Before Christmas

It is apparent from the Crown's submissions at trial that this aspect of Gauci's evidence was the essential cornerstone of the Crown's contention that the date of purchase was 7th December (Day 78/9445). It is not clear how much emphasis it was given by the trial court given the way its reasoning is set out at paragraph [67].

The assertion by the witness that he thought the transaction "must have been about a fortnight before Christmas" was, however, patently unreliable in that:

- Whilst giving his evidence, Gauci repeatedly sought to qualify his evidence and stressed that he did not know about dates (Day 31/4738, 4741, 4803, 4810 & 4820);

- This evidence appeared to be closely linked to his recollection as to when the Christmas lights were put up – but that evidence was highly confused (see above);

- Gauci was clear in his evidence that his recollection of the event at the time of giving his police statements was better than it was by the time of the trial (Day31/4740 & 4782);

- The trial court knew that Gauci had never previously mentioned this time frame prior to giving evidence (Appeal Court Opinion at paragraph [336]);

- The trial court knew that, in his first and most contemporaneous police statement, Gauci had been able to say only that the purchase took place one day during the winter in 1988 and that he could not remember the date (Day31/4786 & 4793);

- The trial court knew that, in another prior statement (dated 10th September 1990 (CP 469)), Gauci had said that the believed the sale to have taken place at the end of November (Day31/4802); and

- The trial court was aware of at least one further statement (dated 21st February 1990 (CP 466) where Gauci had left open the possibility that the sale took place in November (Day31/4815).

In the context of the first appeal in which the reasonableness of the findings were not addressed, the appeal court concluded that it was open to the trial court to accept Gauci's evidence (Appeal Court Opinion at paragraph [345]). However, viewed properly – including in the context of previous statements – it was unreasonable to rely upon this confused evidence. Not least where it is not confirmed or supported by any other reliable evidence (see also the conclusion of the SCCRC: Statement of Reasons 21.93 & 21.97).

4.2.12 Date of Purchase: Reasonableness of the inferences drawn

The inference that the date of purchase was the 7th December can be seen to be unreasonable having regard to the evidence.

First, it is not properly supported by the evidence – as outlined above.

Secondly, it does not have proper regard to the onus of proof. The onus is upon the Crown to establish the date of 7th December in order to be able to identify the appellant was the purchaser. The Crown failed not only to provide a proper or suffiicent evidential basis that the date was the 7th December but they failed to exclude the other possibilities, including the 23rd November.

Thirdly, this failure appears to have proceeded upon a mistaken view that:

- The defence conduct in raising the prospect of 23rd November as a competing date resulted in the narrowing of choice to those two dates; and

- The evidence of the weather was consistent with and could be taken into account in support of the inference of 7th December

4.2.13 Date of Purchase: Materiality of the inference

The date of purchase is an indispensible step in drawing the inference that the appellant is the purchaser which in turn is essential to allow the inference of guilt to be drawn.

In this way it is a link in a chain of evidence which makes up the strand of identification of the purchaser and, as such, the chain analogy applies – namely that the strength of the connection is only as strong as the weakest link.

Accordingly, on any view the inference is material to and an essential ingredient of the verdict. As such it too requires to be proved to by sufficient evidence.

4.2.14 Date of Purchase: Sufficiency of the inference

Given the materiality of this first inference it requires to be established on evidence which would entitle the trier of fact to find it proved beyond a reasonable doubt. Or in terms of the test of sufficiency addressed above (at section 2.2.5) it must be the only reasonable inference which arises from the combined circumstances relied upon.

It is clear here that it is not the only inference available. Even on the approach of the trial court it is drawn as a matter of choice between competing possibilities. The very real competing possibility was not excluded by the evidence. Moreover as stated above, in fact there were other possible dates, which whilst disregarded by the trial court remained available on the evidence.

In any event the evidence used to support the inference as to the date of purchase was not sufficiently reliable to entitle the trial court to find proved to the requisite standard.

4.2.15 Presence of the appellant in Sliema

There was undisputed evidence that the appellant was in Malta from the 7th December 1988 to 9th December 1988, using his own passport.

Taking this along with the date of purchase (assuming it has been reasonably inferred), the question arises whether it can then be reasonably inferred that the appellant was the purchaser of the clothing.

The appellant challenges the reasonableness of the trial court's use of the presence of the appellant in Sliema in drawing the inference that he was the purchaser in Ground 2.2.1 (page 31).

Unreasonable inference: Unsupported by the evidence

The appeal court considered the trial court had drawn the inference on the following basis:

> "[293].... In the circumstances it seems to us that the trial court was simply saying that Mr Gauci's evidence of identification by resemblance taken along

> with evidence as to the date of the purchase, when the appellant was proved to have been staying in Sliema, enabled the inference to be drawn that he was the purchaser."

Nothing is said as to whether or not this was a properly drawn inference.

Assuming the date of purchase was reasonably inferred and the presence in Sliema proved, it is submitted that this evidence nonetheless, cannot reasonably yield the inference drawn. This is so for a number of reasons:-

First, evidence of resemblance is no more than evidence that the appellant looks like the purchaser. It does not identify the appellant as the purchaser. On this basis, evidence that the appellant was in Sliema on the date of purchase is meaningless.

Secondly, there is no aptitude and coherence between the fact of his presence in Sliema and the resemblance identification. The former does not confirm and support the latter. There is no relationship between these two pieces of evidence. There is no connection between the purchase or the shop and the appellant established by his presence in the town. There is no evidential nexus linking the two – as perhaps might arise if there was a link established between the appellant and the shop for example by independent evidence of possession of clothing.

Equally, there is no necessary logical connection between the appellant's presence in the town and his being the purchaser. Presence in the town is so remote as to be irrelevant to the inference drawn. All the evidence of presence does is establish that it was <u>possible</u> for the appellant to be the purchaser i.e. contrary to the normal position applying here, when it would be impossible as the appellant resides outwith the country. The only significance of this evidence is that it enables the Crown case to be possible. That it is possible he was the purchaser does not enhance or point toward the case he was. No doubt it was possible for very many others who resembled the purchaser to carry out the purchase.

Finally there is nothing unusual about the appellant's presence in Sliema or his residence at the Holiday Inn. The evidence showed the appellant made frequent visits and usually stayed at this hotel.

Accordingly, the presence of the appellant in the town does not transform the resemblance identification into a good or positive identification.

Reference is made to the case of *Gonshaw v Bamber* 2004 SCCR 482. This case concerned the disturbance of an eagle's nest on South Uist. There was a positive identification of the appellant at the nest. The issue was whether there was sufficient circumstantial support for the evidence to establish the appellant was the perpetrator. The challenge to sufficiency was made at the no case to answer stage. The advocate depute relied on several circumstances:

- First, the appellant had been in a remote area of South Uist. He had been found living in a hostel there two days after the offence, having come from London.
- Secondly, he had been found to have been in possession of an Ordnance Survey map of the area of Daliburgh, which included the locus.
- Thirdly, the witness Stevenson had described the person seen by him as male and as having been in possession of binoculars.
- Fourthly, the witness Evans had said that the person had been a male, had been in possession of binoculars and also a rucksack.
- Fifthly, on 9 April 2001 the police witnesses had found the appellant in the Howmore Hostel in South Uist in possession of binoculars and a rucksack.
- Sixthly, the appellant had initially given a false name to the police after having been cautioned and searched.
- Seventhly, the house of the appellant in London had been searched, in which a number of items listed at p 9 of the stated case had been found, including a book on birds of prey, with a marker at the entry on golden eagles and their nests.

It was submitted that these circumstances, in combination, provided corroboration for the identification evidence.

The majority found that this was not sufficient.

Lord Osborne identified that the question for the court is whether the material relied upon as corroboration is capable of confirming or supporting the direct evidence on the crucial facts. Whether it ultimately does confirm or support that evidence must be a matter for the tribunal of fact which makes the decision as to guilt or innocence, provided that the case proceeds to that stage.

Considering the circumstantial support he stated (emphasis added):

> "[14] As regards the matters first relied upon by the Crown, it appears to me that they are incapable of confirming or supporting the evidence of Paul Boyer. Mere presence in the island of South Uist two days after the commission of the offence and having an address in London appears to me quite incapable of providing corroboration of Paul Boyer's evidence of identification. It appears to me that that evidence bears no relationship to that direct evidence. My view as regards the second circumstance relied upon by the Crown is the same. Presence in South Uist, together with the possession of a number of Ordnance Survey maps, appears to me again to have no relationship to the direct evidence relied upon. As regards the third, fourth and fifth circumstances relied upon by the Crown as corroboration, which it appears to me must be considered together, I am not persuaded that that material has the effect contended for by the respondent. What is being considered is the possession by the appellant, a male person, of binoculars and a rucksack in the hostel two days following the commission of the offence, items of a kind that had been seen in the possession of the male person in the glen by the witnesses Stevenson and Evans. In my view, having regard to the utterly commonplace nature of these items in a remote rural context, I consider that they can perform no corroborative function here. As regards the giving by the appellant of a false name following upon being cautioned and searched in the hostel, I am unable to conclude that that circumstance is capable of possessing corroborative effect, particularly in the absence of any finding about what was said by the police officers concerning the nature of their enquiries at the time when they cautioned and searched the appellant. Finally,

> I am not persuaded that the items found in the appellant's house in London possess any corroborative effect in the context. Those items, at best, might demonstrate an interest in certain birds, quite a common enthusiasm. It appears to me that more than that is required to confirm or support the direct evidence of identification. of the appellant as the person involved in the commission of the offence. While I have dealt with these pieces of evidence individually, the Crown's argument was that it was in combination that they were capable of providing corroboration of the direct evidence of Paul Boyer. Having regard to the nature of the material founded upon, I remain unpersuaded that that is so. It appears to me that there is simply no discernible relation between that material and the direct evidence, to enable it to furnish the necessary confirmation or support."

This is relevant because what the Crown sought to rely upon to support the positive identification, was presence of the appellant in the remote rural community at the time – and whilst in possession of similar articles, the binoculars and rucksack. Such presence was not only regarded as insufficient but as bearing no relationship to the identification evidence.

This evidence is far stronger than in the present case because the starting point is a positive identification, the presence was remote and without a large population and in addition to presence was the possession of similar items.

The dissenting opinion of Lord MacFadyen was directed to the same question, namely whether the evidence was capable of supporting the direct evidence.

> "[26] The proper approach is to take the body of circumstantial evidence as a whole and ask whether it is capable of affording such support or confirmation. Equally, it is no doubt possible to figure further details which would have made the confirmatory effect of the evidence much stronger--for example, if the appellant's rucksack had been of a distinctive colour spoken to by Mr Stevenson or Miss Evans, or if the Ordnance Survey map had borne a mark identifying the particular crag where the eagle's nest was situated. But the fact that the evidence could have been stronger in various ways does not mean

> that, as it stands, it is incapable of affording corroboration of Mr Boyer's identification of the appellant. Moreover, as Lord Coulsfield pointed out in *Fox* at p 143C and F, it is not essential that the circumstances relied on as providing corroboration should be incriminating in themselves. In taking the view that the circumstantial evidence founded on is capable of affording corroboration, I regard it as appropriate to refrain from considering what weight or significance I would have attached to it if the issue had been whether, assuming the absence of the appellant's admission of his presence at the locus, it had been proved beyond reasonable doubt by the end of the trial that the appellant was the perpetrator of the offence."

It is not clear as to why he concludes that the circumstances are capable of providing corroboration. However it does appear here that he has proceeded here from viewing capability being measured by or tied to the rule that circumstantial evidence need not be incriminatory in itself. If one conflates these two concepts then it is difficult to see how any circumstances could not be capable of providing corroboration. There is no assessment of aptitude and coherence and remoteness. Lord Osborne on the other hand considered the question of confirmation and support and found there to be no connection.

4.2.16 Other Evidence

As is noted in Ground 2.2.1 (page 31), there are no other circumstances which bear upon the trial court's drawing of the inference that the appellant was the purchaser. Circumstantial evidence or inferences drawn in respect of other acts of the appellant do not involve him in the commission of the crime.

The evidence of association between the appellant and persons involved in the sale of purchase of the timers cannot assist in an inference regarding the purchase of the clothing. It might be different if there as evidence connecting the appellant with that purchase, but at best the trial court could only conclude a general association.

The evidence of the presence of the appellant at the airport at the time of the departure of the flight KM 180 cannot assist in the absence of any evidence that that presence contributed to the commission of the offence. In any event, the inference drawn by the trial court of that presence being 'connected' to ingestion, was dependant on having already concluded both that the appellant was the purchaser and second that ingestion took place at Luqa (see below).

4.2.17 Defective Reasoning: The Judges' Approach:

Separatim there are fundamental flaws in the judges' reasoning from which the inference is drawn. In this separate way the inference is an unreasonable one. The appellant challenges the trial court's reasoning in relation to inference of identification in ground 2.1.1(2) at page 11.

Even leaving aside the approach taken which appears to treat the resemblance identification as some kind of positive identification – addressed above at Section 4.2.5, the basis upon which the trial court found the identification evidence reliable is flawed.

The assessment of the identification evidence was made in the following way:

- The trial court concluded that Gauci was in the first place entirely credible (at paragraph [67]).

  The judges recognised at the same time as making this finding that credible witnesses can also be wrong in their identification evidence.

- The trial court concluded that the evidence that the purchaser was a Libyan was entirely reliable (at paragraph [67]).

  There is no mention here over the confusion of the witness as to why he concluded that the purchaser was Libyan, but nonetheless this finding is not

unreasonable. The issue here is that this does not take the identification of the appellant any real distance.

- The trial court concluded that the evidence of Tony Gauci regarding the list of clothing that he sold was reliable (at paragraph [67]).

  There was no dispute of this evidence at trial. It has however no proper bearing upon the reliability of the witness' identification evidence. The fact that a witness can give an accurate and detailed account of one part of an event has no correlation to his ability to given an accurate visual identification.

- The crucial assessment is set in paragraph [69] as follows:

  > "What did appear to us to be clear was that Mr Gauci applied his mind carefully to the problem of identification whenever he was shown photographs, and did not just pick someone out at random. Unlike many witnesses who express confidence in their identification when there is little justification for it, he was always careful to expresss any reservations he had and gave reasons why he thought that there was a resemblance. There are situations where a careful witness who will not commit himself beyond saying that there is a close resemblance can be regarded as more reliable and convincing in his identification than a witness who maintains that his identification is 100% certain. From his general demeanour and his approach to the difficult problem of identification, we formed the view that when he picked out the first accused at the identification parade and in Court, he was doing so not just because it was comparatively easy to do so but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser, and we did regard him as a careful witness who would not commit himself to an absolutely positive identification when a substantial period had elapsed. We accept of course that he never made what could be described as an absolutely positive identification, but having regard to the lapse of time it would

> have been surprising if he had been able to do so. We have also not overlooked the difficulties in relation to his description of height and age. We are nevertheless satisfied that his identification so far as it went of the first accused as the purchaser was reliable and should be treated as a highly important element in this case."

This flawed in a number of respects.

First, the finding that the witness was careful is based apparently primarily on the fact that the witness expressed reservations and "would not commit himself to an absolutely positive identification when a substantial period had elapsed".

