CHAPTER 17
ANTHONY GAUCI

Introduction

17.1 On 4 October 2004 MacKechnie and Associates lodged with the Commission a substantial volume of submissions concerning Anthony Gauci. Many of the points raised, such as those concerning the authenticity of Mr Gauci's initial police statement of 1 September 1989, are based on allegations made by the Golfer and are therefore dealt with in chapter 5. Other points reflect issues which the Commission has already dealt with in its responses to the submissions concerning the Yorkie trousers (chapter 10) and babygro (chapter 11). The submissions also make reference to Mr Gauci having been paid a "reward" for his involvement in the case and to evidence not heard at trial concerning the Christmas lights in Tower Road in 1988. These issues are addressed respectively in chapters 23 and 24. The allegation that the defence ought to have called Mr Gauci's brother, Paul Gauci, as a witness is addressed in chapter 18.

17.2 In the Commission's view there are two matters raised in the submissions which merit close scrutiny. The first is the allegation that in return for his cooperation in the case Mr Gauci was given "hospitality" by the police; the second is an allegation that not all of Mr Gauci's police statements were disclosed to the defence and that two are "missing".

(1) Mr Gauci's visits to Scotland

The submissions

17.3 According to the submissions Mr Gauci was "influenced and manipulated by certain police officers in order to support a circumstantial case which itself is partly a fabrication." This allegation is said to be based partly upon information provided by the Golfer.

17.4 It is alleged that Mr Gauci, accompanied by Paul Gauci and possibly other members of his family, was taken abroad at the "instigation and expense of the Scottish police." The submissions thereafter list a number of dates between 1999 and 2002 on which it is said that Mr Gauci travelled to and from Malta. According to the submissions "it is believed that substantial hospitality was given to Mr Gauci and his family on these trips." It is alleged, for example, that they were taken to "areas of possible interest" such as Inverness and Fort William, were accommodated in expensive hotels and were "chauffeur driven by the police." It is submitted that even in a case like the present one the treatment afforded to Mr Gauci was unusual.

17.5 In support of these submissions reference is made to a transcript of a conversation between Mr Gauci and George Thomson, an investigator employed at one time by MacKechnie and Associates (see appendix). The conversation, which took place on 29 December 2001, was recorded by Mr Thomson without Mr Gauci's knowledge. The background to the incident is contained in a statement made by Mr Thomson, a copy of which is contained in the appendix. According to the statement, in December 2001 Mr Thomson was instructed on behalf of "the defence team" to conduct enquiries in Malta regarding information that Mr Gauci had been offered inducements in respect of his evidence. On 28 December Mr Thomson entered Mary's House and Mr Gauci engaged him in conversation. Mr Thomson did not record what was said on this occasion and the following account is based solely on the contents of his statement.

17.6 According to the statement when Mr Thomson said he was from Scotland Mr Gauci replied that he was going there soon "to climb mountains". Mr Gauci explained that he would be visiting Inverness and that he had been to Scotland on five previous occasions. Mr Thomson asked him whether he had friends or relatives in Scotland, to which Mr Gauci replied, "Yes friends from Scotland Yard". He went on to say that officers from Scotland Yard had taken him "fly fishing for salmon" in Scotland. He claimed to be a very important witness in a terrorist case and that "the police had to look after him 'very good' to keep the man in jail." He explained that the man was due to appeal shortly which was why Scotland Yard were taking him to Scotland. Mr Thomson then asked, "Are you looked after OK, do they give you plenty money?", to which Mr Gauci replied, "They have to, they want this man to stay

in jail". Mr Thomson's impression was that when Mr Gauci said this he was responding to the first part of that question (ie "are you looked after ok…"). Mr Gauci went on to say that he had stayed at the Hilton hotel when his friends took him to Scotland and that he was moved around all the time, staying only two days in any one hotel. He mentioned hotels in Glasgow, Inverness and Perth.

17.7 After leaving Mary's House Mr Thomson contacted Ian Ferguson from the "Defence Investigation Team" and informed him of what had occurred. He was thereafter instructed by Mr Ferguson to develop his relationship with Mr Gauci and to tape-record any future conversations with him. The following morning Mr Thomson returned to Mary's House accompanied by his daughter who was carrying a video camera. The lens cap on the camera remained closed, but the external microphone was activated in order that sound could be recorded. The recording formed the basis of the transcript referred to above.

17.8 Some aspects of the transcript are difficult to follow, but it is clear from the opening passages that Mr Gauci has some familiarity with the River Clyde. He indicates that one year previously he spent a week in the area during which time he went into the hills. There is then the following exchange:

GT - Have you ever fished the Tay, at Pitlochry?

AG - We went to the farm, breeding farm…

AG - There was the Hilton, it was only about a two hour drive

GT - Where from?

AG - I don't know … it's your country

GT - It's only a wee country

AG - Your country … 20 miles … they take me for a drive 4 hours…they take me everywhere and I cannot remember all the…

GT - Is that when you were staying at the Hilton in Inverness?

AG - Uh huh. There is a place. A fishing place. You were there? ...

17.9 Mr Gauci goes on to make references to drinking whisky and going to very old pubs where he ate Scottish food. He claims to have visited a place where birds are bred and to have been taken one day to the cemetery in Lockerbie and to a big church there. He seems to suggest that he was accompanied on these visits by members of his family including his brother and sister. He believed he might be coming to Scotland again in "about 15 days".

17.10 On 27 January 2002 an article appeared in the *Mail on Sunday* in which extensive reference was made to the contents of Mr Thomson's statement and the transcript. Entitled "The High Life of Tony Lockerbie", the article alleged that Mr Gauci had been given "free holidays" and "lavish hospitality" by the police. The journalist responsible for the article was Ian Ferguson.

The Commission's enquiries

Enquiries with D&G

17.11 In March 2005 the Commission requested from D&G copies of all records held by them relating to any visits Mr Gauci and his family had made to Scotland. Arrangements were thereafter made for a member of the Commission's enquiry team to view various protectively marked documents at a police station in Dumfries. Copies of these items were later passed to the Commission by D&G following the signing of the minute of agreement between both organisations (see chapter 4). The Commission sought, and was given, consent by D&G to disclose certain passages from the documents, the terms of which are referred to below. Versions of the documents (in which other passages have been redacted by D&G) are contained in the appendix of protectively marked materials. Because at least one of the officers responsible for preparing the documents continues to work in the field of witness protection, no reference is made here to their identities.

17.12 Following an assessment by officers from Strathclyde Police in 1999, Anthony and Paul Gauci were included in the witness protection programme operated by that force. In terms of a confidential report dated 10 June 1999 (see appendix of protectively marked materials; also chapter 23) the officers concerned identified several stages in the trial proceedings at which it was considered the threat against both witnesses might increase. The report also highlights the potential for "spontaneous difficulties" emerging, "thus creating the need for action ranging from an increase in the attention by local officers, to temporary removal from the island."

17.13 As a result of the publication of the article in the *Mail on Sunday*, one of the officers involved in the initial assessment of the witnesses prepared a further confidential report dated 27 January 2002 (see appendix of protectively marked materials). It is clear from this that Anthony and Paul Gauci visited Scotland on a number of occasions in their capacity as protected witnesses. The report provides details of these visits and explains why they were considered necessary. The visits are listed below under appropriate headings.

- Crown precognition

17.14 According to the report Mr Gauci's first visit to Scotland was in 1999 when he was precognosced by the Crown. He was accompanied on this occasion by Paul Gauci and two Maltese police officers. The visit took place over 2 days (3 nights) and during their stay the witnesses resided at what is described in the report as a "moderately priced" hotel in Glasgow (the Commission sought D&G's consent to disclose the name of the hotel but this was request was declined). The witnesses were driven to Dumfries to be precognosced, but neither was aware of their proximity to Lockerbie. Indeed, it was recognised by the officer who prepared the report that it would have been "wholly inappropriate" for the witnesses to visit Lockerbie at that time. Although the Maltese officers who escorted the witnesses had asked to be taken there, this request was refused and it was explained to them that "such a visit could be misinterpreted" given that they too were witnesses in the case. According to the report this explanation was accepted and there was no further discussion of the matter. At no time did the officer who prepared the report discuss with the witnesses their

evidence or the case in general. The precognition process was concluded in one day and the following day the witnesses, along with their Maltese escorts, were taken sight-seeing in Edinburgh.

- The closing submissions at trial

17.15 As the trial progressed the threat level in respect of both witnesses continued to be monitored. Following discussions between the officer who prepared the report, the senior investigating officer, the Maltese police and the British High Commission in Malta, it was decided that Mr Gauci should be removed from Malta while the closing submissions in the trial were being made. It was thought that detailed references would be made to Mr Gauci in those submissions and that in order to protect his safety and to avoid unwanted media intrusion both he and Paul Gauci should be taken to Scotland.

17.16 During their visit to Scotland on this occasion, which lasted approximately one week, the witnesses spent time in Glasgow and Aviemore, staying in what are described as "moderately priced hotels" (the Commission's request for consent to disclose the names of the hotels was declined by D&G). According to the report, the reference in the *Mail on Sunday* article to the witnesses being taken salmon fishing was a "complete fabrication". Mr Gauci, it is said, "has never held a fishing rod in his hand whilst in Scotland." The report goes on to explain that Mr Gauci in fact visited a fish farm close to the hotel at which he was staying in Aviemore. The entrance fee of £1 was paid by the police. Mr Gauci also learned that there was an osprey sanctuary nearby and asked to visit this. Again the entrance fee to this attraction, £3, was paid by the police. According to the report Mr Gauci was never taken hill-walking but had used the chairlift in Aviemore to view the surrounding scenery.

- The appeal

17.17 A further assessment of the threat level took place following intimation by the applicant of his intention to appeal the conviction. It was learned that the last day for lodging grounds of appeal was 21 March 2001 and it was considered that due to

the potential for "intense media intrusion and issues relating to personal security" it was necessary to remove both witnesses from Malta during the period following the lodging of the grounds.

17.18 The witnesses were taken to Scotland again and stayed for one night in a hotel in Glasgow where a "competitive rate" had been secured. During this visit Mr Gauci asked to be taken to Lockerbie. According to the report, as Mr Gauci had given evidence and the trial had concluded, "this was not felt to be inappropriate". Indeed, it was considered that such a visit would assist Mr Gauci in recovering from the pressure he had been under since 1988 (see below). The visit to Lockerbie took place in March 2001 and, according to the report, was the first and only occasion the witness had been to the town.

17.19 The report points out that, following discussions with the senior investigating officer, a "protective plan" was drawn up for the removal of both witnesses for the duration of the appeal hearing itself. At the time the report was produced that operation was still ongoing (further reference is made to this below).

17.20 The report also describes Mr Gauci's attitude to his removal from Malta:

> *"Anthony Gauci does not want to leave Malta, even for a single day, not only is he reluctant to leave the island, but it causes him great inconvenience in respect of his business and the well-being of his pigeons and other animals (rabbits). He is advised by the police that he should leave the island in the interests of his own personal security and safety and follows this advice reluctantly. He does not regard leaving the island as a holiday or any sort of reward. Whilst he is away efforts are made to ensure he is comfortable and content. This is only achieved when he receives some entertainment and this has been limited to sight-seeing. The costs incurred relate only to entrance fees to modest attractions, the fish farm and osprey sanctuary are examples. It is not practicable to remove this man from his home and lock him in a hotel room. Not only would this be inhumane, but it would have a detrimental psychological impact on the witness and is contrary to recognised best practice for the management of protected witnesses."*

17.21 According to the report Mr Gauci was not "coached" in his evidence at any time during the visits, nor were any inducements offered or promises made of "financial rewards, trips etc". The only assurances given to him were that the Scottish police would continue to work with the Maltese police on matters relating to his security.

17.22 Evidence of Mr Gauci's vulnerability is said to be provided by an incident which occurred following the verdict. This concerned an occasion when two males, one Maltese and the other Sicilian, entered Mr Gauci's shop and informed him that they represented the "Libyan Defence Team". The men requested that he travel to Libya where he would meet with representatives of the "Defence Team" and would be "handsomely rewarded". According to the report Mr Gauci declined the offer, but was greatly alarmed by the approach.

17.23 The report also points out that in 2002 Anthony and Paul Gauci attended counselling sessions with a psychiatrist who specialises in assisting witnesses who are under threat. According to the report the psychiatrist was of the opinion that both witnesses had experienced a "major psychological impact" as a result of their involvement in the case. The psychiatrist also believed that the strategy adopted by the police should continue and that both witnesses found it reassuring. Indeed, according to the report the absence of such a strategy would lead the psychiatrist to have "grave fears for their psychological well-being".

17.24 Other documents provided to the Commission expand on the information given in the report of 27 January 2002. An undated report marked SECRET and entitled "Appeal Hearing – Temporary Relocation Options" (see appendix of protectively marked materials) makes further reference to Mr Gauci's planned removal from Malta for the duration of the appeal hearing. According to the report Mr Gauci "remains vehemently opposed to such a measure" and "concerns remain regarding his ability to sustain a lengthy absence." The report also refers to certain developments which are said to have "heightened concerns" relating to Mr Gauci. The first of these was the "focus of the grounds of appeal". The second concerned information that a terrorist organisation known as the "Revolutionary Organisation 17 November" had published direct references to the Lockerbie trial and to Mr Gauci's

role in the case. It was considered that this was a "sinister development" which reinforced the need for "continual vigilance". The report recommends that for the duration of the appeal hearing Mr Gauci be taken to a country other than the UK**.** The Commission sought D&G's consent to disclose the name of the country but this request was declined.

17.25 Further reference to Mr Gauci's attitude to his removal from Malta is contained in the minutes of a confidential meeting he attended on 23 March 1999 along with Paul Gauci and various Scottish and Maltese police officers (see appendix of protectively marked materials). The purpose of the meeting was to assess the security of both witnesses and to update them on the possibility of a trial in the event that the accused were surrendered to the Scottish authorities. When asked how he felt about the situation Mr Gauci was noted as replying:

> *"I am afraid now, if it comes to a position I will tell lies, I want to stay in Malta, I get homesick if I am away from Malta, twice I have been away and after a couple of days I want to come home, all my life is here."*

The defence files

17.26 Materials relating to Mr Gauci's visits were also retrieved from the defence files. On 29 January 2002 the applicant's solicitor at the time, Alistair Duff, wrote to Norman McFadyen at Crown Office seeking further information regarding the claims made in the *Mail on Sunday* article (see appendix). Specifically, Mr Duff asked for details of the number, nature and duration of Mr Gauci's visits to Scotland and whether there was any truth in the allegation that he had received "treats" on these occasions. Mr Duff also sought clarification as to whether Mr Gauci had been taken to Lockerbie and "shown a lot of things" on his earliest visit to Scotland.

17.27 In his response dated 30 January 2002 (see appendix), Mr McFadyen explained that as there were concerns for Mr Gauci's safety it would not be appropriate to elaborate upon any arrangements which had made to ensure his protection (the implication in the letter is that Mr Duff was aware of these concerns). Mr McFadyen confirmed, however, that Mr Gauci's only visit to Scotland prior to

giving evidence was when he attended for Crown precognition in 1999. The visit, Mr McFadyen said, lasted 2 days (3 nights) during which Mr Gauci, Paul Gauci, and certain Maltese police officers stayed in Glasgow. According to the letter Mr Gauci was not taken to Lockerbie "at any time during that visit". Although Mr McFadyen was not prepared to discuss any arrangements which had been made subsequent to Mr Gauci giving evidence, he had been assured that at no time did Mr Gauci receive any gifts, as was suggested in the article.

17.28 In a further letter to Mr McFadyen dated 1 February 2002 Mr Duff explained that neither he nor the Scottish counsel acting on behalf of the applicant had any idea of the approach made to Mr Gauci before it happened. According to the letter Mr Duff was informed of the allegations shortly before they were publicised and had shared this information with counsel. Mr Duff added that he had no reason to believe that the allegations were to receive publicity.

Consideration

17.29 As a result of its enquiries the Commission has established that between 1999 and 2002 Mr Gauci left Malta on eight occasions for reasons connected with the case. Three of those occasions are explained by his attendance at Crown precognition, the identification parade and the trial. Of the remaining five, one relates to his attendance at counselling, and the other four relate to occasions when it was considered necessary to remove him from Malta. The decisions taken on each of those four occasions are fully justified by the circumstances referred to in the reports narrated above. It is clear from these that the officers responsible for Mr Gauci's protection perceived there to be real risks to his safety and security based on the prospect of media intrusion and potential threats posed from elsewhere.

17.30 In the Commission's view the question to be addressed is not whether Mr Gauci ought to have been removed from Malta on those occasions, but whether during his time away he might have perceived his treatment as being an incentive to give evidence favourable to the Crown case.

17.31 With regard to his stays in Scotland the Commission does not consider that the treatment afforded to Mr Gauci was particularly lavish. Indeed, the cost of the activities described in the report of 27 January 2002 was on any view modest. As the report points out, it would not have been appropriate simply to keep Mr Gauci in his hotel room during the visits. Aside from anything else, to have done so might have resulted in him being even more reluctant to cooperate with the officers in the event that it was considered appropriate to remove him from Malta on a future occasion.

17.32 In any event almost all of Mr Gauci's visits to Scotland took place after he had given evidence. The only exception to this is his visit in 1999 when he attended Dumfries for precognition and was taken sight-seeing in Edinburgh the following day. However, in the Commission's view any possible significance that might have been attached to this by the defence has to be seen in light of the other information contained in the reports described above. It appears from this that far from viewing his visits to Scotland and elsewhere as an incentive Mr Gauci was strongly opposed to his removal from Malta which he regarded as a source of inconvenience. There are references, for example, to Mr Gauci being "homesick" when he is away from Malta and to concerns as to his ability to handle his removal from the island for the duration of the appeal hearing. In these circumstances the Commission does not consider that evidence of a sight-seeing trip to Edinburgh during a visit connected to his Crown precognition would have provided a sound basis for challenging Mr Gauci's credibility as a witness. Accordingly the Commission does not consider the fact that the defence was unaware of this information at the time of the trial suggests that a miscarriage of justice may have occurred.

17.33 As to the visit Mr Gauci made to Lockerbie it is not clear from the report of 27 January 2002 precisely what he did while he was there. However, read alongside the transcript of his conversation with Mr Thomson, it is reasonable to infer that he went to the garden of remembrance for those who died in the disaster. In the Commission's view, given that the visit took place after the conclusion of the trial it cannot be said to have influenced the content of Mr Gauci's evidence. Accordingly the Commission is not persuaded that evidence of the visit suggests that a miscarriage of justice may have occurred.

(2) Mr Gauci's "missing" statements

The submissions

17.34 According to volume A the configuration applied to Mr Gauci's statements by the HOLMES system suggests that two such statements are potentially "missing". It is explained that each statement stored on HOLMES is given the prefix "S" (for "statement") and a number unique to the particular witness (in Mr Gauci's case, 4677). The first statement given by any witness consists simply of the prefix and the number (in Mr Gauci's case, S4677). However subsequent statements by the same witness are given an alphabetical suffix to indicate their place in the sequence. Thus, according to the submissions, Mr Gauci's statement, S4677R, is his 18th statement.

17.35 According to volume A the sequence of Mr Gauci's statements runs from S4677 to S4677U. It is pointed out, however, that no statements were disclosed to the defence bearing the references S4677J and S4677S. It is acknowledged that this might simply be down to poor record keeping and that even if such statements exist they might not be of any significance. However, it is suggested that S4677S would have been taken in the period just before Mr Gauci identified the applicant from a photograph on 15 February 1991.

17.36 The issue is raised again in the further submissions concerning Mr Gauci. It is pointed out there that the HOLMES computer will not "skip" a letter in the alphabet ie S4677K should not follow S4677I. It is submitted that at trial Mr Gauci was referred to a photo-spread containing an image of the incriminee Mohammed Abo Talb ("Talb") which he had been shown by police on 6 December 1989. In evidence the police officer who interviewed Mr Gauci on this occasion, Henry Bell, agreed that he had shown the photo-spread to Mr Gauci on this occasion. However, the submissions point out that there is no statement by Mr Gauci dated 6 December 1989. The suggestion is then made that if a statement of that date exists it "would or could be" S4677J. According to the submissions "nothing has emerged… to cause a retraction of the allegation that some police statements have been withheld".

17.37 In support of this ground MacKechnie and Associates submitted to the Commission a statement by Leslie Bolland, a retired Det Supt from Hertfordshire Constabulary who has specialist knowledge of the HOLMES system (see appendix). Mr Bolland was given copies of Mr Gauci's handwritten statements and noted that S4677J was missing from the sequence. He accepted that this might have occurred as a result of an attempt to register an original version of one of Mr Gauci's statements when a faxed version of the same statement had already been registered. However, according to Mr Bolland this would mean that the faxed version of the statement was one of those already registered on the system. In such circumstances Mr Bolland would expect to have seen the reference, S4677J, written in pencil on one of Mr Gauci's other statements. However, none of the other statements bore that reference. In addition, Mr Bolland said that if a reference such as S4677J is wrongly used by a HOLMES operator it is normal to re-use that reference in connection with later statements made by the same witness. In the case of Mr Gauci's statements this raised the question as to why statement S4677K was not simply allocated the reference S4677J.

17.38 In Mr Bolland's view the same considerations would apply in respect of S4677S which he noted was also missing from the sequence.

The Commission's enquiries

17.39 The HOLMES database does in fact contain a statement bearing the reference S4677S (see appendix). The statement, which was not lodged as a production, is dated 8 October 1991 but describes the occasion on 6 December 1989 when Mr Gauci was shown a photo-spread containing twelve photographs, including one of Talb. According to the statement Mr Gauci was shown a selection of photographs (CP 1246) but could not identify anyone as the man who purchased the items from his shop. At the foot of the statement there is a note in the following terms:

> *"Statement submitted by DS Byrne as continuity for final report, no statement having been submitted from Gauci. Gauci has not been re-interviewed for this additional statement."*

17.40 As noted in chapter 6, production of the final police report sometimes involved an element of rewriting and rewording of statements based upon earlier accounts given by witnesses or other available records. It appears that S4677S is an example of this in that it is based not upon Mr Gauci's own words but rather on the statements submitted by the officers who spoke to him on 6 December 1989 (see eg Mr Bell's statement S2632H in appendix). There is little doubt that Mr Gauci was seen on this occasion as the police label attached to the photo-spread is dated 6 December 1989 and is signed by him. In evidence Mr Gauci was referred to the photo-spread and accepted that as his signature did not appear against any of the photographs, he had not picked anyone out as the purchaser (see also the evidence of Mr Bell 32/4852-4853). Accordingly, even though S4677S was not lodged as a production the defence was aware of what had occurred when Mr Gauci was seen on this occasion.

17.41 However, as the submissions point out, the Crown also did not lodge any statement with the reference S4677J. Although a statement bearing that reference is held on the HOLMES database, it contains only Mr Gauci's name and the words "Registered in Error" (see appendix). Another statement attributed to Mr Gauci, S4677V (see appendix), is blank but was also registered in error (see action A11783 in appendix).

17.42 The Commission raised this and other matters with D&G whose response is contained in a letter dated 11 August 2005 from (retired Supt) Thomas Gordon (see appendix). The letter provides a very detailed account of the use of HOLMES during the police investigation and the possible reasons why witness statements were at times registered on the system in error. In order properly to understand these reasons it is necessary to set out briefly Mr Gordon's account of the procedure for registering statements on HOLMES and the difficulties caused in the present case by the fact that enquiries were being pursued outside the UK.

17.43 Generally, the first stage in the process of registering statements on HOLMES occurs when the statement is given to a "receiver" in the incident room. The role of the receiver is to read the statement in order to establish whether it

requires any urgent "actions" (ie instructions for further enquiries by officers). If no such actions are required, the statement is passed to an "indexer" whose job is to register the statement on the system. If the witness is already known to the system, the indexer will also update his "nominal" index (ie the record containing, among other things, the witness's personal details and details of his previous statements). In such circumstances the indexer can view the text of any other statements given by the witness in order to ensure that the statement about to be registered has not already been entered on the system.

17.44 In the present case, given the scale of the enquiry and the fact that it brought together officers from a number of different forces, on-site training was provided to those employed in the incident room. According to Mr Gordon the sheer volume of paper meant that mistakes were made in terms of the registration of particular items. However, the supervisory structure of the incident room was designed to detect such errors, which is why items found to have been wrongly recorded were designated as "registered in error".

17.45 Matters were further complicated by the fact that the incident room was also receiving materials from Malta. The enquiry team in Malta would often spend up to 20 days at a time there and on their return would deposit with the incident room manuscript statements and other items recovered by them. In some cases documents would be faxed from Malta so that they could be entered on the system more quickly.

17.46 Mr Gordon points out in his letter that in the present case there were two particular factors which might have contributed to errors in registration. The first concerns the large volume of typing required to enter the information on the system. This meant that the text of statements would not be available on the system for several days, particularly where a back-log existed. The second difficulty arose from statements being faxed to the incident room. Because faxed statements were often difficult to read, typists would on occasion wait for the original versions to be delivered before entering the text on the system.

17.47 As a result of both these factors, indexers would be able to see from the nominal records that a statement had been registered, but would not be able to see the

text of that statement. According to Mr Gordon's letter the most common mistake made by an indexer in such circumstances was to assume that an original of a statement was the first version received by the incident room, when in fact a faxed copy had already been registered. The result of this was that statements might be recorded on the system in duplicate. The mistake would thereafter be detected and one of the statements marked as "registered in error". Indeed, as a result of an exercise undertaken by Mr Gordon on 4 October 1991 he established that there were 39 statements registered in this way, one of which was S4677J. A list of the statements is contained in Mr Gordon's letter.

17.48 Mr Gordon explains in his letter that Mr Gauci's statements S4677H (undated but relating to an interview on 27 September 1989) and S4677I (dated 4 October 1989) were both registered on the HOLMES system on 6 October 1989. S4677J was registered on 20 October 1989 and S4677K (undated but relating to an interview on 2 October 1989) was registered on 27 October 1989. According to Mr Gordon there are two possible reasons as to why S4677J was registered in error:

(1) A duplicate of either S4677H or S4677I was mistakenly registered as S4677J.

(2) A statement by another witness was mistakenly attributed to Mr Gauci's nominal.

17.49 Mr Gordon points out in his letter that as S4677J was already recorded on the system, the next statement from Mr Gauci required to be given the reference S4677K. According to Mr Gordon it was not the practice to reattribute statement references which had been used in error as this would indicate that a statement had been registered on the system before it was taken.

17.50 With regard to S4677V Mr Gordon explained that this was registered on the HOLMES system on 30 April 1999. In his view the error might have had something to do with Mr Gauci's statement S4677U (dated 13 April 1999) which was registered on the system on 15 April 1999. Mr Gordon points out that S4677U relates to Mr Gauci's attendance at the identification parade on 13 April 1999 and was taken by a DC Stevenson. DC Stevenson's own statement in relation to the matter, S5710, was

registered on the HOLMES system on 29 April 1999. In Mr Gordon's view a likely explanation for the error was that when DC Stevenson submitted his statement to the incident room he included a copy of the statement he had taken from Mr Gauci. In these circumstances it was possible that the copy of Mr Gauci's statement was wrongly registered as a new statement. Another possibility was that an indexer had wrongly registered to Mr Gauci's nominal record a statement given by another witness.

17.51 As part of its assessment of this issue the Commission obtained from D&G copies of the HOLMES logs showing all the actions raised in respect of Mr Gauci. One of the actions, A11783, is in the following terms:

> *"RESULT: S4677 to S4677U (minus S4677V) passed to* [the procurator fiscal] *Mr Brisbane as per receipt no E0048, S4677V is recorded on HOLMES as error"* (see appendix).

17.52 Mr Gordon was referred to this action and his attention was drawn to the fact that it contains no reference to S4677J as having been registered in error. Mr Gordon was asked for his views on this and to provide a copy of the receipt no. E0048.

17.53 Mr Gordon explained that action A11783 had been raised following receipt of a letter from Crown Office requesting copies of all Mr Gauci's statements (see appendix). He pointed out that the indexer who processed this request had noted on the letter the references "S4677 – S4677U". Mr Gordon suggested that the indexer might have seen from Mr Gauci's nominal record that S4677V was registered in error, but might simply have failed to notice that an earlier statement, S4677J, was also marked in this way. According to Mr Gordon there can be doubt that S4677J was registered in error at that time as it was one of the items he had identified as a result of the exercise he undertook in 1991.

17.54 Mr Gordon also produced the receipt no. E0048 (D11559) which lists the statements ultimately passed to the Crown as a result of the action (see appendix). There is no reference to S4677J in the list and the reference S4677V has been overwritten so as to read S4677U. The amendment has been initialled by Mr

Brisbane, the procurator fiscal who received the statements. In Mr Gordon's view this indicated that when Mr Brisbane checked the statements he noticed that the statement marked S4677V on the receipt was in fact S4677U. He added that the only reasonable explanation for the reference to S4677V on the receipt was that this had been mistakenly inserted instead of S4677U.

17.55 Mr Gordon was also asked whether it was possible to recover from the HOLMES system an audit trail which might give further information as to why S4677J and S4677V were registered in error. According to Mr Gordon, however, difficulties encountered when transferring the information held on HOLMES to its successor, HOLMES II, meant that the retrieval of such information would not be possible. Mr Gordon added that even if these problems could be overcome the only additional information which could be provided was the identifying number of the HOLMES operators who had made the errors. Mr Gordon suggested that given the passage of time it was unlikely that the individuals responsible would be able to explain the occurrence of the errors.

17.56 In conclusion Mr Gordon was "absolutely certain" from his knowledge of the HOLMES system and the investigation in general that no statements by Mr Gauci exist under the references S4677J and S4677V.

Consideration

17.57 The Commission has found nothing which might support the allegation that the police have withheld statements given by Mr Gauci. In terms of Mr Gordon's letter the existence of S4677J and S4677V might be explained either by the registration of earlier statements already on the system, or by statements from another witness being wrongly attributed to Mr Gauci's nominal index. Neither of those explanations appears implausible to the Commission, particularly when one considers the task faced by the incident room in entering information on the system and the further complications caused by the receipt of original and faxed versions of statements.

17.58 In any event if the reference to S4677J on the HOLMES system is truly evidence of an attempt to withhold one of Mr Gauci's statements it is difficult to see why those responsible did not simply allocate that reference to one of Mr Gauci's later statements, as suggested by Mr Bolland in his statement. If that had been done there would have been nothing in Mr Gauci's nominal index to suggest that the statement originally given reference S4677J had ever existed. In the Commission's view it is also important to bear in mind that by 1991 there were a total of 39 "statements" registered in error on the HOLMES system, some relating to witnesses who on any view were not vital to the police investigation.

17.59 In these circumstances the Commission is satisfied that S4677J and S4677V are not additional statements by Mr Gauci and that the appearance of those references in Mr Gauci's nominal index arose from administrative errors.

Conclusion

17.60 In the Commission's view neither of the matters described in this chapter is capable of supporting the allegation that a miscarriage of justice may have occurred in the applicant's case.

CHAPTER 18
ALLEGED DEFECTIVE REPRESENTATION

Introduction

18.1 A substantial part of volume A (chapter 13 and parts of chapters 10 and 11) is dedicated to allegations of inadequate representation against the applicant's trial representatives. The allegations are wide-ranging and cover failures both to prepare and present the defence and to advance legal argument or assert "legal rights" on behalf of the applicant. The issues relate to many aspects of the case but in the main concern the approaches taken to the incrimination defence, the applicant's movements on 20-21 December 1988, the identification evidence of Anthony Gauci and the conduct of the appeal. It is submitted that as a result of each and all of the alleged failures the applicant was denied a fair trial.

18.2 The Commission undertook a range of enquiries in this connection. The files prepared by the firm of solicitors which represented the applicant at trial (McCourts) were examined, as were certain of those prepared by the firm which represented the co-accused (McGrigors). Extensive interviews were conducted with several of the applicant's trial representatives, namely his senior counsel William Taylor QC (on two occasions), his junior counsel John Beckett QC and his solicitor Alistair Duff. Copies of their statements are in the appendix of Commission interviews. The Commission originally intended to interview all members of the applicant's defence team but in light of the information obtained from Mr Taylor, Mr Beckett and Mr Duff this was not considered necessary.

18.3 It is appropriate to note that Mr Taylor is a former member of the Board of the Commission who tendered his resignation immediately upon the Commission receiving the submissions on behalf of the applicant.

18.4 In addressing the allegations the Commission has applied the following principles derived from previous decisions of the court:

(1) The conduct of an accused's defence can be said to amount to a miscarriage of justice only where it has deprived him of a fair trial (*Anderson v HMA* 1996 SCCR 114; *E v HMA* 2002 SCCR 341; *Jeffrey v HMA* 2002 SCCR 822).

(2) A fair trial is denied to an accused where his defence was not presented at all (*Anderson v HMA*; *McIntyre v HMA* 1998 SCCR 379) or was not properly presented (*Garrow v HMA* 2000 SCCR 772; *E v HMA*; *McBrearty v HMA* 2004 SCCR 337; *Grant v HMA* 2006 SCCR 365); a fair trial may also be denied where counsel's exercise of discretion in conducting an accused's defence was "contrary to the promptings of good reason and sense" (*McIntyre v HMA*).

(3) The entitlement to a fair trial should not be viewed as involving a right to a retrial simply because things might have been done differently by counsel; there can be no miscarriage of justice if counsel conducts the defence within the instructions given to him according to his own professional judgment as to what is in the best interests of his client (*Anderson v HMA*; *Grant v HMA*).

(4) An accused who argues that his defence was inadequately prepared must show what would have been revealed had there been adequate preparation (*McIntosh v HMA* 1997 SCCR 389).

(5) An appeal based on alleged defective representation should not be put forward unless the grounds specify the allegation on all material points and there is objective support for it (*Grant v HMA*).

18.5 The Commission has also sought to assess the allegations in light of the facts and circumstances known to the defence at the particular point when decisions or approaches were taken, rather than with the benefit of hindsight (*McBrearty v HMA; Strickland v Washington* 466 US 668, as quoted in *Anderson v HMA*).

18.6 Each of the allegations made on behalf of the applicant is addressed in turn below. In the final section of this chapter the Commission sets out its conclusions in respect of several matters not raised in the submissions.

(1) The incrimination defence

Background

18.7 Before considering the allegations made under this heading it is worth detailing the terms of the notice of incrimination and the trial court's approach to the evidence led in this connection.