However, it is doubtful that there is a proper evidential base to make this assessment of care being taken. The language used may simply reflect an overabundance of caution but it may not. It is more, if not just, as likely that the witness expressed reservations because he had reservations. He qualified his selection of the appellant because he could not positively identify him. His evidence is hesitant rather than circumspect. This interpretation is consistent with the initial non-identification responses given at the photo show and at the parade. The fact that he only made a resemblance identification in court, where it was patently obvious who he should identify, is eloquent of his inability to make an identification. It is noteworthy that in prior statements which were produced but not led in evidence the witness makes unequivocal and positive identification of others (Statement dated 10 September 1990 (CP 469)). In any event there was insufficient evidence before the trial court to give the full picture of the context of these qualifications and thereby entitle the finding of his being careful as opposed to hesitant.

Secondly, and more importantly, this assessment is flawed because it seeks to turn what is properly a negative into a positive. The qualifications expressed, the reservations as to the selections made, are interpreted as indications of care being taken from an assumed starting point of a positive identification. In other words the suggestion here is that when Mr. Gauci stated at trial, "He resembles him a lot", he really meant, "that's him". The resemblance selections are viewed as being positive

identifications by a circumspect or careful witness. As such they are somehow more reliable than what they in fact are.

Moreover the very real problem of seeking an identification of a stranger from a very long time ago is erroneously used here to in some way justify the limitations of the identification evidence. Again in other words the view is that were it not for these problems then the identification would have been positively made.

What the judges describe as the witness giving expressed reasons for making his selections are more properly viewed as making qualifications or expressing the similarities in features for the resemblance claimed. The reasons for finding a resemblance given are only properly evidence of the finding of a resemblance and the limitations of that resemblance.

Thirdly, a significant part of the conclusion of the reliability of the identification evidence appears to arise from assessment of the demeanour of the witness giving rise to the conclusion that the witness genuinely believed or "felt" that he was correct. This is not a proper basis for assessing reliability. It is well established that self-belief or self-confidence is not a reliable indicator of accuracy in eyewitness identification. Indeed a charge to the jury in this case would arguably involve directions that a confident witness could be wrong. Certainly such directions would be necessary in most other comparable jurisdictions.

Fourthly, even if the self-belief of the witness is relevant, if the accuracy of an identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, conviction or belief and the honesty of the witness will not suffice to raise the case to the requisite standard of proof, and a conviction.

In carrying out such an assessment what the court needed to do was to go beyond the credibility and their impression of the witness and to put the identification evidence in its proper context. That is to make a contextual analysis of the identification and consider properly the risk factors which apply. To consider, for example, the kinds of issues that a jury would be given in directions:-

- the conditions of observation, the nature of the event – was it memorable;

- the gap in time, what happened within that gap of time which might effect the reliability of recall, specifically to consider the fact that the witness had seen the Focus magazine photograph;

- to consider the circumstances of and the conduct of the identification procedures and in particular to consider the suggestiveness of the dock identification.

There is no indication given in the judgment that such factors, which would have featured in jury directions and which a jury would have required to consider, have been properly taken into account.

A remarkably similar approach was taken by the trial judge in the Canadian case *R v Reitsma (supra)* and that approach was challenged successfully on appeal where Justice Rowles' dissenting opinion was subsequently upheld by the Supreme Court. In this case there was evidence that on the day following the incident the complainant was shown a photographic line-up. The appellant was depicted in photograph seven. The complainant did not make a positive identification but the note he wrote on the form said that "Photo #7 is similar to the suspect". No other pre-trial identification procedures were undertaken. The trial took place 11 months later. At trial, the complainant identified the appellant as the person he had seen in his house.

The trial judge in his reasons emphasised his comprehension of the dangers of identification evidence, but stated

> "I think it is important to note that in this particular case Mr. Carter was not one of these persons who, at the outset, is absolutely certain, convinced of their correctness and carry on with their sureness as time proceeds.

Mr. Carter, when he was shown the photographic lineup... selected number seven, who was Mr. Reitsma... but very fairly, at that time, did not say he was certain this was the person, and he has explained why he did that in testimony today, and that he would not send anyone to jail on the basis of a photograph, especially that photograph, and then described the 3-D issue and the difference between identifying a person from a photograph and when seeing that person in person, or live.

...

Here there is no question it was a brief period of observation as these things go, fifteen seconds, but at the same time, it was noon, he was not woken from a sound sleep, it was not night time. There was nothing to suggest in the testimony from Mr. Carter that he was traumatized, had any difficulty observing the person.... I am satisfied that having regard to the totality of the circumstances here, that Mr. Carter's identification evidence is reliable."

The appellant argued that the trial judge erred in using the complainant's reluctance to make a positive identification in the photo line-up to enhance or bolster the reliability of his identification evidence.

In considering the question as one as to whether the verdict based on this evidence was unreasonable Justice Rowles first noted the distinction between credibility and reliability in respect of this evidence and referred [41] to the decision of the Alberta Court of Appeal in *R. v. Atfield* (1983), 25 Alta. L.R. (2d) 97 at 98-99:

> "The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. <u>The accuracy of this type of evidence cannot be determined by the usual tests</u> <u>of credibility of witnesses, but must be</u>

> tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak.

As is said in *Turnbull*, [63 Cr. App. R. 132, [1976] 3 All E.R. 549] the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof, and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous *Adolph Beck* case, 20 seemingly honest witnesses mistakenly identified Beck as the wrongdoer."

Justice Rowles then observed (emphasis added):

> "[44] From his reasons for judgment, it is apparent that the trial judge regarded the complainant's note on the photo lineup as a "qualified identification" rather than a failure to identify. It is also apparent that he regarded the complainant's reaction to the photo line-up favourably in the sense that the complainant was said to have acted "very fairly" in declining to reach a firm conclusion on a photograph. In effect, the trial judge appears to have viewed this as a case of a careful, fair witness who wanted an opportunity to see the suspect in person whom he had identified in the photograph before making a positive identification that could result in imprisonment of the person in question.
>
> …

[55] Regardless of the view taken of the complainant's testimony in regard to the photo line-up, however, it is not possible to elevate the complainant's statement on the exhibit that "Photo #7 is similar to the suspect" into a positive identification through an assessment of the witness's honesty and fairness.

[56] That brings me to the courtroom identification. The trial took place some 11 months after the offence. The complainant identified the appellant in the courtroom in the circumstances set out in the agreed facts. The appellant argues that little or no weight could be attached to this identification evidence because of the circumstances in which the identification was made. Support for the argument that little or no weight can be attached to a "dock" identification where there has been no positive pre-trial identification may be found in *R. v. Amaral* [Q.L. 1990 O.J. No. 1762] (Ont. C.A.). Appellant's counsel referred as well to *R. v. Hibbert* (24 July 1996) Victoria Registry VO2554 (B.C.C.A.), in which Legg J.A. observed in para. 57:

‘The identification of the accused for the first time in the courtroom after a failure to positively identify him from a photo line-up is of little weight.’

…

[58] The frailties of eye-witness identification may be most pronounced in cases where the accused was not known to the complainant before the offence and where the complainant's opportunity to observe the perpetrator was limited to a brief, stressful encounter. In this case, the encounter was brief and unexpected but not stressful

…

[61] The present case is one in which the complainant's identification evidence is unsupported by any other direct or circumstantial evidence. Reliance on the honesty and fairness of the witness to overcome the weaknesses in the identification evidence and to raise the case to the requisite standard of proof does not accord with the jurisprudence. The complainant's evidence that photo seven in the photo line-up was

"similar" to the intruder could have had some evidentiary value if the identification procedure in the courtroom had been analogous to a line-up. Unfortunately it was not and any weight which might reasonably have been attached to the complainant's photo line-up evidence was effectively undermined by the manner in which the appellant was presented for identification in the courtroom. In the circumstances in which the appellant was identified in the courtroom in this case, little, if any, weight could be attached to that identification evidence.

[62] For the foregoing reasons, I am of the view that the verdict cannot reasonably be supported by the evidence in this case.""

4.2.18 Materiality of the inference

It is plain that the trial court placed crucial emphasis on this inference. At paragraph [55] Gauci is described as an important witness. His identification was treated "as a highly important element in this case" (at paragraph [69]) and it was stated in the judgment that "a major factor in the case against the first accused is the identification evidence of Mr. Gauci" (at paragraph [88]).

The Appeal Court stated "we are satisfied that it was entitled to treat Mr Gauci's evidence of identification, so far as it went, as being reliable and as being a highly important element in the case." (Appeal Court Opinion at 297).

And that, taken together with his independently vouched presence in Malta on the 7th of 22 December, is significant evidence (Day 78/9453).

It is in any event clear that this inference was crucial to conviction in that it provides the only link between the appellant and the commission of the crime. It is the only evidence of acts on his part which can be inferred to be contributory to the concerted plan. The ultimate inference of guilt rests critically upon this inference.

4.2.19 Sufficiency: Only reasonable inference

Given that this inference is crucial to the conviction then it requires to be established by full proof and on evidence which would entitle a jury to find it proved to the requisite standard, beyond a reasonable doubt.

Put another way the inference drawn has to be the only rational inference that the combined circumstances will bear. This test of sufficiency must in turn apply to the inference drawn as to the date of purchase. This is because each of these inferences are dependant upon each other in order to establish a connection with the facts in issue. Each inference is an indispensable step on the route to the inference of guilt. That ultimate inference must be based on a foundation of undoubted facts or conclusions. Otherwise it cannot be found to be established beyond a reasonable doubt. Each stage of necessary inference must be capable of satisfying the standard of proof. One cannot be satisfied beyond a reasonable doubt of the truth of an inference drawn from facts or other inferences about the existence of which one is in doubt.

An example of this is *Little v HMA* 1983 JC 16. In this wholly circumstantial case the appellant Little was convicted of acting in concert with here co-accused in the murder of her husband, specifically the instigation of her co-accused McKenzie to carry out the shooting. This was a strong circumstantial case with evidence of a concerted plan and evidence pointing to the accused's participation in the plan. There was evidence of motive and intention; that she and McKenzie formed a plan; evidence that connected her to the use of the gun on the night in question; evidence of meetings with McKenzie in the run up to the murder; evidence of her withdrawing of a large amount of money on the day of the murder and evidence that McKenzie had unexplained money after the event. Finally there was evidence that McKenzie went to her after the shooting and she became involved in organising the disposal of the body. The jury were directed that they had to be satisfied beyond a reasonable doubt that the appellant instigated the shooting otherwise they must acquit.

In the present case, a jury would be directed that they had to be satisfied beyond a reasonable doubt that the appellant was the purchaser otherwise they must acquit.

In view of the foregoing submissions that the evidence cannot properly support the inference being drawn at all, it is perhaps obvious that there is insufficient evidence to establish the inference to the required standard. In other words insufficient to entitle the trial court to find that this inference the only reasonable one available on the evidence.

The various strands relied upon in reaching the conclusion as to the date of purchase and to finding the appellant identified as the purchaser must cohere such as to be mutually corroborative. Here they bear no real connection and cannot be said to confirm and support each other.

It cannot be said that the date of purchase is a necessary inference from the totality of the relevant circumstances relied upon. It cannot be said that the conclusion that the appellant was the purchaser is the only reasonable conclusion from the totality of the evidence relied upon.

4.2.20 Conclusion

1. The quality of the resemblance identification evidence, having regard to all the circumstances of the identification made – not least in regard to the exceptional gap in time and to the negative and qualified terms of the selections made of the appellant by the witness – are such that no reasonable jury would be entitled to found upon it and to convict in reliance upon that evidence.

2. Further and in any event the inference drawn that the appellant was the purchaser of the clothing is unreasonable in that:

    (a) It is unsupported by the evidence; notably in that the witness only selected the appellant at identification procedures on a generalised resemblance basis at best and this resemblance was not transformed, confirmed or supported by any other evidence.

(b) In any event the approach taken to eyewitness evidence and the basis upon which the court concluded the purported identification evidence could be relied upon, demonstrate defective reasoning which render the inference unreasonable.

3. Further and in any event the inference drawn that the date of purchase was the 7th December 1988 is unreasonable in that:

(a) It is not properly supported by the evidence, in particular, in that

- The finding that Paul Gauci was watching football on the date of purchase is not properly established in the evidence
- The evidence as to the putting up of the Christmas lights is so confused that no reasonable jury could place reliance upon it
- The evidence of the weather could not support that date

(b) The trial court misdirected itself in respect of focussing only on the two 'competing' dates based on the broadcast of football matches. The only basis for the inference drawn was by making a choice between what it viewed as the only competing possibilities. This was wrong in that :

- There was no clear evidence of what (if indeed any) football match(es) were being watched by Paul Gauci
- It is based upon misinterpretation of the joint minute as limiting the possible dates to 23 November or 7th December
- There was a failure here to recognise the onus of proof was on the Crown to establish the date of purchase on satisfactory evidence

4. Further and in any event the inference drawn that the date of purchase was the 7th December 1988 is not the only reasonable inference available on the evidence and cannot be established beyond a reasonable doubt. This inference being the first indispensible step in drawing the inference of identification, which in turn is indispensible in drawing the ultimate of guilt, requires to be established to this standard to entitle conviction.

5. There is no other evidence which bears upon or enhances the resemblance identification made. In particular, the evidence of the appellant's presence in Sliema on the date of purchase has no connection to the resemblance identification and does not transform into a good or positive identification.

6. The inference that the appellant was the purchaser was crucial to the inference of guilt drawn and without it the circumstantial case against the appellant necessarily unravels.

7. This inference being an indispensible step in the conclusion of guilt requires to be not only a reasonable inference arising from the evidence but the only reasonable inference arising from the evidence. It cannot be said here that the conclusion that the appellant was the purchaser is the only reasonable conclusion from the totality of the evidence relied upon. Even having regard to the whole circumstances, the inference that the appellant is not the purchaser remains open on the evidence. As such it cannot be found to be established to the requisite standard of proof.

4.3 THE APPELLANT KNEW THE PURPOSE FOR WHICH THE CLOTHING WAS BOUGHT

4.3.1 Inference of knowledge

Having concluded that the appellant was the purchaser of the clothing, the trial court then proceed to conclude that it was "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]).

It was necessary in order to attach liability as an accessory to the appellant that, at the date of purchase of the clothing, there existed a criminal purpose to destroy a civil passenger aircraft, and that the appellant was aware of this purpose and "aimed at" it by buying the clothes. As seen above at section 4.1.4 above, there was no evidence accepted upon which the trial court could make any finding as to when the criminal purpose came into existence. It is trite to say that the appellant could not be aware of it if it did not exist. Nonetheless this is important given the basis upon which the trial court appears to have inferred knowledge. In particular it is important since the purchase of the clothing is not itself a criminal act. In addition, it is important given the gap in time and absence of any other findings connecting the purchase of the clothing to the commission of the crime (other than the forensic conclusion that the clothes ended up in the primary suitcase).

It is worth noting that the trial court did not address the question of whether or not the purchase of the clothing did in fact assist the commission of the crime. It is accepted that although this is not addressed, it would be reasonable to infer that the clothing was used to assist in making the suitcase containing the IED appear as normal luggage. The important gap here is the absence of any necessary link between the purchase and such use of the clothing in the commission of the crime. So, for example, the purchaser could have been asked to make the purchase without any knowledge of the intended use of the purchase or the purchase could have been made before any criminal purpose was formed.