18.8 The schedule to the notice included reference to the following incriminees:

- *"Members of the Palestinian Popular Struggle Front which may include Mohamed Abo Talb, Crown witness no 963, Talal Chabaan, present whereabouts unknown, Mohammed Ghaloom Khalil Hassan, present whereabouts unknown, Hashem Salem also known as Hashem Abu Nada, present whereabouts unknown, Madieha Mohamed Abu Faja, present whereabouts unknown, Abd El Salam Arif Abu Nada, Magdy Moussa, Jamal Haider, all present whereabouts unknown but all formerly directors of the Miska Bakery, Malta and Imad Adel Hazzouri, Gawrha, 42 Triq Patri, Guzi Delia Street, Balzan.*

- *Members of the Popular Front for the Liberation of Palestine-General Command (PFLP-GC)."*

18.9 According to the trial court's judgment (paragraphs 73-81) evidence was led that a cell of the PFLP-GC was operating at least up until October 1988 in what was then West Germany. The evidence showed that at least at that time the cell had both the means and intention to manufacture bombs which could be used to destroy civil aircraft. On 26 October 1988, as part of an operation code-named "Autumn Leaves", the German police (the "BKA") raided premises in Frankfurt and the home of Hashem Abassi in Neuss and seized a car which had been used by the leader of the cell, Haj Hafez Kassem Dalkamoni ("Dalkamoni"). As a result of the operation the BKA found, among other things, radio cassette players, explosives, detonators, timers,

airline timetables and seven used Lufthansa luggage tags. There was a considerable amount of evidence at trial of bombs being manufactured so as to be concealed in Toshiba radio cassette players. The models being used were, however, different from the RTSF-16 model used in the bombing of PA103 and the timers were known as "ice cube" timers which were different from MST-13 timers.

18.10 Among those arrested during the raids were Dalkamoni, Hashem Abassi, his brother Ahmed Abassi and a bomb-maker for the PFLP-GC named Marwan Khreesat ("Khreesat"). Dalkamoni was later convicted of various offences and sentenced to 15 years imprisonment. The Abassi brothers and Khreesat were among those released by the BKA shortly after the arrests took place.

18.11 The trial court concluded that although the cell could have regrouped by 21 December 1988 there was no evidence that it had the materials necessary to manufacture an explosive device of the type that destroyed PA103. In particular there was no evidence that the cell had an MST-13 timer.

18.12 The court also narrated the evidence given at trial by the incriminee, Mohammed Abo Talb ("Talb"). Talb had joined the Palestinian Popular Struggle Front (the "PPSF") in about 1972 and was based in Lebanon and latterly Damascus. In 1983 he left Damascus for Sweden where he had lived ever since. In evidence he said that after arriving in Sweden he did not belong to any Palestinian organisation and ceased all activities in relation to Palestine. However, in 1989 he was convicted of a number of serious offences arising from the bombing of targets in Copenhagen and Amsterdam in 1985 and was sentenced to life imprisonment. He was still serving that sentence at the time he gave evidence.

18.13 Before his imprisonment Talb lived in Uppsala, Sweden with his wife Jamilla Mougrabi and their children. When he was arrested in 1989 his wife's brothers, Mahmud and Mustafa Mougrabi, were also arrested along with Talb's friend, Martin Imandi.

18.14 Although the court accepted that there was a great deal of suspicion surrounding the actings of Talb and his circle, it concluded that there was no evidence

to indicate that they had either the means or intention to destroy a civil aircraft in 1988.

The submissions and the Commission's responses

(a) Alleged failure to pursue the disclosure of evidence

18.15 It is alleged that the defence failed to pursue the disclosure of materials which might have implicated the PFLP-GC in the bombing. Reference is made, for example, to the terms of various cables prepared by the US Defense Intelligence Agency (the "DIA") and to the minutes of the International Lockerbie Conferences held by police and prosecutors from various countries in the years following the bombing. According to the submissions those sources demonstrate that the incriminees were the main suspects for many years and that there must therefore have been considerably more information that could have been sought by the defence. Reference is made to a particular DIA cable (see appendix) in which it is reported that the bombing of PA103 was conceived, authorised and financed by a former Minister in the Iranian government, Ali-Akbar (Mohtashemi-Pur), and was contracted to the PFLP-GC. The same individual is reported in another DIA cable (see appendix) to have paid $10m for the bombing of PA103 in retaliation for the shooting down of an Iranian Airbus by a US Navy battle cruiser, the USS Vincennes, in July 1988. According to the submissions the DIA cables "specifically discounted" Libyan involvement in the bombing. It is submitted that at the very least the cables themselves could have been led in evidence to show that intelligence opinion had focussed on the incriminees.

Consideration

18.16 In the Commission's view it is appropriate to categorise the non-disclosure of material evidence as a breach of the Crown's duties under *McLeod v HMA* 1998 SCCR 77 rather than as a failure on the part of the defence to pursue such evidence (*Sinclair v HMA* 2005 SCCR 446, Lord Hope at paragraph 34). The Commission's conclusions as to whether the Crown satisfied its obligations in respect of material concerning the incriminees are set out in chapter 14.

18.17 As to the allegation that the defence did not lead the contents of the DIA cables, there was evidence before the court that the PFLP-GC had been the main focus of the police investigation and that many Scottish officers were engaged in enquiries in this area over a considerable period of time (Gordon Ferrie: 3/330-331). There was also evidence that the BKA became involved in enquiries into the bombing of PA103 because it was considered that there might be a link between this and the Autumn Leaves suspects (Anton Van Treek: 71/8720). In light of that evidence, and given the circumstances of the operation and its proximity to the bombing of PA103, it must have been plain to the court that the PFLP-GC were the initial suspects in the investigation.

18.18 Although certain of the DIA cables suggest that in 1989 there was no credible intelligence implicating Libya in the bombing, it has to be remembered that these were produced well before the link was made between the fragment PT/35(b) and the MST-13 timer by forensic scientists in June 1990 (see chapter 8) and therefore before any major link to Libya was established. Moreover, information contained in certain other cables would clearly not have been helpful to the defence. For example, in one of the cables dated 24 September 1989 there are references to Libya, Iran and Syria having signed a "cooperation treaty for future terrorist acts", and to the bomb used to destroy PA103 as having been constructed in Libya. In these circumstances it is understandable that the defence did not seek to lead evidence of the cables.

(b) Alleged failures to present the incrimination defence

18.19 It is alleged that the incrimination defence was not properly presented and that this resulted from failings on the part of the defence and also on the part of the Crown in respect of its obligations of disclosure (as to the latter see chapter 14). Although it is acknowledged that many of the important features of the evidence were presented at trial it is submitted that this was done in a way which did not properly reflect the strength of the evidence. For example, it is said that the greater part of the evidence was contained in joint minutes and that the inferences to be drawn from these were not at all obvious. It is also alleged that the closing submissions on the

incrimination were "extremely brief" and involved little attempt to present the "whole picture".

18.20 According to the submissions the consequence of those alleged failures was that the link between the PPSF and PFLP-GC – and hence the link between the individuals based in Sweden and those in Germany – was "not realised", although it is acknowledged that such a link was admitted in evidence by Talb and "was evident from all the circumstances". Furthermore, it is alleged that evidence concerning the links between Talb and Dalkamoni, and between the various alleged terrorist cells in Malta, Cyprus and Yugoslavia, was not presented by the defence.

18.21 It is also submitted that there was no proper context given to the incrimination evidence and no attempt to "tie it together" for the court. It is said that this was "disastrous" in that it rendered much of the information presented as "meaningless" and made it easier for the court to view each of the parties incriminated as entirely separate and therefore to dismiss them individually. Such a context could, it is submitted, have been established by expert evidence on the structure and coalitions understood to exist between the various terrorist groups operating at the time. According to the submissions, MacKechnie and Associates were unable to provide any expert opinion in support of these allegations. However, it is suggested that such evidence "could" be obtained and "would" show the following:

- that the PFLP-GC and the PPSF operated together at the relevant time, have a long history of terrorist activity and had the means and intention to bomb PA103;

- that in the view of the intelligence community both organisations were the prime suspects for a considerable period;

- that at the relevant time there was a political coalition of Palestinian, Syrian and Iranian forces against the US and Israel, and that in December 1988 a coalition organised by the leader of the PFLP-GC, Ahmed Jibril ("Jibril"), was expected to carry out a terrorist act against the US;

- that the "combined operation" (ie the bombing of PA103) was "probably" supported and financed by Syria and Iran and had a cell structure covering Sweden, Denmark, Greece, Germany, Cyprus, Malta and Yugoslavia;

- that individuals within those cells were trained (mainly in Syria and eastern Europe) in the making and use of explosive devices for attacks on airlines, and that the method used included hiding Semtex within Toshiba cassette recorders;

- that "they could have ingested the bomb either at Frankfurt or Luqa"; and

- that in 1991 Iraq invaded Kuwait and the political context changed in that during the Gulf war the US maintained "relatively good relations" with Syria and Iran.

18.22 According to the submissions it is easy to make a "different and compelling" defence case once the links are made between the activities of the various individuals associated with the PPSF and the PFLP-GC. The submissions thereafter narrate in detail the features of what is said to be an "alternative" incrimination defence which could have been presented. Included in this is a section dealing with the figure known as Abu Elias who was referred to on several occasions in the trial evidence, mainly by FBI Special Agent Edward Marshman who testified as to what Khreesat had told him at an interview in 1989.

18.23 The submissions conclude that the conduct of the incrimination defence fell short of what was reasonable and defied "the promptings of good reason and sense."

Consideration

18.24 In the Commission's view the most surprising feature of the allegation concerning expert evidence is that it appears to be based on nothing more than speculation as to its likely content. It seems doubtful, for example, that any "expert"

on terrorism could give competent evidence as to whether in December 1988 a coalition led by Jibril was expected to carry out an attack against the US, or that the terrorist operation in respect of PA103 had a cell structure covering specific countries, or that members of those cells were trained elsewhere in the use of explosives, or that the operation was supported and financed by Syria and Iran. Likewise, it is difficult to see what an expert on terrorist matters might have added to the existing evidence as to whether the bomb was ingested at Frankfurt, Luqa or Heathrow airports. Although the political situation prevailing in the Middle East in 1991 would have been a competent subject for expert evidence, again it is difficult to see how in itself this might have undermined the available evidence concerning MST-13 timers and their links to Libya, let alone the evidence implicating the applicant in the bombing.

18.25 It is also important to bear in mind that expert evidence of the kind described in the submissions might well have suggested Libyan involvement in terrorism. Evidence was led at trial that the PFLP-GC was "apparently … dependent upon Syria, and also has contacts with Libya" (Anton Van Treek: 71/8741). According to Mr Duff the defence was aware of those links through its own enquiries. The defence had also precognosced an officer in the British Security Service, known as "Mr A", who had experience in Middle Eastern affairs and who suggested that Libya, along with Iran, Iraq and Syria, was a known sponsor of terrorism. Although evidence of Libya's alleged links to terrorism might not have assisted the Crown in demonstrating that the applicant was responsible for this particular terrorist act, in the Commission's view the concerns on the part of the defence as to what such an expert might have to say are entirely understandable (see Mr Beckett's statement at paragraph 45).

18.26 In any event the vast majority of the matters to which it is claimed such an expert would have spoken featured clearly in the evidence at trial. It is alleged, for example, that the defence failed to realise the links between the PFLP-GC and the PPSF. However, as the submissions appear to acknowledge, evidence as to the relationship between those organisations was given by Talb in cross examination. Both organisations, Talb agreed, shared "the same goal" (68/8272). Later in cross examination Talb provided a brief account of the history of the PPSF and accepted that what marked out the PPSF and the PFLP-GC in the 1970s and 1980s was their rejection of any political settlement which would allow the state of Israel to exist in

the Middle East (68/8496-8500). There was also evidence led as to the history and structure of the PFLP-GC and its involvement in previous terrorist attacks on aircraft (Anton Van Treek: 71/8739-8741).

18.27 In these circumstances the Commission does not consider there to have been any failure on the part of the defence to "realise" the links between the two organisations. Their shared objectives at the time were the subject of submissions and were acknowledged by the trial court in its judgment.

18.28 It is also alleged that the defence failed to present evidence of the links between Talb and Dalkamoni and between various individuals who were based in Sweden and Germany. However, although Talb denied any knowledge of Dalkamoni (68/8352) there was evidence that his visit to Cyprus between 3-18 October 1988 coincided with Dalkamoni's apparent presence there on 4 October (Hans Rustler: 72/8840-41). There was also evidence that Talb had met Dalkamoni's brother, Bilal Hassan, in Uppsala in 1987 (69/8523). As to the links between the individuals in Sweden and Germany, there was clear evidence of these in joint minute number 16 and they were acknowledged by the court at paragraph 77 of its judgment.

18.29 A further allegation is that expert evidence would have shown that the plot to bomb PA103 involved a cell structure covering countries such as Malta, Sweden, Denmark, Germany, Cyprus and the former Yugoslavia. As noted above the Commission is doubtful that expert evidence could competently have shown any such thing. In any event there was evidence at trial as to the links between the various individuals of interest in those countries. In respect of those in Sweden and Malta, there was evidence in joint minute number 16 that Talb's return ticket from Malta to Stockholm was purchased by the incriminee, Abd El Salam, whose flat in Malta was owned by the PLO. There was also evidence in the same joint minute from which one could infer that on 11 December 1988 Abd El Salam telephoned Talb in Sweden.

18.30 In respect of Denmark, there was evidence in joint minute number 11 as to the suspicious actings of two of the incriminees, Talal Chabaan and Magdy Moussa, who flew to Malta on different dates in December 1988 and returned to Denmark shortly after the bombing.

18.31 There was also evidence of investigations conducted in Cyprus by the BKA along with Scottish and American police officers. Following the Autumn Leaves operation the BKA suspected that a Syrian who lived in Cyprus, Habib Dejani ("Dejani"), was involved with those arrested and had links with Dalkamoni (Anton Van Treek: 71/8726-8730). Talb was cross examined extensively on his visit to Cyprus between 3 and 18 October 1988 but denied having met Dalkamoni during that time or indeed on any occasion (68/8312). Talb was also asked in cross examination why his brother in law, Mahmud Mougrabi, had told the police that Talb made regular visits to Cyprus in order to uplift funds from the PPSF. Talb denied that this was the purpose of his visits. He accepted that during his stay in Cyprus in October 1988 he had resided at the Nicosia Palace Hotel. However, he was unable to recall whether the Swedish police had asked him about a restaurant close to that hotel which he had visited regularly and which was said to be owned by Dejani (69/8522-8524). There was also evidence that while in Cyprus on that occasion Talb had made a number of telephone calls to Abd El Salam in Malta.

18.32 In respect of Yugoslavia there was evidence that Yugoslavian currency was found by the BKA in a car which had been used by Dalkamoni (Hans Rustler: 72/8845). There was also evidence that Mobdi Goben, a deceased senior member of the PFLP-GC, had resided in Yugoslavia and was in charge of the PFLP-GC sector there (Edward Marshman: 76/9245-9246). Khreesat was also said to have been to Yugoslavia along with Abu Elias (76/9244).

18.33 With the exception of that concerning Cyprus and Yugoslavia, all of the above evidence was referred to by the defence in closing submissions. It does not appear to the Commission that those submissions were "extremely brief", as is alleged on behalf of the applicant. The defence accepted that there was no evidence that any of the incriminees were at Luqa airport on 21 December 1988 but submitted that there was nevertheless "something of a web" linking those in Malta, Sweden and Neuss whose intentions were only too clear. Reference was also made to the Autumn Leaves suspects as being "but one cell of a much larger organisation" (80/9599). Bearing in mind the limitations of the available evidence it is difficult to see what more the defence could have done in this connection.

18.34 As noted earlier, the submissions go on to detail what is referred to as an "alternative" incrimination defence which it is said could have been presented at trial. Again, however, the vast majority of the evidence narrated in this part of the submissions was before the court. While certain matters, such as Dalkamoni's apparent financial connections to Cyprus on behalf of the PFLP-GC, were not led in evidence the Commission does not consider that in themselves these were significant to the applicant's defence.

18.35 Part of the so-called alternative defence case relates to Abu Elias. However, the defence led evidence as to what Khreesat had told the FBI about this individual (Edward Marshman: 76/9240). According to the statement given by Khreesat on this occasion, Abu Elias was an expert in airport security who, Dalkamoni said, had arrived in Germany on 22 October 1988. Dalkamoni visited Khreesat in Neuss that day and told him that he was leaving to go to Frankfurt. Thereafter Khreesat noticed that an explosive device on which he had been working (known as the "fifth device") had been removed from his workroom. According to the evidence Khreesat "speculated" that Dalkamoni had taken the device with him, as only he and Dalkamoni ever went into that room. Khreesat also assumed that the device had gone to Abu Elias. Four days later Khreesat and Dalkamoni were on their way to meet Abu Elias when they were arrested as part of the Autumn Leaves operation.

18.36 In the Commission's view any suggestion that the fifth device was the one used in the bombing of PA103 is undermined by other information given by Khreesat to the FBI, the terms of which were also led in evidence. Khreesat told the FBI that the fifth device was contained in a single-speaker Toshiba cassette player which looked exactly like an RT-F423 model, and that he had never worked on a circuit board of the type used in the twin-speaker RTSF-16 model (ie the model employed in the bombing of PA103). Although in his defence precognition (see appendix) Khreesat said that the fifth device was contained in a twin-speaker Toshiba cassette player, the defence was unable to explore this with him given his refusal to testify at the trial. In any event there was no evidence that the fifth device contained an MST-13 timer and, in terms of his accounts to both the FBI and the defence, Khreesat indicated that he did not use digital timers (of which the MST-13 is a type).

18.37 The only other available information tending to implicate Abu Elias in the bombing of PA103 is contained in the Goben memorandum in which it is suggested that he placed the explosive device in the luggage of one of the passengers on PA103, Khaled Jaafar. However, as explained in chapter 14 above, the defence considered this allegation to be unreliable, a conclusion which in the Commission's view is justified. In any event, for the reasons outlined in that chapter the Commission is doubtful that the contents of the memorandum amount to admissible evidence.

18.38 In conclusion the Commission does not consider that there was any failure on the part of the defence to present such material evidence in respect of the incrimination as was available to them at the time of the trial. Although different approaches could doubtless have been taken as to the particular evidence deployed and the way in which this was presented, there is nothing in the submissions on this issue which leads the Commission to conclude that the applicant was denied a fair trial.

(2) The applicant's movements on 20-21 December 1988

The applicant's submissions

18.39 The following allegations are made under this heading:

(a) The defence failed to lead any evidence to explain why the applicant possessed a coded passport (the "Abdusamad passport") and why on 20-21 December 1988 he used this in connection with a visit to Malta. In particular the defence failed to lead evidence from the applicant to the effect that he had been issued with the Abdusamad passport for use in "sanctions-busting" activity. The applicant's own account could have been confirmed by Khalifa Masoud Abu Aisha Ferjani, the administrative director of the Libyan intelligence service (the "JSO"). The defence attempted to lead similar evidence from the witness, Miloud Omar El Gharour, but abandoned this following an objection by the Crown.

(b) The defence failed to lead any evidence to explain the purpose of the applicant's visit to Malta on 20-21 December. Evidence could have been led from the applicant in this connection and from the Crown witness, Vincent Vassallo, whose home the applicant visited on the evening of 20 December.

(c) The defence failed to lead any evidence to contradict the Crown's position that the applicant was a member of the JSO. Evidence to this effect could have been given by Mr Gharour and Mr Ferjani who would have been able to confirm, first, that the issuing of coded passports does not infer membership of the JSO and, second, that in any case the applicant was not a member of that organisation.

Consideration

The advice given to the applicant

18.40 It is appropriate to deal first with the allegation that the defence ought to have led evidence from the applicant, as this underpins many of the issues raised under this heading. According to the submissions the applicant was willing to testify at trial but accepted the advice of his former representatives not to do so. Reference is made to a defence discussion paper which sets out the reasons for and against the applicant giving evidence (see appendix) and it is alleged that the reasoning employed in this is unsatisfactory. Although it is acknowledged that the advice given by the defence in this connection cannot "in itself" amount to defective representation, according to the submissions it forms part of the "general failure to present any evidence in explanation of pertinent matters."

18.41 Summaries of the various accounts given by the applicant at precognition (and at interview with the Commission's enquiry team) are contained in chapter 27 below and there is no need to repeat them here in any detail. In respect of the Abdusamad passport the applicant explained at precognition that this had been issued to him in connection with his obtaining spare parts for aircraft operated by Libyan Arab Airlines ("LAA"). As to his use of that passport on 20-21 December the applicant provided several possible reasons for this, ranging from it having been the

first one that came to hand to his desire to hide from his wife that he was paying an overnight visit to a place where Libyans went to drink and womanise.

18.42 In respect of the purpose of his visit to Malta on 20-21 December 1988, and what he did while he was there, the applicant gave varying and sometimes inconsistent accounts over the course of his precognitions. The applicant also provided information that might actively have assisted the Crown case had it featured in evidence. For example, he said in his twelfth supplementary precognition that while in Malta on the evening of 20 December he had purchased two carpets. The following morning he took the carpets to Luqa airport and told the LAA station manager there, Mustapha Shebani, about them. Mr Shebani informed the applicant that he would arrange for the carpets to be placed in the hold of the LAA aircraft on which the applicant was due to fly that morning (flight LN147 to Tripoli). According to the precognition Mr Shebani must have done so as the applicant collected the carpets upon his arrival in Tripoli later that day.

18.43 However, the evidence at trial indicated that the applicant did not check in any luggage on flight LN147 (Anna Attard: 36/5508). Accordingly, if the applicant had given evidence in those terms it might have assisted the Crown in showing, first, that he received special treatment at Luqa airport by means of his relationship with persons who worked there and, secondly, that he could arrange for items to be placed on board aircraft without there being any record of this. Although there is no indication in the precognition that the applicant would receive favourable treatment at Luqa airport from airlines other than LAA, nevertheless such evidence would clearly not have been helpful to his defence.

18.44 With regard to his connections to the JSO the applicant admitted in his first defence precognition that as head of airline security in 1986 he was seconded to that organisation. He explained that his position as head of airline security involved him training JSO officers and receiving reports from such officers who were positioned as assistant station managers at foreign airports. The applicant was also associated with or related to individuals such as Ezzadin Hinshiri ("Hinshiri") and Abdullah Senoussi ("Senoussi") who at one time occupied senior positions in the JSO. Indeed, Senoussi had been instrumental in the applicant's appointment to the Centre for Strategic

Studies ("CSS") in 1987. In his fifth supplementary precognition the applicant is noted as saying that because the funding for the CSS came from the JSO "the [CSS] therefore became part of the security or intelligence service. I therefore accept that I was effectively working in an office which was part of the security or intelligence and that I was the coordinator."

18.45 Although at no point in his precognitions does the applicant say explicitly that he was a "member" of the JSO, in the Commission's view any evidence he might have given on this issue would have been likely only to confirm his associations with that organisation and its senior officials.

18.46 In considering the allegation that the defence ought to have led evidence from the applicant it is also important to consider some of the other concerns expressed by his former representatives, both in the defence discussion paper and at interview.

18.47 According to the discussion paper, by giving evidence the applicant would have opened himself up to cross examination on issues which were not at that time considered by the defence to be major problems. Reference is made in the paper to such matters as the JSO, the CSS, the Salinger interview and the applicant's finances which, according to the paper, "make other peoples' finances pale into insignificance" (see chapter 27 below). The paper also highlights the importance to the Crown case of the applicant's movements on 20-21 December and acknowledges that his explanations for these have "some deficiencies as [the applicant] recognises." There is also reference to the applicant's close relationships with Hinshiri and Said Rashid ("Rashid") both of whom the Crown considered to be "key players in the saga". According to the paper it was expected that the applicant might also be subject to lengthy cross examination as to his knowledge and understanding of airline security.

18.48 Those concerns were repeated and in some cases expanded upon by the representatives at interview. All those interviewed recalled that the defence had sought to get the trial under way in order to prevent the Crown from lodging the applicant's Swiss bank accounts. The sums of money held in these accounts, and the points at which particular sums were deposited, were said to be a source of concern to

the defence and it was felt that if the applicant testified the Crown might seek to lead evidence of these in replication.

18.49 There was also concern expressed as to the following comment by the applicant in his first supplementary defence precognition:

> *"…as a Libyan Arab Airlines employee and as someone well known, both at Tripoli airport and at the airport in Malta, I could get away with not using a passport or an identification card at all, but simply by wearing my Libyan Arab Airlines uniform. This may sound ridiculous but it is true. If I wanted to do something clandestine in such a way that there would be absolutely no record at all of me going from Tripoli to Malta and back again, I could do it."*

18.50 Mr Beckett considered that if the applicant had spoken to this in evidence it would have removed the need for the Crown to establish the date of purchase of the items from Mary's House as 7 December 1988. According to Mr Beckett, if it was possible for the applicant to enter Malta in the manner he described then the clothing could have been purchased on any day within the relevant time frame. Mr Duff and Mr Taylor recalled having similar concerns.

18.51 Mr Beckett said that although there were some references to Hinshiri, Senoussi and Rashid in the evidence, the applicant's connections to them would have been augmented by his own evidence. According to Mr Beckett the applicant might also have revealed his connection to Mohammed El Marzouk (aka Mohammed Al Nayil and Ahmed Ali Wershefani), one of the two Libyans arrested in Senegal on an occasion when an MST-13 timer was recovered on board a passenger aircraft. In Mr Beckett's view the more the applicant could be linked to such persons the worse it would have been for his defence.

18.52 Another matter raised by the former representatives at interview concerned the applicant's account that the CSS was simply an academic institution. In his first precognition the applicant described the CSS and its role in monitoring the worldwide media, and how people around the world collected articles from newspapers and magazines and sent them there. The precognition goes on: "I remember that there was

a man in Spain who used to send back articles from the Spanish media. Sometime during the 1990s it turned out that he was an American spy and he was assassinated." In Mr Beckett's view such information was not helpful to the defence.

18.53 Both Mr Duff and Mr Beckett also recalled concern as to the possible involvement of Mohammed Abouagela Masud ("Masud") in the bombing, with whom the applicant is alleged to have travelled on a coded passport from Malta to Tripoli on 21 December 1988. According to Mr Duff the defence gained access to many individuals during its pre-trial preparations but the applicant said he knew nothing about Masud. Enquiries by the applicant's Libyan lawyers also failed to trace this individual despite the fact that a passport number existed for him. Mr Beckett suggested that the Crown might have explored this issue in its cross examination of the applicant.

18.54 The matters detailed above are merely examples of the difficulties which might have faced the defence in the event that the applicant had given evidence. Although it is conceivable that other representatives might have taken a different approach, in the Commission's view the advice given to the applicant in this connection was based on a careful consideration of what was in his interests at that time and was entirely sound.

18.55 The remaining evidence which it is alleged the defence ought to have led under this heading is considered below.

<u>The issuing and use of the Abdusamad passport</u>

18.56 It is alleged that a witness on the Crown list, Khalifa Masoud Abu Aisha Ferjani, who was the administration director of the JSO, could have testified that the applicant was issued with the Abdusamad passport for use in "sanctions busting" activity.

18.57 According to his defence precognition (see appendix) Mr Ferjani said that when the JSO was involved in obtaining spare parts for aircraft they sought assistance from various people in this field. As the applicant had lectured in airline security the

JSO asked him to cooperate, and gave him a coded passport for this purpose. A note at the foot of the precognition inserted by Mr Duff indicates that Mr Ferjani was considered to be a good witness who came across as "fairly credible". According to a letter sent by Mr Duff to Crown Office dated 12 September 2000 (see appendix) it appears that the defence at one stage expected to call Mr Ferjani.

18.58 Mr Beckett was asked about this issue at interview. He explained that there was a lot of "shadow boxing" between the Crown and defence at trial, particularly in relation to whether the applicant was to give evidence, and that this might be the reason why Mr Duff had intimated to the Crown the possibility of calling Mr Ferjani. Looking at the situation now, however, Mr Beckett saw difficulties in leading evidence from this witness. For example, Mr Ferjani had denied in his precognition that the applicant was head of airline security, when it was clear from the evidence and from the applicant's own accounts that he had occupied this position. In Mr Beckett's view there was therefore an "obvious problem of credibility" in relation to Mr Ferjani. Mr Beckett also queried the significance of Mr Ferjani's account in the absence of evidence from the applicant on the matter. He acknowledged that there might have been some value in obtaining an explanation as to why the applicant had been issued with the Abdusamad passport. However, in Mr Beckett's view Mr Ferjani's evidence might have underlined the absence of any explanation from the applicant as to why he had used this passport on 20-21 December 1988 and had never used it again. According to Mr Beckett only the applicant could explain this and he had never said that the reason for the visit was in order to obtain aircraft parts. The defence, he pointed out, did not know at the time what the court's approach was going to be to the evidence. It was, Mr Beckett said, easy to query decisions once it was known what evidence had been accepted. Mr Beckett was in no doubt that the applicant's instructions would have been taken about potential defence witnesses.

18.59 In addressing this allegation it is important to consider the relevant passages of the trial court's judgment. The court pointed out at paragraph 87 that there was no evidence as to why the Abdusamad passport was issued to the applicant and that his only use of it in 1988 was in connection with the overnight visit to Malta on 20-21 December, following which it was never used again. The court went on to say the following 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. 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."

18.60 In the Commission's view the above passage demonstrates that the critical issue, so far as the court was concerned, was the applicant's presence under a false name at Luqa airport at the time when the device must have been planted on KM180. Accordingly, although evidence from Mr Ferjani might have been helpful in showing that the Abdusamad passport was issued to the applicant in connection with his role in obtaining spare parts for LAA aircraft, it would have done nothing to explain why the applicant had used it to travel to Malta on 20-21 December 1988, or why on the night of his arrival he checked in to the Holiday Inn using the name Abdusamad rather than his own. Only the applicant could have explained these matters and as indicated there were good reasons why he was advised not to do so.

18.61 In view of these factors the Commission does not consider that the decision by the defence not to call Mr Ferjani in this connection resulted in the applicant being denied a fair trial.

<u>The purpose of the applicant's visit to Malta on 20-21 December</u>

18.62 It is alleged that, aside from the applicant himself, the defence could have led evidence from Mr Vassallo as to the purpose of the applicant's visit to Malta on 20-21 December. However, while Mr Vassallo could (and did) speak to the applicant visiting his home on the evening of 20 December, again only the applicant could have explained whether this was the purpose of his trip or whether he had some other reason for being in Malta. As noted earlier, the perceived deficiencies in the

applicant's explanations for this visit were a key factor in the advice of his representatives not to give evidence.

The applicant's membership of the JSO

18.63 It is also alleged that the defence could have led evidence from Mr Gharour and Mr Ferjani in order to contradict the Crown's position that the applicant was a member of the JSO.

18.64 In the Commission's view there is nothing in Mr Gharour's evidence or defence precognition to indicate that he could have assisted the defence in this connection.

18.65 Mr Ferjani denied in his defence precognition that the applicant was a member of the JSO but said that when Rashid became the manager of the technical administration department of that organisation he had asked the applicant to give some lectures concerning flight security. As noted above Mr Ferjani also denied that the applicant was head of airline security but said that between 1984 and 1986 he was in charge of training. Mr Ferjani did not think that the applicant had any connection with the JSO after that time but as Mr Ferjani was posted abroad in 1987 he did not have so much knowledge of what was going on.

18.66 In the Commission's view the fact that Mr Ferjani denied that the applicant was head of airline security raises questions as to his overall reliability. Furthermore, as he was posted abroad in 1987 he would not have been able to say whether the applicant had continued his association with the JSO in the period leading up to the bombing. In any event the question as to whether Mr Ferjani ought to have been called in this connection must be viewed in the light of the information known to the defence at the time, including what the applicant had said at precognition. As stated above the applicant informed his representatives that he was seconded to the JSO in 1986 and that the CSS, where he was appointed in 1987, was effectively part of the intelligence services. It was no doubt this information which led the defence to accept in closing submissions that the applicant "may have been in the JSO" in 1986 (80/9538).

18.67 In the Commission's view, although the applicant might not have been a "member" of the JSO he appears from his own account to have been so closely associated with that organisation as to make any distinction meaningless in terms of his defence to the charges. Viewed in that context, evidence from Mr Ferjani that the applicant was not a member of the JSO would have been of little, if any, value to the defence.

18.68 In these circumstances the Commission does not consider that the decision not to call Mr Ferjani in this connection resulted in the applicant being denied a fair trial.

(3) The identification evidence of Anthony Gauci

General

18.69 It is alleged in the submissions that at both the trial and appeal there was an "extraordinary failure" on the part of the defence to challenge Mr Gauci's identification of the applicant as the purchaser of the items. A substantial number of issues are raised under this heading but broadly it is alleged that the defence failed to do the following:

(a) obtain and lead expert evidence on Mr Gauci's identification of the applicant;
(b) object at trial to the admissibility of evidence of the identification parade;
(c) object to Mr Gauci's dock identification of the applicant; and
(d) adequately challenge Mr Gauci's evidence in cross examination.

18.70 The allegations made under each of these headings are addressed in turn below. A further allegation that the defence failed to pursue what is described in the submissions as Mr Gauci's "missing statements" is addressed in chapter 17.

(a) *Alleged failure to obtain and lead expert evidence*

The applicant's submissions

18.71 According to the submissions there is now a well-established set of criteria relied upon by psychologists to assess the reliability of identification evidence. Reference is made to a report by Professor Elizabeth Loftus of the University of Washington ("the Loftus report": see appendix) which appears to have been obtained prior to the applicant's appeal. The identity of the party who instructed the report is not entirely clear from the submissions, or from the report itself, but it does not appear that the applicant's trial representatives were directly involved in this.

18.72 According to the submissions the report details the presence of key factors which undermine the reliability of Mr Gauci's identification evidence. The submissions acknowledge that "in one sense these matters are obvious" but point out that their recognition in the findings of scientific research is properly a matter for expert evidence. Such evidence, it is said, "could" be admitted and is material to the determination of a critical issue at the applicant's trial.

The Loftus report

18.73 The report itself is fairly brief and is based upon what Professor Loftus herself describes as limited information. Reference is made to the discrepancies between certain aspects of Mr Gauci's early description of the purchaser and the applicant's characteristics in 1988. The report also refers to the cross-racial nature of the identification and explains that more mistakes are made in identifications of this kind. It is pointed out that Mr Gauci's identification of the applicant from a photo-spread on 15 February 1991 occurred more than two years after the purchase of the clothing and that this constitutes an "extraordinary long retention interval." According to the report it is well known in the research literature that memory fades over time and that substantial fading occurs over a two year period when memory becomes more susceptible to "post event suggestion" such as exposure to photographs and media coverage.

18.74 The report also refers to the evidence at trial that in late 1998 or early 1999 Mr Gauci saw a photograph of the applicant in a magazine. Reference is made to a phenomenon known as "photo-biased identification" in which the viewing of a photograph can make someone look familiar when they are seen again at a later stage. It is said that this phenomenon would apply to Mr Gauci's identification of the applicant at the identification parade.

18.75 Professor Loftus concludes that the existence of these factors gives rise to "quite a bit of scepticism" about the reliability of Mr Gauci's identification of the applicant. According to the report although the trial court expressed concern about certain aspects of the identification evidence it does not appear fully to have appreciated the substantial difficulties that can occur when so many problematic factors are present.