Immediately after drawing the inference that if the appellant was the purchaser, it was not difficult to infer he was aware of the purpose, the trial court listed a series of factors which, although it is not clear, may be the basis for their drawing the inference. (paragraphs [88]-[89]). These factors are:

- The appellant was a member of the JSO occupying posts of fairly high rank;
- He had been head of airline security, from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports to or from which LAA operated;
- He appears to have been involved in military procurement;
- He was involved with Bollier, although not in connection with MST-13 timers;
- He rented premises from Bollier and intended business with MEBO; and
- He had associations with members of the JSO or Libyan military who purchased MST-13 timers.

But this evidence of the appellant's background and his association with others has no connection with and is remote from the inference of knowledge. This background of association with the JSO and both the purchaser and supplier of the timers has no application – or coherence and aptitude – in the absence of any evidence or finding that those with whom he was generally associated were participants in the common criminal purpose which had already been formed at the time of this association. Or that those with whom he associated are shown to share the common criminal purpose at some later point.

In any event it does not follow that merely because a person purchased a selection of clothing he must have known that it was intended for use as part of the complex plot in the commission of this offence. Not least where, as here:-

- There was no finding that the criminal purpose existed at the time of the purchase and no evidential basis upon which this could be found;

- There was no evidence about the circumstances in which the clothing came to be united with the IED in the primary suitcase;
- There is a significant gap of time between the purchase and the ingestion of the primary suitcase which adds significance to the lack of evidence about the circumstances in which they became united;
- There is no evidence of what happened to the clothing purchased in between;
- The possibility of innocent involvement in the purchase is not excluded;
- There is nothing nefarious or criminal about the purchase of clothing in and of itself.

The judgment makes no attempt to address these issues. Indeed the trial court rejected all other evidence of acts of participation by the appellant which might have assisted in closing these significant gaps. For example, the court rejected evidence that on the morning of the date of purchase the appellant arrived in Malta with a bag which he was able to carry as cabin baggage, rather than having checked it in (Trial Court Opinion paragraph [43]; Majid Day 50/6808-09). The trial court rejected the evidence that the appellant was in possession of a brown hardshell Samsonite suitcase the day before the offence (paragraph [43]). The court rejected the Crown's submission that on 20 December, the appellant brought components of the IED to Malta (paragraph [43]). The trial court did not find, as the Crown had urged, that the appellant had a part in the arranging of Bollier's journey to Tripoli in the days leading up to the crime, nor that Bollier went to make a modification to the MST-13 timer to be used in the IED, nor that it was intended that Bollier, the appellant and Fhimah would all take the same flight back to Malta on 20 December (paragraph [46] contrasted with Crown Final Submissions Day 79/9488, line 8-12; Day 79/9492, line 5-10; Day 79/9493, line 6 – 79/9494, line 9; Day 79/9489, line 4-15; Day 79/9489, line 25 – 79/9490, line 25).

Other Evidence

It may be said that the trial court could have relied on the evidence of Gauci that what the purchaser was buying did not seem to be of importance (Trial Court Opinion paragraph [12]).

Even assuming that this and all the other evidence could be relied upon and taken together, there is still no proper basis for this inference of knowledge. Notably –

Nature of the purchase

The fact that the clothing purchase was unusual and noteworthy, in that the purchaser was not interested in what he was buying or their sizes, is insufficient in itself to yield knowledge that the purchase was for this particular purpose.

Presence at the Airport

The departure of the appellant from the airport at or about the time when the suitcase containing the IED must have been planted on flight KM180 does not provide a basis properly to infer knowledge in the absence of any connection between the appellant and the suitcase or the appellant and its ingestion. There was no evidence about how the suitcase was ingested, nor was there any evidence that any contribution was made by the appellant. There was no evidential connection here between the appellant and the suitcase. It might be different if the informer Majid's evidence linking the appellant to the suitcase had been accepted (Trial Court Opinion paragraph [85]; Majid Day 50/6817-8) or if the court had found that there was concert with the co-accused Fhimah (Trial Court Opinion paragraph [85]).

While the trial court found that the appellant's visit to Malta on a coded passport on 20-21 December was a visit "in connection with the planting of the device", the nature of that connection is not defined. Had it been so defined – for example, by acceding to the Crown's suggested inference that he brought with him components of the IED, or by accepting the Crown's submission that on 21 December Fhimah took the appellant to the airport in order to assist him in causing the primary suitcase to be ingested by using his airside pass to overcome security – in these circumstances, it may have been possible to use the appellant's presence at the airport at or about the time the device must have been planted as evidence confirming that as at 21 December he knew of the common criminal purpose. Without accepting this evidence, however, the connection can be nothing more than temporal and geographical.

Even if the presence of the appellant, (without any other evidence of his participation or intention to participate at the airport) could be used as some kind of unspecified evidence suggestive of prior concert, it cannot establish that the common criminal purpose existed at the date of purchase or that the appellant had at that stage acceded to the plan knowingly. In other words even if presence at the airport might provide a basis to infer that on that date, 21st December, the appellant knew or was aware of the plot, it cannot found an inference that he had knowledge of the plot at the date of purchase. There is gap in the evidence here between the purchase and the ingestion.

4.3.2 Materiality and sufficiency of inference

This inference is clearly material, without it the identification of the appellant as the purchaser does not connect him to the commission of the crime. It requires to be established on evidence which could be found proved beyond a reasonable doubt.

In view of the gaps in the evidence here, on any view this cannot be found established to that standard. Even taken together, the disinterested nature of the purchase and the presence at the airport are insufficient to found the inference as a reasonable one and as the only reasonable inference arising from that evidence.

4.3.3 Conclusion

1. The inference that the appellant knew of, or must have known, the purpose for which the clothing was purchased has no basis in the evidence. In particular in view of:-
    (a) the absence of any evidence of the existence of a criminal purpose on the date of purchase; and
    (b) the gap between the purchase and ingestion and the absence of any evidence linking the purchase and the use of the clothing, other than the fact the clothing was found inside the primary suitcase.

2. The evidence of the appellant's background and his association with others has no connection with and is remote from this inference of knowledge.

3. The evidence of the disinterest in the purchase and the presence of the appellant at Luqa airport cannot establish that the common criminal purpose existed at the date of purchase or that the appellant had at that stage acceded to the plan knowingly.

4. Even if the inference were a reasonable one there is insufficient evidential basis to entitle it to be found established beyond a reasonable doubt and it is not the only inference which can be drawn. As such there is insufficient proof that the appellant, in buying the clothing, knowingly assisted in the commission of the crime, whereby the trial court was not entitled to convict.

4.4 PROVENANCE OF THE PRIMARY SUITCASE: INGESTION AT LUQA

4.4.1 Circumstances relied upon: Evidential base

The trial court accepted forensic evidence that flight Pan Am 103 was destroyed by an explosion within baggage container AVE4041. The IED was triggered by an MST-13 timer. (Trial Court Opinion at [15]). Assuming the IED was in a piece of luggage or suitcase, it is likely that the piece was positioned such that it was not lying on the floor of the container (Trial Court Opinion at [5]).

Forensic evidence that the primary suitcase identified as containing the IED was a brown (or similar) Samsonite case; that it also contained 12 items of clothing and an umbrella and that most of these items had been purchased from Mary's House, was unchallenged (Thomas Hayes Days 15/2336 & 16/2458; Tony Gauci Day 31/4725).

Flight History

Flight KM 180 from Luqa arrived at Frankfurt at 12.48 on 21st December. Just over 4 hours later (at 16.53) PA103A (a feeder flight for PA103) left Frankfurt bound for Heathrow. After PA 103A arrived at Heathrow baggage belonging to passengers bound for New York was transferred onto PA103. PA 103 left Heathrow at 18.30.

The container AVE4041 was loaded with baggage that had arrived at Heathrow on PA103A (online baggage) as well as a quantity of interline baggage (i.e. baggage that had arrived at Heathrow on board flights from different carriers).

The evidence before the trial court examined three possible places where ingestion of the IED could have occurred – Heathrow, Frankfurt and Luqa – any of which was accepted by the Crown to be a possibility. The Crown and therefore the trial court did not and could not identify the origin of the primary suitcase by a process of elimination. Several possible means by which it could have been introduced were

identified, and these opportunities for ingestion could not be excluded. The implications of this position are examined below.

Heathrow

The evidence led concerning Heathrow was limited and concentrated on the loading of the container AVE4041. This container AVE4041 was set aside to receive interline baggage for loading onto PA103. A number of bags were placed into it in the interline shed and then it was taken (via the baggage build up area) to flight PA103A from Frankfurt, where it was loaded with bags from that flight (Trial Court Opinion [22]). Prior to this and whilst still in the interline shed a baggage handler John Bedford (whose evidence was accepted) said that he had left the interline shed to have a cup of tea. On his return, he saw that two cases had been added to the container. One of these cases was a brown or maroony-brown hardshell Samsonite type suitcase (Trial Court Opinion [23]).

Other evidence suggested that security generally at Heathrow was lax (Trial Court Opinion [23]). It was accepted that it was a possibility that an unaccompanied and extraneous bag could have been introduced at Heathrow (John Bedford Day 44/6445; Peter Walker Day 43/6259 & 6291 and Trial Court Opinion [22]-[24]).

Frankfurt Airport

The evidence led about Frankfurt was directed to the distinct questions of whether the records justified an inference that an unidentified and an unaccompanied bag arrived on KM 180 from Luqa and if so whether that bag was the primary suitcase. The focus of the evidence was therefore (i) the gaps in the Pan Am systems for handling baggage (in particular the baggage of interline passengers arriving into Frankfurt on another airline and transferring onto Pan Am) which left the airline vulnerable to ingestion of an explosive device, and (ii) the computerised baggage handling system at Frankfurt, with particular reference to the process of baggage transfer between the arrival of the KM 180 and the departure of PA 103A. This evidence concentrated on the records and their interpretation, and there was little examination of the opportunity for infiltration to have occurred at Frankfurt.

Evidence of an unaccompanied bag from Luqa

This consisted essentially of documentary records and from their interpretation the trial court drew the inference that an unidentified and unaccompanied bag travelled on KM 180 from Luqa and was transferred to PA 103A from Frankfurt to Heathrow.

At Frankfurt, Pan Am did not attempt to reconcile interline passengers and their baggage, but relied instead on x-raying interline bags (Heribert Leuninger Day 36/5548*;* Wulf Krommes Day 36/5561 and Trial Court Opinion [28]). The standard of training given to x-ray operators was poor (Oliver Koch Day 39/5937 and Trial Court Opinion [34]). The absence of any system of reconciliation between the interline passengers and their baggage left open the prospect of unaccompanied baggage being loaded. There was evidence here of at least two apparently unaccompanied bags which were ingested into the baggage system for loading onto PA103A. The first of these was the bag inferred to have been carried on KM180. The second was a bag which, taking a similar view of the Frankfurt records, appeared to have been transferred from LH1071 from Warsaw. (See Trial Court Opinion [33], Appeal Court Opinion [175]) .

At Frankfurt, employees known as interline writers were responsible for directing transit baggage from incoming flights to coding stations. These coding stations were located in areas known as V3 and HM (Joachim Koscha Day 37/5633; Andreas Schreiner Day 37/5714; Gunther Kasteleiner Day 38/5824; Trial Court Opinion [26]). Incoming baggage was generally brought to V3 in wagons. On arrival it was directed to a coding station. The proper practice was that each coding station should not deal with bags from more than one flight at a time. At the coding station bags were received into the automated baggage system by being placed into individually numbered trays. The information from the luggage tags was entered into the computer.

Computer records from Frankfurt were kept identifying, *inter alia*, the arrival of baggage at V3 and the station(s) at which they were coded (Trial Court Opinion [27]). On 21st December the interline writer for flight KM180 was Andreas Schreiner. He

made a record on the interline sheet (CP 1092) which recorded that one wagon of baggage from KM180 was recorded as arriving at V3 at 1301 (about a minute after the luggage had been unloaded). Handwritten work sheets from Schreiner and Koscha (CP 1061) were produced which showed that one wagon of baggage from KM180 was coded at station 206 between 1304 and 1310 (Schreiner Day 37/5715 and Trial Court Opinion [29]). The coder, a Mr Koca, did not give evidence. There was a dispute at trial as to whether this worksheet recorded 13.10 or 13.16 as the finishing time, and the appeal court decided that the trial court misinterpreted the evidence regarding the end-time as disclosed by the coders' worksheet, which was properly viewed as inconclusive, but decided this error was not material. Accordingly these documents were capable of supporting the inference that a wagon of baggage, containing one or more items from KM180 was coded between 1304 and 13.10/1316. They did not show however what happened to the baggage thereafter.

At Frankfurt, it was possible for a limited period to identify via the computer all items of baggage sent through the system to a particular flight (Koscha Day 37/5642; Kasteleiner Day 38/5796; Bogomira Erac Day 47/6661; Trial Court Opinion [27]). A printout from the baggage system computer (CP 1060) showed this information in relation to baggage sent to flight PA 103A. The printout was examined by the trial court along with evidence explaining how to interpret the entries recorded on it. This bore to show that an item (placed in tray B8849) was coded into the system at 1307 at station 206 and thereafter delivered to the appropriate gate at 15.23 to be transferred onto PA103A (Kasteleiner Day 38/5801; Trial Court Opinion [30]).

There was an apparent discrepancy or error in the records between the numbers of wagons of baggage from flight LH669 (from Damascus) recorded as having been delivered to V3 and subsequently coded into the system. However the trial court found that the re-loading of wagons at customs could account for same (Koscha Day 37/5704; Trial Court Opinion [33]).

This documentary evidence did not establish that the item which was ingested into the baggage system in tray B8849 was in fact loaded onto PA103A. The evidence from the witness Mr Kasteleiner who operated the computer baggage system was that there was no item of baggage left within the baggage transport system. It did not establish

the fact of loading and as the appeal court recognised could not exclude the possibility that an item of luggage had been left at the gate (Appeal Court Opinion at [158]). However the appeal court upheld the trial court's conclusion that it was in fact loaded from other evidence (not identified by the trial court). This was evidence to the effect that interline baggage was sent for x-ray and after its return placed in front of the plane for loading (Roland O'Neil Day 39/5872) and agreed evidence that some of the interline baggage had been loaded on PA103A after being x-rayed (Appeal Court Opinion [157]-[161]).

The Frankfurt records were accordingly capable of bearing the inference that an item of baggage from KM180 had been ingested into the baggage system and transferred onto PA103A. The records did not assist in determining whether such a bag was unaccompanied. That was also a matter of inference – based on the evidence that no passenger from KM180 transferred onto PA103A and that all KM180 passengers recovered their baggage at the end of their journeys. (See below).

Evidence that this unaccompanied bag was the primary suitcase.