The views of the former representatives

18.76 According to Mr Taylor and Mr Duff the defence did not consider leading evidence from an expert such as Professor Loftus. Mr Taylor said that the reason for this was that the trial was before a panel of judges who it could be assumed were aware of the fallibility of eyewitness identification evidence. According to Mr Taylor, judges know the difficulties associated with dock identifications and direct juries on such issues all the time. Because of this Mr Taylor did not consider that expert evidence of this kind would have assisted the defence. A similar position was adopted by Mr Duff.

18.77 Mr Beckett recalled discussing the leading of expert psychological evidence with one of the solicitors in the defence team, Mr Prentice. However, Mr Beckett considered it doubtful that such evidence would be admissible even now. He also questioned the value of such evidence in that it would have involved asking the judges to take account of matters that they already knew. According to Mr Beckett the most an expert would have been able to say was that Mr Gauci's identification of the applicant might be mistaken. However, at trial the defence used the discrepancies between Mr Gauci's description of the purchaser and the applicant's characteristics at the time to demonstrate the same possibility. Mr Beckett emphasised that Mr Gauci's

identification of the applicant was one only of resemblance and that it was difficult to cross examine a witness in such circumstances. He questioned how much "damage" could have been done with expert evidence and said that there was better evidence available with which to challenge Mr Gauci.

Consideration

18.78 In the Commission's view it is difficult to see how any decision not to lead evidence of the kind described in the Loftus report might have resulted in the applicant's defence not being properly presented. The discrepancies between Mr Gauci's early descriptions of the purchaser and the applicant's characteristics in 1988 were brought out clearly in evidence and in closing submissions, and were acknowledged by the trial court in its judgment (paragraphs 68 and 69). Likewise, the court was plainly aware of the intervals between the purchase and Mr Gauci's identifications of the applicant by photograph (in 1991), at the identification parade (in 1999) and at trial. The court was also aware of evidence concerning Mr Gauci's exposure in late 1998 or early 1999 to a photograph of the applicant in a magazine, and reference to the potential effect of this upon the reliability of the parade and dock identifications was made by Mr Taylor in closing submissions (82/9916-9919). Although there was no evidence or submissions on the cross-racial nature of the identification, the Commission understands that research findings in this area are far from conclusive as to its effect upon the reliability of eye-witness identifications (see p 14 of the report obtained by the Commission from Professor Ray Bull: see appendix to chapter 22).

18.79 In the Commission's view none of the matters raised by the defence in evidence and in submissions required the leading of expert evidence in order to confirm or explain their significance. Moreover, it seems unlikely that the terms of the Loftus report would be admissible in evidence. As the submissions frankly accept, the matters raised in the report are in many respects obvious and therefore fall within the common knowledge and experience of a judge or jury (*R v Turner* [1975] QB 834). In that sense they can perhaps be distinguished from the expert psychological evidence led in *Campbell v HMA* 2004 SCCR 220.

18.80 In these circumstances the Commission does not consider that any decision by the defence not to lead evidence from an expert such as Professor Loftus resulted in the applicant being denied a fair trial. In reaching this conclusion the Commission has had regard to the terms of the reports it obtained from Professor Bull and Professor Tim Valentine during the course of its enquiries (see appendix to chapter 22).

(b) *Alleged failure to object to evidence of the identification parade*

Background

18.81 Before setting out the applicant's submissions on this issue it is appropriate to detail the objections made by Mr Duff at the parade itself (evidence of Inspector Brian Wilson: 32/4892). These consisted of challenges to the inclusion of four of the stand-ins by reason of their age, as well as the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten 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;*

- *"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;

- *"Finally, in my view, the stand-ins available in the original pool of 11 were 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"* (32/4899-4900).

The applicant's submissions

18.82 It is alleged in the submissions that the objections taken by Mr Duff at the parade ought to have been renewed at trial with a view to challenging the admissibility of Mr Gauci's identification of the applicant. The following points are made in this connection:

(i) The length of time between the purchase and the parade was so extreme that no reasonable jury would be entitled to rely upon Mr Gauci's identification, and evidence of the same ought not to have been admitted.

(ii) The prejudicial publicity prior to the parade, including the identification of the applicant as "the bomber" in a magazine photograph (the "*Focus* article"), was such that any identification of him could not be obtained fairly and therefore ought not to have been admitted.

(iii) The identification procedure was subverted by the "manner and number" of photographs shown to Mr Gauci prior to the parade. In particular the police had shown him a photograph of the applicant and he had also seen the photograph in the *Focus* article.

(iv) The objections taken at the parade to the fact that none of the stand-ins were Libyan and many were of ages different to the applicant could have been repeated at trial. The submissions also refer to an objection that was not

taken at the parade, namely that the applicant wore distinctive red shoes during those proceedings whereas all the stand-ins wore trainers.

The views of the former representatives

18.83 At interview Mr Taylor was unable to recall whether an objection to the admissibility of the parade evidence had been considered by the defence although he felt it must have been. He was referred to the test for determining the admissibility of such evidence which at the time of the trial (and the interview) was that set out in *Howarth v HMA* 1992 SCCR 364 and in *Lord Advocate's Reference (No 1 of 1983)* 1984 SCCR 62. In *Howarth* it was held that a trial judge will normally be justified in withholding identification evidence from a jury only if he is satisfied that no reasonable jury could have reached any other conclusion than that the identification evidence was so tainted that it must be rejected as unreliable. Asked whether the defence considered the circumstances of the parade had met this test, Mr Taylor said that he did not think the parade was of as great significance as Mr Gauci's identification of the applicant by photograph. He was unable to recall whether the defence had considered the matter but his view now was that the circumstances of the parade were not so tainted that Mr Gauci's identification of the applicant must be rejected as unreliable. Mr Taylor repeated that the defence was dealing with judges at the trial. In his view the judges, having heard evidence of the parade, would have realised its worthlessness.

18.84 Mr Beckett said that he had thought about the possibility of an objection to the admissibility of the parade evidence but, like Mr Taylor, did not consider there to be any basis for saying that it was so tainted that it must be rejected as unreliable. He believed that the matter was considered prior to the trial but he could not remember now what had been discussed. He could not see any basis in law for keeping the parade evidence out.

18.85 Mr Duff could not remember the defence considering an objection to the admissibility of the parade evidence but believed that the judges would have ruled that the evidence was perfectly legitimate. In Mr Duff's view it was an issue for cross

examination and in a normal case a judge would have allowed a jury to hear the evidence.

Consideration

18.86 The question raised by this allegation is whether the conduct of the defence in not objecting to the parade evidence resulted in the applicant's defence not being properly presented and in his being denied a fair trial. This requires an assessment of whether in terms of *Howarth* the defence was justified in taking the view that Mr Gauci's identification of the applicant at the parade was not so tainted that any reasonable jury would have rejected it as unreliable. The Commission is aware that following the decision in *Britz v HMA* 2007 SCCR 21 the test set out in *Howarth* is no longer applicable. Nevertheless it seems to the Commission, notwithstanding the decision in *Boncza-Tomaszewski v HMA* 2000 SCCR 657, that any allegation of defective representation concerning decisions taken by the defence at the applicant's trial must be considered in light of the test applicable at that time.

18.87 It is clear from the objections taken at the time by Mr Duff that the defence was aware of the potential challenges that might have been made to the admissibility of the parade evidence. Although Mr Taylor and Mr Duff had no recollection of such an objection being considered, according to Mr Beckett it appears that the matter was discussed.

18.88 In the Commission's view the extraordinary length of time between the purchase and the parade, and Mr Gauci's exposure to the photograph of the applicant in the *Focus* article in relatively close proximity to the parade, cast doubt upon the reliability of that identification, even though it was one of resemblance only. The Commission is not of the view, however, that these circumstances were such as to render the conduct of the parade, or indeed the holding of the parade itself, improper, or to render Mr Gauci's identification of the applicant at the parade so unreliable that any reasonable jury would have rejected it. Although it is not clear what factors were taken into account by the defence when it considered the matter, in the Commission's view it can be assumed that these included Mr Gauci's identification of the applicant from a series of photographs shown to him by the police in 1991. Like his

identifications of the applicant at the parade and at trial, Mr Gauci's identification of the applicant in 1991 was one of resemblance and was qualified and equivocal. It was also made over two years after the event and was undermined by Mr Gauci's initial descriptions of the purchaser, particularly of his height and age. Nevertheless it was made at a time when Mr Gauci was not at risk of exposure to the applicant's photograph in the media and at a point significantly closer to the purchase than his later identifications. In light of that identification it seems unlikely that the trial court would have upheld an objection to the admissibility of the parade evidence.

18.89 In these circumstances the Commission considers that the defence was entitled to confine itself to challenging the reliability of the parade evidence in closing submissions. In the Commission's view, given the nature of the submissions ultimately made in this connection (see below), this aspect of the applicant's defence was properly presented.

(c) *Alleged failure to object to evidence of the dock identification*

The applicant's submissions

18.90 It is submitted that two separate objections ought to have been made by the defence to Mr Gauci's dock identification of the applicant. The first of these relates to the fact that prior to that identification Mr Gauci was shown the photographs of the applicant which he had previously identified. According to the submissions an objection ought to have been taken either to the showing of these photographs or to the dock identification on the basis that evidence of the photographs had been led. It is submitted that photographs of the kind shown to Mr Gauci by the police are produced for the defence to use as appropriate: they are not expected to be led at all by the Crown in evidence and are certainly not to be used as "prompts". Reference is made in this connection to *MacDonald v Herron* 1966 SLT 61 and to the Guidelines on the Conduct of Identification Parades issued by the Scottish Home and Health Department in 1982.

18.91 The second objection which it is submitted ought to have been taken was to the dock identification itself on the basis that such a procedure is in principle unfair.

It is submitted that the circumstances of the applicant's case are extreme in that evidence of the dock identification was obtained some 11 years after the event and in the aftermath of considerable prejudicial publicity.

The evidence at trial

18.92 Before being asked whether he was able to see the purchaser in court, Mr Gauci was referred by the advocate depute to a number of his police interviews in which he had been shown photographs of potential suspects. In one of his statements, dated 14 September 1989 (CP 458), Mr Gauci had identified the photograph of a man (Mohammed Salem: CP 426) as being similar to the purchaser but "too young". According to the statement Mr Gauci told the police that if the man in the photograph was older by about twenty years he would look like the man who bought the clothing. In evidence Mr Gauci confirmed that the man in the photograph was "a little bit young" to be the purchaser (31/4758).

18.93 Mr Gauci accepted in evidence that about the end of 1989 or the beginning of 1990 his brother had shown him a newspaper article about the case. The article, which appeared in *The Sunday Times* (CP 1833), contained photographs of two men both appearing under the caption "bomber" (CP 1833). Mr Gauci said about the man pictured in one of the photographs: "I thought it was the one on this side, I thought. That was the man who bought the articles from me" (31/4768). The photograph in question was of Talb.

18.94 Mr Gauci was also referred to his statement of 15 February 1991 (CP 470) in which he picked out the applicant's photograph from a photo-spread containing a total of twelve images (CP 436). Mr Gauci said in the statement that the photograph of the applicant showed him in "his thirty years" and that "he would perhaps have to look about ten years or more older and he would look like the man who bought the clothes." He also said that, of all the photographs he had seen, the one of the applicant "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." In evidence Mr Gauci confirmed that what he had said to the police in this connection was the truth.

18.95 Mr Gauci was also asked about an occasion towards the end of 1998 or the beginning of 1999 when another shopkeeper in the street showed him the *Focus* article which contained a photograph of the applicant. In evidence Mr Gauci recalled showing the photograph to a Maltese officer, Mr Scicluna, and telling him "this chap looks like the man who bought the articles from me." He did not remember saying to Mr Scicluna "that's him".

Consideration

18.96 For the same reasons as it doubts the reliability of Mr Gauci's identification of the applicant at the parade, the Commission also has significant doubts as to the reliability of his later identification of the applicant in court. In the Commission's view that identification is further undermined by the highly suggestive context in which it took place and by the manner in which Mr Gauci's evidence on this issue was led by the Crown. In particular, given the risk that Mr Gauci's identification of the applicant might be affected by his exposure to the photograph in the *Focus* article it is difficult to understand why the advocate depute considered it appropriate to show him the same photograph prior to asking him whether he could see the purchaser in court (see chapter 21).

18.97 In the present context, however, the Commission requires to consider whether the lack of any objection to the way in which this aspect of Mr Gauci's evidence was led by the Crown resulted in the applicant's defence not being properly presented and in his being denied a fair trial.

18.98 In his closing submissions Mr Taylor referred to the "notoriously unreliable nature of eyewitness identification", which in the present case he said was compounded by the "large intervals between the incident and the so-called identifications" (82/9912). The identifications of the applicant at the parade and in court were described as "worthless pieces of evidence" and reference was made to photographs of both accused having been shown on television and in newspapers across the world since 1991, and to the photograph Mr Gauci had seen in the *Focus* article. Mr Taylor also referred to previous authorities in which it was held that the publication of such photographs was capable of prejudicing a trial by affecting the

identification evidence of witnesses (82/9918). Mr Gauci's identification of the applicant was said to be further undermined by his identification of Talb. However, according to Mr Taylor's submissions the "fatal undermining" of Mr Gauci's identification of the applicant was his initial description of the purchaser's height, age and skin colour. It was clear from this, Mr Taylor submitted, that Mr Gauci was describing someone other than the applicant (82/9926).

18.99 In the Commission's view, based on the above account, it is difficult to maintain that this aspect of the applicant's defence was not properly presented. It is clear that the approach taken by the defence to the dock identification was that it was wholly unreliable and ought to be rejected. The factors in support of that approach were highlighted both in the evidence and in closing submissions. Although other representatives might have opted to combine that approach with an objection to the manner in which Mr Gauci's evidence was led by the advocate depute, in the Commission's view this was not essential to the proper presentation of the applicant's defence. In terms of the approach taken in submissions it appears that the defence considered the reliability of any dock identification to be undermined regardless of the manner in which Mr Gauci's evidence on this issue was obtained. In the Commission's view, given the length of time which had elapsed since the purchase, and the evidence of Mr Gauci's exposure to the *Focus* article in 1998 or 1999, this was not an unreasonable approach to take. In any event, for the same reasons as the court was unlikely to uphold an objection to the admissibility of the parade evidence the Commission considers that any objection to the admissibility of the dock identification was also unlikely to succeed.

18.100 In these circumstances the Commission considers that the defence was entitled to allow Mr Gauci's evidence to be led and to confine itself to challenging the reliability of the dock identification in submissions. Ultimately, of course, the court rejected those submissions but in the Commission's view this does not imply that the approach taken by the defence was unjustified or contrary to reason.

18.101 The second allegation under this heading is that the defence ought to have objected to the admissibility of the dock identification on the basis that such a procedure is in principle unfair. The same point was argued before the Privy Council

in *Holland v HMA* 2005 SCCR which was decided after the submissions in the present case were made to the Commission. The Privy Council made clear in *Holland* that it was concerned only with circumstances in which a Crown witness who identifies an accused in court has previously failed to pick him out at an identification parade, a situation that does not arise in the present case. It was held that "except perhaps in an extreme case" there is no basis either in domestic law or in the European Convention on Human Rights for regarding evidence of dock identifications as inadmissible per se (Lord Rodger at paragraph 57).

18.102 In the Commission's view the arguments advanced in *Holland* were fairly novel, and even if the decision in that case had been more favourable to the appellant it would be difficult to maintain that a similar objection was essential to the proper presentation of the applicant's defence. In any event it is clear from papers extracted from the defence files that a great deal of consideration was given to challenging Mr Gauci's dock identification. An opinion was obtained in this connection from a senior counsel not involved in the case which, although supportive of a challenge, was not considered by the defence as presenting a sound basis for doing so. A further opinion was obtained from Professor Christopher Gane of the University of Aberdeen, the terms of which were not supportive of such a challenge. The defence also undertook an extensive exercise in which it sought to establish the legal status of dock identifications in several other European countries.

18.103 Ultimately no objection was taken to the dock identification but it is clear that this decision was reached only after careful consideration of the potential merits of such a challenge based upon the authorities and other materials available at that time. Although other representatives might have taken a different course, in the Commission's view there is no basis for saying that the approach taken by these particular representatives was unwarranted or contrary to reason. Accordingly the Commission does not consider that the applicant was denied a fair trial in this connection.

(d) *Alleged failure adequately to challenge Mr Gauci in cross examination*

The applicant's submissions

18.104 It is alleged that there was a failure by the applicant's senior counsel (Mr Taylor) to put basic and important matters to Mr Gauci in cross examination. Although it is acknowledged that the content of questions put to witnesses is a matter for counsel's discretion, it is submitted that there was such a failure in the present case that it can properly be said to amount to defective representation. According to the submissions the conduct of the cross examination was "so completely inept that it could be said to defy 'all good sense'."

18.105 It is alleged that the following matters should have been put to Mr Gauci:

(i) his previous identification of Talb as the purchaser;

(ii) his prior statements to the effect that the purchaser may have returned to Mary's House on other occasions;

(iii) the inconsistencies in his prior statements such as his references to the purchaser having hired a taxi;

(iv) the fact that 8 December 1988 was a public holiday in Malta "which did not fit with the description of the date of purchase";

(v) the basis for his identification of the purchaser as a Libyan;

(vi) his previous description of the purchaser which did not fit that of the applicant;

(vii) his previous statements in which "the only date he had specified was 'in November'"; and

(viii) his prior statements concerning the question of whether the Christmas lights in Tower Road were up at the time of purchase.

Consideration

18.106 Points (vi), (vii) and (viii) can be dealt with easily as the matters which it is alleged were not put were plainly raised with Mr Gauci (see in relation to point (vi) 31/4790-4797, 4812-4813; point (vii) 31/4802; and point (viii) 31/4802, 4809).

18.107 Each of the remaining allegations is addressed in turn below. It is worth noting that many of them appear in the form set out above and are unaccompanied by submissions.

(i) Mr Gauci's previous identification of Talb as the purchaser

18.108 This allegation relates to an article about the case published in *The Sunday Times* which Mr Gauci was shown about the end of 1989 or the beginning of 1990. As noted earlier, the article contained photographs of two men, one of whom was Talb. When asked by the advocate depute whether he saw any similarity between either of those photographs and the purchaser, Mr Gauci replied: "I thought it was the one on this side [Talb], I thought. That was the man who bought the articles from me" (31/4767). He was then asked what it was about Talb's photograph that made him think that he "looked similar" to the purchaser, as a result of which an objection was made by Mr Taylor on the basis that Mr Gauci's earlier answer had been that Talb "was the man who bought the articles". The advocate depute rephrased the question and Mr Gauci went on to say that Talb "resembled" the purchaser (31/4768). Earlier in examination in chief Mr Gauci was referred to a number of instances in which he had failed to identify Talb from photographs shown to him by the police (31/4764-4765).

18.109 The matter was raised again in cross examination by counsel for the co-accused at which time Mr Gauci said of Talb's photograph in the article, "He resembles [the purchaser] a lot."

18.110 In the Commission's view, given what Mr Gauci had said in examination in chief, it is understandable why Mr Taylor did not seek to question him further on the matter. Mr Gauci's initial identification of Talb in examination in chief was more certain than what he had told the police about the same photograph in his statement of 5 March 1990 (CP 467). There he said that he thought the photograph "may have been" the purchaser, which was effectively the position he adopted latterly in examination in chief. In these circumstances Mr Taylor was entitled to take the view that there was nothing to be gained from further questioning on this matter.

18.111 Accordingly the Commission does not consider that the approach taken by the defence to this issue resulted in the applicant being denied a fair trial.

(ii) Mr Gauci's other "sightings" of the purchaser

18.112 It is alleged in the submissions that the defence failed to put to Mr Gauci the terms of his prior statements in which he described having seen the purchaser, or a man or men who resembled him, on other occasions.

18.113 In order to address this allegation it is necessary to summarise the relevant passages in Mr Gauci's statements on this issue. Neither the defence nor the Crown sought to lead the contents of these passages in evidence.

The terms of Mr Gauci's statements

- The sighting in Tony's Bar

18.114 In his statement of 13 September 1989 (CP 456) Mr Gauci told the police that "about three months ago" he was in Tony's Bar in Sliema when he recognised a man as looking like the purchaser. The man was about 50 years of age and Mr Gauci heard him talking to three other men. According to Mr Gauci "they spoke as Libyans. That was their own language." Mr Gauci could not be positive that it was the same man who bought the clothing but he looked "very similar." He had not seen this man since.

- The sighting in Mary's House

18.115 In his statement of 26 September 1989 (CP 459) Mr Gauci told the police that at about 11.30am on Monday 25 September 1989 he was alone in Mary's House when a man entered. Mr Gauci was immediately startled as he believed that this man was the "same man" as he had described in his previous statements (ie the purchaser). He had the same colour and style of hair, had no hair on his face and had dark skin. He was around 6 feet in height or just under and was about 50 years of age. The man walked straight into the shop and immediately asked Mr Gauci for a dress. Mr Gauci asked him what type and for what age, to which the man replied "for 4 years". Mr Gauci thereafter sold him four dresses. The man asked for a reduction and according to the statement "he asked for a reduction the first time he was in the shop". Mr Gauci followed the man out of the shop to see if he got into a car but was frightened to get too close in case the man noticed him watching. The man had spoken English and had a Libyan accent and Mr Gauci was convinced that he was a Libyan.

18.116 At the foot of the HOLMES version of this statement (see appendix) there is a note by the police to the effect that when initially seen Mr Gauci said that the man described in the statement had visited his shop on 21 or 22 September 1989. However, when the statement was noted he said that the visit had taken place on 25 September and was not questioned about the date change. The note also refers to evidence that the applicant was in Malta on 21-24 September 1989.

18.117 Further reference to this incident is made by Mr Gauci in his statement of 4 October 1989 (CP 462) but on this occasion he referred to the man who bought the dresses as being only "similar" to the purchaser. According to the statement the man had come to his shop "last Monday" ie 25 September 1989.

18.118 Mr Gauci was re-interviewed about this sighting on 10 September 1990 (CP 469) at which time he repeated that the man who bought the dresses was only "similar" to the purchaser and he could not say for definite that it was the same person.

18.119 Mr Gauci was questioned on the matter once again on 4 November 1991 (CP 471) at which time he said the following:

> *"I can say that the man who bought the damaged clothing you brought to me at first must have been a twin because if he was killed in the plane, then it must have been his twin that bought the dresses, they really looked like the same person."*

18.120 Mr Gauci was asked in this statement to explain why on the morning of 26 September 1989 he had told the police that the man who purchased the dresses had come into his shop on 21 or 22 September, but when seen that evening had said that the incident had taken place on 25 September. Mr Gauci was unable to explain this. He could only say that he had problems at the time with his father and brother who did not want him to speak to the police any more, and that he might have got things mixed up.

- The sighting at the Hilton Hotel

18.121 According to his statement of 21 February 1990 (CP 466) after closing his shop in Valletta in about May 1987 Mr Gauci was working in his shop in Sliema when a Libyan man came in and bought two or three "Whitney" make blankets. The man did not have any transport and asked Mr Gauci to deliver the items. He showed Mr Gauci a piece of paper with an Arabic name written on it and "Room 113, Hilton Hotel". Later the same day Mr Gauci went to the Hilton Hotel and asked for the man at reception. The man came down to reception and Mr Gauci handed over the blankets. Mr Gauci thought that this man "may have been the man" who purchased the clothing from him in November or December 1988.

18.122 According to the statement Mr Gauci had not mentioned this before "because he did not remember it". He had thought about it the previous week and had remembered it then. He could not be certain that it was the same man who had purchased the clothing but it could have been. He could not remember the man's name and had no record of the sale.

18.123 Mr Gauci referred to this incident again in his statement of 5 March 1990 (CP 467). There he said that he was sure that the man who purchased the blankets had come to his shop in 1987 and that it might have been June of that year. He had closed his shop in Valletta in April 1987 and it was sometime after that. He could not remember if it was summer or not. The man who bought the blankets had come into his shop straight away without looking at the displays as if he knew where he was going. The man who purchased the clothing in November/December 1988 had done exactly the same thing which was one of the reasons he thought it might be the same man. Mr Gauci thought the man who bought the blankets was "similar" to the man who bought the clothing in 1988 "if not the same man."

18.124 It is important to note that the applicant was established to have been in Malta between 29 March and 4 April 1987 staying from the former date until 3 April in room 140 at the Hilton Hotel (see CP 571, 573, 727 and 728).

<u>The views of the former representatives</u>

- William Taylor QC

18.125 Mr Taylor's memory of the approach taken by the defence to these issues was poor. He was unable to remember whether the defence had considered cross examining Mr Gauci in relation to the sighting in September 1989. He agreed that the inconsistencies in Mr Gauci's accounts on this issue gave rise to issues concerning his reliability, but other than this he was unable to assist with the question. When asked whether he considered as significant Mr Gauci's varying accounts as to whether the man he saw on this occasion was the same man who visited his shop in 1988, Mr Taylor said that in order to answer this question he would need to find his notes for this part of the trial. He could not think of any reason why the defence would not have used this information in cross examination.

18.126 In respect of the 1987 sighting Mr Taylor confirmed that the defence was aware that the applicant had stayed in the Hilton Hotel and he had some memory that the applicant was in Malta more often than the Crown could prove. Mr Taylor believed that there would have been consideration given to cross examining Mr Gauci

on this issue, as it was an obvious line to take, but without his notes he was unable to assist further. He added that if the matter was not dealt with in cross examination there would be good reasons for this.

- John Beckett QC

18.127 In Mr Beckett's view it was naïve to suggest that evidence of Mr Gauci's other sightings of the purchaser would have assisted the defence. It was, he said, a tactical decision not to refer to them at trial.

18.128 With regard to man who purchased the children's dresses from Mary's House in September 1989, Mr Beckett referred to the fact that the applicant was in Malta on 21-24 September 1989. It was suggested to Mr Beckett that Mr Gauci's change in position within the space of a day, from initially telling the police that he had seen the man the previous week, to saying that he had in fact seen the man the previous day, perhaps said something about Mr Gauci's reliability or even credibility. In reply Mr Beckett said that if the defence had led this evidence it would have been open to the court to choose the version of events which coincided with the applicant's presence in Malta. Had the court done so then in Mr Beckett's view this would have provided strong support for Mr Gauci's identification of the applicant as the purchaser. Mr Beckett explained that if the defence could have shown that Mr Gauci had always said he had seen the man on 25 September 1989 they would have used the evidence of the sighting. However, as the evidence stood it could have gone either way for the applicant. Although the court ultimately accepted Mr Gauci's evidence the defence did not know at the time what its attitude would be. In Mr Beckett's view it was legitimate for the defence not to gamble on leading evidence of the sighting. He added that if the defence had led evidence of the other sightings and the court had been convinced by the version that supported the Crown case then the applicant had "had it".

18.129 Mr Beckett considered the sighting most dangerous to the defence was the one that Mr Gauci described as having taken place in 1987 when a man residing at the Hilton Hotel had bought some blankets from him. Mr Beckett said that although Mr Gauci did not get the room number of the hotel "correct" and the date was not exact,

there was evidence that the applicant had stayed at the Hilton Hotel around that time. According to Mr Beckett, if the Crown had led this evidence the defence would have sought to challenge it, and it would have been a very big gamble to raise the matter themselves. Mr Beckett accepted this meant that certain aspects of Mr Gauci's accounts which might have reflected upon his reliability were not brought out in court, but said that these were the judgments that had to be made. Although looking back in the knowledge that the applicant was convicted one might say that the defence ought to have gambled on this, there was a possibility at the time that it might have shored up the identification. In Mr Beckett's view Mr Gauci needed to be out by only one month, and to have got the hotel room number wrong, and the evidence of this particular sighting would have been a "very damaging connection to the applicant."

18.130 In respect of Mr Gauci's possible sighting of the purchaser in Tony's Bar about three months prior to being interviewed by the police on 13 September 1989, Mr Beckett explained that there was a CIA cable in which the witness Abdul Majid Giaka ("Majid") had said that the applicant was in Malta on 10 April 1989. Although looking back Majid's evidence was not accepted by the court there was a danger at the time that his evidence might have been accepted "for such an innocuous thing as this date". Mr Beckett pointed out that Mr Gauci's cross examination had taken place a long time before Majid gave evidence. The defence, Mr Beckett said, had to assess whether it would constitute a good attack on Mr Gauci's reliability and decide whether to gamble or not to gamble. In the event the decision was taken not to gamble.

- Alistair Duff

18.131 Mr Duff said that the defence had agonised over whether to cross examine Mr Gauci on the terms of his statement of 26 September 1989. The defence, he said, was operating on the basis that the judges were "desperate" to convict and so wanted to avoid providing them with material that would have given them confidence to do so. This was one of the judgments which had to be exercised during the day-to-day process of defending. Mr Duff accepted that the consequence of this approach was that the court was not made aware that over a short period of time Mr Gauci had

altered his position as to when the incident had occurred. However, in his view it would have been open to the judges to say that the man had come to the shop in a time-span in which the applicant was in Malta. The question the defence had to address was whether to bring this out to demonstrate Mr Gauci's unreliability and at the same time run the risk of the judges being given something else on which to hang the conviction.

18.132 Mr Duff was also referred to the fact that over the course of his statements of 26 September 1989, 10 September 1990 and 4 November 1991 Mr Gauci had variously described the man who bought the dresses as "the same man" as the purchaser, as "similar" to him though not definitely the same, and as being the "twin" of the purchaser. Mr Duff did not consider these differences in Mr Gauci's accounts to be significant.

18.133 In respect of the 1987 sighting Mr Duff recalled that this too was debated by the defence. Although the defence was aware that the applicant used to stay at the Hilton Hotel and was in Malta in 1987, Mr Duff did not recall whether they knew at the time that the applicant had stayed in a different room to the one that Mr Gauci had mentioned. Either way, he said, the judges could have ignored this discrepancy to the prejudice of the defence. In Mr Duff's view the question was where the advantages and risks lay for the defence and how they balanced.

Consideration

18.134 In the Commission's view there is little doubt that evidence of Mr Gauci's other possible sightings of the purchaser was of potential value to the defence. The account given by Mr Gauci in his statement of 26 September 1989 concerning the man who purchased the children's dresses amounts to his only positive identification of the purchaser ("I believe this man was the same man I have described in my previous statements"). Moreover, his recollection that this sighting had occurred on 25 September 1989 would effectively have ruled the applicant out as the purchaser given that there was no evidence that he was in Malta on that date. The same might be said of the sighting in Tony's Bar in around June 1989 when again there was no evidence that the applicant was in Malta.

18.135 In the Commission's view there are also a number of inconsistencies in Mr Gauci's accounts of the sightings which could have reflected upon his reliability or even his credibility. Of particular concern is the fact that over the course of 26 September 1989 Mr Gauci altered his position from saying that the man who bought the children's dresses had come to his shop the previous week, to saying that he had come the previous day. A further cause for concern is Mr Gauci's varying accounts as to whether the man who bought the children's dresses was the "same man" as the purchaser or whether he was only similar (see chapter 26 below).

18.136 However, as Mr Beckett and Mr Duff made clear at interview, there were also very good reasons why the defence sought to avoid leading evidence of the other sightings. It is clear from their accounts that the matter was given careful consideration and that a tactical decision was made on the basis of what was perceived to be the best interests of the applicant at that time. In the Commission's view, given the risks associated with leading the evidence, it is difficult to see how that decision could be described as contrary to reason, as is alleged in the submissions.

18.137 In these circumstances the Commission does not consider that the approach taken by the defence in this connection resulted in the applicant being denied a fair trial.

(iii) <u>The purchaser's use of a taxi</u>

18.138 According to the submissions the defence failed to put to Mr Gauci the inconsistencies in his statements surrounding the purchaser's use of a taxi after leaving his shop. Again, in order to address this allegation it is necessary to set out the relevant passages in Mr Gauci's statements and evidence as well as the views of the former representatives on the matter.

The applicant's statements and evidence

- Statement: 1 September 1989 (CP 452)

"I asked him if I would carry his parcels to the car as I assumed he had a car. He said that he was in a taxi and he took the parcels from me and he walked out of the shop. I followed him to the door and he turned left and walked up the street. I saw a white coloured Mercedes taxi parked at the corner. I then came back into the shop. I cannot recall anything in particular about the white Mercedes. This type of car is used as a taxi in Malta. I assume the man got into the taxi, it was an old type ……

I cannot state that this man entered the taxi I can only say that he walked towards the car."

18.139 A similar account was given by Mr Gauci in his statement of 21 February 1990 (CP 466).

- Statement: 5 March 1990 (CP 467)

"I have been asked to go over again the circumstances of the man (suspect) arriving and leaving my shop and the sighting of the white Mercedes taxi. I now remember that when the man left my shop he walked downhill in Tower Road towards the sea front. At that time it was raining.

About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the kerb, on the same side of the road as my shop about twenty yards up the street, where I have shown you. I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop.

I handed over the two parcels and the man left the shop walking back up the road to the taxi. He put both parcels on the back seat of the taxi before climbing back into the front passenger seat. The taxi then drove off up Tower Road.

I have been asked why I have not mentioned this before and I can only say that I did not think you asked me directly about it. I have been thinking about the man and I remember this now."

- Statement: 10 September 1990 (CP 469)

"I made up the clothing the man had bought into the parcels which I wrapped. In my original statement I said that I next saw the man when he returned to the shop but subsequently I said that I had seen him sitting in the front seat of the taxi which was driven up Tower Road. What happened was I went to the front of the shop and was looking out and saw the taxi being driven up the street. As it passed my shop I recognised that the front seat passenger was the same man who had bought the clothing. I saw the taxi at the corner, where I pointed out to the officer, (top of Tower Road) and I went back into the shop to collect the parcels. The man came back down to the shop and I met him in the hallway. I asked if I could carry the parcels to his car and he said he had a taxi. The man walked up to the taxi, put both parcels on the back seat and he got into the front seat beside the driver. I can't say anything more about the taxi, it's just as I described to you, the old type."

- Evidence in chief

Q. After you made the sale to the Libyan man, did he leave the shop?

A. Yes. He ordered a taxi from the Strand, I think it's from the ferries he got it. He went downwards. He went down the hill.

Q. And did he, when he left at that stage, take with him the clothing, or did he return to pick it up?

A. *No, he came back. I took the items to the taxi. He was parked a bit upwards from our shop.*

Q. *So do I understand you to say that he left your shop to go to the taxi rank to get a taxi?*

A. *Exactly.*

Q. *And he came in the taxi to collect the clothing?*

A. *Yes. Yes. I took the things myself to the taxi.*

The views of the former representatives

- William Taylor QC

18.140 Mr Taylor considered Mr Gauci's accounts of the purchaser's use of a taxi to be peripheral to his identification evidence. He questioned what could have been made of the issue and said that on the face of it the witness "must just be recollecting more clearly the incident with the taxi". Mr Taylor was doubtful whether the accounts given by Mr Gauci on this issue were really that different from one another. When it was suggested to him that there were certain irreconcilable differences between them Mr Taylor supposed that this might suggest some form of "prompting" by the police. However, he could not recall what had gone through his mind at the time. He knew about it and he recalled looking at it but in a normal case he would probably have anticipated a "put-down" by the bench to the effect, "What does this matter?" In Mr Taylor's view even if Mr Gauci's accounts had been prompted by the police it did not really matter. In terms of criminative evidence he questioned whether they went anywhere.

- John Beckett QC

18.141 Mr Beckett explained that although the defence was aware of the inconsistencies in Mr Gauci's accounts on this issue they did not think much of them. Mr Beckett had provided Mr Taylor with a note containing details of various matters on which Mr Gauci had changed his position which included the purchaser's use of a taxi. Mr Beckett considered these matters to be weaker than the inconsistencies regarding the identification. As Mr Taylor had not referred to them during cross examination Mr Beckett presumed that he too had preferred to concentrate on matters relating to the identification. According to Mr Beckett it would have been difficult to cross examine Mr Gauci about issues such as the use of the taxi and it was a question of what "damage" one would be able to do. In his view it was a judgment for the cross examiner to make. If Mr Gauci's accounts concerning the taxi had somehow borne upon the identification then in Mr Beckett's view it would have been "fair enough" to lead this evidence. However, he did not consider that it would have been an effective form of cross examination as it stood.

18.142 It was suggested to Mr Beckett that although Mr Gauci's description of the use of the taxi did not relate to the identification, it nevertheless pointed to an individual who was prepared to give detailed accounts of matters when in reality he might not be certain of his own memory. Mr Beckett accepted this point but said that it was for Mr Taylor to address. In Mr Beckett's view it was the identification evidence which had to be attacked and the defence had to use its best weapons in that connection. He questioned whether it would have been any better for the defence if other aspects of Mr Gauci's accounts had been brought out. In his view the approach taken by the defence in this connection did not amount to an unreasonable exercise of discretion.

- Alistair Duff

18.143 Mr Duff was unable to remember whether the defence had considered cross examining Mr Gauci on this issue. He recalled that the defence was aware of the various accounts Mr Gauci had given but he could not remember what consideration

was given to putting these to him. He accepted, however, that there would have been no risk to the defence in doing so.

Consideration

18.144 Although the circumstances surrounding the purchaser's use of a taxi are not germane to Mr Gauci's identification of the applicant as the purchaser, nevertheless the inconsistencies in his accounts of this incident are striking. In the period between his statements of 1 September 1989 and 5 March 1990 Mr Gauci's description of events changed from one in which he could only assume that the purchaser got into the taxi, into one in which he saw the purchaser sitting in the front passenger seat, getting out of the taxi, picking up the parcels of clothing, placing these on the backseat and climbing back into the front passenger seat. His only explanation for never having mentioned the latter account on any previous occasion was that it was not something he had thought about or been asked directly about. Given the terms of his statements of 1 September 1989 and 21 February 1990, however, this is clearly not the case. By the time he gave evidence Mr Gauci's account had developed further into one in which he, and not the purchaser, had taken the parcels out to the taxi.

18.145 In these circumstances, if Mr Gauci had been cross examined on this issue it might have assisted in casting further doubt upon his reliability as a witness. Although such questioning would not directly have undermined his identification of the applicant it was perhaps capable of showing Mr Gauci to be a witness prone to embellishing his accounts of events over relatively short periods of time. It might also have been capable of showing him to be someone who was at ease with describing particular events in detail when in reality his memory of those events might not have been clear.

18.146 However, in the present context the Commission requires to consider whether the decision by Mr Taylor not to cross examine Mr Gauci on this basis was contrary to reason and resulted in the applicant's defence not being properly presented. It has to be said that Mr Taylor's account at interview in this connection was not convincing. Nevertheless both he and Mr Beckett were of the view that it was Mr Gauci's identification evidence which mattered and that his accounts of the

purchaser's use of a taxi were peripheral to this. Such an approach is reflected in the terms of Mr Taylor's cross examination of Mr Gauci, the clear focus of which was the identification of the applicant and matters concerning the date of purchase.

18.147 In the Commission's view it is difficult to see how such an approach can be said to be contrary to reason since these were precisely the factors capable of implicating the applicant in the bombing. Even if Mr Gauci could have been shown to be unreliable in his recollection of the purchaser's use of the taxi, it does not by any means follow that the court would have taken the same view of his identification of the applicant. In the Commission's view cross examination on such matters was not essential to the proper presentation of the applicant's defence. Accordingly, although different approaches might have been taken by other representatives, the Commission does not consider that the approach taken by the defence to this matter resulted in the applicant being denied a fair trial.

(iv) The Feast of the Immaculate Conception

18.148 A further allegation is that the defence failed to put to Mr Gauci the fact that 8 December 1988 was a public holiday in Malta. There are no submissions on this matter and all that is said is that such evidence "did not fit with the description of the date of purchase."

The evidence at trial

- Major Joseph Mifsud

18.149 The defence led evidence from Major Mifsud who confirmed that 8 December was a public holiday in Malta known as the feast of the Immaculate Conception. Aside from stationers who were permitted to stay open until midday, the shops in Malta closed on that date. Major Mifsud was shown a copy of the co-accused's 1988 diary which had been recovered by the police in Malta (CP 517). He confirmed that the words "The Immaculate Conception" were printed on the page of the diary relating to 8 December, as were the words "Public Holiday" (76/9210-9212).

- Anthony Gauci

18.150 In cross examination Mr Gauci was referred by Mr Taylor to his statement of 19 September 1989 (CP 454) in which he said that he was "sure it was midweek when [the purchaser] called". It was suggested to him that by "midweek" he did not mean a Monday or a Saturday, to which he replied "No, certainly not a Saturday" (31/4810-4811). He then went on to say that by "midweek" he meant Wednesday (31/4819-4820). There was then the following exchange:

> *Q. ... Would another way of approaching it be this: that midweek entails being separate from the weekend; in other words, the shop would be open the day before and the day after? And that would give me a clue to what you mean.*
>
> *A. That's it. Exactly. Tuesday and Thursday.*
>
> *Q. It would include Tuesday and Thursday. So we narrow it down to Tuesday, Wednesday or Thursday.*
>
> *A. I think Wednesday is midweek* (31/4821*).*

<u>The defence closing submissions</u>

18.151 Mr Taylor submitted to the trial court that Mr Gauci had never said that the purchase of the clothing took place on the day before a public holiday, and that this was something he would have been "highly likely" to do if the incident had occurred on such a day. Mr Taylor accepted that the issue of a public holiday had not been raised with Mr Gauci in evidence but sought to explain that questioning on this issue would have been "futile" as Mr Gauci had no recollection of the date of purchase. In Mr Taylor's submission he had put to Mr Gauci the only matter which he had a prospect of remembering, namely whether his shop was open the day before and the day after the purchase (82/9884-9885).

18.152 It was submitted by Mr Taylor that the feast of the Immaculate Conception would be of significance to a shopkeeper and that Mr Gauci's failure to "make the

connection" was something that the court could take into account. Put another way, Mr Taylor said, the day before a public holiday is "something that would stick in your mind", and if the purchase had taken place at such a time Mr Gauci would have remembered this. However, despite repeated questioning on the matter by the police Mr Gauci had never once mentioned the public holiday (82/9887-9888).

18.153 In Mr Taylor's submission Mr Gauci's evidence was that the shop was open the day before and the day after the purchase. Accordingly, given that 8 December was a public holiday, the court could reasonably conclude that the purchase date was not 7 December (82/9888-9889).

The trial court's approach

> *"He* [Mr Gauci] *was also asked in cross examination what he meant when he used the word 'midweek' and he responded by saying that he meant a Wednesday. It was put to him that midweek meant a day which was separate from the weekend, in other words that the shop would be open the day before and the day after. To that Mr Gauci said 'That's it. Exactly. Tuesday and Thursday.' But he then went on to say that for him midweek was Wednesday. It was not put to him that Thursday 8 December 1988 was a public holiday, it being the feast of the Immaculate Conception on that day… We are satisfied that when Mr Gauci was asked whether the shop would be open the day before and the day after he was being asked what he meant by the word 'midweek', and not whether the day after the purchase of the clothing was made in his shop, the shop was open for business"* (paragraph 64).
>
> "*We are unimpressed by the suggestion that because Thursday 8 December was a public holiday, Mr Gauci should have been able to fix the date by reference to that. Even if there was some validity to that suggestion, it loses any value when it was never put to him for his comments"* (paragraph 67).

The appeal court's approach

18.154 At appeal it was argued that the trial court had erred in dismissing the defence submission concerning the public holiday. In support of this ground Mr Taylor made similar submissions to those he had made before the trial court.

18.155 In reply the advocate depute said it was clear that the decision not to put the issue of the public holiday to Mr Gauci was a deliberate tactic by the defence. In the advocate depute's submission the failure to cross examine Mr Gauci on this issue was a factor which the trial court was entitled to take into account in rejecting criticism of his evidence.

18.156 In the appeal court's view the advocate depute's submissions were well founded. Mr Taylor had submitted to the trial court that the fact that the day after the purchase had been a public holiday would stick in Mr Gauci's mind. However, that was all the more reason for putting the point to Mr Gauci in cross examination. The defence had led evidence from Major Mifsud that 8 December was a public holiday but had failed to put that to Mr Gauci. Accordingly the trial court had been correct in taking the view that the failure to cross examine Mr Gauci on the matter resulted in the point losing any value which it might otherwise have had (paragraph 345).

The views of the former representatives

- William Taylor QC

18.157 Mr Taylor confirmed that the decision not to ask Mr Gauci about the issue of the public holiday was a tactical one. In his view it was important to consider the answer one might get to a question of that kind. The witness might have given a very definite answer to the question "and then all our work would have been undone". In Mr Taylor's view the closest one could get was what he had obtained from the witness, namely that his shop was open the day before and the day after the purchase. Mr Taylor felt that what the trial court had said about the matter not having been put to Mr Gauci really only applied to a civil proof in which there is a duty to put one's

position to a witness and to rely upon the response given. In Mr Taylor's view it would have been very risky to put the point directly to Mr Gauci in cross examination.

- John Beckett QC

18.158 Mr Beckett thought that the Crown had lost sight of the fact that 8 December was a public holiday in Malta and recalled that they were very surprised when evidence of this emerged. The defence had asked Major Mifsud about the issue of the holiday because "that way we avoided alerting anyone else to it". The defence was satisfied that it could prove the matter in evidence without first alerting the Crown and therefore had not flagged it up in advance by, for example, exploring it with Mr Gauci at precognition. The intention, he said, was to "keep our powder dry" and to use a potentially powerful weapon to best effect. The defence had to consider whether to ask Mr Gauci "straight out" whether or not the day after the purchase was a public holiday. If Mr Gauci had accepted that it was not then it would have indicated that 7 December was not the date of purchase. According to Mr Beckett, however, the defence could only suspect that the Crown had not canvassed this matter with Mr Gauci. The defence believed that the police knew about it, and the danger was that if the matter had been put to Mr Gauci directly he might have given the "wrong" answer. There were, Mr Beckett said, "live risks with this unpredictable witness". Accordingly the defence had tried to "elicit this from the witness indirectly via his statements".

18.159 Mr Beckett considered the trial court's attitude to this issue as "a little harsh". However, the defence appreciated that by trying to elicit the evidence obliquely from Mr Gauci it might not get the point across. With hindsight Mr Beckett considered that the defence should perhaps have asked the question straight out. If in response Mr Gauci had confirmed 7 December as the date of purchase the defence could have cross examined him on the contents of his prior statements. However, in Mr Beckett's view the trial court had not been unduly troubled by differences between Mr Gauci's evidence and his prior statements.

18.160 Mr Beckett said that in light of the trial court's apparent criticism of the defence on this point he had wondered at the time whether the decision not to put the

matter directly to Mr Gauci in cross examination amounted to a potential ground of appeal in terms of *Anderson v HMA*. However, after the matter had been discussed with two other members of the defence team the view taken was that it "got nowhere near" defective representation. Mr Beckett recalled that the defence was disappointed that its approach had not worked and added that if this had been considered sufficient for an *Anderson* ground then he would have withdrawn from acting.

18.161 As far as Mr Beckett was aware the applicant had not instructed the defence to cross examine Mr Gauci on the issue of the public holiday. In Mr Beckett's view the discovery of this information by the defence was a "smart piece of detective work" and would not have been possible if the applicant's defence team were "grossly incompetent".

- Alistair Duff

18.162 Mr Duff considered that the trial court's criticisms of Mr Taylor's approach to cross examination were used simply as "a way out". For example, although the court pointed out that Mr Gauci had never been asked directly about the public holiday, it "knew fine that as a defence lawyer you always ask the questions up to, but never ask the final question of, the witness." If Mr Gauci had been asked whether the day after the purchase had been a public holiday, the danger was that he would "suddenly come out and confirm that it was, that he now remembered it." In Mr Duff's view the judges knew that, and had only criticised the approach taken because they wanted to convict.

18.163 Mr Duff was asked if consideration had been given to raising the issue of the public holiday with Mr Gauci at precognition. Mr Duff could not say that he had specifically thought of this issue at the time. Indeed, he could not recall whether he knew about the public holiday at the time he precognosced Mr Gauci. Mr Gauci had been precognosced in the presence of two Maltese police officers throughout the precognition and so even if Mr Duff had known about the public holiday at that time he would not have wanted to raise the issue in case the officers reported this to the Crown.

18.164 It was suggested to Mr Duff that he could simply have asked Mr Gauci at precognition whether or not his shop was open on the day after the purchase without raising the issue of the public holiday itself. Mr Duff accepted that he could have done so but considered it to be a "pretty fine point."

18.165 In Mr Duff's view although the defence knew why Mr Taylor had asked the questions that he did, it "perhaps came across somewhat opaquely to the court."

Consideration

18.166 The question raised by the submissions is whether the decision not to put directly to Mr Gauci the issue of the public holiday was contrary to reason and resulted in the applicant being denied a fair trial.

18.167 It is true that if the matter had been raised with Mr Gauci, and he had replied that his shop was open on the day after the purchase, this would have significantly undermined 7 December as the date of purchase. Equally, however, if Mr Gauci had said that his shop was closed on that day this would have provided very powerful support for the Crown's position as to the date. In light of that risk the defence adopted a tactical approach whereby Mr Gauci was questioned only on what he meant by the word "midweek". In the Commission's view, although such an approach relied heavily on the possible inferences from Mr Gauci's response, it avoided the risks associated with a more direct approach and allowed the defence to present a submission which was capable of casting further doubt on 7 December as the date of purchase. Given the adverse consequences to the defence of an unhelpful answer from Mr Gauci, it would be difficult to describe the conduct of the defence in this connection as contrary to reason.

18.168 Depending on the point at which the defence became aware of the public holiday it would have been possible for the defence to raise the matter with Mr Gauci at precognition. Although Mr Beckett and Mr Duff suggested at interview that by doing so the defence might have alerted the Crown to the evidence of the public holiday, this was hardly inevitable and in any case could have been avoided by simply asking Mr Gauci whether he could recall his shop being open the day after the

purchase. Mr Gauci's answer to that question might have allowed the defence to reach a more informed view as to the best approach to be taken with the witness in cross examination. However, it obviously would not have provided any guarantee that Mr Gauci would adopt the same position in evidence. As Mr Beckett said at interview, the impression the defence had of Mr Gauci was that he was "liable to say anything." Accordingly, even if Mr Gauci had said at precognition that his shop had been open on the day after the purchase, in the Commission's view the defence would still have been justified in taking the approach it did.

18.169 For these reasons the Commission does not consider that the manner in which this aspect of Mr Gauci's cross examination was conducted led to the applicant being denied a fair trial.

(v) The "Libyan" identification

18.170 It is alleged in the submissions that the defence failed to clarify with Mr Gauci the basis for his identification of the purchaser as a Libyan. In particular it is said that the Maltese commonly refer to all persons of Arab extraction as "Libyan" and that the term is used generically. It is also pointed out that although in cross examination counsel for the co-accused, Mr Keen, established that Mr Gauci had no recollection of the languages which he and the purchaser had used, in terms of his statement of 1 September 1989 Mr Gauci's only basis for identifying the purchaser as Libyan was the language spoken by him. Reference is also made to a number of Mr Gauci's other statements which it is said reveal a "sinister" attitude towards Libyans as well as the suggestion of racism.

18.171 In order to address this allegation it is necessary to set out the relevant passages of Mr Gauci's statements and evidence, the trial court's approach to this issue and the views of the former representatives at interview.

Mr Gauci's statements

18.172 In his statement of 1 September 1989 (CP 452) Mr Gauci said the following about the purchaser's appearance and nationality:

"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, I can tell the difference between Libyans and Tunisians when I speak to them for a while. Tunisians often start speaking French if you talk to them for a while. He was clean shaven with no facial hair. He had dark coloured skin… The man spoke to me all the time as a Libyan."

"On picking out the trousers I asked him what size and he said 'more or less my size'. The Libyans do not really know their sizes or bother. The Libyans normally just put their elbow into the trousers and if it fits both sides, they say they will take it. I do not know how they do this."

18.173 Mr Gauci's statement of 13 September 1989 (CP 456) has already been referred to in the context of his other possible sightings of the purchaser. The statement describes an occasion about three months previously when he saw four men in Tony's Bar in Sliema, one of whom he recognised as looking like the purchaser. Mr Gauci described this man as a Libyan and said that he and the other men in his company "spoke as Libyans. That was their own language."

18.174 As noted earlier Mr Gauci's statement of 26 September 1989 (CP 459) relates to the occasion when a man who he thought was the "same man" as the purchaser bought a number of children's dresses from his shop. According to the statement:

"The man spoke English when he came into my shop yesterday. He had a Libyan accent and I am convinced that he is a Libyan."

18.175 In his statements of 21 February 1990 (CP 466) and 5 March 1990 (CP 467) Mr Gauci makes reference to the man who purchased blankets from his shop in 1987 who he believed may have been the purchaser. In the former statement he describes this man as a Libyan and as having shown him a piece of paper on which was written an "Arabic name" and "Room 113, Hilton Hotel". In the latter statement he said of

what was written on the piece of paper "I cannot read Arabic but it was a Libyan name".

18.176 In his statement of 10 September 1990 (CP 469) Mr Gauci said that he was "positive" that the purchaser was a Libyan.

Mr Gauci's evidence

- Examination in chief

  Q. Did you recognise his nationality?

  A. Yes

  Q. What nationality was it?

  A. To me he was a Libyan

  Q. Are you familiar, from the experience in your shop and in Malta, with Libyans?

  A. Many come, and I recognise them (31/4731).

- Cross examination by Mr Taylor

  Q. ... Let me just deal with one last area, Mr. Gauci. You've been very helpful to me, and I'm grateful to you for answering all of my questions. Malta is a stopping-off point, is that right, for many people from North Africa who are en route for Europe?

  A. That's it, sir.

Q. And it's also a holiday destination for North Africans who want to come to have a good time in the beauty of Malta before going back home again?

A. That's it, sir.

Q. Would I be right in thinking that at any time, almost throughout the entire year, a visitor to Malta would notice that there was a large population of people from North Africa and the Middle East, Arab in appearance, on the island?

A. However, however, people like me, in business, we immediately notice Arabs. We know – we can distinguish between -- at the moment, we have Russians coming over. We have experience in business, so we know exactly who are Europeans, who are Arabs.

Q. Indeed. And I don't seek to suggest otherwise. In North Africa there are Arabs who -

A. We are talking in a straightforward manner, sir.

Q. Thank you. There are Arabs in North Africa who are former colonists of the French and who therefore tend to speak French as a second language rather than English; isn't that right?

A. Algiers and Tunisia, yes. Italians -- Libyans sometimes talk English in the same way as we do -- Maltese, I mean.

Q. And Egyptians?

A. That we recognise Egyptians. Obviously, they speak different from Libyans. My own experience, I can distinguish between Libyans and Egyptians.

Q. But you are not an expert? In Maltese.

A. I am not an expert, obviously.

Q. As a matter of interest, do you speak Arabic yourself?

A. I can manage.

Q. And on the day of the clothing purchase, was the conversation in English, or in Arabic?

A. In both languages.

Q. In both (31/4821-4823).

- Cross examination by Mr Keen

Q. Mr. Gauci, a few moments ago you told us that you couldn't speak Arabic and you understand very little.

A. It's not that I don't know. But I can manage. I can manage a lot. I do a lot of speaking with them, because with a bit of Maltese and a bit of Arabic, and we can manage.

Q. So do I take it you understand sufficient Arabic to be able to sell clothes?

A. Certainly. Of course, yes.

Q. You told us you do not read English. Is that correct?

A No. That's true.

Q. But do you understand sufficient English to sell clothes?

A. Oh, yes, of course. Yes.

Q. The man who came into your shop to buy the clothes that you have been talking about spoke to you in Arabic, or in English, or in Maltese?

A. I believe we spoke Maltese and Arabic that day. That's 11 years ago. That's the way I recollect we spoke.

Q. And yet just a moment ago, you recollected that you spoke in Arabic and English, Mr. Gauci. Would it be fair to say that you in fact have no recollection of the conversation or the language which was employed?

A. Well, exactly. Exactly. All these years -- I mean, you can't remember everything precisely, but that's -- most of the time that's the way we speak with them, in our language and their language, and we understand each other quite well. We even have the same sort of character. We get on well together.

Q. So if the man who came into the shop to buy the clothes was an Arab, you believe you would have spoken to him in a mixture of Arabic and Maltese; is that the position, Mr. Gauci?

A. That's the way we speak to them most of the time. That's the way I -- that's what I do, at least. I -- I look -- I try and see what they prefer. Some of them, they say they want to speak Arabic, and I say, do you understand me, and he says yes, and we talk. Some others say, speak English, because they do speak English too. Last week I had one, and he said he wanted to speak English, and I said, okay, I'll speak English. Do you understand?

Q. So you might have spoken to this customer in Arabic, or in Maltese, or in English, or in a mixture of these languages; is that fair, Mr. Gauci?

A. Yes, it could be. Yes.

Q. And, as you say, it could be, but it was many years ago?

A. Yes. Yes. 11 years. So many years. I would like to have a computer in my head instead (31/4823-4825).

The trial court's approach

"The clear impression that we formed was that he was in the first place entirely credible, that is to say doing his best to tell the truth to the best of his recollection, and indeed no suggestion was made to the contrary. That of course is not an end of the matter, as even the most credible of witnesses may be unreliable or plainly wrong. We are satisfied that on two matters he was entirely reliable, namely the list of clothing that he sold and the fact that the purchaser was a Libyan" (paragraph 67).

The accounts of the former representatives

- William Taylor QC

18.177 Mr Taylor was asked whether the defence had considered the possibility that in some of Mr Gauci's statements he appeared to conflate "Arab" with "Libyan". In response Mr Taylor said that "every Arab in Malta was in fact Libyan" and that "nobody went to Malta except the Libyans, who got all the goods they needed from there." Mr Taylor did not recall being pre-occupied by Mr Gauci's description of the purchaser as Libyan and did not think that much turned on it.

18.178 Mr Taylor questioned whether if he had persuaded the court that the purchaser was Arab rather than Libyan this would have prevented a miscarriage of justice. He agreed that any acceptance of the Libyan identification would have assisted in the identification of the applicant as the purchaser. However, he said that Mr Gauci would have been re-examined on the matter "and the advocate depute would have made a mockery of it" by referring to "the fact that Moroccans speak with a French accent, or that Egyptians do not travel to Malta."

18.179 Mr Taylor pointed out that, in any event, the applicant's instructions were simply that he was not the purchaser and accordingly the defence did not know

whether the purchaser was Libyan or Arab. In Mr Taylor's view even if the Libyan identification had been undermined the court could simply have concluded that the purchaser was an Arab; and Libya is an Arab country.

- John Beckett QC

18.180 Mr Beckett was referred to the relevant passages in Mr Gauci's statements and was asked if the defence had any concerns regarding the reliability of his identification of the purchaser as Libyan. Mr Beckett pointed out that the applicant's position was simply that he was not the purchaser and the defence therefore had nothing from him with which to cross examine Mr Gauci in this connection. In these circumstances, he said, the defence just had to use what factors it had. Mr Beckett did not personally think there was anything suspicious about this aspect of the evidence and pointed out that Mr Gauci had identified the purchaser as Libyan at a time when it was clear the police suspected Palestinians or Talb as having perpetrated the bombing.

18.181 Mr Beckett was asked if the defence had been aware of an apparent tendency among the Maltese to describe all persons of Arab appearance on the island as "Libyan". Mr Beckett believed that Mr Taylor "gave this a go" in cross examination but, in Mr Beckett's view, it had not worked well and indeed had looked like it might get worse for the applicant. The focus, he said, had to be on the identification evidence and there was a danger of getting over-ambitious in trying to challenge everything. Mr Beckett was sure that the defence had discussed this possible line of cross examination and he was aware of the Maltese term "Libyano". However, in Mr Beckett's view there was more to it than that. The defence had an opinion from George Joffe, an expert in Middle Eastern affairs, who stated that the majority of Arabs in Malta were in fact Libyan. In addition the Libyan Cultural Centre was close to Mary's House, a fact that in Mr Beckett's view demonstrated that Mr Gauci would have been familiar with Libyans.

18.182 Mr Beckett accepted that the defence could have explored the matter with Mr Gauci but he doubted that it would have changed the outcome. In his view it was simply a judgment that had to be made. Mr Beckett did not think it surprising that the court had accepted this aspect of Mr Gauci's evidence and did not think that the

defence had exercised poor judgment in concentrating on the identification of the applicant as being the evidence which mattered. It had to be the applicant who was the purchaser, not just any Libyan. In these circumstances the defence had not considered the identification of the purchaser as Libyan as significant in itself.

18.183 Mr Beckett accepted that the Libyan identification had played a fairly important part in the court's judgment, but said that the question was whether one could have seen this coming. Even if it was capable of being predicted, Mr Beckett questioned whether it would have been possible on the information available to persuade the court to depart from its conclusion. In Mr Beckett's view there was material available to "shore up" the Libyan identification. Much time could have been spent on this by the defence and in the end the court might have been given a sounder basis for holding the evidence to be reliable. Mr Beckett did not see the value of general evidence that Maltese people tended to describe all Arabs on the island as Libyan, as in his view it was what Mr Gauci did that mattered.

- Alistair Duff

18.184 Mr Duff did not recall being aware of such a tendency on the part of the Maltese, nor was he familiar with Maltese term "Libyano". Asked whether the defence had any concerns regarding the reliability of Mr Gauci's identification of the purchaser as Libyan, Mr Duff replied: "We were aware of this, that he said the purchaser was Libyan, and we had in our heads the question of how he knew that, but I cannot remember anything in detail." There was also the possibility, he said, that the purchaser, though a Libyan, was not the applicant and "so it would not necessarily have affected our approach". It was suggested to Mr Duff that where, as in the present case, the identification evidence was uncertain, undermining any aspect of it might have assisted the defence. Mr Duff said that he did not disagree with this.

18.185 Mr Duff said that there must have been consideration given to challenging the Libyan identification as the defence knew it was an issue, but he could not remember now what decisions were made. He could not recall any consideration being given to obtaining expert opinion on the matter.

Consideration

18.186 It is clear from Mr Beckett's account that the questions put by Mr Taylor in cross examination were an attempt to explore with Mr Gauci his basis for identifying the purchaser as Libyan. Although there was no direct challenge to this aspect of Mr Gauci's evidence, in the Commission's view this is not surprising given the absence of any sound foundation for doing so. As Mr Beckett said at interview, the applicant's instructions, which amounted to a simple denial that he was the purchaser, were of no assistance in this connection. The only other available means of challenging the evidence lay in the apparent tendency among the Maltese to describe as "Libyan" all persons of Arab appearance in Malta. At interview only Mr Beckett recalled being aware of this phenomenon but it seems clear from what he said that the other members of the defence team were also aware of it at one time.

18.187 In the Commission's view, however, although there is evidence that some Maltese use the term "Libyano" in this way, this does not appear to be universal among them (see eg the statements obtained by the Commission from George Grech, Godfrey Scicluna, Tonio Caruana and Godwin Navarro: appendix of Commission interviews). Moreover, the terms of Mr Gauci's statement of 1 September 1989 suggest that in identifying the purchaser as a Libyan he appreciated the distinction between "Arab" and "Libyan" and between Libyans and Tunisians. Furthermore when it was put to him in cross examination that certain countries in North Africa are former colonists of the French, Mr Gauci correctly pointed out that two such countries were Algeria and Tunisia. He also said that he could distinguish between Libyans and Egyptians on the basis that they "speak different". In the Commission's view, factors such as these are not supportive of the submission that when Mr Gauci identified the purchaser's nationality he was simply using "Libyan" as a convenient term for "Arab".

18.188 In any event, if the terms of Mr Gauci's statement to the Commission are anything to go by, it does not appear that the defence would have benefited from any further exploration of this matter. At interview Mr Gauci said that he was "one hundred per cent confident" that the purchaser was a Libyan. He acknowledged that there is a habit on the part of some Maltese to describe all Arabs on the island as

"Libyan" but said that this was not something he himself did. According to Mr Gauci "to say that a person is an Arab is different from saying that a person is Libyan. Libyans are different from, for example, Moroccans and Iraqis."

18.189 It is also alleged in the submissions that the contents of some of Mr Gauci's other statements suggest a sinister or racist attitude towards Libyans. The Commission is satisfied, however, that in terms of the information available to the defence there was no proper foundation for suggesting to Mr Gauci that his identification of the purchaser's nationality was based on prejudice against Libyans (see chapter 26).

18.190 The Commission accepts that across his statements and evidence the precise means employed by Mr Gauci in seeking to distinguish Libyans from persons of other Arab nationality remains unclear (see chapter 26). However, the question raised by the submissions is whether Mr Taylor's cross examination on this issue resulted in the applicant's defence not being properly presented and in his being denied a fair trial. For the reasons given the Commission does not consider such an allegation to be well-founded.

(4) The conduct of the appeal

The applicant's submissions

18.191 The final matter raised under the heading of defective representation concerns the manner in which the defence conducted the applicant's appeal against conviction. It is alleged that at appeal none of the "obvious grounds" was argued, such as those based upon the sufficiency of evidence or the reasonableness of the verdict under section 106(3)(b) of the Act. Instead, it is alleged, arguments were made "on a peculiar and incompetent basis", namely that the trial judges had misdirected themselves.

18.192 It is submitted that the appeal, as argued, was doomed to failure because it had no proper basis in law. The appeal grounds had attacked the reasoning of the trial court on the basis, first, that it had not provided adequate reasons for the conviction

and, secondly, that it could be shown to have misdirected itself. However, according to the submissions those arguments were described by the appeal court respectively as "misconceived" and "not well founded". Indeed, according to the submissions the appeal court had concluded that "the whole appeal was irrelevant."

18.193 It is submitted that the arguments the defence sought to make at the appeal should have been presented under the heads of sufficiency and section 106(3)(b). The failure to do so, it is submitted, meant that the appeal court did not consider the fundamental issues in the case. According to the submissions it is "patent" from the terms of the appeal court's opinion that argument under those grounds would have been considered differently.

The appeal court's approach

18.194 The appeal court noted at an early stage of its opinion that the applicant was not relying upon grounds based on the sufficiency of the evidence or the reasonableness of the verdict under section 106(3)(b). Instead, the court observed, many of the grounds were concerned with the trial court's treatment of the evidence and the defence submissions. In particular it was alleged that the trial court had failed to take proper account of, or have proper regard to, or give proper weight to, certain evidence, factors or considerations.

18.195 Mr Taylor argued that although it was not a court of review, it was nevertheless open to the appeal court in the present case to review the trial court's conclusions in light of the evidence which the latter had considered material. In addition it was argued that a miscarriage of justice could be established by a failure on the part of the trial court to give adequate reasons for its conclusions on particular matters. The appeal court rejected the first of those arguments as "not well founded" and the second as "misconceived". Its views on both issues are perhaps best summed up in the following passage of the opinion:

> *"With regard to the trial court's conclusion that Mr Gauci's evidence of identification by resemblance, as far as it went, was reliable, the appellant contends that the trial court 'failed to have proper regard or give proper weight'*

to the considerations listed in the ground of appeal. As we have already indicated, this wording demonstrates a misconception as to the nature and extent of the role of the appeal court in considering an appeal against conviction, whether or not reasons for the conviction have been given. While the trial court must have regard to the evidence which was led before it, the weight which is to be given to evidence which it has decided to accept must be a matter for it to assess. Further, the trial court is not bound to set out in detail every step in its process of reasoning, nor is it required to deal with every submission made to and refer to every disputed question of fact. The fact that a particular piece of evidence is not expressly referred to in the judgment of the trial court does not mean that the trial court must be taken to have failed to take it into account. When it is alleged, not that there was in law an insufficiency of evidence, but that there had been a failure by the decision-making body to have proper regard to, or give proper weight, or take proper account of, certain evidence, all of which relate to questions of weight, then it seems to us that the only ground which could be put forward for quashing the verdict would be that the jury or trial court had returned a verdict which no reasonable jury or trial court could have returned: see section 106(3)(b) of the 1995 Act. In that connection Mr Taylor made it clear that he was not seeking to rely on section 106(3)(b)" (paragraph 288).

18.196 The appeal court made the same point throughout its opinion in respect of other grounds argued on behalf of the applicant. The opinion concludes with the following passage:

"When opening the case for the appellant before this court Mr Taylor stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly

directing itself, could have returned in the light of that evidence…" (paragraph 370).

The views of the former representatives

- William Taylor QC

18.197 Mr Taylor said that he had wanted to present an argument under section 106(3)(b) but had been persuaded by the other members of the defence team that this would be "entirely counter-productive" in that it would attract the ire of the appeal court judges. In Mr Taylor's view an argument based on that provision would have been "laughed out of court". It was, he said, a tactical decision not to include it as a ground of appeal. Mr Taylor did not accept the appeal court's view that certain of the grounds ultimately argued were misconceived.

- John Beckett QC

18.198 Mr Beckett said that Mr Taylor and the other senior counsel in the defence team, David Burns QC, had worked together on a framework for the appeal. However, as Mr Beckett understood matters, the decision not to argue unreasonable verdict at appeal had a number of aspects. Mr Beckett pointed out that in terms of section 106(3)(b) it is the court's verdict which requires to be considered unreasonable, not its findings. He added that if the appeal court's opinion is examined closely it is clear that in respect of all the crucial matters the trial court was held to have been "entitled" to find as it did. Accordingly, Mr Beckett did not read the appeal court's opinion as suggesting that a ground based on section 106(3)(b) would have succeeded. In Mr Beckett's view "not many" of the misdirection grounds fell foul of the finding that the weight to be attached to the evidence was a matter for the trial court.