The records from Frankfurt cannot yield this inference. The evidence relied upon to find that the unaccompanied bag was the primary suitcase is rehearsed by the trial court (Trial Court Opinion [82]). It consisted of the following:

1. The clothing in the primary suitcase was purchased in Malta;
2. The purchaser was a Libyan
3. The IED was triggered by an MST-13 timer, a substantial quality of which had been supplied to Libya; and
4. An unaccompanied bag was from KM 180 was loaded onto PA 103A

Which taken together gave rise to an "irresistible" inference that the unaccompanied bag was the primary suitcase (Trial Court Opinion [82])

Evidence of opportunity of ingestion at Frankfurt

There was very little evidence relating to the opportunity for infiltration of a bag at any stage prior to the loading of all of the luggage on PA 103A. For example there was no evidence about the handling of the bags from KM 180, whether before arrival at V3 or when being transferred to, and left at, the gate. There was evidence that there were no safeguards in place against tampering with the trolleys which brought baggage from aircraft to the baggage reception areas, and that there was no record of who transported the baggage from KM 180 to Hall V3 (Schreiner Day 37/5723). The absence of a system of reconciliation and the presence of another unaccompanied bag suggested that infiltration was possible. (The appeal court concluded that it was possible that ingestion occurred at Frankfurt, but that on the evidence this was "a theoretical rather than a real possibility" – Appeal Court Opinion [271]).

Luqa Airport

The evidence led in respect of Luqa was directed to the opportunity of ingestion there. However this evidence, on any view, caused the Crown considerable difficulties. It consisted of evidence from different sources – both the direct evidence of witnesses and from records – all of which pointed away from the opportunity of ingestion and also directly contradicted the suggestion that there was an unaccompanied bag on flight KM 180.

Luqa had a relatively elaborate security system. It is described in the opinion of the Appeal Court at [264]-[267]. Put shortly this evidence was that :-

> "[264] Luqa airport was relatively small in 1988. There were not very many check-in desks. Behind these there was a conveyor belt and behind it a solid wall, separating the check-in area from the airside area. Three doors behind the check-in desks, between the public area and airside, were kept locked. There were other doors between the airside and the open area, but these were guarded by military personnel, who also dealt with security at other entrances to the airside area. The military controlled access and exit to airside. The conveyor belt carried items of baggage along behind the check-in desks

through a small hatch into the airside baggage area. The hatch was also under observation by military personnel, and there were Customs officers present in the baggage area, which was restricted in size. Items of baggage passing along the conveyor belt were checked for the presence of explosives by military personnel using a sniffer device which could detect the presence of many explosives. Accordingly the only access from the check-in area to the sniffer area was through the hatch or a separate guarded door.

[265] Air Malta acted as handling agents for all airlines flying out of Luqa. The check-in desks for all flights were manned by Air Malta staff. Station managers and other staff of other airlines were present at the airport. The security arrangements governing the issue of Air Malta baggage tags were tight.

[266] All items of baggage checked-in were entered into the airport computer as well as being noted on the passenger's ticket. After passing the sniffer check, baggage was placed on a trolley in the baggage area to wait until the flight was ready for loading. It was then taken out and loaded. The head loader was required to count the items placed on board. The ramp dispatcher, the airport official on the tarmac who was responsible for the departure of the flight, was in touch by radiotelephone with the load control office. The load control had access to the computer and after the flight was closed would notify the ramp dispatcher of the number of items checked-in. The ramp dispatcher would also be told by the head loader how many items had been loaded -
"So the head loader will count the bags; load control will have records of how many bags should go on that flight, and they will match the two. If there was a discrepancy would take various steps to resolve it. Interline bags would be included in the total known to load control, as would any rush items." (Borg Day 33/5016)

The trial court noted (at [38]) and apparently accepted that –

"The evidence of the responsible officials at the airport, particularly Wilfred Borg, the Air Malta general manager for ground operations at the time, was

that it was impossible or highly unlikely that a bag could be introduced undetected at the check-in desks or in the baggage area, or by approaching the loaders, in view of the restricted areas in which the operations proceeded and the presence of Air Malta, Customs and military personnel. Mr Borg conceded that it might not be impossible that a bag could be introduced undetected but said that whether it was probable was another matter."

This latter reference is important. The Crown sought to rely heavily upon a purported concession made in the evidence of Mr Borg that it was possible that an unaccompanied bag was loaded.

It is necessary to examine this evidence properly:

"Q If on such a flight in 1988 an extra bag over and above the total that were due to be carried was in fact transported, would that surprise you?

A Yes, it would.

Q Why is that?

A Because if there was a physical match, and the numbers tallied, the only explanation I can then give is a mistake has been made. A bag would have been wrongly loaded.

Q What do you mean by a physical match in this situation?

A In the sense that the physical count by the head loader gives the actual amount loaded. If anything else went on, then either the head loader miscounted, or else I cannot explain it.

Q But, from what you've told us, if the head loader miscounted by one, then an extra bag could be carried, over and above the total that was meant to be?

A If he miscounted, yes.

Q All right. And if it was demonstrated that in 1988, on a given flight, an extra bag over and above the total that was due to be carried, was in fact carried, then it would follow, wouldn't it, that the checks which were in place had not identified that extra bag?

A If it is proven so, yes. But one must also realise that the checks we had in place were unique to Malta, as far as I am aware.

Q But in discussing the possibilities here, what we've already identified is that all that would be required would be the chance of a head loader miscounting by one?

A Yes.

Q All right. And, of course, it was possible for staff to make errors, was it not?

A Human error is always a possibility, at the end of the day.

Q All right. And errors on the part of members of staff could lead to bags being transported that ought not to have been in a number of different ways, couldn't they?

A Yes, they could. If that weren't resolved, no bag would be lost, we wouldn't need the lost luggage department.

Q Of course, I understand. In the way of the operation of airports, do bags sometimes end up at Malta that weren't destined to arrive at Malta?

A Yes, they do.

Q And do you have a unit called the baggage services unit?

A Yes, we have.

Q That attends to such bags?

A Like any other airport, yes.

Q Yes. Such a unit would exist in any airport?

A Correct.

Q All right. And just as bags were sometimes received at Malta in error, were bags ever sent in error from Malta to the wrong airport?

A Yes, they were.

Q And that situation must have been one in which the bag or bags were sent on the wrong aircraft?

A Yes, they were. Or left behind.

Q Sorry?

A Or left behind.

Q Well, but I am asking you about the occasions on which bags were sent in error from Malta to the incorrect airport.

A Correct. There were cases, yes.

Q And they would, of necessity, therefore, have been carried on the wrong aircraft?

A Exactly. Yes.

Q And that's despite the checks that you've just told me about?

A Yes.

Q Which were designed to avoid that?

A They are designed to reduce that. You can never eliminate human error.

…

Q I see. Now, what we've just discussed, Mr. Borg, is that human error can always exist, and an extra bag could be carried by virtue of a mistake being made?

A Yes, it could.

Q And we've talked about examples of that. Can we put the question of mistake aside for a moment now, and think about something else. Can we consider the position of someone with knowledge of how the various systems and checks operated within Malta Airport in 1988. And can we think of somebody who had that knowledge and would also have access to all areas of the airport. Now, there will be a number of people who fall into that category?

A There would be, yes.

Q Would it have been possible, in 1988, for someone with that knowledge and that access to have deliberately circumvented the checks that you have in place?

A Anything is possible. Whether it is probable is a different story.

Q Yes. You see, plainly, one could imagine any number of ways, perhaps, in which someone could deliberately --

MR. DAVIDSON: I object to that question in the way it's framed. It's leading the witness. It may be an important matter.

LORD SUTHERLAND: I'm not sure that it got far enough, but it certainly was headed towards being a leading question, Mr. Depute.

MR. TURNBULL: I accept that, My Lords.

Q Taking on board that such things might be possible, Mr. Borg, can you think of any particular ways in which someone could deliberately circumvent the checks that you had in place?

A The possibility is always there. It's the level of difficulty of achieving that possibility. One can also rob a bank.

Q All right. You see, I am trying to just check of how difficult such things might be. And can I ask you to think of this, and I simply give it just as an

example, to ascertain the measure of impossibility. If, for instance, a head loader was not -- was prepared, deliberately prepared not to count a particular bag, would that circumvent the check?

A Of course it would.

Q So that's just an example of the sort of thing that could be possible?

A Yes."

(Day 33/5032-8)

Under cross the witness gave some perspective of the margin for error under the "unique" reconciliation system in operation -

"…we were unique in having a physical count of the baggage which was loaded on aircraft and trying to tally that with what was checked in. We did a survey for six months before Lockerbie, up till six months after Lockerbie, because we were asked to do so, and traced each and every mishandled baggage out of Malta and into Malta on all flights in a year. The figures worked out that for every bag mishandled out of Malta --

Q I wonder if you could just speak a little more slowly. I'm sorry to interrupt you, Mr. Borg.

A The figures turned out that for every bag mishandled out of Malta, five bags were mishandled into Malta on the same flight, either from Heathrow, Frankfurt, or whatever.

Q I see.

A And that is the value of the reconciliation process."

Further in respect of the potential for the margin of error, the witness subsequently indicated that the survey of approximately 14,000 flights some 24 mishandled bags were identified. (Day 34/5176-5179)

The head loader for KM 180 (Michael Darmanin) was on the witness list but not led. However in response to cross examination Mr Borg emphasised there was no evidence of subversion and that Darmanin was never under suspicion (Day 34/5193-4). It was also established that neither the check in agents or the loaders would know where they were to be allocated until the start of their shift (Day 34/5171-2). Finally

the check in agent was led in evidence but it was never suggested to her that there had been any attempt at subversion of the system.

Unaccompanied Bag on KM 180

As to the flight KM 180 itself the evidence showed that:-

- No passenger on KM 180 had an onward booking to the U.S. All passengers on KM 180 retrieved all their checked-in bags at their destinations. (Trial Court Opinion [31])
- The documentation for KM 180 does not record the carriage of any unaccompanied bag (Borg Day 33/5105)
- The records relating to KM180 show no baggage discrepancy, and the flight log (CP930) shows that fifty-five items of baggage were loaded, corresponding to fifty-five on the load plan. (Trial Court Opinion [39]).

4.4.2 Findings and inferences drawn

The trial court found the following:

The court inferred, principally from the Frankfurt records, that an item of unaccompanied baggage which came into Frankfurt on KM180 was transferred to and loaded onto PA103A. (Trial Court Opinon paragraphs [31], [35], [82])

The court concluded that the evidence that –

- the clothing in the primary suitcase was purchased in Malta;
- the purchaser was a Libyan
- the IED was triggered by an MST-13 timer, a substantial quality of which had been supplied to Libya; and
- an unaccompanied bag was from KM 180 was loaded onto PA 103A

when taken together gave rise to an “irresistible” inference that the unaccompanied bag from KM 180 was the primary suitcase (Trial Court Opinion paragraph [82])

Accordingly the court found proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow.

4.4.3 Materiality and sufficiency of the inference

Within the Grounds of Appeal (Grounds 2.1.3 (page 14), Ground 2.2.3 (page 33) and Ground 2.2.6 (page 39)), the appellant challenges the inference drawn by the trial court that the primary suitcase was ingested at Luqa. This issue is raised both under the heading of defective reasoning and on the basis that it was not supported by the evidence.

It was expressly conceded by the Crown that the inference of ingestion of the primary suitcase at Luqa was critical to proof (Crown Appeal Submissions Day 96/27). The appeal court viewed this inference as "plainly an essential part of the Crown case" (Appeal Court Opinion paragraph [59]).

That being so, as stated above (at section 2.2.5) the evidence which supports this inference must be such as to, first, render the inference a reasonable one and secondly, sufficient to find it the only reasonable inference which can be drawn.

4.4.4 Defective Reasoning

It is not clear how these conclusions were reached on the evidence. The reasoning of the trial court in drawing these inferences appears to be defective.

<u>The initial inference – ingestion of an unaccompanied bag at Luqa</u>

The judgment reads as if the trial court prematurely drew the inference from the Frankfurt records that there was an unaccompanied bag on flight KM 180. Paragraph [31] of the judgment begins with the statement:

> "[31] The documentary evidence as a whole therefore clearly gives rise to the inference that an item which came in on KM180 was transferred to and left on PA 103A."

And concludes with the statement:

> "…It follows that there is a plain inference from the documentary record that an unidentified and unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and there was loaded on PA 103A"

Paragraph [35] states:

> "[35] The evidence in regard to what happened at Frankfurt airport, although of crucial importance, is only part of the evidence in this case and has to be considered along with all the other evidence before a conclusion can be reached as to where the primary suitcase originated and how it reached PA103. <u>It can, however, be said at this stage that if the Frankfurt evidence is considered entirely by itself and without reference to any other evidence, none of the points made by the defence seems to us to cast doubt on the inference from the documents and other evidence that an unaccompanied bag from KM180 was transferred to and loaded onto PA103A."</u>

This is before the trial court has considered the evidence from Luqa airport.

The appeal court did not accept this criticism at the appeal and accepted the Crown argument that the trial court's conclusions had only been reached later (as rehearsed in paragraph [82]) of the judgment – (see Crown Appeal Submissions Day 96/10-14 and Appeal Court Opinion paragraphs [263]-[274]). Nonetheless the impression remains that the trial court was, at the least, favourably disposed to the drawing of this inference from the outset. Or, alternatively, had reached a prematurely concluded view as to the presence of an unaccompanied bag from KM 180 whilst postponing its conclusion in relation to whether that bag was the primary suitcase.

The Luqa airport evidence is then rehearsed by the trial court and apparently accepted. Nowhere in the trial court's reasoning is there the rejection of, or any reasons given for the rejection of, this evidence. The evidence is undisputed. Nor is

there any apparent resolution of the conflict between the inference drawn from the Frankfurt records and the evidence from Luqa airport.

At the same time, the import of the Luqa airport evidence is understated and does not properly reflect the evidence given. Notably in the following findings:

- That on the face of it, the arrangements at Luqa seem to make it "extremely difficult" for an unaccompanied and unidentified bag to be shipped on a flight out of Luqa (Trial Court Opinion paragraph [38])
- That "...the Malta documentation for KM180 does not record that any unaccompanied baggage was carried..." (Trial Court Opinion paragraph [31]) Whereas properly put the Malta documentation does record that an unaccompanied bag was not carried
- That the method by which ingestion was achieved at Luqa is not established and the Crown could not point to any specific route by which it could have been done. "The absence of any explanation is a major difficulty for the Crown case" (Trial Court Opinion paragraph [39]).

These findings do not fairly represent the undisputed evidence. This evidence necessarily implies that no unaccompanied bag was loaded on to KM 180. The "major difficulty" for the Crown case here is that the evidence from Luqa airport is that there was no bag ingested there and it is not apparent that a bag could be ingested there. The Crown had no basis to suggest how this could be overcome.

It is not at all clear whether the trial court started by drawing the initial inference from the Frankfurt records alone and then moved on to infer that this was the primary suitcase, or whether it sought support for the initial inference from the other evidence.

This is important because the starting point, the initial inference, if it is drawn from the Frankfurt records – as it appears from paragraph [35] that it was – it is an unreasonable inference given the inconsistent facts. The Crown appeared to concede during the appeal that the Frankfurt records alone would not be enough in the face of the Luqa airport evidence (Crown Appeal Submissions Day 96/22).

Furthermore, when the relevant evidence is considered (analysed in detail below at 4.4.5), the initial inference is not supported by any of the factors identified by the trial court in paragraph [82] or indeed by any other evidence. None of the three factors referred to (the clothing, the purchaser and the timer) is relevant to or in any way undermines the evidence about Luqa.

The second inference – Ingestion of the primary suitcase

The Frankfurt evidence alone cannot yield the inference of ingestion of the primary suitcase, only of an unaccompanied bag which might be the primary suitcase. The inference drawn that the unaccompanied bag is the primary suitcase is a further inference which cannot be reached without consideration of the other separate evidence of, for example, the clothing.