18.199 Mr Beckett pointed out that in terms of *King v HMA* 1999 SCCR 330 the basis of any appeal under section 106(3)(b) was that no reasonable jury could have reached the verdict. Accordingly, if the defence had argued the appeal under section

106(3)(b) it would have been open to the Crown and the court to identify an alternative rational basis for the conviction in terms of the evidence not rejected by the trial court. Mr Beckett thereafter suggested an approach to the evidence which, according to him, would have permitted a reasonable court to convict the applicant without the need to establish the date of purchase as 7 December 1988.

18.200 According to Mr Beckett the defence was aware that it needed to "break new ground" in the appeal. In his view it would have been a tall order to argue that there was no rational basis for the verdict, and neither he nor Mr Burns thought that the defence could succeed in that argument. It was suggested to Mr Beckett that a successful argument under section 106(3)(b) would have been no taller an order than arguing grounds that were ultimately viewed as misconceived. Mr Beckett accepted that the defence had lost the appeal and were therefore not in a good position to say that they were right. Although the appeal court had found some of the grounds to be misconceived Mr Beckett did not think that the approach taken by the defence could be strongly criticised.

- Alistair Duff

18.201 Mr Duff said that although he had been involved in discussions on this matter he had left it to counsel to decide. The decision not to argue grounds based on section 106(3)(b) had proceeded upon an analysis of the law by counsel with which Mr Duff had agreed.

Consideration

18.202 In the Commission's view there is no basis in the appeal court's opinion for the submission that all of the grounds founded on alleged misdirections by the trial court were irrelevantly framed. According to the appeal court such grounds were irrelevant only to the extent to which they sought to question the weight the trial court had attached to particular pieces of evidence. Where it was established, however, that a particular inference was not open to the trial court on the evidence, the appeal court considered that this would be indicative of a misdirection and that in such circumstances it would then require to assess whether it had been material (paragraph

25). This was precisely the approach taken by the appeal court to those grounds which alleged that the trial court had misdirected itself as to the evidence of the witness Andreas Schreiner (paragraph 101), and as to the terms of joint minute number 7 (paragraph 319; see below). In light of this the Commission does not consider there to be any merit in the submission that the appeal court viewed the "whole appeal" as irrelevant.

18.203 At interview there was a clear divergence of opinion among the former representatives as to why no reliance was placed on section 106(3)(b) at appeal. Whereas Mr Beckett and Mr Duff recalled that the decision in this connection was based upon an examination of the relevant case-law, Mr Taylor believed that it was dictated by tactical considerations designed not to alienate the appeal court. Whatever may have been the basis for this decision, it is clear that the appeal court considered that many of the grounds ultimately argued were misconceived. While certain grounds were treated by the court as relevantly framed in order to do justice to the arguments made in support of them (see eg paragraph 290), it seems clear from the opinion that these were not considered in the context of section 106(3)(b).

18.204 Given its conclusions in chapter 19, the Commission does not consider that the defence can be criticised for its decision not to challenge the sufficiency of the evidence. However, as stated in chapter 21, the Commission has reached the view that the trial court's verdict is at least arguably one which no reasonable court, properly directed, could have returned. In particular the Commission does not consider there to be any reasonable basis for the trial court's conclusion that the purchase took place on 7 December 1988 and therefore for the inference it drew that the applicant was the purchaser of the items from Mary's House.

18.205 Despite that conclusion, in the Commission's view it is understandable why members of the defence team believed an argument seeking to challenge the reasonableness of the verdict would not be successful. Prior to *E v HMA* 2002 SCCR 341 (the decision in which was issued towards the end of the appeal hearing in the applicant's case) an appeal on this basis had never succeeded in Scotland. In these circumstances the Commission is satisfied that a tactical decision not to argue a ground similar to that advanced in chapter 21 was not contrary to reason. In any

event, it seems to the Commission appropriate to deal with that ground under section 106(3)(b) and the case law relating to that provision, rather than the principles listed at the beginning of this chapter.

Other matters raised with the former representatives

Background

18.206 In addition to the matters raised in the application the Commission sought the views of the former representatives on a range of other issues considered relevant to the question of defective representation. In the main these related to the approach taken by the defence to the evidence regarding the date of purchase. One particular matter concerned how the defence had approached Mr Gauci's evidence that his brother, Paul Gauci, was watching football on television on the date of purchase. However, having considered the accounts given by the representatives (as well as those given by Anthony and Paul Gauci at interview) the Commission is satisfied that this aspect of the applicant's defence was properly presented. Full details of the matters raised with the representatives in this connection are given in their respective statements.

18.207 The purpose of this final section is to consider the approach taken by the defence to two matters. The first concerns the cross examination of Mr Gauci in respect of his evidence that the purchase "must have been about a fortnight before Christmas". The second is the decision by the defence not to call Paul Gauci as a witness.

(1) *Mr Gauci's evidence of "about a fortnight before Christmas"*

Background

18.208 In order properly to assess this issue it is necessary to set out the other evidence on which the trial court relied in establishing the date of purchase:

- Mr Gauci's evidence that his brother, Paul Gauci, did not work in the shop that afternoon because he had gone home to watch a football match on television; and the terms of joint minute number 7 which agreed that particular football matches were broadcast live by the Italian television channel, Radio Televisione Italiana (RAI), on 23 November or 7 December 1988 (the trial court was held at appeal to have misconstrued the terms of this joint minute and the foregoing summary is therefore based upon the contents of the minute itself).

- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the former Chief Meteorologist at Luqa airport, Major Joseph Mifsud, to the effect that there was a 10% probability of rain in Sliema at the material time on 7 December 1988.

- Mr Gauci's evidence which, according to the trial court, was that the purchase was "about the time when the Christmas lights would be going up" in Tower Road, Sliema.

18.209 Mr Gauci's evidence that the purchase "must have been about a fortnight before Christmas" was given by him in examination in chief (31/4730). In cross examination Mr Taylor referred him to a passage in his statement of 1 September 1989 in which he described the purchase as having occurred "during the winter in 1988" (31/4876). Mr Taylor also referred him to his statement of 10 September 1990 in which he said that the purchase had taken place "at the end of November" (31/4802). The relevant passages of Mr Gauci's evidence are set out in chapters 21 and 24.

18.210 In his closing submissions Mr Taylor said that when contrasted with his more contemporaneous recollection on 10 September 1990 Mr Gauci's evidence that the purchase must have been about a fortnight before Christmas was "plainly unreliable" (82/9873).

18.211 At appeal it was argued that the trial court had failed to take into account the fact that Mr Gauci had never told the police at any of his early interviews that the purchase had taken place about a fortnight before Christmas (paragraph 334 of the appeal court's opinion). In rejecting this ground the appeal court observed that the trial court had referred to statements which Mr Gauci had made to police officers in September 1989 in none of which did he refer to the purchase as having taken place a fortnight before Christmas. The appeal court did not consider it necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage. According to the appeal court "the fact that such statements had not been made at an earlier stage must have been quite apparent to the trial court" (paragraph 336).

18.212 Although Mr Taylor referred Mr Gauci to the terms of previous statements in which he had given timescales other than "about a fortnight before Christmas", the views of the representatives were sought as to why it was not put to him that he had never given that timescale on any previous occasion.

<u>The views of the former representatives</u>

- William Taylor QC

18.213 Mr Taylor did not recall any particular importance being attached to this aspect of the evidence at trial. He pointed out that a fortnight before Christmas is 11 December and that "7 December is outwith that period and 23 November is completely outwith it." It was suggested to Mr Taylor that in terms of the trial court's judgment Mr Gauci's evidence that the purchase was about a fortnight before Christmas was crucial to the finding as to 7 December. Mr Taylor was reminded that the evidence of the football broadcasts pointed to both 23 November and 7 December, that the weather evidence pointed more to 23 November and that Mr Gauci's account that the purchase had taken place midweek (or Wednesday) pointed to both dates. Mr Taylor said he found it difficult to piece together the thinking of the defence at the time. He thought that Mr Gauci's evidence was significant in terms of the approach described to him but he did not recall its significance at the time. He did not remember thinking that Mr Gauci had "changed his evidence" on this matter. In Mr

Taylor's view it was just an approximation by the witness which the trial court had fastened upon.

18.214 Mr Taylor agreed that "except by default" it was not made clear to the court that Mr Gauci had never given that time-frame before. He pointed out, however, that Mr Gauci's testimony was different from any of his previous statements to which the court was referred. In Mr Taylor's view he was being asked to be a "counsel of perfection" in this matter. He said that once a written judgment had been issued anyone could be questioned on why they had not asked particular questions of a witness.

18.215 Mr Taylor's attention was drawn to the terms of paragraph 334 of the appeal court's opinion in which he was noted as submitting that "nowhere did the trial court acknowledge that Mr Gauci had never told the police at any of his early interviews that the sale had taken place about a fortnight before Christmas". It was suggested to Mr Taylor that a possible reason for this was that it had never been highlighted in cross examination. In reply Mr Taylor referred to the passage in paragraph 336 of the opinion quoted above. In Mr Taylor's view the terms of that passage reflected what he had said earlier in the interview, namely that the judges must have realised that Mr Gauci's evidence was the first occasion in which he had mentioned this time-frame.

- John Beckett QC

18.216 Mr Beckett said that the defence had brought up with Mr Gauci his previous accounts in which he said that the purchase had taken place in "winter" and "November". Although the defence could have gone further by referring Mr Gauci to other passages in his statements in which he said that the purchase had taken place in "November/December", in Mr Beckett's view this would have allowed the Crown to rely on the reference to December. This would in turn have left open the possibility that the purchase might have been about a fortnight before Christmas. Mr Beckett considered that it was better to make the point in closing submissions. In his view the defence had "floated" the inconsistency with the witness and had obtained useful material from him.

18.217 It was suggested to Mr Beckett that there was a distinction between, on the one hand, referring Mr Gauci to previous statements in which he had said something different and, on the other, challenging him directly that on no previous occasion had he said that the purchase took place about a fortnight before Christmas. Mr Beckett thought this matter would have been raised in defence submissions at the trial, but said that in any event the court was aware that on previous occasions the witness had said "winter" and "November 1988". In Mr Beckett's view there was a risk of pushing the witness in cross examination. The defence did not know what he would say in such circumstances. It was not difficult to envisage him saying that, now he was giving evidence on oath, he was convinced it was a fortnight before Christmas. According to Mr Beckett the defence ran the risk of Mr Gauci saying anything in his evidence and so it would have been dangerous to put this matter to him in cross examination. In Mr Beckett's view by getting from the witness that his memory of events would have been better at the time he gave his statements, and by showing that in those statements he had referred to "November" and to "winter", this contradicted the evidence that the date of purchase was in December and undermined Mr Gauci's account that it had taken place about a fortnight before Christmas. Mr Beckett accepted that it might have been possible to approach the matter in a different way but in his view this would not have been without risk given Mr Gauci's unpredictability as a witness.

18.218 Mr Beckett was asked why, if that was the approach, Mr Taylor had submitted at appeal that the trial court had failed to acknowledge that Mr Gauci had never told the police of the time-frame he had given in examination in chief. Mr Beckett replied that what Mr Gauci had said in his early interviews was explored in cross examination to the applicant's advantage. In Mr Beckett's view Mr Taylor had exercised his discretion in this matter and the point being raised was a "very minute dissection" of the defence approach. Mr Taylor, he said, had to make a judgment on the day as to the danger in pursuing this line and had to try to undermine the Crown case as safely as he could bearing in mind the unpredictable nature of the witness. Mr Beckett did not see anything wrong in Mr Taylor's approach and did not consider that this had undermined the applicant's right to a fair trial.

18.219 Mr Duff was unable to recall anything about the matter at interview.

Consideration

18.220 Prior to giving evidence Mr Gauci had never been recorded as saying that the purchase must have been about a fortnight before Christmas. The question for the Commission is whether by failing to put this to him directly the defence failed properly to present the applicant's defence and denied him a fair trial.

18.221 In the Commission's view this aspect of Mr Gauci's evidence was critical to the trial court's determination that the purchase had occurred on 7 December. Evidence of the football broadcasts pointed to both 23 November and 7 December and there was nothing in Mr Gauci's evidence that the purchase had taken place "midweek" (or on a Wednesday) which would support one of those dates over the other (both dates having occurred on a Wednesday in 1988). In terms of the passages in his statements that were put to him Mr Gauci's accounts to the police were either supportive of both dates ("November or December 1988") or pointed towards 23 November ("end of November") Likewise, evidence of the weather, while not excluding 7 December, pointed strongly to 23 November. Accordingly, in the Commission's view, it was only Mr Gauci's evidence that the purchase had taken place about a fortnight before Christmas (taken perhaps with his confused account that the Christmas lights were "going up" at the time) which allowed the court to conclude that the purchase date was 7 December.

18.222 In the Commission's view there might have been value in challenging Mr Gauci directly on the basis that he had never mentioned this particular time-frame in any of his statements. As Mr Beckett said at interview, however, there were also risks associated with such a course in that it was possible that Mr Gauci's response to further questioning would have been more certain than his account in examination in chief. In the Commission's view, given that the defence regarded Mr Gauci as an unpredictable witness, any decision by Mr Taylor not to challenge him directly on this matter amounted to a reasonable exercise of the discretion afforded to counsel in such matters.

18.223 In any event Mr Taylor put to Mr Gauci the passages in his statements in which he had described the purchase as having taken place "during the winter in 1988" and "at the end of November." Accordingly the trial court was aware that in none of the statements that were put to him in evidence had Mr Gauci mentioned that the purchase must have been about a fortnight before Christmas. Indeed, in terms of the appeal court's opinion it must have been quite apparent to the trial court that Mr Gauci had never mentioned this time-frame before in any of his previous statements.

18.224 In these circumstances the Commission does not take the view that the conduct of this aspect of Mr Gauci's cross examination resulted in the applicant's defence not being properly presented or in his being denied a fair trial.

(2) *The decision not to call Paul Gauci as a witness*

18.225 According to the volume of submissions submitted by MacKechnie and Associates concerning Anthony Gauci (see chapter 17), the fact that the defence did not call Paul Gauci was "surprising" given that in his police statement of 19 October 1989 he indicated that 23 November 1988 was "the date in question". The inference in the submissions is that the decision by the defence not to do so amounts to defective representation.

18.226 The Commission raised this matter with the former representatives and in light of their responses it is satisfied that the decision by the defence not to call Paul Gauci was justified. The submissions fail to take account of the fact that Paul Gauci was re-interviewed by the police in respect of this matter on 14 December 1989. Paul Gauci refused to provide a statement on that occasion but the details of what he told the police are contained in a statement by one of the officers who interviewed him, Henry Bell (S2632F: see appendix). According to Mr Bell's statement, on 14 December 1989 Paul Gauci was shown editions of a Maltese newspaper dated 23 November and 7 December 1988 in which the times of broadcasts of particular football matches were listed. In light of those listings Paul Gauci agreed that the "probable date was 7 December 1988."

18.227 Although Mr Bell's statement appears not to have been disclosed to the defence, he provided a similar account in his defence precognition (see appendix). At interview Mr Beckett explained that in light of Mr Bell's precognition the defence considered Paul Gauci to be a "dangerous witness" in that there was a risk that his evidence might assist the Crown in establishing the date of purchase as 7 December 1988. Similar views were expressed by Mr Taylor at interview.

18.228 In these circumstances the Commission does not consider that the decision by the defence not to call Paul Gauci was contrary to reason or that it resulted in the applicant being denied a fair trial.

Conclusion

18.229 In the Commission's view there is nothing in the submissions under this heading, or in the accounts given by the former representatives at interview, which supports the submission that the conduct of the defence was such as to deny the applicant a fair trial. Accordingly the Commission does not consider that a miscarriage of justice may have occurred in this connection.

CHAPTER 19
THE SUFFICIENCY OF THE EVIDENCE

The Grounds

19.1 The applicant raises the following grounds under this heading:

(1) At the trial and the appeal the Crown's submissions on the nature of a circumstantial case were based on an error of law; and

(2) The evidence the trial court found acceptable was insufficient to convict the applicant of murder.

The submissions in respect of ground (1)

19.2 The submissions attack the approach taken by the Crown and the appeal court to the law concerning circumstantial evidence. That attack is based on the view that the Crown and the appeal court failed to take account of the distinction between a case where circumstantial evidence is relied on to corroborate direct evidence and one like the present case which consists wholly of circumstantial evidence. It is accepted in the submissions that in the former case the circumstantial evidence need not be unequivocal but may be capable of differing interpretations, and that it is the function of the jury to determine whether or not to adopt the interpretation which supports the direct evidence. In the latter case, it is submitted that the circumstantial evidence taken as a whole must be unequivocal and point only to guilt.

19.3 The submissions refer to the cases of *Little v HM Advocate* 1983 SCCR 56; *Fox v HMA* 1998 SCCR 115; and *Mack v HM Advocate* 1999 SCCR 181, and argue that these were misunderstood by the Crown and the appeal court or that they were mistakenly applied to a case such as the present where the evidence was wholly circumstantial. Among the passages referred to in the submissions is the following passage from *Little* (in which the appellant was convicted of incitement to murder):

"The question is not whether each of the several circumstances 'points' by itself towards the instigation libelled but whether the several circumstances taken together are capable of supporting the inference, beyond reasonable doubt, that Mrs Little in fact instigated the killing of her husband by Mackenzie" (at p 61).

19.4 According to the submissions the above passage was relied upon by the Crown at appeal as support for the proposition that in a wholly circumstantial case the combined circumstances need only be *capable* of supporting the inference of guilt. It is submitted that the reference in *Little* to circumstances being "capable of supporting the inference, beyond reasonable doubt" should not mean capable in respect of being one of a number of possibilities but capable in respect of being sufficient to entitle the jury to convict.

19.5 The submissions then refer to the trial judge's charge to the jury in *Little*. There it was said that the essence of the Crown case was that the facts, considered together, demonstrated that two of the accused offered the third accused money for the killing, and paid money to him after the killing (see 1983 SCCR at p 58). The trial judge went on to quote the following well-known passage from Walker and Walker on Evidence:

"If all the circumstances in combination – the strands in the cable – lead to a full and complete assurance of the fact in issue, an assurance or moral conviction which would induce a sound mind to act without doubt on the conclusions which it naturally leads, the fact in issue may be regarded as proved. If, on the other hand, there is a single proved circumstance which is incompatible with the fact in issue, then the proof of that fact fails" (1st edition at paragraph 9).

19.6 The submissions also cite the following passage from Dickson on Evidence in support of the proposition that the whole circumstances must point only to the incrimination of the accused:

"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 and satisfactory and conclusive as to leave no rational doubt in the minds of the jury that the prisoner is guilty" (paragraph 98).

The Commission's response to Ground (1)

19.7 Although the submissions make reference to the Crown's written and oral arguments these arguments are relevant only to the extent that they were adopted by the court at appeal. The appeal court stated at paragraph 32 of its opinion:

"Before us, the advocate depute relied on three cases in support of two… propositions which he advanced. The first proposition was that in a circumstantial case it is necessary to look at the evidence as a whole. Each piece of circumstantial evidence does not need to be incriminating in itself; what matters is the concurrence of testimony. The second was that the nature of circumstantial evidence is such that it may be open to more than one interpretation, and that it was precisely the role of the trial court to decide which interpretation to adopt."

19.8 The appeal court went on at paragraph 33 to quote the passage from *Little* above. It then quoted the following passages from *Fox* and *Mack* at paragraphs 34 and 35 respectively:

"[It] is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view – which is the one that matters – the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard" (*Fox* at p 126E-F).

"There is nothing strange in discovering that circumstantial evidence may give rise to a number of possible inferences since that is one of the characteristics of evidence of that type. When presented with such evidence, the jury have to decide whether they draw the inference that the accused is guilty of the crime" (*Mack* at p 185).

19.9 The court concluded that these passages supported the propositions advanced by the advocate depute, "with which we did not understand Mr Taylor to take issue" (at paragraph 36).

19.10 In the Commission's view, the applicant's submissions misrepresent both the Crown's submissions at appeal and the court's attitude towards them. At no point did the Crown submit that a circumstantial *case* might be open to a number of interpretations; rather its submission was simply that adminicles of circumstantial *evidence* may each be open to more than one interpretation. Both *Little* and *Mack* (on which the Crown relied and to which the court referred) make it clear that in a purely circumstantial case the combination of facts and circumstances must amount to proof beyond reasonable doubt, a standard which in the Commission's view cannot reasonably be achieved where the evidence as a whole is open to a number of interpretations.

The submissions in respect of ground (2)

19.11 On behalf of the applicant it is submitted, citing Hume on Crimes, ii, 384-386, that there are several ways in which circumstantial evidence can be insufficient to entitle a jury to convict: first, when the circumstances, even when taken together, cannot be regarded as sufficiently incriminatory but are too ambiguous; secondly, when there is insufficient "aptitude and coherence" between the pieces of evidence (ie they lack the necessary probative force); and thirdly, when the facts relied on are too remote from the *facta probanda* and the inference sought cannot reasonably be drawn.

19.12 The submissions go on to state that it cannot be a subjective matter for the trial court to decide whether it considers the entire circumstances amount to a case against the applicant. There must be an objective standard whereby one can say that

the circumstances are so ambiguous, or lacking in probative force, that no reasonable jury could have convicted.

19.13 It is submitted in the application that the circumstances relied on to convict the applicant were as follows:

(i) The purchase of the items in Malta;
(ii) The presence of those items in the primary suitcase;
(iii) The identification of the applicant as the purchaser;
(iv) The unaccompanied bag from Malta;
(v) The applicant's movements under a coded passport at material times; and
(vi) His association with Edwin Bollier and others.

Items (i), (ii) and (iii): the purchase and the identification of the purchaser

19.14 It is accepted in the submissions that the first three items, taken together, suggest involvement in the early stages of the plan which led to the murder, but it is submitted that they are insufficient to suggest involvement in the murder. It might, it is said, have been different if the purchase had been of equipment used in making the bomb, or if it had been of something nefarious necessarily pointing to knowledge of the use to which it was intended to be put, or had been so closely related in time that involvement in the final stage of the plan could reasonably be inferred. However, that was not so. It is submitted that the trial court went too far when at paragraph 88 it drew the inference from the miscellaneous nature of the purchases that the applicant must have been aware of the purpose for which they were bought. To draw such an inference, it is said, is wholly unreasonable.

19.15 It is submitted that the inference drawn in respect of the applicant can be compared with the court's reluctance to draw a similar inference in respect of the co-accused. The court observed in this connection that even if it had accepted that the co-accused obtained the luggage tags, it would be going too far to infer that he was necessarily aware that they were to be used for the purpose of blowing up an aircraft. It is argued in the submissions that the same could be said about the purchase of the clothing.

Item (iv): the unaccompanied bag from Malta

19.16 It is pointed out in the submissions that the fact that the bomb was ingested at Luqa is inferred from evidence of an unaccompanied bag on flight KM180 from Malta to Frankfurt. This, it is submitted, heightens the significance to be attached to the applicant's presence in Malta on 7 and 20 to 21 December 1988, and to Mr Gauci's evidence. However, it is argued that there is no link between the applicant and the primary suitcase or between the primary suitcase and the suggested unaccompanied bag.

19.17 Further, it is pointed out that the evidence on which the court relied to infer that there was an unaccompanied bag came from the records at Frankfurt. The records at Luqa airport, it is submitted, directly contradict that evidence. The submissions argue that the court provided no reasons for preferring the Frankfurt evidence and claim that there is no evidential basis for such a preference. Indeed, it is submitted that there was positive evidence against the ingestion of the suitcase at Malta.

Item (v): the applicant's movements under a coded passport at the material times

19.18 According to the submissions the Crown case was very different from the basis on which the court eventually convicted the applicant. In the context of the Crown case, the applicant's presence at the airport and his use of a coded passport could, it is said, "amount to something". However, it is submitted that there "just was not the evidence to support the Crown case." According to the submissions the court somehow managed to maintain that the applicant's presence at Luqa airport was incriminatory, despite its rejection of much of the Crown evidence.

19.19 The submissions argue that in these circumstances the inference drawn by the court that the applicant was at Luqa in connection with the planting of the bomb was unreasonable (which the Commission has taken to mean unsupported by sufficient evidence). The submissions claim that according to the court's judgment the drawing of that inference appears to depend upon the absence of any alternative explanation.

Such an approach, it is said, is quite wrong, and inverts the onus of proof in that it suggests that the applicant required to show his innocence to prevent the court drawing an incriminatory inference.

The Commission's response to ground (2)

19.20 In the Commission's view, before one can determine the question of sufficiency in the present case one has first to establish the evidence to be taken into account.

19.21 It is clear that when one is addressing the question of sufficiency of evidence at the no case to answer stage, the Crown case must be taken "at its highest". The test to be applied in such circumstances is whether there was evidence which if accepted would be sufficient for conviction (see *Williamson v Wither* 1981 SCCR 214 and *R v Galbraith* [1981] 1 WLR 1039 at p 1042). In other words, it does not involve an assessment of the credibility and reliability of the evidence. In the present case, given the evidence of Abdul Majid Giaka ("Majid") and Edwin Bollier, it is understandable why a submission of no case to answer was not made on behalf of either accused at the close of the Crown's case.

19.22 Similarly, in the context of an appeal based on insufficient evidence the High Court will not assess the credibility and reliability of that evidence. Appeals based solely upon challenges to the credibility and reliability of evidence are properly considered under section 106(3)(b) of the Act which concerns the reasonableness of the verdict.

19.23 In the present case, however, because, uniquely for a trial under solemn procedure, one is aware of the evidence which was accepted and rejected, the Commission has considered only that evidence which the trial court did not expressly reject. Such an approach is consistent with that which is likely to have been taken by the appeal court had grounds relating to sufficiency been argued at the applicant's appeal:

"Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment" (at paragraph 369 of the appeal court's opinion).

19.24 The Commission is conscious that the nature of circumstantial evidence is such that there is a often a fine line to be drawn between determining whether as a whole it satisfies the requirements of legal sufficiency, and determining whether the weight that can reasonably be applied to each adminicle of evidence is strong enough to justify conviction. In cases which include direct evidence, legal sufficiency is satisfied where there is evidence from at least one other source which can support the direct evidence. However, the test for a wholly circumstantial case requires something more than just the presence of two relevant circumstances. It also requires some assessment of the weight of the evidence, a factor which is also important in any determination of the reasonableness of the verdict.

19.25 Bearing in mind this potential for overlap, in determining the question of sufficiency in the applicant's case the Commission has not sought to assess the court's approach to the reliability or credibility of each adminicle. It has also not sought to assess whether in light of any difficulties with particular strands of evidence it was open to a reasonable court, properly directing itself, to apply weight to the inference that most supports the Crown's case. In other words the Commission has not assessed the *quality* of each piece of evidence. The approach adopted by the Commission is to take at its highest the evidence which the trial court did not expressly reject and apply to this as a whole the principles set out in the passages in *Little*, Walker and Walker and Dickson quoted above.

19.26 Earlier in this chapter the Commission listed the circumstances on which it was submitted that the applicant's conviction is based. The Commission accepts that with the addition of the evidence about the explosive device, its location on board PA103 and the supply of MST-13 timers, those circumstances broadly encapsulate the evidence relied upon by the trial court.

19.27 Before dealing with the principal question as to whether the evidence accepted by the court was sufficient to warrant the applicant's conviction, it is necessary to address three other points made in this part of the application. The first is the suggestion that the evidence accepted by the trial court does not establish any direct link between the applicant and the primary suitcase, or between the primary suitcase and the unaccompanied item transferred from KM180 to PA103A. In the Commission's view, it is not necessary to establish direct links between particular strands of the evidence. Rather, what one must do is to consider all the circumstances together, which may or may not allow indirect links to be drawn. In relation to the applicant and the primary suitcase there is, for example, an indirect link via the purchase of the clothing (see below).

19.28 The second point that requires to be addressed is the submission that the trial court went too far in drawing the inference from the miscellaneous nature of the items purchased from Mary's House that the applicant must have been aware of the purpose for which they were bought. What the trial court said at paragraph 88 of its judgment was:

> *"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."*

19.29 This passage appears shortly after the court makes reference to the applicant's visit to Malta on a coded passport between 20 and 21 December 1988. In the Commission's view, what the trial court is saying here is that, assuming the applicant purchased the items, the facts that these were established to have been within the primary suitcase and that he was at the airport two weeks later when flight KM180 took off allow it to draw the inference that he must have been aware of the purpose for which the items were being bought. The Commission considers the evidence in this respect is sufficient to permit such an inference. In the Commission's view, the trial court should not be taken in the above sentence to be saying that the miscellaneous nature of the purchases is sufficient in itself to infer that the applicant must have been aware of the purpose for which the items were being bought.

19.30 The third point is the submission that, notwithstanding the trial court's rejection of much of the Crown evidence, it still somehow managed to infer that the applicant's presence at Luqa airport was incriminatory. It is submitted that according to the judgment the drawing of this inference appears to depend on the absence of any alternative explanation. Such an approach, it is said, inverts the onus of proof in that it suggests that the applicant required to show his innocence to prevent an incriminatory inference from being drawn.

19.31 The relevant passage in paragraph 88 is as follows:

> *"It is possible to infer that this visit* [to Luqa airport] *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."*

19.32 In the Commission's view, what the trial court is saying in the first two sentences of the above passage is that it is possible to draw the inference that the applicant's visit to Luqa on 20 and 21 December was in connection with the planting of the explosive device, but that it would not have been possible to do so had an innocent explanation been given for the visit *which the court found acceptable*. The court goes on to say that it does not accept the applicant's denial that he visited Malta at that time, as stated by him in the Salinger interview. In the Commission's view, the court did not conclude that the applicant was at Luqa in connection with the planting of the explosive device simply on the basis that there was no innocent explanation for his visit. It did, of course, come to that conclusion, but it did so on the basis of all the circumstances as narrated in paragraph 89 of the judgment. Accordingly, in the Commission's view, there was no inversion of the onus of proof by the court.

19.33 The main question at issue is whether the evidence not rejected by the trial court, when taken at its highest, supports the inference, beyond reasonable doubt, that the applicant was guilty of murder. A brief indication of the evidence taken into account by the Commission in assessing this issue is given above. A fuller summary is contained in chapter 2.

19.34 In the Commission's view, it was proved at trial that PA103 was destroyed by an explosive device contained in a Toshiba RT-SF16 radio cassette recorder; that a single solder-masked MST-13 timer triggered the explosion; that the explosive device was in an unaccompanied suitcase held in container AVE 4041 within the cargo hold of the aircraft; and that the suitcase contained items which matched many of those purchased from Mary's House on the occasion described by Mr Gauci.

19.35 As regards the evidence about an unaccompanied bag from Malta, there is, in the Commission's view, a clear inference from the documentary records at Frankfurt that an unidentified, unaccompanied item travelled on KM180 and was loaded on PA103A at Frankfurt. Most of the baggage unloaded from PA103A was placed in container AVE 4041 which it was established held the primary suitcase. The Commission accepts that there is an absence of any explanation of the method by which the primary suitcase might have been placed on board flight KM180. In the Commission's view, however, the absence of such an explanation can at most be seen as a failure to prove one circumstance; it ought not to be seen as a single proved circumstance which is incompatible with the fact at issue and which results in a failure to prove that fact (see Walker and Walker, quoted above).

19.36 In the Commission's view, the latter analysis would have been correct only if evidence had been led and accepted that it was not possible for an unaccompanied bag to have been put on at Luqa undetected. As the trial court noted at paragraph 38 of its judgment, however, Wilfred Borg, the Air Malta general manager for ground operations at Luqa at the time, conceded that such a scenario might not be impossible. That being the case, the Commission does not consider it appropriate to ask in isolation whether the documentary evidence from Frankfurt can be accepted in preference to the conflicting evidence from Luqa airport. In a wholly circumstantial case such conflicting pieces of evidence must be considered in light of all the other

circumstances. In that regard, the Commission considers that evidence that clothing found to have been inside the primary suitcase was purchased in Malta some time before the bombing is capable of lending support to the Frankfurt evidence.

19.37 As regards the identification of the applicant as the purchaser of the items, Mr Gauci said in evidence that the purchaser was a Libyan who resembled the applicant "a lot". A combination of two circumstances are relevant to that identification: (i) the evidence that the purchase took place on 7 December 1988; and (ii) the evidence that on that date the applicant was not only in Sliema but staying in a hotel close to Mr Gauci's shop.

19.38 In relation to circumstance (i), Mr Gauci said that the purchase must have been about a fortnight before Christmas in 1988, that it was a midweek day, that to him midweek means Wednesday and that the Christmas decorations were being put up. His brother, Paul Gauci, had gone home to watch football on television and it was agreed by joint minute number 7 that on 23 November and 7 December 1988 there was live football broadcast by Italian Radio Television. While the weather conditions on 23 November 1988 as spoken to by Major Joseph Mifsud were consistent with Mr Gauci's evidence that a light shower occurred between 6.30pm and 7.00pm on the date of purchase, Major Misfud did not rule out the possibility that there was a brief light shower on 7 December. It was argued on behalf of the applicant at appeal that, taken together, Major Mifsud's evidence that the rain which might have fallen in Sliema on the evening of 7 December would not have been sufficient to wet the ground, and Mr Gauci's statement of 10 September 1990 in which he said that the ground was damp at the time of purchase, ruled out 7 December as the purchase date. In the Commission's view, however, taking the Crown case at its highest Major Mifsud did not express himself with sufficient certainty on this point to justify the exclusion of 7 December. Because of this the Commission does not consider that his evidence amounts to a single proved circumstance which is incompatible with the fact at issue (Walker and Walker, quoted above).

19.39 In the Commission's view, leaving aside any assessment of the *quality* of the evidence relied upon by the court to establish the date of purchase, there was sufficient in the above factors for it to reach the conclusion that the purchase took

place on 7 December 1988. Although the appeal court held that the trial court had misinterpreted the terms of joint minute number 7, in the Commission's view, given that there was no evidence that football was broadcast on television in Malta on any other dates in November or December 1988, the court was entitled to reach the view that the matches Paul Gauci had watched were shown on 23 November and 7 December 1988. Viewed in the context of a choice between those dates, Mr Gauci's evidence that the purchase must have been about a fortnight before Christmas points more to 7 December than to 23 November. His evidence that the Christmas lights were being put up at the time is also not inconsistent with 7 December 1988. Although evidence as to the weather conditions points more to 23 November than to 7 December, Major Mifsud did not rule out the possibility that the conditions described by Mr Gauci were present on the latter date.

19.40 As regards circumstance (ii), there is evidence that from 7 to 9 December 1988 the applicant stayed at the Holiday Inn, Sliema, which was approximately 200-250 yards from Mary's House.

19.41 In relation to the events on 20 and 21 December 1988, there is documentary evidence that the applicant arrived at Luqa airport at about 5.30pm on 20 December using a coded passport in the name of Abdusamad and that he stayed overnight in the Holiday Inn, Sliema, using that name. He left Malta on 21 December, again using the coded passport, and was at Luqa airport at a time when the passengers and luggage for flight KM180 from Luqa to Frankfurt were being checked in. As indicated, the Commission considers that when combined with Mr Gauci's identification of the applicant as the purchaser and the adminicles in support of 7 December 1988 as the purchase date, evidence of the applicant's movements on 20-21 December 1988 using a passport in a false name is sufficient to infer that he was aware of the purpose for which the items were being bought.

19.42 Majid gave evidence that the applicant was the head of the airline security section of the JSO until January 1987 and that Ezzadin Hinshiri, Said Rashid and Nassr Ashur were the heads of the various departments at the JSO in 1985. In addition to his using his coded passport on 20 and 21 December 1988, he had done so in August 1987 when he travelled on the same flight as Nassr Ashur, who was also

travelling on a coded passport. There was evidence that between 1985 and 1986 Mr Bollier supplied 20 samples of MST-13 timers to the Libyan military, where he dealt with, among others, Mr Hinshiri, Mr Rashid and Mr Ashur. He also gave evidence that in 1988 Mr Bollier's firm, MEBO, rented an office in its premises to ABH, a firm in which the applicant was a principal. Although none of this evidence demonstrates criminal conduct on the part of the applicant, it does establish his association with the individual who produced timers of the kind which triggered the explosion on board PA103. It also establishes his association with figures in the Libyan military and intelligence services who received a quantity of such timers in the years prior to the bombing. Mr Bollier's evidence also suggested that the applicant was involved in military procurement on behalf of the Libyan government.

19.43 In summary, the applicant, a Libyan, was identified, albeit by resemblance, as the person who purchased items found to have been inside the primary suitcase. There was evidence that the purchase took place on 7 December 1988, a date on which the applicant was in Malta staying at a hotel close to Mary's House. The applicant flew into Luqa airport on the night before the bombing and the following day returned there at a time when KM180 was checking in. Based on the Frankfurt evidence and the Maltese origin of the clothing, there was sufficient evidence to conclude that the primary suitcase was placed on board that flight. The applicant flew out of Luqa airport that morning and on both flights used a passport which was in a false name and which he never used again. He had a business relationship with Mr Bollier who sold electronic equipment to Libyan military representatives, including timers of the type which was used to trigger the explosion on board PA103. There was also evidence that he was or had been a senior member of the Libyan intelligence service and that he associated with the Libyan officials who procured the timers from Mr Bollier.

19.44 In the Commission's view, the circumstances set out above (which are those set out in paragraph 89 of the trial court's judgment), when taken at their highest, are sufficient to entitle a court or jury to be satisfied beyond reasonable doubt that the applicant was the purchaser of the items in the primary suitcase, was aware of the purpose for which these were bought, and that his visit to Malta on 20 to 21 December was connected to the ingestion of the device at Luqa airport. The Commission

believes that the coincidence of the applicant's connection to each of the various strands imbued the evidence as a whole with sufficient aptitude and coherence to justify his conviction.

19.45 For these reasons the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 20
SUBMISSIONS REGARDING
THE REASONABLENESS OF THE VERDICT

Introduction

20.1 It is alleged in the submissions that the trial court's approach to the following aspects of the evidence was unreasonable:

(1) the "Libyan assumption";
(2) the provenance of the primary suitcase;
(3) Edwin Bollier;
(4) Abdul Majid Giaka ("Majid");
(5) the rejection of the defence case; and
(6) the identification of the purchaser.

20.2 The Commission's conclusions in respect of items (1) to (5) are set out below after a summary of the applicable law. Item (6) forms part of the Commission's decision to refer the applicant's case and is therefore addressed in chapter 21. Additional submissions made in respect of the court's approach to evidence of the applicant's movements on 20 to 21 December 1988 are also taken into account in that chapter.

The applicable law

20.3 The current powers of the appeal court in relation to unreasonable verdict are contained in section 106(3)(b) of the Act which provides for an appeal on the ground of a miscarriage of justice based on the jury's having returned a verdict which no reasonable jury, properly directed, could have returned. The applicant did not rely on this provision at appeal.

20.4 In *King v HMA* 1999 SCCR 330, the first case to be heard under the new provisions, it was held that the test to be applied under section 106(3)(b) was

objective in that the court must be able to say that no reasonable jury *could* have returned a guilty verdict on the evidence before them. An appellant who relies on section 106(3)(b) must therefore establish that, on the evidence led at the trial, no reasonable jury could have been satisfied beyond reasonable doubt that he was guilty (Lord Justice General (Rodger) at pp 333-334). Although in dealing with such appeals the court is required to examine the evidence which was before the jury, in terms of *King* it is not for the court simply to substitute its 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 court might have entertained a reasonable doubt on the evidence (Lord Justice General (Rodger) at p 334).

20.5 Earlier legislation (see Criminal Appeal (Scotland) Act 1926 section 2(1)) contained similar provisions to section 106(3)(b). However, the Commission is conscious that the court has always been reluctant to allow an appeal on such a ground, taking the view that the assessment of evidence, and particularly of its weight, is a matter for the jury. The approach frequently taken by the court is that if evidence is capable of giving rise to two or more possible inferences, it is for the jury to decide which inference to draw, and that intervention is appropriate at appeal only where the inference was not a possible one in the sense that it was not open to the jury on the evidence. This was the approach taken by the appeal court in the applicant's case (see the opinion of the court at paragraph 25).

20.6 In *E v HMA* 2002 SCCR 341, however, the decision in which was issued during the hearing of the applicant's appeal, a somewhat different approach was taken. The appellant in *E* was charged with raping his daughter L between 1993 and 1995 and his daughter A between 1996 and 1997. The Crown relied on the *Moorov* doctrine for corroboration. There were inconsistencies in the various statements that the complainers had made and in their evidence. In particular, A had made no complaint until about six months after the alleged incident, when she was interviewed because of a complaint L had made. At that stage A denied that the appellant had penetrated her, but she was interviewed again after her mother had told the social work department that she had incriminated the appellant. At that interview A initially denied that the appellant had penetrated her, but then incriminated him. She also incriminated him in her evidence, but there were discrepancies between what she said

at interview and in evidence. There was no medical evidence of penetration, which she said had occurred when she and the appellant were lying on their sides. Evidence was led at trial that many children who have been the subject of abuse show no evidence of damage, and that a child may give different accounts on different occasions consistently with her evidence being reliable. The appellant was convicted of raping both girls. He appealed on the basis of, *inter alia*, section 106(3)(b).

20.7 In upholding the appeal on the above ground, the Lord Justice Clerk (Gill) reviewed the court's approach to appeals on the ground that a jury's verdict was unreasonable. In particular the Lord Justice Clerk was of the view that whatever may have been the law before 1997 when the current provisions were introduced, the court ought to interpret section 106(3)(b) "on the basis that it effected a change" (paragraph 28). In his opinion, the new provisions recognise that "even in a well-run system unreasonable verdicts can happen from time to time".

20.8 Although the decision in *E* does not overturn the rule that it is not for the High Court at appeal simply to substitute its view of the evidence for the view taken by the jury, the Lord Justice Clerk observed that "we cannot now regard the issue of reasonable doubt as being at all times within the exclusive preserve of the jury" (paragraph 29). The Lord Justice Clerk added that the collective experience of the appeal court in criminal jury trials, as counsel and as presiding judges, equips it to make a judgment about whether the jury's verdict was reasonable, and that the court should bring that experience to bear on that question "rather than interpret section 106(3)(b) out of existence by excessive deference to the judgment of the jury" (paragraph 35). Clearly in the applicant's case the "jury" comprised judges, but in the Commission's view the principles expressed by the Lord Justice Clerk apply equally to judges where they take the role of finders in fact. He also stated:

> *"[T]he court must certainly keep in mind that the jury heard and saw the witnesses, and 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"* (paragraph 31).

20.9 The Lord Justice Clerk sought also to distinguish the circumstances that prevailed in the case before him from those in *King* and *Donnelly v HMA* 2000 SCCR 861. In respect of *King* the jury had reached its verdict on an assessment of two irreconcilable lines of evidence, namely medical evidence establishing that the victim must have died before a certain time and eyewitness evidence that the victim had been seen alive after that. This, the Lord Justice Clerk said, was a classic jury question. He stated that *Donnelly* was to similar effect, whereby the defence evidence simply presented an alternative version of the facts. However, he described the case before him as a "case where the jury, before even looking at any competing version of the facts, had to consider the preliminary difficulties created by the evidence of the complainers themselves" (paragraph 33), adding:

> *"This case is quite unlike those under section 106(3)(b) that the court has had to consider hitherto. This was a case where, by reason of the Moorov doctrine, [A's] evidence underpinned the entire prosecution. [A's] credibility and her reliability were therefore crucial. We have to decide whether her evidence, looked at in the whole context that Lord McCluskey has described, could have provided a reasonable basis for a verdict of guilty beyond reasonable doubt"* (paragraph 37).

20.10 The court held (Lord Hamilton dissenting) that standing the contradictions in A's evidence; the contradictions between the statements at the two interviews; the contradictions between the account eventually given at the second interview and her evidence; her age; the alleged positions of the child and the appellant when the penetration was said to have occurred; and the complete absence of any signs on medical examination of any degree of penetration, no reasonable jury could hold that her evidence that she had been sexually penetrated was reliable, even if they thought she was trying to tell the truth in court (Lord Justice Clerk at paragraphs 40-44; Lord McCluskey at paragraph 37). Indeed, it was observed that there was no acceptable evidence that A was raped at all (Lord Justice Clerk at paragraph 41; Lord McCluskey at paragraph 35).

20.11 In the present case submissions are made about the trial court's treatment of the six different aspects of the evidence listed above and in each instance it is argued that the court's approach was unreasonable. Given the way the application has been

set out, the Commission has, for the purpose of clarity, addressed the submissions about the court's treatment of each part of the evidence, and it has commented on individual submissions where it has considered that to be necessary. The Commission recognises, however, that any finding under section 106(3)(b) must be based upon the evidence not rejected by the trial court taken as a whole. The issues dealt with in this chapter are those which the Commission does not consider warrant a reference under that section, even in light of its conclusions in chapter 21 below.

(1) The "Libyan Assumption"

Summary of the submissions

20.12 The applicant's submissions under this heading can be summarised as follows:

(i) There was no evidence from which the trial court might reasonably have assumed that the Libyan Government and its agencies were involved in terrorist activities generally, or that the Libyan Government or the JSO had the means and intention to destroy PA103 in particular. The court nevertheless made those assumptions, which provided a context in which it could interpret certain actions as nefarious (for example, the applicant's use of a coded passport), and it extended the assumptions it made about Libya (the state) to a Libyan national (the applicant), so that circumstances that were not "accused-specific" (for example, the supply of MST-13 timers to Libya) were taken to be evidence implying the applicant's involvement.

(ii) Mr Gauci's identification of the purchaser as a Libyan, taken in isolation, does not lead to a necessary inference that the plot was Libyan in origin. Yet the court joined that link to Libya with the evidence that the vast majority of MST-13 timers that MEBO produced were supplied to Libya, and concluded that "the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin". This was a "gigantic leap" in reasoning. The identification of the purchaser as Libyan does not incriminate the applicant, nor is it suggestive of the involvement of the Libyan

Government. Similarly, the supply of MST-13 timers to Libya does not incriminate the Libyan Government.

Consideration

20.13 In the Commission's view it is not entirely correct to say that there was no evidence from which the trial court might reasonably have inferred that the Libyan Government or its agencies were involved in terrorist activities generally. Leaving aside the evidence of Majid on this matter (which the court rejected) and the circumstances surrounding the arrest of a JSO officer, Mansour Omran El Saber, in Senegal on 20 February 1988 (which the court did not consider established a link between that individual and an MST-13 timer and explosives recovered on the same occasion) there was evidence that the PFLP-GC had "contacts to Libya" (Anton Van Treek: 71/8741).

20.14 As to whether the Libyan Government or the JSO had the means and intention to destroy PA103, there was evidence that an order for MST-13 timers, the kind used to trigger the explosion, had been received by Mr Bollier from a senior official in the JSO and that a substantial quantity of such timers were supplied to the offices of the Libyan secret service in Tripoli and to the Libyan Embassy in East Berlin during the course of 1985 and 1986 (23/3760-3761). There was also evidence that a quantity of clothing which matched items established to have been within the primary suitcase was purchased by a Libyan who closely resembled the applicant. In addition, there was evidence that the applicant was head of the airline security section of the JSO until January 1987.

20.15 The relevant part of the judgment is paragraph 82, where the court concluded that "the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin." This was based upon a number of circumstances including those described in the foregoing paragraph. The question raised by the submissions is whether the court's conclusion in this respect was one which no reasonable court could have reached upon the available evidence.

20.16 In the Commission's view taking into account the evidence about the random nature of the items purchased from Mary's House; that many of them were established to have been in the primary suitcase; that they were purchased by a Libyan; that a substantial number of MST-13 timers had been sold to Libya and that an unaccompanied item was transferred from KM180 to PA103A, it was not unreasonable to conclude, first, that the unaccompanied item was the primary suitcase and, secondly, that the plot was of "Libyan origin." This is not to say necessarily that the plot was hatched by the organs of the Libyan Government but simply that the plot originated in Libya. The Commission also does not consider this to have been an unreasonable context in which to consider the evidence implicating the applicant.

(2) The provenance of the primary suitcase

Summary of the submissions

20.17 According to the submissions the trial court gave no reasons in respect of:

(i) why it preferred the conclusion that the bomb was ingested at Luqa;

(ii) why it rejected the other possible points of ingestion suggested by the defence; and

(iii) its conclusion that the Crown had overcome the difficulty that there was no evidence as to how the primary suitcase was loaded on flight KM180 at Luqa.

Consideration

20.18 It is clear that in establishing that the primary suitcase began its journey at Luqa airport the trial court took into account the inference from the Frankfurt records that an unaccompanied, unidentified item had been transferred from flight KM180 (from Malta to Frankfurt) to PA103A (from Frankfurt to London Heathrow). In terms of paragraph 35 of the judgment, however, the court considered that this evidence required to be considered along with all the other evidence before a conclusion could be reached as to the point of ingestion. The court went on to consider the security

arrangements at Luqa airport and concluded that the absence of any explanation as to the method by which the primary suitcase might have been placed on board KM180 was a "major difficulty" for the Crown case and one which had to be considered along with the rest of the circumstantial evidence in the case.

20.19 Having considered the evidence establishing the possible involvement on the part of both accused, the trial court concluded at paragraph 82 that "from the evidence 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." In reaching that conclusion the court appears to have relied on the following additional circumstances:

- the evidence that with one exception the clothing in the primary suitcase was purchased in Mr Gauci's shop on 7 December 1988;

- Mr Gauci's evidence that the purchaser of the clothing was Libyan; and

- evidence that the trigger for the explosion was an MST-13 timer, a substantial quantity of which had been supplied to Libya.

20.20 The trial court's approach to this aspect of the evidence was considered by the appeal court, although not specifically in the context of an argument based on section 106(3)(b). The court's conclusion was that although paragraph 82 of the judgment did not set out matters in the best order, the trial court had nevertheless disposed of the outstanding issues. The court added:

> *"What the trial court can be seen to have undertaken* [in paragraphs 16–82] *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 at Luqa, notwithstanding the difficulty of infiltration there and the absence of any evidence about how this was achieved, because of the view it had formed about the strength of the inference which it drew from the documents*

and other evidence relating to Frankfurt, and the other circumstances which it regarded as criminative and which pointed to infiltration at Luqa" (paragraph 274).

20.21 The appeal court also addressed the argument that by assessing the question of ingestion at Luqa in the light of Mr Gauci's evidence and the evidence of the supply of MST-13 timers to Libya, the trial court had taken into account collateral issues (ie issues of no relevance to the question of whether the suitcase was ingested there). In response to that argument the Crown submitted that the JSO had a presence at Luqa airport and that several high ranking members of that organisation had placed an order for MST-13 timers, a number of which had been delivered. According to the Crown this meant that there was a link between the JSO and Luqa airport and between the JSO and the type of device used to cause the explosion.

20.22 The appeal court held that the trial court was entitled to regard evidence that the purchaser of the clothing was a Libyan and that the trigger was an MST-13 timer as part of the circumstances relevant to proving the Maltese origin of the primary suitcase. In the appeal court's view it was not necessary in a circumstantial case that every piece of material evidence should be indicative of criminal conduct, and those matters could have been regarded as collateral only if they could not on any view have been relevant to the proof of the provenance of the primary suitcase, which was clearly not so (paragraph 257).

20.23 In the Commission's view paragraph 82 of the court's judgment does not make it clear how the identification of the purchaser as Libyan and the supply of MST-13 timers to that country assist in establishing Luqa as the point of ingestion. However, as the Crown submitted at appeal, it seems likely that this was based upon evidence that the initial order for such timers was made by senior officials within the JSO and that that organisation had a presence at Luqa airport in the form of the assistant station manager of LAA.

20.24 In the Commission's view, however, a reasonable trial court, properly directed, could have concluded that Luqa airport was the point of ingestion simply on the basis of the Frankfurt records and the undisputed evidence that many of the items

established to have been within the primary suitcase were purchased in Malta. In reaching this view the Commission has taken into account Mr Borg's evidence to the effect that, though improbable, it might not have been impossible for a bag to be introduced undetected into the baggage system at Luqa. Although the Commission's finding on this issue represents a departure from the reasoning employed by the trial court, it is consistent with the objective approach to section 106(3)(b) as described by the court in *King* and in particular with the need to consider the reasonableness of the court's *verdict* as opposed to its written judgment. In light of its conclusion the Commission does not consider it necessary to assess whether the identification of the purchaser as Libyan and the supply of MST-13 timers to Libya are factors which a reasonable court could have taken into account in determining the point of ingestion.

(3) The evidence of Edwin Bollier

Summary of the submissions

20.25 The applicant's submissions under this heading can be summarised as follows:

(i) In general terms, Mr Bollier was such a fantastic witness that no reasonable jury ought to have convicted in reliance on his evidence unless this was corroborated. In certain cases a witness can be so incredible and unreliable that his evidence ought to be removed from a jury, and Mr Bollier was such a witness. The trial court was wrong to conclude that the absence of any challenge to certain aspects of Mr Bollier's evidence implied an acceptance of these by the defence. In addition, while the court indicated that it was prepared to accept Mr Bollier's evidence when *inter alia* it was supported by other sources, in some cases the court did not adhere to this approach.

(ii) The applicant's association with Mr Bollier was very weak and did not justify an inference that he was in any way connected to the supply of items used in the destruction of PA103.

(iii) Although there is evidence that MEBO supplied timers to the Libyan Government, there was no evidence that the applicant was involved in the purchase of timers. For this reason the court's reliance on the applicant's association with Mr Bollier and members of the JSO or Libyan military who purchased MST-13 timers was unwarranted.

Consideration

20.26 The trial court explained at paragraph 49 of its judgment that, despite finding Mr Bollier at times an untruthful and at other times an unreliable witness, it accepted certain parts of his evidence when this "has not been challenged and appears to have been accepted, or where it is supported from some other acceptable source." The evidence accepted by the court can be summarised as follows:

(a) Mr Bollier had had military business dealings in relation to the Libyan Government with Ezzadin Hinshiri ("Hinshiri") since the early 1980s and in about July 1985, on a visit to Tripoli, he received a request for electronic timers from Said Rashid ("Rashid") or Hinshiri;

(b) in the summer of 1985, Mr Bollier delivered two prototype MST-13 timers to the Stasi in East Berlin;

(c) in 1985 and 1986 Mr Bollier supplied 20 sample MST-13 timers to Libya in three separate batches and may have been correct when he said in evidence that this order consisted of circuit boards which were solder-masked on one side and on both;

(d) in 1986 or 1987 Mr Bollier attended tests carried out by the Libyan military involving MST-13 timers which were brought by Nassr Ashur;

(e) MEBO rented an office to ABH, a company of which the applicant and Badri Hassan ("Hassan") were principals, and the applicant and Hassan explained to Mr Bollier that they might be interested in taking a share in or having business dealings with MEBO; and

(f) Mr Bollier visited Tripoli between 18 and 20 December 1988 in order to sell a quantity of Olympus timers to the Libyan army.

20.27 It is acknowledged in the submissions that there is no authority for the proposition that a witness can be so incredible and unreliable that his evidence ought to be removed from a jury. Indeed, such a submission may run counter to the principle that a fact-finder is entitled to reject parts of a witness's evidence and accept other parts. Further, although a decision by the Crown or defence not to challenge a witness on a particular matter at trial is not necessarily to be taken as an acceptance of that matter (*King* at p 342), it may nevertheless affect the weight and value which the fact-finder places on the evidence of such a witness (see *McPherson v Copeland* 1961 JC 74; *Young v Guild* 1985 JC 27).

20.28 In relation to the court's acceptance that MEBO had business dealings with the Libyan Government since the 1980s and received a request for electronic timers from Rashid or Hinshiri in about July 1985, the Commission notes that both Mr Bollier and Mr Meister spoke to this in evidence. When Mr Meister was shown photographs of Rashid and Hinshiri (CP 313 image 11, photograph 14; and image 19, photograph 20), he identified the photographs as looking like the two men. Evidence that MEBO received an order for electronic timers in July 1985 is supported by the orders for circuit boards which MEBO placed with Thuring AG in August and October 1985. In evidence Astrid Thuring spoke to the order card relating to an order that MEBO placed with Thuring on 13 August 1985 for 20 MST-13 circuit boards (CP 402, photograph 2-575). She stated that, according to a delivery note (CP 319, image 1), Thuring supplied 24 such circuit boards on 16 August 1985. In addition, she spoke to the order card relating to an order that MEBO placed with Thuring on 8 October 1985 for 35 MST-13 circuit boards (CP 402, image 208). According to a further delivery note (CP 400, image 1), Thuring supplied 34 such circuit boards on 5 November 1985.

20.29 The Commission notes that no documentary evidence was led at trial that directly vouched Mr Bollier's evidence about the supply of MST-13 timers to Libya (although Mr Meister understood that Mr Bollier had personally delivered these in

1985: 22/3741). Accordingly, it seems that the court was prepared to accept Mr Bollier's evidence on this issue on the basis that it had not been challenged and appeared to have been accepted by the defence. Although the Commission recognises that any assessment of the reasonableness of the verdict must proceed purely on the evidence before the trial court (*King*; *Campbell v HMA* 1998 SCCR 214), the account given to the defence by Hinshiri is of assistance in understanding why no such challenge was made. In his defence precognition (see appendix) Hinshiri confirmed that he had ordered a quantity of MST-13 timers and that these had subsequently been delivered to him. A similar account was given by him when questioned by the Scottish police in Libya on 30 October 1999 (see appendix).

20.30 As to Mr Bollier's evidence that he delivered two prototype MST-13 timers to the Stasi in East Berlin in the summer of 1985, the Commission does not consider that the court's acceptance of this can assist in any argument under section 106(3)(b). His evidence on this issue potentially undermined the Crown case and was used by the defence in seeking to establish an alternative to Libya as the source of MST-13 timers (80/9575).

20.31 Mr Bollier's evidence as to the tests involving MST-13 timers carried out by the Libyan military was that these took place at a military camp in Sabha, and that several high ranking military personnel, including Nassr Ashur, were also present. Mr Bollier said that he was there for two days and that he thought it was in 1987. He saw about four MST-13 timers at that time, which he believed had been taken there by Nassr Ashur. When he was shown a photograph of Nassr Ashur (CP 413, image 1) he identified this as looking like him.

20.32 The court's basis for accepting this aspect of Mr Bollier's account was "the way he gave evidence" about the matter. This amounted to a departure from the criteria the court had applied in respect of other aspects of Mr Bollier's evidence which had been accepted where they had not been challenged or where they were supported by some other acceptable source. It is not clear from the judgment precisely what it was about the way in which Mr Bollier gave evidence on this issue that impressed the trial court, but in the Commission's view his account is detailed and precise and therefore unlikely to have been fabricated. In light of this the

Commission does not consider that Mr Bollier's evidence regarding the testing was such that no reasonable trial court could have accepted it.

20.33 The court also accepted Mr Bollier's evidence that MEBO rented an office to ABH, a company in which the applicant and Hassan were principals, and that the applicant and Hassan expressed an interest in taking a share in MEBO. It was not disputed by the defence that the applicant, along with Hassan, was a principal of ABH. Moreover, the fact that ABH rented premises from MEBO is vouched by the existence of an unsigned lease between the firms dated 3 June 1987 (DP 35, images 1 and 2); a receipt for rent received by MEBO from Hassan dated 3 March 1988 (CP 378); and a rental cheque from Hassan to MEBO dated 20 February 1989 (CP 376, item 1). That there was an intention that the two firms would do business together is vouched by an unsigned contract dated 31 June 1987 which envisaged that ABH would act as distributor for MEBO's products in Libya (CP 328).

20.34 There was also other documentary evidence vouching the association between the applicant and MEBO. Mr Meister spoke to a telex he sent to the applicant dated 2 April 1988, in which he complained about several occasions when the Libyans had failed to make payments and about difficulties he had had contacting the applicant (DP 16, document 21). He spoke also to a telex that he sent to the applicant dated 16 October 1987, which related to invoices for payments owed by ABH and by Hinshiri (DP 16, document 30). In addition, Mr Meister accepted in evidence the terms of a statement from MEBO to Hassan dated 5 August 1989 which detailed the costs of renting the office from MEBO and the use of the telex facility there (DP 16, document 12).

20.35 In relation to the court's acceptance that Mr Bollier travelled to Tripoli on 18-20 December 1988 in order to sell 40 Olympus timers to the Libyan army, the initial purchase of these timers by Mr Bollier was vouched by invoices. In particular he spoke to the invoice for 16 timers dated 5 December 1988 (CP 321, image 1) and a further invoice dated 15 December 1988 in respect of the remaining 24 timers which he had purchased separately (CP 321, image 2). Mr Bollier's visit to Tripoli was vouched by his airline ticket, which was issued on 16 December for travel on 18 December (CP 317, image 2). His account that Hassan had placed the order for 40

MST-13 timers at the end of November or start of December 1988 was vouched by Mr Meister who spoke to Mr Bollier taking the timers to Tripoli, from where he contacted Mr Meister and asked him to get in touch with Hassan. Although there was no evidence to vouch Mr Bollier's account of events when he was in Tripoli the court declined to draw the adverse inference suggested by the Crown in this connection (paragraph 46).

20.36 In summary, as much of the evidence given by Mr Bollier which the trial court deemed acceptable was supported by documentary and other evidence the Commission does not consider that the court's approach to it can be criticised. In the Commission's view the court was also entitled to accept those aspects of his evidence noted above for which there was no such support.

20.37 A further question concerns the inferences that the trial court drew from those aspects of Mr Bollier's evidence it accepted (see points (ii) and (iii), above). These were as follows:

> *"He* [the applicant] *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*" (paragraph 88).

20.38 As noted above, in listing what it considered to be the criminative circumstances against the applicant, the court included his "association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers" (paragraph 89).

20.39 In the Commission's view, given the evidence the court accepted, those inferences cannot be said to be unreasonable. It is true that there is no evidence of any direct connection between the applicant and the supply or purchase of timers and that his associations with Mr Bollier and members of the Libyan military are not in themselves indicative of his involvement in the crime. In the Commission's view, however, they were relevant background circumstances on which the trial court was entitled to rely.

(4) The evidence of Majid

Summary of the submissions

20.40 The Commission understands the applicant's submissions under this heading to be as follows:

(i) The trial court rejected Majid's evidence in all respects except his description of the organisational structure of the JSO and its personnel, but given his utter lack of credibility and reliability, the court's acceptance of his evidence, even to that limited extent, was unreasonable. In order to accept this part of Majid's evidence the court would require to have had some distinct rationale for doing so, which it did not have.

(ii) The court, in accepting Majid's evidence to the extent that it did, overlooked the limited terms of that evidence.

Consideration

20.41 The aspects of Majid's evidence which the court was prepared to accept are as follows:

(a) In 1984, Majid joined the JSO where he was initially employed in its vehicle maintenance department.

(b) In December 1985, he was appointed as assistant to the station manager of LAA at Luqa airport. In that year, the director of the central security section of the JSO was Hinshiri, the head of the operations section was Rashid, the head of special operations in the operations department was Nassr Ashur and the head of the airline security section was the applicant until January 1987 when he moved to the strategic studies institute.

(c) The co-accused was the station manager for LAA at Luqa from 1985 until about October 1988.

20.42 It is acknowledged in the submissions that a fact-finder is entitled to accept certain parts of a witness's evidence and reject others. In principle, then, the court's approach cannot be criticised. However, the issue is whether the court's decision to accept Majid's evidence in the limited terms that it did was reasonable. Relevant to this issue is whether the court had some distinct rationale for doing so.

20.43 No challenge was made at trial to Majid's evidence that he was at one time the assistant station manager of LAA at Luqa, a position normally occupied by a member of the JSO. In the Commission's view, that evidence itself provides a reasonable basis for the court's acceptance of his evidence about the organisational structure of the JSO and its personnel. Furthermore, Majid was not cross examined about the applicant's membership of the JSO nor was any challenge made at appeal to the court's acceptance of that evidence. At least part of the reason for this was that the defence was in possession of information supportive of this aspect of Majid's evidence (see chapters 18 and 27 for an account of what the applicant told his representatives at precognition).

20.44 In light of the above, the Commission considers that a reasonable court would have been entitled to accept Majid's evidence in the limited terms that the trial court did.

20.45 In relation to point (ii) above, the Commission considers that the trial court drew two inferences from Majid's evidence either alone or in combination with other evidence it accepted. The first was that the applicant would be aware, at least in general terms, of the nature of security precautions at Luqa airport. In the Commission's view, despite the distinctions that might be drawn between airline and airport security, it is difficult to view that inference as one which no reasonable trial court could have drawn. Indeed, one would be justified in supposing a degree of overlap between the two fields, given the possibility that a breach of airport security might give rise to a threat to airline security. The second inference was that the applicant, along with Hinshiri, Rashid and Nassr Ashur, was a senior official in the

JSO and was therefore linked with the individuals who Mr Bollier said had ordered a quantity of MST-13 timers or who had attended military tests involving the use of such timers. Again, the Commission does not consider that this inference can be said to be unreasonable. Although the applicant's associations with those individuals are not in themselves indicative of his involvement in the crime, they are nevertheless relevant background circumstances on which the trial court was entitled to rely.

(5) The rejection of the incrimination defence

Summary of the submissions

20.46 The applicant's submissions on this issue can be summarised as follows:

(i) The trial court considered each of the groups named in the schedule to the notice of incrimination, Parvez Taheri and the evidence about the Goben memorandum as separate issues or defences, and therefore failed to make the necessary links between the respective groups and individuals.

(ii) The court imposed a burden of proof on the defence, which is illustrated by its treatment of the evidence about Abo Talb ("Talb"). By acknowledging that the PFLP-GC had the means and intention to destroy civilian aircraft but concluding that there was no evidence linking that group to MST-13 timers, the court further inverted the onus of proof.

(iii) The court's approach to the evidence about the PFLP-GC cell in West Germany was flawed, in that it failed to give real effect to its acknowledgement that the cell had the means and intention to destroy a civil aircraft. The court failed to take into account that the cell was targeting US airlines and that it produced improvised explosive devices in the same brand of radio cassette recorder (Toshiba) as was used in the bombing of PA103. It also failed to recognise that the particular make of radio cassette recorder was a hallmark of the PFLP-GC. Instead the court relied upon particular differences between the models of radio cassette recorder. There was, however, clear evidence that Marwan Khreesat could and did introduce

bombs into a variety of electronic devices. In his defence precognition, he even speaks of having seen a twin speaker model in the boot of Dalkamoni's car. The court also relied heavily upon the make of timer used in the bombing of PA103, thereby ignoring the evidence that the supply of MST-13 timers was not confined to Libya. The court also relied on the absence of a barometric device in the bombing of PA103, whereas the evidence suggested only that such a device was not found, not that one was not used. The court thereby ignored the obvious suggestion in support of the defence case, namely that a group was involved in a plot to bomb airlines (the only possible need for a barometric device).

20.47 The submissions also refer in this context to the following comments by Professor Alan Dershowitz about the trial court's approach to the evidence:

"The court erred – as a matter of basic science, logic and common sense – in the manner in which it 'combined' or 'added up' each of the unreliable, unconvincing, problematic and equivocal items of evidence to come up with a 'sum' of proof beyond reasonable doubt."

Consideration

20.48 In relation to point (i), the court acknowledged that there was evidence that some of those in Talb's circle in Sweden associated with members of the PFLP-GC cell in West Germany. For example, the court noted that in 1988 Mohamed Al Mougrabi, Talb's brother-in-law, visited Hashem Abassi in Neuss and met Haj Hafez Kassem Dalkamoni ("Dalkamoni"), the apparent leader of the PFLP-GC cell there, at a time when Marwan Khreesat ("Khreesat") was manufacturing bombs there. In addition, Ahmed Abassi, who also lived in Uppsala, Sweden, and who knew both Talb and Mohamed Al Mougrabi, was staying with his brother Hashem in Neuss at the time of the Autumn Leaves raids. Ahmed Abassi was with Dalkamoni and Khreesat on an expedition to buy electrical components on 26 October 1988 when they were arrested by the BKA. The court also referred to evidence that at the material time the PPSF – an organisation for which Talb had worked in what he

described as military operations – and the PFLP-GC shared the same political objective (at paragraph 77).

20.49 In relation to the incriminee Parvez Taheri, the Commission notes that Mr Taylor, in his closing submissions, made clear that he was not suggesting that Mr Taheri may have been responsible for the crime charged (paragraph 72). Like the trial court, the Commission considers that this concession was correct in light of Mr Taheri's evidence. With regard to the submissions concerning the Goben memorandum, there was no evidence at trial about this and it is therefore outside the scope of this ground of review.

20.50 In relation to point (ii), the court made it clear that the notice of incrimination in no way affected the burden of proof:

> *"As with all special defences, this Notice does not in any way affect the burden of proof. That remains on the Crown throughout the trial and it is therefore for the Crown to prove beyond reasonable doubt that the accused committed the crime charged. There is therefore no onus on the Defence to prove that any of the persons referred to in the Schedule to the Notice were the perpetrators"* (paragraph 71).

20.51 It is alleged that the court inverted the onus of proof by concluding that there was no evidence linking the PFLP-GC with MST-13 timers. In the Commission's view, however, what the court was saying in this part of its judgment was simply that, having considered the circumstantial evidence against the applicant, the evidence about the incriminees did not give rise to a reasonable doubt as to his guilt.