However, as with the initial inference (discussed above), the evidence about Luqa airport ruled out anything other than the possibility of accidental introduction of an unaccompanied bag or a very limited set of circumstances in which the deliberate subversion of the airport security measures could be effected. As is discussed in detail below in section 4.4.5, there was no evidence whatsoever, either direct or circumstantial, of any such subversion.

It is not apparent whether or not the trial court proceeded on the basis that the conflicting evidence from Frankfurt and Luqa could be reconciled – this would be consistent with the court's understatement of the import of the evidence (referred to above) and with the absence of any apparent resolution of this conflict. During the Crown submissions it appeared to be suggested that the Luqa airport evidence could be reconciled with ingestion there (see below). If that is what was being suggested, then it is wrong as it is not properly supported by the evidence. Drawing the inference of ingestion on this basis was unreasonable.

It is not apparent whether or not the trial court did resolve the problem of the inconsistent facts presented by the Luqa airport evidence. This is not addressed in the judgment. Nothing is said at any time about rejecting the evidence from Luqa. It

could be that the inconsistent facts were simply set aside without resolution. There is no explanation or apparent resolution of this inconsistency.

The trial court's conclusion at paragraph [82] is:

> "....When, however, the evidence regarding the clothing, the purchaser and the timer is taken with the evidence that an unaccompanied bag was taken from KM180 to PA103A, the inference that that was the primary suitcase becomes, in our view, irresistible. As we have also said, the absence of an explanation as to how the suitcase was taken into the system at Luqa is a major difficulty for the Crown case but after taking full account of that difficulty, we remain of the view that the primary suitcase began its journey at Luqa."

This statement does not provide any reasoning. There is no explanation of how this difficulty was resolved (if at all). As suggested below, taking full account of the difficulty here must raise a reasonable doubt.

The appeal court appear to suggest that the difficulty is resolved by implication here:

> "[274] In our opinion, therefore, a proper analysis of the judgment from paragraph [16] to paragraph [82] does not disclose any underlying defect in reasoning such as to amount to a misdirection. What the trial court can be seen to have undertaken was the task of deciding what weight to attach to any particular piece of evidence or body of evidence which it accepted, which was precisely its function as a trial court. Once it had done that, it was open to it to decide that the primary suitcase began its journey on flight KM180 at Luqa, notwithstanding the difficulty of infiltration there and the absence of any evidence about how this was achieved, because of the view it formed about the strength of the inference which it drew from the documents and other evidence relating to Frankfurt airport, and the other circumstances which it regarded as criminative and which pointed to infiltration at Luqa."

This suggests that the trial court having accepted the Luqa airport evidence must have weighed it up against the other evidence and resolved the inconsistency due the 'strength of the inference' drawn from the Frankfurt documents and other evidence.

Lack of reasoning

The difficulty with this analysis is that it is not at all clear that this is what the trial court did. Where there are clear inconsistent facts which require to be addressed before an important inference can be reasonably drawn, this ought to be addressed within the judgment. Reasons must be given for findings made upon contradicted evidence, and upon which the outcome of the case rests. Without any reasoning it cannot be assumed that the inconsistency has been resolved.

The absence of such an explanation supports the conclusion that the trial court's assessment of this evidence was unreasonable and that there was no proper recognition of, or resolution of, the inconsistent facts.

In *R v Sheppard* [2002] 1 S.C.R. 869, 2002 SCC 26 at (38) the Supreme Court in Canada accepted that the absence of adequate reasons may "contribute to appellate intervention" and contribute to a conclusion that a verdict is unreasonable albeit the inadequacy of reasons does not itself constitute unreasonableness; and further that want of reasoning should not itself prevent argument as to the reasonableness of the approach taken. That inadequate reasons can contribute to a conclusion of an unreasonable verdict is further addressed in *R v Biniaris supra* at (37) (emphasis added):

> "(37) …The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

> For example, in *R. v. Burke* 1996 CanLII 229 (S.C.C.), [1996] 1 S.C.R. 474, this Court was in a position to identify the deficiencies in the trial judge's analysis of the evidence which led to her unreasonable conclusions in respect of the three counts of indecent assault facing the accused. In that case, Sopinka J. found that the trial judge had ignored the possibility of collusion or corroboration between witnesses before accepting their "strikingly similar" evidence, had not been alive to circumstances (i.e., the absence of physical traces of an alleged indecent assault which, if true, should have left observable marks) which caused great concern about the reliability of evidence adduced in support of allegations of a bizarre nature, and had relied uncritically on unorthodox identification evidence. Similarly, in *R. v. Reitsma*, 1998 CanLII 825 (S.C.C.), [1998] 1 S.C.R. 769 this Court agreed with Rowles J.A., dissenting, that the trial judge had failed to advert to deficiencies in the pre-trial identification procedure and the shortcoming of "in dock" identification. Finally, in *R. v. O'Connor* (1998), 123 C.C.C. (3d) 487 (B.C.C.A.), at pp. 492-93 and 518-20, the trial judge accepted the accused's evidence that he was not present at the place where the offence was alleged to have been committed, and yet convicted the accused. This logical inconsistency was relied upon by the Court of Appeal to explain the unreasonableness of the verdict. These examples demonstrate that in trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law."

Here the defective reasoning is relied upon as support for the view that the verdict was unreasonable in that it demonstrates a failure by the trial court to take proper account of the evidence or properly weigh the evidence. It is not suggested here that the defects are such that this in itself is an error of law or a basis for finding the verdict unreasonable (such as suggested by Fish J in *R v Beaudry (supra)*).

In particular here in the absence of any apparent rejection of the undisputed and inconsistent facts, the appropriate conclusion is that the trial court failed to take proper account of same and failed to resolve the inconsistency before drawing the inference of ingestion. As such the drawing of that inference is unreasonable.

4.4.5 Reasonableness of the inferences drawn

As already stated, the appellant within the Grounds of Appeal (Ground 2.1.3 (page 14), Ground 2.2.3 (page 33) and Ground 2.2.6 (page 39)) challenges the inference in relation to ingestion of the primary suitcase both on the basis that it was not supported by the evidence and under the heading of defective reasoning.

Standing the difficulty in comprehending the reasoning process of the trial court, it is necessary to consider each different basis upon which the inference of ingestion could have been drawn. In each instance it is submitted that there was no proper or sufficient evidence to support the inference and as such the inference was unreasonable.

It is not suggested here - as set out in part of the ground of appeal (at pp.16-17) - that resolution of the inconsistent facts from Luqa airport cannot be made by rejection, as a result of the acceptance of other evidence, but rather that the other evidence relied upon is insufficient to allow a reasonable court to reject the inconsistent facts from Luqa.

<u>Ingestion inferred in the absence of inconsistency</u>

The trial court may have taken the view that the acceptance of this evidence did not create an inconsistency which had to be resolved – i.e. that it was ‘difficult’ but not impossible for there to be ingestion at Luqa. If it did, then this would be an unreasonable approach in that it is incompatible with the evidence.

In seeking to justify the trial court’s decision, the Crown position on appeal was, at least in part, that the two chapters of evidence – i.e. Frankfurt records on the one hand

and Luqa airport evidence on the other - were reconcilable in that Mr Borg's evidence had admitted the possibility of the Crown case – i.e. ingestion by subversion at Luqa.

The following passages from the Crown submissions on appeal encompass this approach:

> "LORD OSBORNE:....But is it not a different matter to say, on the basis of these features of the situation, that the bomb passed through Luqa Airport, standing that there is considerable and quite convincing evidence that that could not have happened.
>
> MR. TURNBULL: Can I begin by begging to disagree with the last words that My Lord used, because Mr. Borg, the witness from Malta, did not say that it was impossible --
>
> LORD OSBORNE: He didn't say it was impossible, no.
>
> MR. TURNBULL: And that's why I ask My Lord to reconsider the words "could not have happened."
>
> Now, with that in mind --
>
> LORD OSBORNE: All right. Was a highly improbable scenario...
>
> MR. TURNBULL: Yes. With that in mind, what one finds is that there is apparently documentation, as interpreted by witnesses, to suggest that an unaccompanied suitcase did travel from Malta to Frankfurt, and then one returns to the Luqa chapter and finds that that's a very difficult thing to understand. And if matters remain there, then the Crown case would go no further forward. But what one does find is that a bomb was on the aircraft Pan Am 103 and that in that same suitcase there was clothing which was purchased from a shop in Malta, and that very fact is capable of vouching the proposition of Maltese ingestion. On its own, it probably wouldn't be enough to combat the evidence given by Mr. Borg as to the security procedures at Malta, but when it is linked with other evidence of an acceptable sort, which shows that despite what Mr. Borg says, an unaccompanied bag did in fact travel, then the inference is capable of being drawn, because it's combination of two separate types and sources of evidence..." (Day 96/22)

and

> "But perhaps My Lord also should bear two factors in mind. The Crown case was that the procedures were subverted, and Mr. Borg naturally accepted that it would be possible to subvert procedures. This is a criminal act. This is not an act of negligence. All procedures of the sort that exist at airports are designed to prevent this event occurring. This event did occur; procedures were subverted. That is plain. The only question is where those procedures were subverted... The second is that the procedures at all airports are designed to prevent this event occurring, but the fact is that it did." (Day 96/31)

Within this approach the Crown appear to suggest first, that the mere fact that there was a bomb on the plane supports the inference of ingestion at Luqa – which is plainly wrong. And secondly, that given this, the 'Crown case' of subversion was established –"the procedures were subverted" which is inaccurate. There were other possibilities of ingestion elsewhere on the evidence which did not necessitate the claimed subversion of procedures at Luqa.

Most importantly, this position is not supported by the evidence as rehearsed above. There was no evidence of, and no admission of any real possibility of, ingestion at Luqa by the means of subversion.

Properly understood and in the context of his whole evidence what Mr Borg said was that:

- There was no unaccompanied bag loaded on to KM180.

- In theory, he accepted that if proved that there was such a bag, then this could either be by accident or in some way he couldn't explain. It could be by a result of a discrepancy in the records. "Human error is always a possibility, at the end of the day." Taken as a whole the witness acknowledged that miscounts had happened and could happen but was keen to restrict the potential for the margin of error as a result of the unique reconciliation system in place. Nonetheless this was evidence that accidental ingestion was a not unheard of or even uncommon event.

- However he did not accept that this could arise from deliberate circumvention of the system but only acknowledged an improbable and abstract possibility that all things are possible. Taken as a whole his evidence clearly was against the speculative possibility of deliberate circumvention and that there was no evidence of same.

It is a distortion of the evidence of Mr Borg to suggest he accepted and provided a basis for the possibility of ingestion by subversion. He did accept the real possibility of a discrepancy in the records from human error or accidental ingestion – but this was excluded by the trial court, for obvious reasons, as the means for ingestion of the primary suitcase (Trial Court Opinion paragraph [39]).

There is no basis in any of the evidence for the inference that an unaccompanied bag was or could have been introduced by deliberate circumvention of the system in place at Luqa. This suggestion by the Crown was wholly speculative.

It is worth noting that the Crown's speculation of ingestion by deliberate subterfuge requires:

- Intentional acts by a person who could overcome the general security – this being, the Crown suggested, someone in the position of the co-accused at the airport; and

- A further intentional act by another (corrupted) airport worker. On the evidence, this second person would have to be either the person manning the check in desk (who would require to alter the computer record of checked baggage by adding an additional bag into the records) or the head loader (who would reduce by one the count of bags actually loaded onto the aircraft, thus bringing that number back into harmony with the number of bags recorded as having been checked-in for the flight).

There was no such evidence. The check-in operator gave evidence (Anna Attard Day 36/5505) and it was not suggested to her that she acted to subvert the system. The head loader (Darmanin) was available to give evidence but was not called. However Mr Borg, who did give evidence, emphasised that Darmanin was trustworthy and had never been the focus of any suspicion during the inquiry (Wilfred Borg Day 34/5193-4). There was also evidence (Borg: Day 34/5171)) that neither loaders nor check-in staff would know in advance what flights they would be handling during a day's work. On any view, this would make it more difficult for a terrorist to enlist the assistance of a corrupt checker-in/head loader to assist in introducing a bomb onto a particular flight.

Accordingly to approach this evidence on the basis that there is no inconsistency arising from the Luqa airport evidence is incompatible with that evidence. Any inference based upon same is unreasonable.

It is, however, possible to resolve the inconsistency in another way, which at the same time leads to the conclusion that there is no inconsistency between the documentary record at Frankfurt and the Luqa evidence. The possibilities of ingestion at Frankfurt airport before encoding were only touched upon in the evidence. Whilst this means there was no clear evidence supporting such a possibility, it was clear on the evidence that ingestion at this point was not impossible:

> "…It was also possible that, if the primary suitcase travelled from Frankfurt on flight PA103A, it was infiltrated there, but in the state of the evidence this, by contrast with the position at Heathrow, was a theoretical rather than a real possibility. This possibility, however, required to be considered…" (Appeal Court Opinion paragraph [271])

If a bag was ingested at Frankfurt prior to encoding then this would explain the Frankfurt records and of course be entirely compatible with the Luqa airport evidence.

It is also notable that the defence case of incrimination of the PFLP-GC involved leading undisputed evidence which *inter alia* showed (see 4.8.2 below) :-

- A connection between the PFLP-GC cell and Frankfurt

- The intention of the PFLP-GC to destroy civilian aircraft by explosive devices
- Possession of materials which included airline (including Pan Am) timetables and baggage tags

This evidence is relevant to consideration of the possibility of ingestion at Frankfurt.

However the trial court does not seem to have considered either the possibility of ingestion at Frankfurt or the potential relevance of the defence case – having been already inclined to draw the inference favourable to the Crown (Trial Court Opinion paragraph [35]).

Ingestion inferred in the face of inconsistent facts

As indicated above, once this evidence is accepted, unless it is thereafter rejected, the inference of there being an unaccompanied bag on flight KM180 cannot be reasonably drawn.

Further, the strength of the other evidence is irrelevant if the inconsistent facts remain and are not rejected. For example, overwhelming circumstantial evidence of guilt cannot overcome the accepted fact of an alibi. In this way the strength of the other supporting evidence here cannot overcome accepted evidence against ingestion at Luqa.

See *Dickson* supra at 91 paragraph 108 and the importance of inconsistent facts addressed above.

Ingestion not properly or sufficiently supported by the evidence

If the appeal court is correct in the view that the trial court had by implication considered and resolved the contradictions in the evidence by rejecting the Luqa airport evidence on the basis of the strength of the evidence supporting ingestion at Luqa, then it is submitted the latter was not, on any view, sufficiently strong to enable it to reasonably do so.

The matter of weight is of course within the province of the trier of fact. However where the choice made or the finding of strength made by the trial court is a finding which no reasonable trier of fact could make, then such a finding and any inference drawn from it are unreasonable. This was recognised as a possible basis for intervention at the first appeal (Appeal court opinion paragraph [84]).

In respect of what is here a material finding and crucial inference, another way of describing this is that on the whole relevant evidence no reasonable jury could have been left without a reasonable doubt.

In order to overcome such an inconsistent fact and draw such a crucial inference, the evidence on the other side has to be capable of establishing that ingestion at Luqa must have happened. i.e. the evidence must be sufficient to remove any reasonable doubt.