20.52 The Commission accepts that the items found at Talb's home on 18 May 1989, including the barometer with the barometric device removed, are capable of suggesting an intention to attack civil aircraft at some point. In light of this, the Commission is doubtful as to the trial court's conclusion "that there is a great deal of suspicion as to the actings of Abo Talb and his circle, but there is no evidence to indicate that they had either the means or intention to destroy a civil aircraft in December 1988" (paragraph 81). However, against Talb's involvement in the

bombing was the fact that there was no evidence of his presence in Malta after 26 October 1988, and therefore nothing to indicate that Mr Gauci's partial identification of him as the purchaser of the clothing was correct. There was also no evidence of his presence in Malta on the date of the explosion and nothing at all to link him to MST-13 timers. Accordingly, while it is true that there was no evidence that the applicant had possession of the materials necessary to manufacture the device used to bomb PA103, nevertheless unlike the position in the cases of Talb and the other incriminees there was evidence which, if accepted, connected him to the clothing in the primary suitcase and to the men involved in the sale and purchase of MST-13 timers.

20.53 In relation to point (iii), the court acknowledged that explosives, detonators, timers, barometric devices, arms, airline timetables and seven unused Lufthansa luggage tags were recovered in the Autumn Leaves raids (paragraph 73). There was also evidence that traces of the chemicals PETN and RDX – both used in the manufacture of Semtex – were found on two sections of the luggage container in which the bomb was situated, and that Semtex was recovered during the Autumn Leaves operation. The court was also aware that in October 1988 the BKA recovered two Toshiba 453 BomBeat radio cassette players. One of these had been modified to form an explosive device and was found in the boot of Hashem Abassi's car; the other was found at residential premises in Neuss occupied by, among others, Hashem Abassi. Although the latter device had not been adapted to form an explosive device, it had certain modifications from which one could infer that it was intended to be constructed into such a device.

20.54 The court was also clearly aware that the device used to bomb PA103 was housed in a Toshiba RT-SF16 BomBeat radio cassette player. However, while Toshiba radio cassette players were recovered in the Autumn Leaves operation, it is not necessarily the case that they were a hallmark of the PFLP-GC, as is suggested in the submissions. Khreesat, in his FBI statement of November 1989 (CP 1851), which was led in evidence, stated only that he had made five devices in 1985, all housed in Toshiba 453s. However, he had then deactivated them and in October 1988 had used one to build a single device. This device was found in the boot of Hashem Abassi's car and one of the other models was the device found in Neuss. In addition, however,

the BKA also recovered a Sanyo monitor and two radio tuners all of which had been constructed into improvised explosive devices.

20.55 In any event, the device recovered during the Autumn Leaves operation was different from a Toshiba RT-SF16 BomBeat radio cassette player, in that it had one speaker, not two. In that regard, Khreesat said that he never used radio cassette players with twin speakers to convert into explosive devices (see paragraph 74 of the judgment). Khreesat's FBI statement includes the following passage:

> *"Khreesat is sure that the fifth device was also a Toshiba radio cassette recorder. When shown a catalogue of Toshiba products, Khreesat said the fifth device looked exactly like a model RT-F423 radio cassette recorder* [a single-speaker model]. *It was bronze in colour just like the model in the catalogue."*

20.56 In other words, Khreesat identified the fifth device on which he worked as being a particular single-speaker radio cassette recorder. Unlike his defence precognition (see appendix to chapter 18) his FBI statement contains no mention of there having been a twin-speaker stereo in the boot of Dalkamoni's car.

20.57 The court did not rule out potential access to MST-13 timers by parties other than Libya and the Stasi, but it noted that there was no evidence linking the PFLP-GC cell in West Germany to such timers. Indeed, there was no evidence that such timers were in any other hands than Libya or the Stasi, except for the two Togo timers, which were obtained from the US and French authorities and produced at trial, and the Senegal timer, which the court wrongly stated was handed over to the Scottish police in 1999 (see chapter 8 above).

20.58 In relation to the submission that the evidence suggested only that a barometric device was not found, rather than that one had not been used, the court's conclusion was as follows:

> *"On the evidence which we heard we are satisfied that the explosive device which destroyed PA103 was triggered by an MST-13 timer alone and that neither an ice-cube timer nor any barometric device played any part in it"* (paragraph 74).

20.59 That conclusion was based on the evidence of Allen Feraday of RARDE, and of John Orkin, a CIA officer whose job it was to analyse technical devices used by terrorist organisations. Mr Feraday spoke to section 10.2 of the RARDE report:

> *"The improvised mechanism of the explosive device included a proprietary long delay electronic timer type 'MST-13' manufactured by the MEBO company of Switzerland. Such a versatile long delay timer would not require any further actuation devices, such as a pressure operated switch* [ie a barometric device]*, in order to construct a viable improvised explosive device capable of repeated flights before detonation after a preset time. The 'MST-13' timer has previously been used in improvised explosive devices"* (21/3269).

20.60 However, when Mr Keen questioned Mr Feraday about the device recovered in the Autumn Leaves operation, the following exchange took place:

> *Q. If you wanted a longer time delay, or if you wanted to be able to set the time delay in the Toshiba bomb once it was constructed, the simple way of doing that would be to remove the relatively simple timing device you saw and substitute for it a more sophisticated timing device, such as a MEBO MST-13; is that correct, Mr. Feraday?*
>
> *A. Yes, sir…* (21/3347-3348).

20.61 Mr Orkin stated in evidence that an MST-13 timer would provide up to almost 10,000 hours' delay, as compared with less than an hour for an ice cube timer. He also said that an MST-13 would be far more accurate than an ice-cube timer, because it was crystal-controlled. An MST-13 timer would also be more stable than an ice-cube timer. According to Mr Orkin the inherent unpredictability of ice-cube timers made them very difficult to use. Mr Orkin's only knowledge of occasions when an ice-cube timer had been used in conjunction with another device, such as a barometer, was the device recovered in the Autumn Leaves operation. He explained that the purpose of using an ice-cube timer in conjunction with a barometric device was to guarantee that the target, an aeroplane, was airborne before the timer was

started. When he was asked why an ice-cube timer on its own would not be suitable for that purpose, he said that because of the time delay on an ice-cube timer, there probably would be insufficient time for the aircraft to become airborne before the timer triggered the explosion (71/8804-8825).

20.62 Therefore, according to Mr Feraday, while an MST-13 timer could be used in conjunction with a barometric device it did not require to be so used. Likewise, in terms of Mr Orkin's evidence, a barometric device was not required. Clearly a barometer would have guaranteed that the bomb exploded when the plane was airborne, but there was no evidence that one was used, and it was not an essential component of the device that destroyed PA103. In light of this evidence as a whole, the Commission does not consider that the trial court's conclusion that an MST-13 timer alone triggered the explosion was one which no reasonable trial court could have drawn.

20.63 In conclusion, the Commission considers that the relevance to PA103 of the evidence arising from the Autumn Leaves operation is undeniable. This was particularly so given Khreesat's account that the cell was in possession of a Pan Am timetable, that it used Toshiba radio cassette recorders to create improved explosive devices and that the cell was based partly in Frankfurt, from where PA103A departed. In addition the evidence relating to the movements of some of the incriminees in Malta during October and December 1988 are particularly suspicious (see joint minute number 11). In these circumstances, the Commission has some doubt as to the trial court's conclusion that: "While no doubt organisations such as the PFLP-GC and 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" (paragraph 82). In the Commission's view, there was *some* evidence that *could* support an inference of involvement by one or both of those groups.

20.64 However, the question for the trial court was whether the evidence about the incriminees, by itself or in conjunction with other evidence, gave rise to a reasonable doubt as to the guilt of the applicant. In the Commission's view, the evidence concerning the incriminees goes some way to providing an alternative explanation as

to the person or persons who perpetrated the crime (as in *Donnelly*). However, such evidence, even taken at its highest, does not undermine the body of evidence against the applicant. In particular, it has no effect upon Mr Gauci's evidence that the applicant resembled the purchaser of the clothing; or evidence of his presence at Luqa airport on 21 December 1988 on a coded passport at a time when the explosive device would have been placed on board KM180; or evidence of his association with the seller and purchasers of MST-13 timers. In these circumstances the Commission does not consider that the trial court's rejection of the incrimination evidence renders the verdict one that no reasonable court could have returned.

Conclusion

20.65 In the Commission's view, none of the matters raised on behalf of the applicant under grounds (1) to (5) above is such as to cast doubt upon the reasonableness of the verdict in terms of section 106(3)(b). The Commission's conclusions in respect of ground (6), which concerns the trial court's approach to Mr Gauci's identification evidence and the date of purchase, are set out in the next chapter.

CHAPTER 21
"UNREASONABLE VERDICT"

Introduction

21.1 In a substantial portion of his submissions the applicant seeks to demonstrate under section 106(3)(b) of the Act that the verdict in his case was one which no reasonable trial court, properly directed, could have returned. Many of the submissions made under this heading have been addressed in chapter 20. In this chapter the Commission sets out its conclusions in respect of grounds concerning the approach taken by the trial court to Mr Gauci's identification of the applicant as the purchaser and to its finding as to the date of purchase.

21.2 The principles which the Commission has applied in assessing this ground are set out in chapter 20 and are derived from the decisions in *King v HMA* 1999 SCCR 330 and *E v HMA* 2002 SCCR 341. For present purposes they can be summarised as follows:

- The test under section 106(3)(b) is objective and an appellant who relies upon it must establish that, on the evidence led at trial, no reasonable jury *could* have been satisfied beyond reasonable doubt that he was guilty (*King* at p 333);

- A miscarriage of justice is not identified simply because, in any given case, the court might have entertained a reasonable doubt on the evidence (*King* at p 334);

- In light of section 106(3)(b) the issue of reasonable doubt is not at all times within the "exclusive preserve" of the jury and the court has to assess the reasonableness of the verdict with the benefit of its collective knowledge and experience (*E* at p 351);

- In making that assessment the court must keep in mind that the jury saw and heard 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 (*E* at p 352).

The applicant's submissions

21.3 The following is a broad summary of the applicant's submissions:

(i) Mr Gauci's police statements, when viewed with his evidence at the trial, demonstrate the poor quality of his identifications of the applicant as the purchaser which, in any event, were not positive identifications;

(ii) Mr Gauci's identification of the applicant was further undermined because he identified others as the purchaser;

(iii) the manner in which the identification parade was conducted was unfair;

(iv) Mr Gauci's dock identification of the applicant was unfair and incompatible with the applicant's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention");

(v) the reliability of the "Libyan identification" was questionable;

(vi) the trial court failed to direct itself properly on matters relating to identification evidence; and

(vii) the inference the trial court drew about the date of purchase was unreasonable.

21.4 Standing those matters it is submitted that the inference drawn by the trial court that the applicant was the purchaser of the items was unreasonable.

21.5 The approach taken in this chapter is to consider each of the applicant's submissions in turn, highlight those aspects which the Commission considers to be significant and in the concluding part of the chapter assess how these might affect the reasonableness of the verdict, applying the principles set out above.

(i) The quality of Mr Gauci's identification of the applicant

21.6 According to the submissions Mr Gauci's prior statements demonstrate the poor quality of his identification evidence. Reference is made in particular to Mr Gauci's initial description of the purchaser's height and age which it is said is inconsistent with the applicant's height and age at the material time.

21.7 Mr Gauci was referred in evidence to various police statements in which he had given descriptions of the purchaser. It is worth setting out the relevant passages of his evidence in full.

Examination in chief

Q. What sort of build did [the purchaser] *have?*

A. I'm not an expert on these things. I think he was below six feet. I'm not an expert on these things. I can't say.

Q. What age would you say he was?

A. I said before, below six – under 60. I don't have experience – I don't have experience on height or age (31/4752).

Q. Does the statement then read as follows, that it was taken on the 14th of September 1989, at the police headquarters, and it states: That at about 7.25 p.m., on Thursday, 14 September 1989, I went to police headquarters, Floriana, along with two police officers, Detective Chief Inspector Bell and Inspector Scicluna. It had been explained to me that the officers wished me to look at photographs to see if I could pick out anyone in the photographs as the man I sold

the clothing to in November or December 1988 and had given a description of to the police. I agreed to attend and look at the photographs. When I arrived at the police office, I was taken to a room. There was [sic] *four officers present in the room, and they are named. I was then shown two cards of photographs which had a total of 19 photographs thereon. I identified a photograph of a man in one of the cards* [a Mohammed Salem, born 1956]. *This photograph is similar to the man who bought the clothing. The man in the photograph I identified is too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who bought the clothing.*

I wonder if we could have on the screen at this point Production 426. Do we see in the bottom right-hand corner of the screen your signature?

A. Yes.

Q. And do we see the date, 14/9/89?

A. Yes.

Q. We can see that on that particular sheet there are five photographs along the top and four below. And do we see that you have signed the second photograph from the left in the top row? Do we see that?

A. Yes. Yes.

Q. And is that the photograph of the man that you've been referring to in this statement, of a man that is similar to the man who bought the clothing, but you said that he was too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who had bought the clothing. Is that right?

A. Yes, something like that. Yes. I thought he was a little bit young from the photo. He didn't look as young as that, the chap who bought the stuff from me (31/4757-4758).

Q. *The statement* [of 15 February 1991, which relates to Mr Gauci being shown a card containing photographs of several individuals including one of the applicant] *goes on to say: I looked at every photograph on the card, and I counted a total of 12 photographs on the card. The first impression I had was that all 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 to try and allow for any age difference. I then pointed out one of the photographs, and I later counted the photographs from the left as number 1 to the photograph at number 8* [the applicant].

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 in his 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 8 resembles the man who bought the clothing, but it is younger. I was asked to sign my name across the top left side of the photograph to indicate that this was the photograph I had identified to the police. I signed the photograph. I also signed a label for the card containing the photographs…

… The photograph at the right-hand end has your signature in the corner. Do you see that?

A. *Yes. Yes.*

Q. *Is that the photograph to which you had been referring?*

A. *Yes…*

Q. *The statement goes on to say: Mr Bell wrote down the statement for me. I can only say that of all the photographs I have been shown, this photograph 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.*

And what you said about this photograph in this statement at the time, was that the truth?

A. Yes, I have signed it, too. Yes, number 8.

Q. And when you said that this was 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, is that also the truth?

A. Of course. He didn't have such long hair, either. His hair wasn't so large (31/4773–4774).

Cross examination

Q. ... But let's look at the description [in Mr Gauci's statement of 1 September 1989]. *He was about six foot or more in height. Yes?*

A. I always said six foot, not more than six feet (31/4789).

Q. All right. Now, you, in the course of that statement [of 13 September 1989], *tell us some further information about the man. What you say is, and listen carefully if you would to me, please: I think the man I described would be about size 16 and a half or 17-inch collar. I am reading line 25. I think the man I described would be about size 16 and a half or 17-inch collar?*

A. Because that was the size of the shirts he took, he bought.

Q. I understand. Carrying on with the information that you are giving the police, you say this: He was about 50 years of age, and I think the age of the man in the photofit is between 45 and 50, which would be – which is just about right. Do you see that? So, in terms of the description, you've given a description as best you can and being as honest you can on the 1st of September of 1989, you were able to add two further details on the 13th of September, these details being the

man's collar size and his age. And his age you describe as about 50 years of age (31/4796-4797).

Q. I think you were seen again by Detective Chief Inspector Bell on the 14th of September 1989 in the evening… Now, you identified a photograph of a man [Mohammed Salem] *in one of the cards you were shown, and you indicated that the photograph was similar to the man who bought the clothing, at the foot of page 1. But you qualified it at the top of page 2: The man in the photograph I identified is too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who bought the clothing. Is that right?*

A. Maybe (31/4801).

Q. All right. Now, I want to look at the middle of page 3 [of Mr Gauci's statement of 10 September 1990]. *Well, let's start at the top of page 3, just for completeness. You are asked there about the description: I've been asked to go over the description of the man, and the description is exactly the same. I would say he was about 50 years old and I am positive he was a Libyan…* (31/4802).

Consideration

21.8 The Commission notes that at the identification parade the applicant's height was measured at 5 feet, 8 inches, and that in December 1988 he was 36 years old. Mr Gauci's descriptions of the purchaser's age in his police statements ("about 50" and "between 45 and 50") and of his height ("about 6 foot or more") are therefore markedly different from the applicant's age at the time of purchase and his height. This was acknowledged by the trial court which described these inconsistencies as "a substantial discrepancy" (at paragraph 68 of the judgment). The Commission shares that view and considers the inconsistencies to be significant in any assessment of the reliability of Mr Gauci's identification of the applicant as the purchaser. The Commission returns to this issue in the concluding part of this chapter.

21.9 In the Commission's view the terms of Mr Gauci's statements of 15 February 1991 and 14 September 1989 quoted above are of little assistance in assessing his evidence about the age of the purchaser. In the former statement he said that the applicant, as pictured in the photograph shown to him, was "in his 30 years" and that he "would perhaps have to look about 10 years or more older" to look like the purchaser. However, while it is known that the same photograph appears in a passport issued to the applicant in 1986 (and indeed in an application for an entry visa to Czechoslovakia in connection with a planned visit there in June 1985) there was no evidence at trial as to when that photograph was taken (see paragraph 294 of the appeal court's opinion). The same applies to Mohammed Salem's photograph which was shown to Mr Gauci by police on 14 September 1989 and about which Mr Gauci said that he would look like the purchaser if he was older by about 20 years. Although it is known that Mr Salem was born in 1956 there was no evidence led as to his age at the time the photograph was taken.

21.10 A further submission under this heading is that Mr Gauci's identification of the applicant is tantamount to his saying that the applicant, though he looks like the purchaser, is not the purchaser. Reference is made in this connection to *Macdonald v HMA* 1997 SCCR 116. The accounts given by Mr Gauci in his statements and in evidence are detailed above. In the Commission's view it is difficult to maintain that Mr Gauci was attempting to convey in these that the applicant, while looking like the purchaser, was not him. Rather it seems that the qualifications expressed by Mr Gauci are simply an indication of the uncertainty in his identification of the applicant.

(ii) Mr Gauci's identification of others

21.11 The passages in Mr Gauci's evidence relating to his identification of Mohammed Salem as similar to the purchaser are noted above. Mr Gauci also identified the incriminee Abo Talb ("Talb") on a number of occasions. The following are the relevant passages of his evidence:

Examination in chief

Q. Do you remember there being an article in the newspaper [an edition of *The Sunday Times* which Mr Gauci saw at the end of 1989 or the beginning of 1990] *about the Lockerbie disaster?*

A. Yes. Yes. But they were two people, not one person alone, I remember.

Q. And did you tell the police about looking at that newspaper?

A. Yes.

Q. I wonder if you could look please at Production 1833 [the newspaper article in question]*... Now we can see a photograph which has the word "bomber" across it, and we can see a photograph of wreckage below… When the article is opened up, you can see that in the top right-hand corner there is a photograph of a second man with the word "bomber" across it. Do you see these?*

A. Yes. Yes.

Q. And as you said a moment or two ago, there were indeed two photographs of men in this article?

A. Yes. Yes.

Q. When you saw the photographs of men in this article, what did you think about them? ...

A. I thought it was the one on this side, I thought. That was the man who bought articles from me.

Q. Now, when you say "on this side", we can see two photographs, one on the right-hand side of the screen and one on the left-hand side of the screen. Which one are you referring to?

A. To the right. The one on this side. On the right [Talb].

Q. What was it about that man's photograph that made you think he looked similar to the man who bought the clothes?

Q. [Following an objection by counsel for the applicant] *Mr Gauci, what was it about the photograph that made you think that was the man who bought the articles from you?*

A. He resembled – he resembled him, didn't he?

Q. In what way?

A. His face and his hair was the way it appeared to me (31/4767–4769).

Q. Turn to page 7, please. And if I remind you that this was a statement taken on the 10th of September 1990, on page 7, at line 11 of the page, the police have noted you as saying: I have been shown many photographs over the last year, but I have never seen a photograph of the man who bought the clothing.

And when you said that in September of 1990, was that the truth?

A. Yes, at that time, that was what I thought it was. I saw that in photos and ... (31/4770).

21.12 The advocate depute also referred Mr Gauci to his statement of 15 February 1991, in which he said that the photograph of the applicant was the only photograph he had seen which was really similar to the purchaser, other than the one his brother showed him. The photograph shown to Mr Gauci by his brother was that contained in *The Sunday Times* article referred to above.

Cross examination

> *Q. Do you recollect looking at this production* [1833: the article in *The Sunday Times* which contained a photograph of Talb] *earlier today in your evidence?*
>
> *A. Yes. Yes, I do.*
>
> *Q. And these are the photographs that were shown to you by your brother, are they not?*
>
> *A. Yes.*
>
> *Q. And you identified the photograph on the right of the two photographs in respect of the man who came into the shop. Do you recollect that?*
>
> *A. Yes. He was* [sic] *resembles him a lot. He resembles him a lot* (31/4829).

The appeal court's approach

21.13 At appeal it was argued by counsel that Mr Gauci's identifications of Talb and Salem from photographs undermined his identification of the applicant by photograph. In rejecting this argument the appeal court said the following:

> *"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"* (paragraph 292).

Consideration

21.14 In the Commission's view the fact that Mr Gauci identified other individuals as resembling the purchaser does not in itself render the court's acceptance of his

partial identification of the applicant as unreasonable in terms of section 106(3)(b). It might have been different if Mr Gauci's identifications of the applicant and others had all been positive as clearly this would reflect upon his reliability given that there was only one purchaser. However, it seems to the Commission that it is of the nature of resemblance identifications that they can be made in respect of more than one person.

(iii) The identification parade

21.15 The applicant's submissions on this issue are to the effect that because of the length of time between the purchase and the parade; the fact that in late 1998 or early 1999 Mr Gauci was shown a photograph of the applicant published in *Focus* magazine; the prejudicial pre-trial publicity; and the composition of the parade itself (it did not include any other Libyans and only two of the stand-ins were of a similar age to the applicant), Mr Gauci's identification of the applicant at the parade is unreliable.

Consideration

21.16 The identification parade took place on 13 April 1999 and was conducted by Inspector Brian Wilson who spoke in evidence to the contents of the parade report (32/4898-4900). Before Mr Gauci viewed the parade, Inspector Wilson read to him the following instructions:

> *"The man whom you referred to in your statement to police entered your shop premises, Mary's House, 63 Tower Road, Sliema, Malta, midweek prior to 10 December 1988 and purchased clothing and an umbrella, may or may not be here, but, if you see him, tell me his number."*

21.17 Mr Gauci's response, which was given by him in English, was noted in the following terms:

> *"Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5."*

21.18 Number 5 was the position adopted by the applicant. Inspector Wilson noted in the parade report that the applicant was 47 years old, 5 feet 8 inches tall, of stocky build, with dark curly hair. Prior to the commencement of the parade the applicant's solicitor Mr Duff took issue with the inclusion of four stand-ins by reason of age. He also made the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten 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;*

- *"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;*

- *"Finally, in my view, the stand-ins available in the original pool of 11 were 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"* (32/4899-4900).

21.19 In evidence Inspector Wilson stated that the four stand-ins to whom Mr Duff had objected were removed, but that he had taken no action in respect of the remaining objections other than noting them on the appropriate forms.

21.20 In relation to the period of time between the purchase and the parade, Scots law has always recognised the importance of identification soon after the event in question (see Alison: *Practice of the Criminal Law in Scotland* at p 627; Dickson on Evidence (2nd ed) Vol II, paragraph 263; the Thomson Committee *Criminal Procedure in Scotland* Cmnd 6218 (1975) at paragraph 46.10).

21.21 In the present case the length of time between the purchase and the parade was, from the Crown's perspective, unavoidable and the parade took place as soon as was practicable following the applicant's arrest. That said, the period involved was extraordinary and in the Commission's view raises doubts as to the reliability of Mr Gauci's identification of the applicant during those proceedings.

21.22 As noted above, in late 1998 or early 1999 Mr Gauci was shown a photograph of the applicant published in *Focus* magazine. In evidence Mr Gauci said that he had taken this photograph to a Maltese police officer, Mr Scicluna, and had told him something like "This chap looks like the man who bought the articles from me." Mr Gauci added that the purchaser's hair was much shorter than the hair of the man shown in the photograph and that he was not wearing glasses.

21.23 The appeal court made the following observations in respect of this matter:

> *"Mr Taylor submitted that Mr Gauci might have been influenced in his identification by having seen the appellant's photograph in the magazine not long before the identification parade was held. However, the defence must have been aware that Mr Gauci had seen the magazine containing the appellant's photograph. If it was going to be suggested that Mr Gauci's identification at the identification parade and in court had been influenced by seeing the photograph of the appellant in the magazine, then that should have been put to Mr Gauci in cross-examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci in cross-examination, but it does not*

appear that the defence sought directly to challenge his evidence that the appellant resembled the purchaser of the clothes" (paragraph 302).

21.24 At the time of the applicant's trial the conduct of identification parades was regulated by guidelines issued by the Scottish Home and Health Department ("SHHD"), paragraph 31 of which is in the following terms:

"Care should be taken that any witness who has identified a suspected person by his photograph and who is subsequently called upon to identify that person on his apprehension is not again shown the photograph before identification proceedings" (a similar provision is contained in the current guidelines: *Lord Advocate's Guidelines to Chief Constables on the Conduct of Identification Procedures* (2007) at p 6).

21.25 Clearly the purpose of this provision is to avoid the situation in which a witness, on attending the parade, identifies the person he recalls from the photograph, rather than the person involved in the incident in question.

21.26 Paragraph 23 of the SHHD guidelines is as follows:

"It is essential that the witnesses who are to view the parade do not at any time have an opportunity of seeing the suspect or accused or the other parade members" (an identical provision is contained at p 20 of the current guidelines).

21.27 While this provision relates solely to the conduct of an identification parade, in the Commission's view the risk it seeks to avoid applies equally to situations in which a witness has been exposed to images of the accused in the media.

21.28 In the Commission's view, evidence that Mr Gauci was shown the photograph of the applicant in *Focus* magazine in relatively close proximity to the parade, however innocently – and notwithstanding that the defence did not challenge Mr Gauci on that point – raises a strong possibility that it influenced his identification at those proceedings.

21.29 As to the question of prejudicial publicity in general, as the appeal court observed, even if photographs of the applicant had been published in the media across the world, there was no evidence that Mr Gauci had seen any of them other than that contained in *Focus* magazine. The extent of any other prejudicial pre-trial publicity is therefore not a matter which can be considered in any assessment of the reasonableness of the verdict (*King*; *E*; *Campbell v HMA* 1998 SCCR 214).

21.30 As to the composition of the parade the SHHD guidelines contain the following provision:

> *"The suspect or accused should be placed beside a person of similar age, height, dress and general appearance. It is more important that the stand-ins should resemble the suspect or accused than that they should be like any description given by witnesses"* (at paragraph 10; again, a similar provision is contained in the current guidelines at p 18).

21.31 As noted earlier the evidence before the court was that Mr Duff had made specific objections to the inclusion of four stand-ins by reason of the differences in age between them and the applicant. Those stand-ins were consequently removed from the pool. There was also evidence of a further objection to the effect that none of the available stand-ins was sufficiently similar to the applicant in terms of age and ethnic background. However, there was no evidence as to the similarity or otherwise of the remaining stand-ins to the applicant and no evidence that only two were of similar age to him. Accordingly the Commission does not consider that this aspect of the parade can form part of its assessment of the verdict under section 106(3)(b).

21.32 In summary, the Commission considers that the extraordinary length of time between the date of purchase and the parade and the evidence of Mr Gauci's exposure to the photograph of the applicant in *Focus* magazine in relatively close proximity to the parade (indeed, closer than the trial court appears to have believed: see chapter 22 below) raises doubts as to the reliability of Mr Gauci's identification of the applicant at that time. The Commission returns to these issues in the concluding part of this chapter.

(iv) The dock identification

21.33 It is alleged in the submissions that dock identification evidence is, in itself, objectionable as unfair and is so unreliable that no reasonable jury could rely upon it for conviction. No authority is cited for this proposition but reference is made to several cases which were awaiting judgment by the High Court at the time the submissions were made. One of those cases, *Holland v HMA* 2005 SCCR 417, has since been heard by the Privy Council. The submissions highlight that the period between the purchase and the trial was extreme. It is also alleged that the advocate depute "led" Mr Gauci to his dock identification in that before being asked to identify the applicant in court Mr Gauci was first shown the photographs of the applicant which he had previously identified including the one published in *Focus* magazine. It is submitted that such an approach rendered the dock identification both inadmissible and meaningless in terms of its quality and reliability.

Consideration

21.34 It is worth setting out the trial court's conclusions in respect of Mr Gauci's parade and dock identifications:

> *"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 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"* (at paragraph 69).

21.35 In *Holland* the Privy Council held that the evidence of a witness who identifies an accused in the dock is not by its nature so unfair as to be incompatible in

all cases with the accused's right to a fair trial under article 6 of the Convention. It was also held that "except perhaps in an extreme case" there was no basis, either in domestic law or in the Convention, for regarding evidence of such an identification as inadmissible per se. In *Holland* the Privy Council was primarily addressing the question of whether the dock identification in that particular case was compatible with the appellant's article 6 rights. It was not dealing with a case, like the present one, in which it is alleged that the trial court's acceptance of such evidence resulted in a verdict which no reasonable trial court, properly directed, could have returned. The Privy Council also made clear in *Holland* that it was concerned only with cases in which identification is a live issue at the trial and where the Crown witnesses who identify the accused in court have previously failed to pick him out at an identification parade. As explained above, however, the latter consideration does not apply in the present case. Not only did Mr Gauci pick out the applicant at the identification parade, he also selected his photograph from a total of twelve shown to him by the police on 15 February 1991. While none of these identifications was positive, neither was his dock identification. In these circumstances although the decision in *Holland* is of assistance in highlighting the risks associated with dock identification evidence, its facts are perhaps distinguishable from those of the present case.

21.36 Nevertheless, for the same reasons as it doubts the reliability of Mr Gauci's identification of the applicant at the parade, the Commission also has significant doubts as to the reliability of his later identification of the applicant in court. In the Commission's view that identification is further undermined by the highly suggestive context in which it took place and by the manner in which Mr Gauci's evidence on the matter was taken by the Crown. In particular, given the risk that Mr Gauci's identification of the applicant might be affected by his exposure to the photograph in *Focus* magazine it is difficult to understand why the advocate depute considered it appropriate to show him the same photograph prior to asking him whether he could see the purchaser in court (see chapter 18 for the Commission's conclusions on the absence of any objection to this by the defence). It might be said that in the circumstances of this case the dock identification was simply a formality and that the important factor was Mr Gauci's identification of the applicant from a photograph on 15 February 1991. However, it is clear from the passage in the judgment quoted above that the trial court relied not only upon the photographic identification but also

those made at the parade and in court. It is also clear that the Crown went to some lengths in obtaining the dock identification (see Mr Gauci's evidence at 31/4777-4778).

21.37 In conclusion, given the extraordinary period of time between the purchase and the trial, Mr Gauci's exposure to the photograph in *Focus* magazine, the inherent risks associated with dock identifications and the manner in which this aspect of Mr Gauci's evidence was led by the Crown, the Commission has significant doubts as to the reliability of Mr Gauci's identification of the applicant in court. The Commission returns to this issue in the concluding part of this chapter.

(v) The "Libyan" identification

21.38 It is submitted that Mr Gauci's identification of the purchaser as Libyan is "questionable". In particular it is alleged that although it was not raised in evidence "all persons of Arab extraction are commonly referred to by the Maltese as 'Libyans'" and that this is a generic term. In addition it is said that the basis for this aspect of Mr Gauci's evidence was not fully examined at trial. For example it was established by counsel for the co-accused that Mr Gauci did not remember the languages in which he and the purchaser had spoken, but in terms of his statement of 1 September 1989 Mr Gauci's only means of identifying the purchaser as Libyan was the language used by him. It is submitted that these factors cast serious doubt upon Mr Gauci's identification of the purchaser's nationality. The submissions also appear to criticise the advocate depute who throughout his questioning of Mr Gauci continually referred to the purchaser as "the Libyan".

21.39 In order to consider these matters it is necessary to set out the relevant passages in Mr Gauci's evidence and the trial court's conclusions in this connection.

Examination in chief

Q. Did you recognise [the purchaser's] *nationality?*

A. Yes.

Q. What nationality was it?

A. To me he was a Libyan.

Q. Are you familiar, from the experience in your shop and in Malta, with Libyans?

A. Many come, and I recognise them (31/4731).

Cross examination by Mr Taylor

Q. ... In this statement [Mr Gauci's statement of 1 September 1989] *you told Mr. Bell… 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. I can tell the difference between Libyans and Tunisians when I speak to them for a while. Tunisians often start speaking French if you talk to them for a while…* (31/4789-4790).

21.40 The above passage was not put to Mr Gauci for comment.

Q. ... Now, I want to look at the middle of page 3 [of Mr Gauci's statement of 10 September 1990]. *Well, let's start at the top of page 3, just for completeness. You are asked there about the description: I've been asked to go over the description of the man, and the description is exactly the same. I would say he was about 50 years old and I am positive he was a Libyan* (31/4802).

21.41 Again, the above passage was not put to Mr Gauci for comment.

Q. ... There are Arabs in North Africa who are former colonists of the French and who therefore tend to speak French as a second language rather than English; isn't that right?

A. Algiers and Tunisia, yes. Italians – Libyans sometimes talk English in the same way as we do – Maltese, I mean.

Q. And Egyptians? …

Q. Would you mind saying that again?

A. That we recognise Egyptians. Obviously, they speak different from Libyans. My own experience, I can distinguish between Libyans and Egyptians.

Q. But you are not an expert? In Maltese.

A. I am not an expert, obviously.

Q. As a matter of interest, do you speak Arabic yourself?

A. I can manage.

Q. And on the day of the clothing purchase, was the conversation in English, or in Arabic?

A. In both languages (31/4823).

Cross examination by Mr Keen

Q. The man who came into your shop to buy the clothes that you have been talking about spoke to you in Arabic, or in English, or in Maltese?

A. I believe we spoke Maltese and Arabic that day. That's 11 years ago. That's the way I recollect we spoke.

Q. And yet just a moment ago, you recollected that you spoke in Arabic and English, Mr Gauci. Would it be fair to say that you in fact have no recollection of the conversation or the language which was employed?

A. Well, exactly. Exactly. All these years – I mean, you can't remember everything precisely, but that's – most of the time that's the way we speak with them, in our language and their language, and we understand each other quite well. We even have the same sort of character. We get on well together.

Q. So if the man who came into the shop to buy the clothes was an Arab, you believe you would have spoken to him in a mixture of Arabic and Maltese; is that the position, Mr Gauci?

A. That's the way we speak to them most of the time. That's the way I – that's what I do, at least. I – I look – I try and see what they prefer…

Q. So you might have spoken to this customer in Arabic, or in Maltese, or in English, or in a mixture of these languages; is that fair, Mr Gauci?