Approach of the trial court

Once again, the approach of the trial court here is problematic for a number of reasons:

1. Given the approach to the Frankfurt evidence and the starting point in paragraph [82] of the judgment, it appears that the trial court has proceeded throughout with this inference positively in mind. In the absence of any explanation it is difficult to be certain as to the approach of the trial court, but it appears throughout that the starting point is to accept that evidence, and in this context any weighing of the evidence is to determine whether the Luqa airport evidence is sufficiently strong to displace same, rather than to consider whether the Frankfurt records combined with the other evidence is sufficient to overcome the inconsistent facts and remove any reasonable doubt. This matters, because the onus of proof requires that the trial court find sufficient strength to reject the inconsistent evidence.

2. There is no suggestion that the trial court engaged in any weighing up process commensurate with proof of ingestion at Luqa beyond a reasonable doubt.

Indeed the appearance is that the standard used in the weighing process was simply the respective strengths of each body of conflicting evidence with the other.

3. There is no apparent examination of the respective strengths and quality of the evidence. For example nowhere is addressed the poor quality of the Frankfurt records in comparison to the quality of the evidence from Luqa airport.

Weakness of the evidence relied upon

There is insufficient evidence to entitle the conclusion that there "must have been" ingestion at Luqa despite the inconsistent evidence.

The circumstances here are in contrast to the position in the case of *King v HMA (supra)*, where there was on the one hand a large body of evidence constituting a "very powerful" Crown case (at p238) and, on the other hand, four eyewitnesses whose evidence concerning seeing the deceased alive was inconsistent with that powerful Crown case. There was no question in *King* that the evidence relied upon by the Crown was capable of proving the facts in issue beyond a reasonable doubt.

There are a number of weaknesses in the evidence relied upon here:

Nature and quality of the evidence: the Frankfurt Records

The defence at trial and on appeal made submissions questioning the reliability of the Frankfurt records (which submissions were misdirected to failures of the trial court to take account of same). These submissions were rejected by the trial court (Trial Court Opinion paragraph [33]) and the appeal court (Appeal Court Opinion paragraphs [85], [112]-[113], [133]-[134]). However the issues raised remain relevant here as part of the picture of the quality of the evidence. These are:

- The potential for error in the records particularily regarding timing entries – arising from the frequency with which bags were dispatched, the amount of

items involved, and the very slight margin for error required to give rise to a material inaccuracy.

- The potential for error from an apparent discrepancy relating to baggage from flight LH669 from Damascus between the number of wagons recorded as having been brought to V3 and the number of wagons coded in (at about the same time as baggage from KM180 was being coded at nearby stations).
- Suggestions in the evidence that the system that baggage was coded from one flight at a time was not always complied with in practice.

Moreover it is perhaps obvious that such records can contain errors. Here only the record was relied upon and there was no evidence led from the author to exclude error. In addition the inference of the records as revealing an unaccompanied bag was a matter of interpretation.

This evidence compares unfavourably with the quality of the evidence from Luqa airport which consisted of both records showing no discrepancy and the evidence of witnesses as to the application of the baggage handling system

As rehearsed above the evidence from Luqa airport involved a uniquely rigorous baggage reconciliation system to detect unaccompanied baggage with repeated counting and checking by airport staff at Luqa (to be contrasted with the complete absence of any reconciliation system at Frankfurt.)

This is reflected in Lord Osborne's observations at the appeal: "…looking at the material relating to Luqa, it does not appear to be open to very much criticism, whereas the evidence relating to the circumstances at Frankfurt appears to be open to substantially more criticism" (Crown Submissions at Appeal Day 96/24).

The Uneven Mirror

Before examining the other evidence relied upon, it is necessary to appreciate the context of the overall picture presented.

There are many gaps in the evidence which undermine the reasonableness of the reliance upon that other evidence. There is a difficulty here in that the trial court were presented with an incomplete picture of the various possibilities. There was no evidence led of the opportunity for ingestion at Frankfurt. The real possibility of ingestion at Heathrow was not followed through – which, if it had been, is likely to have established a substantial alternative possibility for ingestion of the primary suitcase (at Heathrow) – see Ground of Appeal 3.4.2 (pp.208-214). The Crown are entitled to lead only the evidence which they seek to rely upon but, in a wholly circumstantial case, in so doing so there is a real danger of the trial court being presented with a distorted picture. The danger of the uneven mirror is addressed above (see section 2.2.2)

Missing evidence

There were significant gaps which include:

- The absence of any evidence of how ingestion at Luqa could be achieved;
- The absence of evidence as to other possible candidates of ingestion, thereby precluding any comparison; and
- The absence of any evidence explaining the presence of other apparently unaccompanied bags on PA 103A.

There is the very real difficulty here of the absence of any evidence as to how a bag could be ingested. As Lord Osborne observed at the appeal:

> "Now, it's quite difficult rationally to follow how the Court take the step of saying, 'Well, we don't know how it got onto the flight. We can't say that. But it must have been there.' On the face of it, it may not be a rational conclusion." (Appeal Day 96/29)

It is difficult to see how the inconsistent fact that there was no ingestion at Luqa can be overcome when there is no evidence of how this could be achieved.

There is a further difficulty in that the evidence suggested other possible sites of ingestion – mentioned above. Notwithstanding that these are only possibilities, these must make it more difficult to infer ingestion at Luqa. If Luqa had been the only place where ingestion could have occurred, or there was evidence eliminating the other possibilities, then the conclusion from other evidence that the bag 'must' have been ingested there could be more readily drawn. These possibilities still remaining open, they undermine the strength of the evidence relied upon.

The other evidence

The appeal court considered that the trial court was entitled to draw the inference, notwithstanding the difficulty of the Luqa evidence "because of the view it formed about the strength of the inference which it drew from the documents and other evidence relating to Frankfurt airport, and the other circumstances which it regarded as criminative and which pointed to infiltration at Luqa." (Appeal Court Opinion paragraph [274])

The other evidence or supporting circumstances relied upon by the trial court to draw the inference consist of "the clothing, the purchaser and the timer." (Appeal court opinion paragraph [272])

This reasoning involves a significant *non-sequitur.* It also appears to derive from a misreading of the trial court's opinion at paragraph [82], where it seems clear that the other evidence is being relied upon to draw the further inference that the unaccompanied bag was the primary suitcase, rather than the basis for accepting the inference that an unaccompanied bag was carried on KM 180.

There is, too, no examination of the purported strength of these combined circumstances, whether they did point to infiltration at Luqa and how remote they are individually and collectively from the issue of ingestion.

The clothing

This evidence is given considerable emphasis in the Crown submissions on appeal although, as seen above, it is also conceded that on its own would not be enough-

> "...what one does find is that a bomb was on the aircraft Pan Am 103 and that in that same suitcase there was clothing which was purchased from a shop in Malta, and that very fact is capable of vouching the proposition of Maltese ingestion... On its own, it probably wouldn't be enough to combat the evidence given by Mr. Borg as to the security procedures at Malta, but when it is linked with other evidence of an acceptable sort, which shows that despite what Mr. Borg says, an unaccompanied bag did in fact travel, then the inference is capable of being drawn, because it's combination of two separate types and sources of evidence..." (Appeal submissions: Day 96/22) (Emphasis added)

This is an important concession because if the other 'acceptable' evidence falls away (as irrelevant) then this suggests the evidence cannot overcome the inconsistent facts – and certainly cannot remove the reasonable doubt raised by them.

The clothing in the suitcase establishes a link to Malta, but it cannot bear upon ingestion in any significant way, because there is a significant gap of time between the purchase of the clothing and ingestion. It is not known where or when the clothing was put with the suitcase and the IED.

The re-statement of the fact that the clothing was bought in Malta cannot overcome the facts inconsistent with ingestion in Malta nor turn a possible inference into an irresistible one.

The purchaser and the timer – All things Libyan

The other evidence that appears to be relied upon here are the earlier stated findings that the purchaser was Libyan and that the timer was a type supplied to Libya. The trial court later drew the inference that the plot was of Libyan origin – this is examined below in section 4.7. What is not clear is how this can possibly be connected to or supportive of ingestion at Luqa. It is not connected to the fact in

issue. It is not reasonable to rely upon this evidence in support of the proposition of ingestion.

Even the broadest possible interpretation of this as given by the Crown at the appeal does not take the matter any distance. On appeal, the Crown submitted that these references to Libyan timers and purchaser also incorporated the links between the JSO and Luqa airport and the Libyan presence there. (see Day 96/19). Elsewhere in the opinion this was described by the appeal court as

> "reliance not only on the evidence of the passage of an unaccompanied and unaccounted-for suitcase through Frankfurt from Luqa to Heathrow, but also on a number on other strands of circumstantial evidence linking the contents of the primary suitcase with Malta and the Libyan secret service, and the appellant with the Libyan secret service, with the contents of the primary suitcase and with Luqa airport at the material time." (Appeal Court Opinion paragraph [252])

This seems to imply a common thread of the Libyan Secret Service which somehow supports ingestion at Malta. But any evidence of the appellant's association with the JSO or the Libyan military who in turn were associated with the purchase of the timers (some 3 years before the destruction of PA103) has no bearing upon the place of ingestion The supply of timers has no connection. Whilst it is correct that there was evidence that the JSO had a presence at Luqa airport, that presence consisted of the informer witness Majid and there is no suggestion he was connected to ingestion. Further there was also evidence of a JSO presence at every airport (with the exception of one in eastern Europe) from which LAA had flights in 1988 – which, on the evidence, included Frankfurt (Wulf Krommes Day 36/5577-8).

In any event the any link between the primary suitcase and the Libyan secret service is the subject of dispute.

In this context all things "Libyan" cannot assist in the determination of the site of ingestion.

4.4.6 Sufficiency of the evidence supporting the inference

As indicated above it is clear that the inference of ingestion of the primary suitcase at Luqa was crucial to the conviction.

In this context the inference of ingestion at Luqa requires to be the only reasonable inference arising from the evidence. Whilst the trial court describe it as “irresistible” inference which would meet the test of sufficiency, analysis of the supporting evidence carried out above demonstrates that it is neither a reasonable inference nor the only reasonable inference available.

This can be alternatively expressed by asking here whether, in the face of the evidence from Luqa airport, a jury acting reasonably and appreciating the burden and standard of proof, could have drawn the inference of ingestion at Luqa. It is submitted that the Luqa airport evidence must raise a reasonable doubt.

4.5 APPELLANT'S PRESENCE IN MALTA ON 20-21ST DECEMBER 1988

4.5.1 Circumstances Relied Upon / Evidential Base

The Visit to Malta

The evidence of the appellant's visit to Malta on 20-21st December 1988 is as follows:

- There was undisputed evidence that the appellant travelled, along with his co-accused Mr Fhimah, from Tripoli to Malta on flight KM231 at about 5.30pm on 20 December (Evidence of Wilfred Borg Day 33/5129).

- He stayed overnight in the Holiday Inn, Sliema, using the name Abdusamad (Doreen Caruana Day 30/4653)

- He left on 21 December on flight LN147, scheduled to leave at 10.20am (see evidence of Martin Baron: Day 35/5395-5397; and Borg: Day 34/5215-6).

- There was evidence from a Mr Vassallo that the co-accused Mr Fhimah visited his house in the evening of 20th December bringing the appellant who was introduced to him in his correct name (Day 56/7621). There was a telephone call recorded from the Holiday Inn, where the appellant was staying, to the second accused's flat at 7.11am on 21 December (Caruana Day 30/4643).

- The appellant had visited Malta on numerous prior occasions, using his own passport and in his own name, including occasions in 1988, staying at the Holiday Inn where he was known (Caruana Day 30/4648).

Coded Passport

There was also evidence of the issue to the appellant of a “coded” passport

- On 15 June 1987 the first accused was issued with a passport with an expiry date of 14 June 1991 by the Libyan passport authority at the request of the Libyan Intelligence Service, the ESO, who supplied the details to be included (Moloud Gharour: Day 59/7785-7788).

- The name on the passport was Ahmed Khalifa Abdusamad (Gharour Day 59/7785).

- Such a passport was known as a coded passport (Gharour Day 59/7785).

- There was no evidence as to why this passport was issued to him (see Crown Submissions Day 78/9413).

- The passport had been used on various previous occasions on trips elsewhere in Africa during 1987 (see Crown Submissions Day 78/9467 and the evidence of Mohammed Abbas and Carol Butler: Day 59).

- The use of the passport on this occasion was the first use of it in 1988 and the last (Butler Day 59/7859-60).

- Such passports were issued by the government and there was evidence that whatever department wanted to have a coded passport issued to a member of its staff, applications for such a passport were directed through the JSO, later named the ESO. (Gharour (Day 59/7786)).

- The appellant travelled to numerous other destinations including Malta in 1988 using his own passport (Carol Butler Day 59/7849).

The defence sought on appeal to suggest that it could be inferred that coded passports were issued to persons involved in sanctions evasion and that the appellant required

such a passport in connection with the obtaining of aviation parts for the LAA airline company in face of sanctions. This was rejected as having no foundation in the evidence (Appeal Court Opinion: paragraphs [358]-[359]).

4.5.2 Findings of the Trial Court

The main findings of the Trial Court in relation to this issue are found at paragraph [88]:

> "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." (Emphasis added)

It is important here to consider the terms of the inference drawn here, namely that the appellant's visit to Malta was "connected with the planting of the device". It is also important to appreciate the precise context in which the trial court draws this inference. It follows two previous inferences: first, the identification of the appellant as the purchaser; and, secondly, the inference of ingestion at Luqa (see paragraph [88].

In setting out the various inferences and evidence relied upon in the conviction in conclusion at paragraph [89] the trial court included the evidence of the appellant's "movements under a false name at or around the material time" as part of what it viewed as forming a "real and convincing pattern".

4.5.3 Reasonableness and Materiality of the Inference

The appellant challenges the reasonableness of this inference on the basis both that the reasoning which led to it is defective and that it is not supported by the evidence in grounds 2.1.5 (page 20) and 2.2.5 (page 38) respectively.

The reasonableness of this inference is dependent upon what is to be understood as being the scope and meaning of the inference drawn of a “visit connected with the planting of the device” and the import of that inference to the conviction.

There would seem to be two possible alternatives.

First, if the inference drawn is limited to that of an unspecified connection and that it is relied upon merely as an adminicle to and necessarily dependant upon the preceding crucial inferences of the identification of the appellant as the purchaser and of ingestion of the primary suitcase at Luqa, then it is accepted that this could be reasonable, but only if those preceding inferences are reasonable (which is challenged).

Alternatively, if it is contended that this inference is to be interpreted in any broader way and in itself implicates the appellant in the commission of the crime – with connection meaning involvement – then this is unreasonable for the following reasons:

1. This is not what is found by the trial court. The term “connected” is deliberately used by the trial court and does not extend to involvement in or contribution to the planting of the device. Any broader interpretation would have been expressed differently.

   The trial court’s use of language is deliberate because an unspecified connection to the commission of the crime is the best that can be inferred from the evidence. That evidence is properly limited in scope to the coincidence of the presence of the appellant at the airport in the context where it has already been concluded that he was the purchaser of the clothing and that ingestion of the primary suitcase was at that airport.

2. If, as it does appear from some of the terms of the judgment, this inference or any other incriminatory inference is drawn from the evidence as to the visit to

Malta as a whole then this does not properly reflect the whole evidence of the visit.

3. So too the absence of any explanation as to the visit does not properly support any inference being drawn.

4.5.4 Nature and Quality of the Evidence of the Visit

There are a number of problems with the supporting evidence relied upon here. Viewed as a whole, the evidence of the visit to Malta considerably weakens the connection drawn and undermines the inference of a nefarious purpose. This is because throughout the visit there were indications which ran contrary to the view of a man seeking to hide his identity or behaving suspiciously. In this way the factors relied upon have a limited force:

Unexplained Visit

It was clear from the evidence generally that it was not unusual for persons to come to Malta from Libya for a short period of time, for example to do shopping (see evidence of Dennis Burke: Day 34/5290 and 5305). It was also established that the appellant made many short visits (Day 50/6808-9; documentary productions of travel documents). There was no explanation for the visit but this has to be viewed in this context of repeated and frequent short visits made by the appellant and many other Libyans to Malta. The absence of explanation in this context cannot add anything.

Further the view that the unknown purpose of the visit is somehow criminative is unfounded. The absence of an innocent explanation, if it amounts to anything, can at best only amount to suspicion which cannot be relied upon. The trial court ought to have adopted the same approach it took to the absence of any explanation of the purpose of the visit of the second accused where it found that “The position on this aspect therefore is that the purpose of the visit by the second accused to Tripoli is simply unknown, and while there may be a substantial element of suspicion, it cannot

be elevated beyond the realm of suspicion" (Trial Court Opinion [85]). As such it was not relied upon.

False Identity

There was no evidence of purpose of the issue of the coded passport or of how, even in theory, this could in any way assist in the commission of the offence, including the use of a false name. There was no suggestion in the evidence that the appellant needed the passport to access secure areas or baggage – indeed the Crown case was to the contrary. The Crown position was that to subvert the system at Luqa required insiders -both someone in the position of Fhimah and someone to overcome the baggage reconciliation system. There was no evidence that the appellant met anyone or contacted anyone at the airport who had such a position. In this context the court rely upon the only conceivably criminative circumstance – the use of the coded passport as inferring the use of a false identity.

But there are many circumstances which undermine this interpretation:

- The coded passport that the appellant travelled on, on 20-21st December 1988, had been issused some considerable time before and had been used before. Therefore data of evidential value would have been available from those trips to investigating officers and none was produced.

- The court heard evidence that this passport was able to be issued in a very short timescale. If that were the case then another passport could have been issued avoiding the necessity of using this one altogether and thereby properly concealing identity (Gharour Day 59/7789).

- This passport which was a production in this case was not destroyed – the appellant had every opportunity to do so – and if it was for the use in the commission of the crime it is extraordinary it was not destroyed.

- This was an airport in which the appellant as ex-head of LAA was known and could not reasonably be supposed to be hiding his presence.

- The appellant returned to the very same hotel where he had previously stayed using the passport –in 1987 (Caruana Day 30/4643).

- The appellant stayed only two weeks beforehand at the Holiday Inn using the passport in his own name. His flight had been delayed at that time on 8th December 1988 and he had to return to the hotel (Caruana Day 30/4648).

- Despite travelling under a false name on 20th – 21st December he claimed his Libyan Arab Airlines discount from the hotel under his name (Caruana Day 30/4663).

- The appellant was open in the embarkation card completed on arrival about where he was going to stay- hence it was so easily traced (see evidence of Andrew Seychell Day 36/5451 and CP 643).

- Upon exit his departure card confirmed where he had been – at the Holiday Inn.

- The appellant's visit included going to see Mr Vasallo – where he was introduced (Day 56/7621).

Viewed properly and as a whole this evidence does not reasonably support the inference of the visit to Malta as being nefarious or in connection with the commission of the offence.

In any event, there is no accepted evidence of this presence as contributing to commission or involving any act furthering ingestion of the device or that the appellant's intention at the airport was other than taking his flight. There is no evidence of the appellant acting with others who were involved in the commission of

the offence. The appellant's presence was, on the accepted evidence, entirely passive. There was no evidence that he did anything other than take his flight home.

As stated above at section 2.1.2 mere presence at the scene of the crime is insufficient to attract liability. The appellant is landside in the airport. The scene of the crime is arguably airside – through security. In any event, there was no evidence of conduct on his part or his location (lanside accessible to the general public) from which it could be reasonably inferred that he was participating in the commission of the crime (unlike *White v McPhail 1990 SCCR 578).* There was no basis therefore in the accepted evidence upon which it cold be said that the appellants visit to Malta was in itself an act of assistance in the commission of the offence by which he might separately attract liability.

Nonetheless there remains the coincidence of the presence of the appellant at the airport whilst using the coded passport or false identity. In isolation and without reference to the other evidence this can only amount to a coincidence. Viewed in the context of the other evidence however it could yield an inference of some unspecified connection. If the preceding inferences, first that the appellant had been the purchaser of the clothing and secondly that ingestion of the primary suitcase was made at Luqa onto flight KM180 were accepted, then this presence could be taken to support an unspecified 'connection'. However what can be made of this is limited. It adds little to proof.

If of course these preceding inferences are unreasonable then this inference of a connection cannot advance proof of the facts in issue.

4.5.5 Conclusion

1. The inference drawn by the trial court was that the appellant's visit to Malta on 20-21st December was a visit connected to the planting of the device. It is accepted that the coincidence of the appellant's presence at the airport on the 21st December, along with the preceding inferences having been drawn that the appellant was the purchaser and the device was ingested at Luqa, can yield

an inference of such an unspecified connection. However those preceding inferences are challenged. Further and in any event such an unspecified connection has little probative value.

2. Any broader interpretation of this inference is contrary to the plain meaning of what is said in the opinion.

3. *Esto* this inference of a connection can imply a finding of involvement by the appellant in somehow assisting in the planting of the device (which is denied)– then this is unreasonable and is not supported by the evidence. There is no evidence from the conduct and location of the appellant to allow an inference of such assistance. There is no evidence to allow an inference of accessory liability at this stage.

4. Further and in any event the whole circumstances of the visit to Malta do not properly support an inference of a nefarious purpose to that visit.

4.6 RELIANCE UPON EVIDENCE OF ASSOCIATION WITH LIBYAN INTELLIGENCE OR MILITARY

4.6.1 Circumstances relied upon / Evidential base

The evidence led in respect of the JSO came from two main sources: the informer Majid Giaka and the arms dealer Edwin Bollier.

- The IED which destroyed PA103 was triggered by an MST-13 timer (evidence of Allen Feraday, Day 20/3178, FEL Report (CP 181) and Trial Court Opinion at [15])

- In 1985 Ezzadin Hinshiri, Nassr Ashur, Said Rashid and the appellant were members of the JSO (Majid Giaka Day 50/6764 and Trial Court Opinion at [42])

- JSO was later renamed ESO (Majid Day 50/6751-3 and Trial Court Opinion at [42]*)*

- The appellant was head of the JSO airline security section until January 1987 when he moved to Strategic Studies Institute (Majid Day 50/6768 and Trial Court Opinion at [42]*)*

- Hinshiri was director of the central security section, Rashid was head of the operations section, and Ashur was head of special operations in the operations department (Majid Day 50/6764-7 and Trial Court Opinion at [42])

- Bollier had military business dealings with Hinshiri in relation to the Libyan Government since early 1980s (Edwin Bollier Day 24/3721-22 and Trial Court Opinion at [49])

- Rashid or Hinshiri requested Bollier to supply electronic timers in 1985 (Bollier Day 24/3755 and Trial Court Opinion at [49])

- Bollier supplied 20 sample MST-13 timers to Libya in 3 batches in 1985-6 (Bollier Day 24/3757, 3760-62 and Trial Court Opinion at [50])

- Ashur brought MST-13 timers supplied to Libya to the desert tests (Bollier Day 24/3794-96, 26/4107-08 and Trial Court Opinion at [53])

4.6.2 Trial Court findings and inferences

Although much was sought to be made of the appellant's association or involvement with the JSO by the Crown in its submissions the trial court drew very little from this evidence in its decision to convict.

The trial court accepted the evidence that the appellant was a member of the JSO, "occupying posts of fairly high rank" including the posts of head of airline security. From this the trial court inferred "that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA operated." (Trial Court Opinion at [88]).

Included in the combined circumstances forming the decision to convict the appellant the trial court referred to "other background circumstances such as his association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers" as part of the pattern (Trial Court Opinion at [89]).

4.6.3 Reasonableness and materiality of inferences

The appellant challenges the reasonableness of these inferences on the basis that they are unsupported by the evidence in ground 2.2.4 (page 37).

The first inference, that as a result of the appellant's prior membership of the JSO as head of airline security it could be inferred that the appellant was " aware at least in general terms of the nature of security precautions" at Luqa airport, was not properly supported by the evidence for the following reasons:

First, knowledge of airline security is not the same as knowledge of airport security. This is particularly relevant given that there was evidence that airline security and airport security were different sections of the JSO and that the former dealt with airlines and the latter with what happens inside the airport (Mansour Saber Day 70/8576).

Secondly, it was the Crown case that the appellant needed insiders to overcome security at Luqa airport and could not achieve this alone (Crown Submissions: Day 79/9504).

In any event it is difficult to see how this first inference bears upon the proof of the involvement of the appellant in the commission of the offence. It is too generalised and too remote.

Similarly the appellant's association with Bollier and with members of the JSO or the military involved in the purchase of timers does not establish any connection to the facts in issue.

- Such an association does not establish any link between the appellant and the timer used;
- There was no evidence of what happened to the timers purchased
- There was no evidence from which any criminal or terrorist intention or purpose held by the Libyan government or the JSO could be inferred. Membership of the JSO was not in any way criminative – nor was any involvement in military procurement.

Again it is difficult to see how this inference bears upon the proof of the involvement of the appellant in the commission of the offence. It is too generalised and too remote.

The appeal court resisted a challenge at the appeal that this association was irrelevant.

> "[356] We do not consider that in either respect the trial court took into account irrelevant matters. It is clear, as was pointed out, that neither of them

was founded on by the Crown as demonstrating criminal conduct on the part of the appellant. It has to be borne in mind that circumstantial evidence may well not be of itself of such a character. Thus the evidence of association or involvement could not of itself show the appellant's guilt. However, it could show that the appellant was no stranger to Mr Bollier and that, at least to some extent, he was involved with the obtaining of military equipment. We are satisfied that neither of these matters should be regarded as having no conceivable bearing on the proof of the circumstantial case against the appellant"

It is one thing to find that this evidence cannot be ruled out as having no conceivable bearing upon proof, it is another to find that it has any real significance or contributes in any significant way to the inference of guilt.

Even if it is accepted that this evidence of association cannot be wholly excluded from consideration of the whole circumstances, it plainly contributes little to proof of the facts in issue.

4.6.4 Conclusion

1. The 'background circumstances' of the appellant's employment history and his generalised association with Bollier and members of the JSO or military are too remote from the facts in issue to contribute to the conclusion of guilt. In so far as any reliance has been placed upon these circumstances in drawing the inference of guilt, such reliance is misplaced.

2. In any event these circumstances cannot contribute anything of substance to proof of the facts in issue.

4.7 LIBYAN PLOT

4.7.1 Circumstances relied upon / Evidential base

The inference was drawn by the trial court that the conception, planning and execution of the offence was a plot of Libyan origin. This could mean the Libyan government, or the Libyan Intelligence Services,the Libyan military or simply Libyan nationals. However, there is no evidence of any organised group or gang acting in concert.

The evidence relied upon here apparently relates to the clothing, the timers, the purchaser. This is as follows:-

The clothing

There was undisputed evidence that the clothing found in the primary suitcase was purchased from Mary's shop in Malta.

The timers

There was forensic evidence of the discovery of PT/35(b) in PI/995, the grey slalom shirt (Hayes Day 16/2482, 2607-8; FEL Report (CP181) page 66 and section 7.2.1, p.129 *et seq)* and the identification of PT/35(b) as being part of MST-13 timer (Feraday Day 20/3171-3176; FEL Report (CP181) as above). From this there was evidence that a MST-13 timer triggered the explosion (Feraday, Day 20/3178); FEL Report (CP 181) as above).

There was evidence accepted from Mr Bollier that the Libyan Government was a customer of MEBO (Edwin Bollier Day 23/3693-94). And that senior members of the JSO or the military, Mr Hinshiri or Mr Rashid, ordered MST-13 timers in 1985 (Bollier Day 24/3755). These were supplied (Bollier Day 24/3757, 3760-62) and there was evidence of tests on same by the Libyan military (Bollier Day 24/3870). Mr

Bollier also delivered two timers to the Stasi in East Berlin in the summer of 1985. (Bollier Day 25/4033).

There was also evidence that in late November or early December 1988, Badri Hassan asked Bollier to supply 40 MST-13 timers for the Libyan army (Bollier Day25/3924) and that Mr Bollier travelled to Tripoli on 18 December 1988 taking 24 Olympus timers with him to deliver to Ezzadin Hinshiri (Bollier Day 25/3933)

There was evidence from Majid that the appellant was a member of the JSO at least until he moved to the SSI (Majid Day 50/6768) and that he occupied posts of fairly high rank (Bollier Day 24/3732). The appellant was associated with Bollier through his connection to the company ABH which rented an office from MEBO (Bollier Day 24/3744-3748; Bollier Day 23/3588).

The purchaser

There was undisputed evidence from Tony Gauci that the purchaser was Libyan (Gauci Day 31/4731).

4.7.2 Findings of the Trial Court

The findings of the trial court on the "Libyan plot" issue are contained in paragraph [82].

> "[82] From the evidence which we have discussed so far, we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow. It is, as we have said, clear that with one exception the clothing in the primary suitcase was the clothing purchased in Mr Gauci's shop on 7 December 1988. The purchaser was, on Mr Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer of the single solder mask variety. A substantial quantity of such timers had been supplied to Libya. We cannot say that it is impossible that the clothing might have been taken from Malta, united somewhere with a timer from some source other than Libya and introduced into the airline baggage system at Frankfurt or

> Heathrow. When, however, the evidence regarding the clothing, the purchaser and the timer is taken with the evidence that an unaccompanied bag was taken from KM180 to PA103A, the inference that that was the primary suitcase becomes, in our view, irresistible. As we have also said, the absence of an explanation as to how the suitcase was taken into the system at Luqa is a major difficulty for the Crown case but after taking full account of that difficulty, we remain of the view that the primary suitcase began its journey at Luqa. 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. While no doubt organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities does not create a reasonable doubt in our minds about the Libyan origin of this crime." (Emphasis added).

The evidence relied upon to draw the inference that the "conception planning and execution" of the plot was of Libyan origin appears to consist of the evidence regarding the clothing, the purchaser and the timer - and presumably the preceding inference drawn of ingestion at Luqa.

The trial court concluded in the evidence regarding the timers that it could not exclude the possibility that more than two were supplied to the Stasi, but there is no positive evidence that they were and that it could not exclude the possibility that MST-13s were made by MEBO and supplied to other parties, but there is no positive evidence that they were (Trial Court Opinion [49]).

4.7.3 Reasonableness and materiality of the inference

The appellant challenges the reasonableness of this inference on the basis that it is unreasonable on the evidence in Ground 2.1.4 (page 18)).

It is not clear exactly what the "clear inference" drawn by the trial court amounts to. It could mean the plot was one conceived, planned and executed by Libyan nationals, or by the Libyan government or by the Libyan Intelligence Service (JSO). This is not a finding of who the plotters or the concerted group are, except to find that they share Libyan nationality.
Even this limited inference is unsupported by the evidence.

- In the absence of any evidence of the conception, planning and execution of the plot it is difficult to see how any inferences can be drawn as to same.

- A Libyan purchaser cannot yield the inference of the nationality or any other identification of the group of plotters – in particular it does not, on its own, suggest the involvement of the Libyan government.

- There is no evidence that the purchase of the timers by the Libyan government was for any criminal or nefarious purpose; there is no evidence that a concerted plan existed at the time of that purchase; there is no evidence that the timers were used nefariously; and there was evidence that the supply of timers to Libya was not exclusive and such timers could be 'at large'. In this context the Libyan connection to such timers does not support the inference of a Libyan plot.

- A geographical connection cannot assist the Court in determining that the common criminal purpose was of Libyan origin.

Even when all of these 'Libyan' links are taken together, the most that can be reasonably inferred here is an unspecified connection between those who committed the crime with Libyan nationals. It cannot support the inference that the commission of the crime – the conception, planning and execution' of the crime – was by Libyans or the Libyan government.

The only reference to a specific group of Libyans is found in the trial court's opinion at paragraph [89]. There, in assessing the circumstances which "form a convincing

pattern of the appellant's guilt", the court refers to the members of the JSO or Libyan military who purchased MST-13 timers. However there was no evidence that the purchase of timers was for a nefarious purpose and there was no such finding made. Nor was there any evidence or finding that members of the JSO or Libyan military had formed a criminal gang, or that those organisations were engaged in nefarious activity. Nor is there any evidence or findings that Hinshiri or Rashid (who ordered the timers) or Ashur (who brought the timers to desert tests) carried out any act which furthered the common criminal purpose, from which it could be inferred that they were participants and shared the common purpose. In particular, there are no findings as to the means by which or the individual through which an MST-13 timer came to be available for inclusion in the IED.

Finally there is no suggestion that this inference supports the case against the appellant. Nor could it. It is relied upon by the trial court as the basis to reject the defence of incrimination of the PFLP-GC. This is addressed below in section 4.8.

Supportive of Ingestion at Luqa

It is not clear whether the trial court have relied upon the inference of a Libyan plot to support the inference of ingestion at Luqa – reference is made in [82] to

> "…when the evidence regarding the clothing, the purchaser and the timer is taken with the evidence that an unaccompanied bag was taken from KM180 to PA103A, the inference that that was the primary suitcase becomes, in our view, irresistible."

This is stated notwithstanding that the inference of ingestion appears to have already been drawn by the trial court, prior to the inference of the Libyan origin of the plot.

The appeal court however concluded that the inference of the Libyan origin of the plot supported the inference of Luqa ingestion (see Appeal Court Opinion at [252]-[257]). This conclusion would appear to have been made on the basis of Crown submissions at the appeal to this effect and which were based upon a link between the JSO and the purchase of the timers or the type of device used; a link between the JSO and Luqa airport and upon the evidence that the purchaser was Libyan (96/18-19;

96/93). These submissions, having a common thread in the form of the Libyan Secret Service (JSO), do not properly bear upon or support the place of ingestion for the reasons given above in examination of the inferences drawn regarding the provenance of the primary suitcase at Luqa (see above in section 4.4.5).

Moreover there is a circularity of reasoning here. On the one hand the inference as to the site of ingestion is part of the evidence relied upon in drawing the inference of a Libyan plot, yet at the same time the inference of a Libyan plot is relied upon to draw the inference of ingestion at Luqa. It cannot reasonably work both ways.

4.7.4 Conclusion

1. The inference that the 'conception, planning and execution' of the crime was of Libyan origin is unreasonable in that it is not properly supported by the evidence. The most that the evidence could yield is an inference of some unspecified connection between those who commited the offence and Libyan nationals.

2. There is no evidence to entitle a finding, nor is a finding made by the trial court, identifying a group with a shared criminal purpose and who were engaged in the furtherance of the commission of this offence.

3. Further and in any event this inference cannot lend support to drawing the preceding inference of ingestion at Luqa, not least in that the evidence relating to the Libyan Secret Service (JSO) does not bear upon and is too remote from the issue of ingestion.

4.8 EXCLUSION OF DEFENCE CASE

4.8.1 Introduction

The trial court's conclusion that the alternative perpetrators identified by the appellant, could be excluded, is a conclusion which falls to be examined as to whether it is reasonable.

Here it is only the rejection of the incrimination of members of the Popular Front for the Liberation of Palestine, General Command, the PFLP-GC which is examined (addressed in ground 2.1.6(1) at pages 22 and 23). No issue is taken with the exclusion of the other parties mentioned in the defence notice.

4.8.2 Circumstances relied upon / Evidential base

<u>The PFLP-GC</u>

A cell of the PFLP-GC was operating in West Germany at least up until October 1988 (Trial Court Opinion [73]).

On 26 October 1988, after a period of surveillance, the West German police, the BKA, made a series of raids and arrested a number of individuals, including Haj Hafez Kassem Dalkamoni, in the Autumn Leaves operation (Trial Court Opinion [73]).

These raids uncovered radio cassette players, explosives, detonators, timers, barometric pressure devices, arms, ammunition and other items including airline timetables, including a Pan-AM timetable, and Lufthansa baggage tags in the possession of the cell. (Trial Court Opinion [73]; Peter Heller at Day 70/8623-8649; CP 1639 and CP 1637, CP 1672; Gerwin Friedrich Day 71/8686 - 8705; CP 1670 CP 1672 CP 1645; Anton Van Treek Day 71/8705 – 8712, 8733 – 8738; CP 1670 and

CP1645; Hans Rustler Day 72/8827 – 8848; CP 1653, CP 1662, CP 1649 and CP1672; Edward Marshman Day 76/9240- 9304)

There was considerable evidence of bombs being manufactured by the cell so as to be concealed in Toshiba radio cassette players. (Trial Court Opinion [73])

From this evidence the Court infers that at least until October 1988, the cell had the means and intention to manufacture bombs which could be used to destroy civil aircraft ([73]).

Most of the Autumn Leaves suspects (except Dalkamoni and Abdel Fatah Ghadanfar) were released shortly after 26 October 1988. ([74]; Joint Minute 16 Day 77/9352)

Whilst the trial court accepted that it is possible that the cell could have re-grouped and re-stocked with necessary materials, they immediately go on to emphasise that:

> "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. For the reasons given elsewhere, while a small quantity of such timers was supplied by MEBO to the East German Stasi, there is no evidence at all to suggest that any of them found their way into the hands of organisations such as the PFLP-GC." ([74])

The implication is that the possibility of the cell continuing to act was regarded as only a theoretical possibility.

Yet there was certainly evidence apparently accepted by the Trial Court which provided a basis for demonstrating that the PFLP-GC had continuing capacity after 26 October 1988. This was in relation to:

- Persons being released from custody (Joint Minute 16 (Day 77/9357-8);

- Skills being available – Abu Elias was the ingestion expert (Marwan Khreesat's statement (taken from Edward Marshman) Day 76/9250-9258; Pierre Salinger 72/8883-8885; and
- Possession of the necessary materials (Khreesat's Statement Day 76/9249, 9254-9256, 9258, 9260, 9268, 9279-9282, 9284-9286, 9291-9301)

In April 1989, three further devices were found at Hashem Abbasi's new address in Neuss, although the indications were that these had been part of the stock in October 1988. (Trial Court Opinion [74]; Frank Leidig Day 70/8649 – 8667; CP 1679; CP 1678; CP 1643; Rainer Holder Day 70/8667 – 8678; CP1801; CP 1641; CP 1645)

There was evidence that the radio cassette players found in the possession of the cell were different from the RT-SF 16 and the timers were "ice cube" which were much less sophisticated and less reliable than the MST-13 ([73]; Rainer Gobel Day 71/8745-8802; John Orkin Day 71/8803-8826).

Finally there was evidence that the principal bomb maker of the cell was Marwan Khreesat, an agent for Jordanian intelligence who had been instructed not to prime any bomb. (Trial Court Opinion [74]). Khreesat claimed never to have used twin speaker radio cassette players (like the RT SF-16) to convert into bombs (Statement of Khreesat taken from Edward Marshman Day 76/9240).

<u>The timers</u>

There was evidence led about the availability of timers – summarised as follows.

There were 58 circuit boards supplied by Thuring to MEBO (24 initially in 1985-single sided (SS); 34 in October 1985 double sided (2S) (see Trial Court Opinion [50]-[51]) of which, the following are accounted for:

- 12 printed circuit boards were seen by CI Williamson in May 1991 (4 SS, 7 2S, 1?) (TJ 50)

- 2 sample timers recovered by CI Williamson in November 1990 (1 SS; 1 2S)

- 2 timers recovered in Togo (1 2S, 1 unclear) ([51])

- 20 timers to Libya ([50])

- 1 timer recovered in Senegal ([52])

- 2 timers sent to East Germans (probably SS because time of delivery is before 2S order)

- TOTALS: Accounted for: 39 of which it was known that there were 7 Single sided and 9 double sided.

Accordingly, on the basis of the evidence, it appears that there were sufficient circuit boards to manufacture 19 unaccounted for MST-13 timers of which as many as 16 were made with printed circuit boards which were masked on only one side (as was the one used in the IED). (For the avoidance of doubt, it should be noted that there is a typographical error at page 23 in paragraph (1)(c)(ii) of the Grounds of Appeal in relation to the summary of the evidence in relation to printed circuit boards.)

4.8.3 Findings of the Trial Court

The trial court made the following findings:

From the evidence the court infers that at least until October 1988, the PFLP-GC cell had the means and intention to manufacture bombs which could be used to destroy civil aircraft (Trial Court Opinion [73]).

However, the court also concludes that there was no evidence that the cell had the materials necessary to manufacture an explosive device of the type that destroyed PA 103, in particular:

- Notwithstanding evidence in relation to supply to Stasi, there was no evidence that MST-13 timers had found their way into the hands of organizations like the PFLP-GC.

- There was no evidence that the cell had an MST-13 timer. (Trial Court Opinion [49] and [74])

- Evidence of the statement from Khreesat that he had been instructed not to prime the bomb and he did not use radios with twin speakers

The trial court's position is then summarised in paragraph [82]:

> "[82]... 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. While no doubt organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities does not create a reasonable doubt in our minds about the Libyan origin of this crime."

4.8.4 Reasonableness and materiality of the inference

The appellant challenges the reasonableness of this inference on the basis that it is unsupported by the evidence in Ground 2.1.6 (page 22).

Contrary to the inferences drawn, there was evidence before the court to demonstrate that the PFLP-GC had the personnel, skills and materials necessary to commit the offence.

There is no doubt that organisations such as the PFLP-GC and PPSF were engaged in terrorist activities during the same period (Trial Court Opinon [82]). The trial court accepted that the Autumn Leaves suspects had the intention to destroy U.S. civilian

aircraft: Trial Court Opinion at paragraph [73]. This is a strong starting point. It is in contrast to the absence of evidence as to alleged Libyan intentions.

On the evidence, the PFLP-GC had not only the means but also the intention to commit the offence. In particular, it is clear from the evidence that the PFLP-GC cell in West Germany had the following items supportive of a plot to destroy a civilian US aircraft:

a number of airline timetables, including a Pan Am timetable; seven unused Lufthansa luggage tags; explosives; detonators; timers; barometric pressure devices; arms; ammunition and the proven use of Toshiba radio cassette recorders to create improved explosive devices (Trial Court Opinion at paragraph [73]; Peter Heller at Day 70/8623-8649; CP 1639 and CP 1637, CP 1672; Gerwin Friedrich Day 71/8686 - 8705; CP 1670 CP 1672 CP 1645; Anton Van Treek Day 71/8705 – 8712, 8719 – 8720, 8733 – 8738; CP1670 and CP1645; Rainer Gobel Day 71/8743-8802; Hans Rustler Day 72/8827 – 8848; CP1653 CP 1662 CP1649 CP1672; Edward Marshman Day 76/9240- 9304; CP1851).

It was clear too that the cell was based partly in Frankfurt, from where PA 103A departed. This connection to Frankfurt, along with the aforementioned means and intention, was significant (Trial Court Opinion at paragraph [73]; Peter Heller at Day 70/8623-8649).

In this context, the conclusion that "there was no evidence from which we could infer that they were involved in this particular act of terrorism," is unreasonable.

The defence case is considered and rejected after the trial court has already drawn the inference of ingestion at Luqa. The latter inference does conflict with the involvement of the PFLP-GC. Yet the defence case is surely relevant to the inference of ingestion. It provided another basis to question or point away from ingestion at Luqa. . But there is no apparent consideration of the defence case as part of that process in weighing up the evidence and drawing the inference of ingestion there. In this way there was a failure to take proper account of the defence evidence of the terrorist cell of the PFLP-GC in West Germany.

The defence case also provides an interesting means of testing support for the inference of a Libyan plot. There is on any view stronger evidence of intention and means held by the incriminee.

Finally the distinction drawn and emphasised about the absence of any evidence of a connection between the PFLP-GC and the type of timer used is surely weakened by the absence of evidence regarding the possession and use of the timers supplied to the Libyan government and the fact that such timers were not exclusively supplied to Libya but were at large.

4.8.5 Conclusion

1. Accordingly the inference drawn that there was no evidence from which it could be inferred that the PFLP-GC were involved in this offence is not compatible with the evidence and is unreasonable.

2. Further the trial court erred in failing to take proper account of the evidence in support of the defence case and failed to consider whether it undermined other inferences drawn as to ingestion and the Libyan origin of the plot.

4.9 THE WHOLE CIRCUMSTANCES

In assessing the overall circumstantial case it is clear that the generalised and ambiguous 'association' rehearsed above, along with the generalised and ambiguous presence at the airport are minor factors. The material inferences upon which this conviction rests are the identification of the appellant as the purchaser; within this the inference as to the date of purchase; following upon this the inference that in making the purchase he did so knowingly assisting the commission of the offence; and finally the inference of ingestion at Luqa.

It is submitted for the reasons set out above that on any proper view of the evidence these crucial intermediate inferences are not reasonable. Nor are they the only reasonable inferences to be drawn from the evidence. There is insufficient evidence to entitle them to be found established beyond a reasonable doubt. Without any of these inferences there is clearly insufficient to convict.

Separatim it has been shown that the foundations for the findings made and the underlying basis from which all of the inferences are drawn contain substantial weaknesses. Doubts arise throughout the factual foundation of the case. Many of the combination of circumstances relied upon are remote from each other and are not properly 'mutually corroborative'. At the same time many of the circumstances even when combined are remote from the facts in issue. There are inherent weaknesses in a case which is wholly inferential – a case built upon inferences which in turn are built upon further inferences. There are yawning gaps in the picture painted by the trial court. Viewed objectively there is no 'real and convincing' pattern but rather, to use the network analogy (above at section 2.2.3), a network produced in which the various threads or strands are insufficiently substantial and insufficiently woven together to entrap the accused. Through these great gaps or rents the appellant is entitled to pass.