A. Yes, it could be. Yes (31/4824-4826).

The trial court's approach

"We are satisfied that on two matters [Mr Gauci] *was entirely reliable, namely the list of clothing that he sold and the fact the purchaser was a Libyan"* (paragraph 67).

Consideration

21.42 In the Commission's view no criticism can be attached to the advocate depute for his use of the term "the Libyan" in his questioning of Mr Gauci. He did so only after Mr Gauci had himself referred to the purchaser as being Libyan and his approach simply reflected the contents of Mr Gauci's Crown precognition (see appendix to chapter 24) in which the term appears throughout.

21.43 According to the prior statements put to him in evidence it appears that Mr Gauci's basis for identifying the purchaser as Libyan was that he was of Arab

appearance and spoke "Libyan". Strictly speaking, however, there is no such language and it is therefore doubtful that this is a sound basis in itself for accepting his evidence on the point. It is also notable that in terms of his statement of 1 September 1989, to which he was referred in evidence, Mr Gauci's apparent ability to distinguish Tunisians from Libyans was based not upon the latter speaking "Libyan" but rather that Tunisians often start speaking French "if you talk to them for a while." In any event the fact that in cross examination Mr Gauci was unable to recall the languages in which he and the purchaser had spoken tends to undermine any suggestion that his identification of Libyan nationality was based on the purchaser's language. Although in cross examination Mr Gauci commented that Egyptians "[o]bviously speak different from Libyans", again it is not clear from Mr Gauci's evidence precisely how they do so.

21.44 Despite these concerns the Commission does not consider that the trial court's acceptance of the Libyan identification can be said to have been unreasonable, although it perhaps went too far in finding Mr Gauci's evidence on the point "entirely reliable". From the court's perspective Mr Gauci was firm in his recollection of the purchaser's nationality not only in examination in chief, but also in the prior statements to which he was referred in cross examination. He also appeared from his evidence to have some experience of dealing with Libyans. Furthermore, although the matter was explored to some extent in cross examination by Mr Taylor and Mr Keen there does not appear to have been any serious attempt to undermine Mr Gauci's evidence in this connection.

21.45 Further consideration of issues arising from the Libyan identification is contained in chapter 26.

(vi) The trial court's alleged failure to direct itself on identification evidence

21.46 Although this ground is not presented under section 106(3)(b) it is appropriate to consider it under this heading.

21.47 It is submitted that the court had no apparent regard to the extraordinary period of time which had elapsed since the purchase of the clothing or to the fact that

the purchaser was a stranger to Mr Gauci and from a different ethnic group. It is alleged that the court also had no apparent regard to Mr Gauci's exposure to the applicant's photograph in the media. In support of these submissions reference is made to a practice note issued by the Lord Justice General (Emslie) dated 18 February 1977, *McAvoy v HMA* 1982 SLT 46 and Lord Cullen's directions to the jury in *Farmer v HMA* 1991 SCCR 986.

Consideration

21.48 The Lord Justice General in his practice note reminded judges of the need to give appropriate and adequate guidance to juries on their approach to the assessment of identification evidence where its quality was in any way in doubt. In *McAvoy* the court held that in cases in which identification is in issue, trial judges may feel it desirable to remind the jury to treat the issue with some care given that mistakes can occur. In particular, a trial judge may remind the jury that the witness was not familiar with the person he identified and that they may wish to ask themselves how long the witness had the person in view, whether the person was clearly visible, how positive the identification was and whether the person concerned was nondescript or had distinctive features. In *Farmer* it was held that similar directions given by Lord Cullen to the jury in that case minimised the risk of injustice. These included directions that the jury should consider any reasons given by a witness for identifying an accused as well as the possibility that the witness was confusing the accused with someone who the witness had seen at some time other than the occasion of the crime.

21.49 In the Commission's view, although the trial court did not make explicit in its judgment that it had directed itself on the matters outlined above, it does not necessarily follow that the court did not have due regard to them. The court was aware of the passage of time which had elapsed between the purchase and Mr Gauci's identifications at the parade and in court, and of the fact that Mr Gauci had seen a photograph of the applicant in *Focus* magazine. The court noted at paragraph 55 of its judgment that Mr Gauci's identifications at the parade and in court had been criticised on the ground that photographs of the applicant had featured in the media and that purported identifications more than ten years after the event were of little if

any value. Before assessing the quality and value of these identifications the court considered it important to look at the "history" which included Mr Gauci's identification of the applicant by photograph in 1991 (when the applicant's photograph had not yet appeared in the media) as well as his identification of other individuals such as Talb.

21.50 The court also acknowledged, presumably as a result of the issues which had been raised by the defence, that there were "undoubtedly problems" with Mr Gauci's identification of the applicant and that there was a "substantial discrepancy" between Mr Gauci's initial description of the purchaser's height and age and the applicant's characteristics at the material time. Nevertheless, the court considered that taken together with evidence as to the date of purchase it was possible to infer that the applicant was the purchaser. In the Commission's view, whatever conclusions one might draw as to the reliability of the evidence on which that inference is based, it appears that the court had regard to all the factors on which a jury would be directed in a similar case.

(vii) The date of purchase

Introduction

21.51 According to the submissions the defence clearly had an interest in establishing the date of purchase as being one on which the applicant was not in Malta, thus excluding his involvement. The Crown, on the other hand, sought to establish that the date of purchase was 7 December 1988, a date which corresponded with the applicant's presence in Malta. It is submitted that in doing so the Crown sought to turn a consistency into positive support for the identification itself.

21.52 The submissions go on to summarise the evidence relied upon by the court in this connection. This consisted of Mr Gauci's evidence that on the date of purchase his brother, Paul Gauci, was absent from the shop watching football on television. According to the submissions "Paul Gauci stated which teams he tended to watch and from TV schedules suggested in a police statement dates which included 23rd November or 7th December… The matter was agreed by joint minute." The

submissions also refer to Mr Gauci's account that the purchase had taken place "about a fortnight before Christmas", a time frame which it is said was given by him for the first time in evidence and which was inconsistent with his prior statements. In addition, Mr Gauci suggested in his statements and in evidence that when the purchaser first left his shop it was "raining or drizzling, not raining heavily." The defence thereafter led evidence to the effect that there was a 90% chance that it was not raining in Sliema on 7 December 1988. It is submitted that, despite this evidence, the trial and appeal courts "insisted that the likely date of purchase was 7 December 1988 and that this supported the identification evidence."

21.53 In order properly to assess this issue it is important to set out in detail the relevant passages in the evidence and the approaches taken by the trial and appeal courts. Before doing so, however, it is helpful to consider the significance of the trial court's finding that the purchase took place on 7 December 1988.

21.54 The trial court accepted that Mr Gauci's identification of the applicant was not unequivocal, but stated that it was possible to infer from his evidence that the applicant was the purchaser of the clothing (at paragraph 88). The court went on to refer to its conclusion that the date of purchase was 7 December 1988, a date when the applicant was in Malta staying at a hotel close to Mary's House. In other words, the court's finding that the purchase took place on 7 December was used in conjunction with Mr Gauci's evidence that the applicant resembled the purchaser to draw the inference that the applicant was the purchaser. The appeal court acknowledged this approach in the following passage of its opinion:

> *"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" (paragraph 293).

21.55 As well as potentially providing support for Mr Gauci's identification of the applicant, any finding that the purchase had occurred on a particular date was significant because, on the evidence, 7 December 1988 was the only date on which the applicant would have had the opportunity to purchase the items. Accordingly if the court had found that the purchase had taken place on some other date in November or December, in terms of the evidence this would effectively have excluded the applicant as the purchaser.

21.56 The trial court referred to the following factors in connection with its finding as to the date of purchase (see paragraphs 64 and 67 of the judgment):

(a) Mr Gauci's evidence that his brother Paul Gauci did not work in the shop on the afternoon of the purchase because he had gone home to watch football on television; and the terms of joint minute number 7 which, according to the trial court, agreed that whichever football match or matches Paul Gauci had watched would have been broadcast by Italian Radio Television ("RAI") either on 23 November or 7 December 1988;

(b) Mr Gauci's evidence that the purchase "must have been about a fortnight before Christmas";

(c) Mr Gauci's evidence that the sale took place on a "midweek" day, and that he thought Wednesday is midweek. (It is not clear what weight, if any, the trial court attached to this evidence. Although it is mentioned in paragraphs 12 and 64 of the judgment, it does not feature in paragraph 67 in which the court narrates the evidence establishing the date of purchase as 7 December. The Commission has nevertheless included this factor in its assessment of the evidence);

- Mr Gauci's evidence to the effect that the purchase was about the time when the Christmas lights in Tower Road would be "going up"; and

- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the Chief Meteorologist at Luqa airport, Major Joseph Mifsud, that there was a 10% probability of rain in Sliema at the material time on 7 December 1988.

21.57 Each of these factors is examined in turn below.

(a) Evidence of the football matches

Mr Gauci's evidence in chief

Q. I wonder if I could ask you about one other thing, Mr Gauci. Earlier on we talked about the occasion when the Libyan gentleman came into the shop and bought the clothing. Apart from yourself working in the shop, was there anybody else working in the shop that day?

A. Not at that moment, but when [the purchaser] *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.*

Q. Where had your brother been that afternoon?

A. 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 (31/4779).

Cross examination

Q. ... Now, turning to page 9 [of Mr Gauci's statement of 1 September 1989] f*or my purposes at the top of the page what you said to Mr Bell on the 1st of September was this: 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. Do you see that?

A. Yes. Yes (31/4793).

21.58 As noted above it was agreed by joint minute number 7 that certain live football matches involving Italian clubs were broadcast by RAI at particular times on 23 November and 7 December 1988. The joint minute also agreed that Maltese and Italian local times are the same.

The trial court's approach

"[Mr Gauci] *could not say what day of the week it was. He was alone in the shop because his brother was at home watching football on television"* (paragraph 56).

"In cross examination, Mr Gauci was referred to a statement which he had given to DCI Bell on 14 September 1989 [in fact the date of the statement is 1 September 1989]. *In that statement he said that the purchase of the clothing was made on a week day when he was alone in the shop. His brother Paul Gauci did not work in the shop on that particular afternoon because he had gone home to watch a football match on television. It was agreed by joint minute that whichever football match or matches Paul Gauci had watched would have been broadcast by Radio Televisione Italiana either on 23 November 1988 or 7 December 1988"* (paragraph 64).

"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… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December" (paragraph 67).

The appeal court's approach

21.59 At appeal it was argued on behalf of the applicant that the trial court had 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. There was also no evidence from which it could be inferred that Paul Gauci had watched football on television only on one or other of those dates. It was submitted that accordingly there was no basis for inferring that the football matches listed in the joint minute were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988. Indeed, there might have been football on television on other days. 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. The defence position, it was argued, 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.

21.60 In reply the advocate depute submitted that the competition which had developed between 23 November and 7 December 1988 emerged because the applicant had introduced the former date as an alternative. Indeed, the whole tenor of the defence submission was to place before the trial court a choice between those two dates. Although at first sight it might appear that the trial court had misinterpreted the joint minute there had been no misdirection, or if there had been it was of no materiality. According to the advocate depute Mr Gauci had not been challenged in cross examination as to whether his brother had been watching football on television on the date of purchase. Indeed, by referring to one of Mr Gauci's prior statements on this issue, counsel for the applicant had sought to bolster his evidence to this effect.

21.61 In the appeal court's view, the trial court had misinterpreted the joint minute. The joint minute had simply related to football broadcasts on 23 November and 7 December and did not contain any agreement that whichever football match or

matches Paul Gauci had watched would have been broadcast on either of those dates. However, the appeal court did not consider this matter to be of any real materiality. The Crown case was that the date of purchase was 7 December which was the only date when the purchaser could have been the applicant. The applicant had clearly put in issue 23 November as a competing date and had led evidence as to the weather conditions on both dates. The defence had gone on to submit that this evidence, taken together with Mr Gauci's evidence as to the weather conditions on the date of purchase, favoured 23 November. It did not appear to the appeal court that there was any evidence directed to showing that the purchase had occurred on Wednesday 30 November or Wednesday 14 November. The critical issue was whether the trial court was 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. However, having regard to the way in which the case was presented to the trial court it seemed to the appeal court that, in effect, the only real competing date was 23 November. Accordingly, the trial court had not erred in approaching the case on that basis.

Consideration

21.62 In terms of paragraph 64 of its judgment, the trial court appears to have accepted the passage in Mr Gauci's statement of 1 September 1989 as evidence that on the afternoon of the purchase Paul Gauci had gone home to watch football on television. In the Commission's view the court was entitled to do so. The statement in question represents Mr Gauci's earliest recollection of his brother's movements that day and, as Mr Gauci said himself on several occasions in his evidence, his memory of the sale was better at that time. Moreover, the relevant passage in the statement was put to Mr Gauci by the defence which did not seek to challenge his evidence of what his brother was doing that day.

21.63 Similarly, although the trial court misconstrued joint minute number 7, the Commission does not consider that it was unreasonable in terms of section 106(3)(b) for the court to narrow the possible dates to 23 November and 7 December, even in the absence of evidence from Paul Gauci.

(b) Mr Gauci's evidence as to when the purchase occurred

Examination in chief

Q. The police came to see you at the beginning of September 1989. Were you able to remember when this particular sale had taken place?

A. No. Exactly, I couldn't remember the date, but I remember all the clothes I had sold.

Q. Were you able to tell them that it was towards the end of 1988?

A. Yes, 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 (31/4730).

21.64 Later in examination in chief Mr Gauci was referred to the following passage in his statement of 14 September 1989:

"[A]*bout 7.25pm, on Thursday, 14 September 1989, I went to police headquarters, Floriana, along with two police officers, Detective Chief Inspector Bell and Inspector Scicluna. It had been explained to me that the officers wished me to look at photographs to see if I could pick out anyone in the photographs as the man I sold the clothing to in November or December 1988"* (31/4757).

21.65 Mr Gauci agreed that his signature was at the foot of that statement.

Cross examination

Q. Now, at the foot of the third page of the witness statement [Mr Gauci's statement of 1 September 1989]*, you indicate that you remembered – I'll put it as it's written: I then remembered that one day during the winter in 1988 I had been working alone in the shop. It was around 6.30, just before closing time at 7.00*

p.m. A man had entered the shop and he started – My copy is cut off. But he was starting to look at some clothing; is that right?

A. Yes (31/4786).

Q. … And then about the middle of the page [of Mr Gauci's statement of 10 September 1990]*, Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November…*(31/4802).

Q. Let's go to Production 466 [Mr Gauci's statement of 21 February 1990] *please … I have been thinking about the day ... the man bought the clothes, November, December 1988* (31/4815).

The trial court's approach

21.66 At no time prior to giving evidence had Mr Gauci been noted as saying that the purchase "must have been about a fortnight before Christmas". However, as noted above, when the advocate depute asked him whether he was able to tell the police in September 1989 when it was that the purchase had taken place, Mr Gauci replied: "Yes, 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." In terms of paragraph 12 of its judgment it seems that the trial court interpreted Mr Gauci's response to be that he had told the police of this time frame:

"Mr Gauci's evidence was that he was visited by police officers in September 1989. He was able to tell them that he recalled a particular sale about a fortnight before Christmas 1988, although he could not remember the exact date."

The appeal court's approach

21.67 At appeal it was argued on behalf of the applicant that in narrating Mr Gauci's evidence in paragraph 12 of the judgment the trial court had failed to take account of the fact that Mr Gauci had never told the police at any of his early interviews that the purchase had taken place about a fortnight before Christmas. It was submitted that while the trial court was prepared to pray in aid Mr Gauci's prior statements when they demonstrated a consistency in his approach, in paragraph 67 of its judgment the court simply ignored those aspects of his prior statements which were inconsistent with the crucial areas of his evidence in court.

21.68 In reply the advocate depute pointed out that in paragraph 12 the trial court was simply giving a brief introductory account of Mr Gauci's evidence, and had indicated that it would return to deal with his evidence in more detail with reference to the date of the transaction and the issue of identification. Mr Gauci gave evidence that the police came to see him at the beginning of September 1989. He could not remember the date of the sale but, on being asked if he was able to tell the police that it was towards the end of 1988, said that it "must have been about a fortnight before Christmas". In the advocate depute's submission it therefore appeared to be Mr Gauci's recollection that he had told the police that the purchase had taken place about a fortnight before Christmas. According to the advocate depute the question as to whether he had in fact said that to the police was not specifically brought out in evidence on made the subject of submission.

21.69 In rejecting this ground the appeal court said the following:

> *"In our opinion there is no substance in this ground of appeal. The trial court referred to statements which Mr Gauci had made to police officers in September 1989 in none of which was there stated to be any reference to the purchase having taken place a fortnight before Christmas or to the fact that the Christmas lights were just being put up. In the circumstances we do not consider that it was necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage. The fact that such*

statements had not been made at an earlier stage must have been quite apparent to the trial court" (paragraph 336).

Consideration

21.70 According to the appeal court, then, the trial court must have been aware that Mr Gauci had not given this time frame in any of the previous statements put to him in evidence. To some extent this conclusion sits uneasily with the terms of paragraph 12 of the judgment quoted above, in which the trial court states that Mr Gauci "was able to tell [police officers] that he recalled a particular sale about a fortnight before Christmas 1988". In the Commission's view the appeal court's conclusion in this respect is supported by the terms of Mr Gauci's evidence which do not reflect the finding made by the trial court in paragraph 12 of the judgment quoted above. In the Commission's view, however, taken as a whole there is nothing in Mr Gauci's evidence to support the view that he told the police of this time frame. Although in examination in chief the advocate depute effectively asked Mr Gauci what he had said to the police in this connection, a careful reading of his response indicates that all he was attempting to convey was simply his own recollection as to when the purchase had occurred.

21.71 As the Crown highlighted at the appeal, Mr Gauci was not cross examined as to whether he had told the police that the purchase must have taken place about a fortnight before Christmas. At the very least, however, the trial court was aware that in his first statement to the police dated 1 September 1989 Mr Gauci had been able to say only that the purchase had occurred "during the winter in 1988". Although this is not necessarily inconsistent with his evidence in chief, it suggests that at the time that statement was given Mr Gauci was unable to be any more specific than that the purchase took place in a particular season. The court was also aware that at interview with the police on 10 September 1990 Mr Gauci believed that the purchase had taken place at the end of November 1988. More generally, the court was aware that in none of the passages in the statements put to Mr Gauci in evidence was there any mention of the time frame given by him in examination in chief.

21.72 The Commission returns to this issue in the final part of this chapter.

(c) Mr Gauci's evidence as to the day of the purchase

Examination in chief

Q. Are you able to say which day of the week it was?

A. No, I have no idea. I can't say. I have no idea. If I said that, I wouldn't be – I would have no – nothing to count on (31/4779).

Cross examination

Q. ... Now, turning to page 9 [of Mr Gauci's statement of 1 September 1989] *for my purposes at the top of the page, what you said to Mr Bell on the 1st of September was this: 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. Do you see that?*

A. Yes. Yes (31/4792-4793).

Q. ... And then about the middle of the page [page 3 of Mr Gauci's statement of 10 September 1990]*, Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November.*

Now, I am going to come back to that, in view of what you said in your evidence in chief, Mr Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr Bell, in September of 1990, that it was a weekday?

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date (31/4802-4803).

Q. Now, without going into it again, the first paragraph [of Mr Gauci's statement of 19 September 1989] *deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.*

A. Yes. Yes, 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 (31/4809-4810).

Q. So can I take it, then, that by "midweek", you mean not a Monday and not a Saturday?

A. No, certainly not Saturday. I believe. But I've already told you, I have nothing, no dates. I don't want to say anything about it, because if I don't know, I don't know. It's simply that. I don't want to mention a date. Why should I say or do so when I do not know? Do you understand?

Q. I do understand. Under our procedure, Mr Gauci, I ask the questions and you answer them.

A. Yes. Yes. But I'm trying to help.

Q. Indeed.

A. That's what I mean, I don't want to give you a date or say it's Friday. I don't want to tell lies. You understand? (31/4811).

Q. What I am interested in is what you said to Detective Constable Crawford in the last sentence [of Mr Gauci's statement of 19 September 1989]*: I am sure it was midweek when he called. What I want to do is see if we can investigate that word "midweek" together. We've already done a bit of this exercise. Your shop was open from Monday through till Saturday?*

A. Exactly.

Q. When you use the word "midweek", what day of the week do you have in mind, or what days? Would it be –

A. Wednesday, I think. That's how I see it.

Q. Wednesday?

A. But I stress the point, I don't know dates. I don't know the dates.

Q. I can assure you…

A. I don't want to cause confusion. I don't know dates.

Q. I understand. You had just –

A. I just open the shop…

Q. … with you. You chose the word "midweek", and you've told me that by "midweek", you probably mean Wednesday. If I popped down to see you in Malta, and we were close friends, and we arranged to meet midweek in two weeks' time, you would be thinking that I would turn up on a Wednesday?

A. That's how I think, sir. This is how I think it. That's how I think. In Malta – in Malta we use this phrase quite often. We say we go out midweek. It's a common phrase in Maltese, in the Maltese language.

Q. Indeed. And because I am not Maltese, I want to understand what it is you mean by it, you see. Would another way of approaching it be this: that midweek entails being separate from the weekend; in other words, the shop would be open the day before and the day after? And that would give me a clue to what you mean.

A. That's it. Exactly. Tuesday and Thursday.

Q. It would include Tuesday and Thursday. So we narrow it down to Tuesday, Wednesday or Thursday.

A. I think that Wednesday is midweek (31/4819-4821).

Consideration

21.73 As indicated above, it is not clear what weight, if any, the trial court attached to this aspect of Mr Gauci's evidence. In the Commission's view the inference that might be drawn from it is that the purchase had taken place on a Wednesday. However, in order to accept that inference the court would require to have ignored those passages in Mr Gauci's evidence (and the terms of his statement of 10 September 1990) in which he made it clear that he was unable to remember the day or date of the purchase. In any event, evidence that the purchase took place on a Wednesday points both to 23 November and 7 December (both fell on that day in 1988) and therefore does not, in itself, assist in determining on which of those dates the purchase might have taken place.

(d) Mr Gauci's evidence as to the Christmas lights

Examination in chief

Q. I wonder if we can try and approach [the date purchase] *then from a slightly different angle. Did the Tower Road in Sliema put up Christmas lights?*

A. Yes. Yes.

Q. How long before Christmas, generally, was that?

A. I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I can't say exactly.

Q. I would like you to think carefully about that, Mr Gauci, if you can, whether at the time when you sold to the Libyan the Christmas lights were on or not.

A. Yes, they were putting them up. Yes.

Q. Do you remember being asked about that by the police when they came to see you?

A. Yes, they had said. And I had said the lights were there when they came to buy.

Q. Am I right in thinking that you, from the time when the police came first to see you, at the beginning of September, were seen by the police on quite a large number of occasions?

A. Yes, they came a lot of times. They used to come quite often, didn't they.

Q. And that would be in the months after they came first to see you, was it?

A. Yes. Not months after. They used to come after. I don't know exactly when they used to come, but I did not take notes when they used to come. But they used to come quite often to see me. They used to come and ask questions, and they used to take me to the depot and things like that.

Q. And when you were interviewed by the police on these occasions, was your memory of the sale to the Libyan better than it is now?

A. Yes, of course. That is 12 years – 11 years after. I mean, 11 years are a long time for me, but in those days I told them everything exactly, didn't I?

Q. And if you told them, in one of these interviews, that the sale was made before the Christmas decorations went up, might that be correct?

A. I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights, though, in those times.

Q. But in any event, you explained that you thought it was about a fortnight before Christmas?

A. Something like that, yes, because I don't remember all these things, do I, when they put the lights on and when they turned them on. I'm not really interested so much because I don't even put decorations, Christmas decorations myself in my shop (31/4739-4741).

Cross examination

Q. [referring to Mr Gauci's statement of 10 September 1990]… *And then about the middle of the page, Mr. Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November*...(31/4802).

A. ... 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.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. 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.

Q. But if a policeman was coming to get you, that would be during the period you were being interviewed.

A. Yes, of course, to tell them about these description.

Q. Yes. And no doubt there were Christmas lights at such occasions, but we are looking at Christmas lights in the context --

A. I remember that there were Christmas lights.

Q. Well, so you say. But we'll examine together in detail what it was you said to the police on the subject of Christmas lights at the time, 10 and 11 years ago.

Now, I want you to look at another statement, please. This is Production 454 [Mr Gauci's statement of 19 September 1989]...

Q. Now, without going into it again, the first paragraph deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before

Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.

A. Yes. Yes, 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.

Q. Undoubtedly. Now, let's deal with two aspects of that last paragraph. One is we can see that the statement was given by you to Mr. John Crawford, Detective Constable John Crawford, about ten to 1.00 on the 19th of September 1989. Is that right? Do you see that?

A. Yes, yes.

Q. And what you say is that the Christmas decorations were not up when the man bought the clothes. So would I be right in thinking that on the 19th of September of 1989, you believed that there were no Christmas decorations up when the man bought the clothes, and you told that to DC Crawford?

A. Maybe (31/4803-4810).

The trial court's approach

"In his evidence in chief, Mr Gauci said that the date of the purchase must have been about a fortnight before Christmas. He was asked if he could be more specific under reference to the street Christmas decorations. Initially, he said 'I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I can't say exactly.' In a later answer when it had been put to him that he had earlier said that the sale was before the Christmas decorations went up, he said 'I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights though in those times'" (paragraph 56).

"The position about the Christmas decorations was unclear, but 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… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of the purchase was Wednesday 7 December" (paragraph 67).

Consideration

21.74 It appears therefore that, despite being aware of his recollections in 1989 and 1990 to the effect that the Christmas lights were not up at the time of the purchase, and despite the substantial degree of confusion in his evidence on this point, the trial court was prepared to accept Mr Gauci's account that the Christmas lights were "going up" at the time. Although the appeal court took the view that the trial court did not attach a great deal of weight to this evidence (see its opinion at paragraph 332), it was nevertheless sufficiently material to feature in the judgment and was a factor on which the court relied to some degree in determining the date of purchase. The Commission returns to this issue in the final part of this chapter.

(e) Evidence of the weather conditions

Mr Gauci's evidence in chief

Q. Do you remember what the weather was like when the man came to the shop?

A. When he came by the first time, it wasn't raining but then it started dripping. Not very – it was not raining heavily. It was simply – it was simply dripping, but as a matter of fact he did take an umbrella, didn't he? He bought an umbrella (31/4741).

Cross examination

Q. And what he [Mr Bell] *has noted you as saying* [in Mr Gauci's statement of 1 September 1989] *is that the man said he had other shops to visit, and he picked up the umbrella and he said he would come back shortly. He paid me in the* [sic] *cash, which I think was 56 Maltese pounds. He then walked out the shop with the umbrella, which he opened up, as it was raining.*

A. The amount was different. The amount was 77 pounds. I always said that…(31/4788).

Q. … What I want to draw your attention to there is on page 5 in this very first interview [of 1 September 1989]. *You indicated to Mr. Bell, and the other police officers, that the man walked out of the shop with the umbrella, which he opened up because it was raining…* (31/4789).

Q. Then on the subject of weather, foot of page 4 and then on to page 5 [of Mr Gauci's statement of 1 September 1989]: *I even showed him a black-coloured umbrella, and he bought it. It then deals with other clothing. Then, in the middle of the page, which we've looked at: The man said he had other shops to visit, and he picked up the umbrella, and he said he would come back shortly… He then walked out of the shop with the umbrella which he opened up as it was raining.*

Do you see that? I take it, then, that on the 13th of September – the 1st of September of 1989 – your memory was that the man purchased the umbrella, he didn't leave it for you to bundle up with the other things he had bought in the shop, but he left with the umbrella and put it up outside the door of the shop because it was raining?

A. Exactly (31/4814-4815).

Q. Let's go to Production 466 please [Mr Gauci's statement of 21 February 1990]: *…I have been thinking about the day the man bought the clothes, November, December 1988. He left the shop after having made the purchases and*

turned right down Tower Road. At that time, he had the umbrella raised and opened. When he returned to the shop, he came from the same direction, but the umbrella was down because it had almost stopped raining, and it was just drops coming down.

So again on this question of weather, on the 21st of February of 1990, when this statement was made by you, your recollection was that when the man left the shop, he turned right down the Tower Road; is that right? And he took the umbrella with him, as you indicated to the police a lot earlier, he put it up, as he was leaving, and then when he came back, the umbrella was down and it had almost stopped raining. And just a few drops were still coming down. Yes?

A. I – precisely, I saw him going down, not going – he went down to get the taxi. He didn't go uphill. He went downhill. I said this – I went uphill to put the things in his taxi.

Q. Yes, I understand that. Can we look together, then, at –

A. It wasn't raining. It wasn't raining. It was just drizzling" (31/4815-4816).

Q. This [statement] *is dated the 10th of September of 1990, and it bears to be taken by Detective Chief Inspector Bell. Now, I invite your attention to page 2 of the statement, at the paragraph near the top of the page: I have been asked about the weather conditions that night the man made the purchase of the clothing. Just before the man left the shop, there was a light shower of rain just beginning. The umbrellas were hanging from the mirrors in the shop, and the man actually looked at them, and that is how I came to sell him one. He opened it up as he left the shop, and he turned right and walked downhill. There was very little rain on the ground, no running water, just damp...* (31/4817-4818).

Major Joseph Mifsud's evidence in chief

21.75 Major Mifsud, the Chief Meteorologist at the Meteorological Office at Luqa airport between 1979 and 1988, was called on behalf of the applicant to give evidence

about the weather conditions at Luqa airport and Sliema on 23 November and 7 December 1988. He was referred to defence production number 7 which consisted of an extract from the meteorological records maintained by his former department for 22 and 23 November and 6 and 7 December 1988. He was also shown a supplementary defence production which consisted of a continuation of those records into Thursday 8 December 1988. The records contained observations about wind, air pressure, temperature, rainfall and clouds at Luqa. Rainfall was observed and recorded every three hours. Recordings were made in GMT, Maltese local time being one hour ahead of this.

21.76 Based on those records Major Mifsud said that at 21.00 and midnight on 6 December 1988 and 06.00 on 7 December no rainfall was recorded at Luqa. At 09.00 on 7 December trace rainfall (ie less than 0.5 of a millimetre) was recorded at Luqa and a further entry in the records indicated that there was a light shower of rain between 08.44 and 08.45. Major Mifsud believed that this shower accounted for the trace of rain recorded at 09.00 that day. A further five entries for 7 December – 11.00, 12.00, 18.00, 20.55 and 23.45 and 23.55 – all recorded that there had been "nil rainfall" at Luqa. Aside from the trace of rain measured at 09.00 on 7 December no rain was recorded as having fallen at Luqa up until midnight. In particular, there was no rain recorded at Luqa at 18.00 (19.00 local time).

21.77 In respect of 8 December, an entry for 04.15 showed that a light shower of rain was recorded at Luqa at that time. Thereafter light intermittent rain was recorded at 04.45 and 05.45. Between 06.00 and 09.00 1 millimetre of rain was recorded as having fallen and between 09.00 and 11.00 6 millimetres of rain were recorded. Between 11.00 and 12.00, 7.2 millimetres of rain were recorded. In general, the records for 8 December showed that between 04.15 and noon there was continuous rain at Luqa.

21.78 According to Major Mifsud the distance between Luqa airport and Sliema was about 5km as the crow flies. He was asked whether in these circumstances he could assess whether on 7 December it would have rained in Sliema between 18.00 and 19.00 local time, to which he replied:

A. As the – we had no rain, all right, between 6.00 and 7.00 in the evening of the 7th at Luqa, so 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… Since we have no direct observation for that locality [ie Sliema]*, I would assume that the general conditions were as represented by the Luqa observation.*

Q. With what result, then, does –

A. Well, if you ask for a percentage, if – if I have to talk about a percentage, probability, I would say that 90 per cent there was no rain. And there was always that possibility that there could be some drops of rain, about ten per cent probability in other places.

Q. So are you saying that your view is that there is a – is your view then that you have a 90 per cent probability that there was no rain –

A. Yeah

Q. – at Sliema?

A. That's my opinion

Q. Between 6.00 and 7.00 –

A. Because I do not have any observations for that locality. This is basically… (76/9202-9203).

21.79 Major Mifsud was then asked about the air pressure measurements in the records. He confirmed that between 15.00 and 18.00 (16.00 and 19.00 local time) on 7 December the air pressure was rising, which restricted the possibility of cloud formation and decreased the possibility of rainfall at Luqa and Sliema. However, the possibility of rain could not be excluded as "there was cloud around, you know, a type of cloud". Major Mifsud could not be exact in saying how long such rain might have lasted but it would only have been for a "very short interval… a few drops". He did

not think that any rain that might have fallen would have made the ground damp because for that to happen the rain has to last "for quite some time". It was possible to have a shower within a very short period "but the cloud does not indicate that there was… that type of precipitation around."

21.80 Major Mifsud was then referred to the weather records relating to Luqa for 23 November 1988. These showed that there was light intermittent rain observed at noon on that date, and that a trace of rain was recorded. According to the records these conditions persisted until 18.00 (19.00 local time) at which time a rainfall measurement of 0.6 of a millimetre was taken. According to Major Mifsud this measurement covered the period between 12.00 and 18.00 (13.00 and 19.00 local time). Asked for his views on what the conditions might have been like in Sliema between 18.00 and 19.00 local time, Major Mifsud replied that he thought that the same conditions would have prevailed in that area. There was "8/8ths" cloud cover recorded at Luqa at that time which, because Malta was small, meant that cloud was covering the whole island. The clouds in question would have been rain-bearing clouds, although the intensity of the rainfall would depend on the thickness of the cloud. As only 0.6 of a millimetre of rain was recorded, the cloud was unlikely to have been that thick "but it did give some rain".

Cross examination

21.81 Major Mifsud accepted that the rainfall measurements to which he had referred in his evidence in chief related purely to Luqa airport. He also accepted that the weather in Malta varied from place to place. He was aware that other records relating to rainfall were kept at police stations throughout Malta. These records were passed by the police to the Meteorological Office at Luqa airport at noon of each day. Major Mifsud was referred to Crown production number 443 which showed the total amount of rain that had fallen at each police station in Malta during the 24-hour period ending at 12 noon on 8 December 1988. The amount of rain recorded varied from place to place; for example, 7.3 millimetres of rain was recorded as having fallen at Luqa airport but only 3.3 millimetres was recorded as having fallen at Sliema police station. According to Major Mifsud, it was not possible to say from the records when

that quantity of rain fell within the 24 hour period. The following exchange then took place:

Q. And since the weather does vary from place to place in Malta, if you have no observation for a particular locality, then it's difficult to express a clear view about the weather conditions in that locality isn't it?

A. It is yeah. Difficult, the question of probability comes in then. Give you a general idea but you can't be 100 per cent sure, so this is the thing.

Q. I understand that. So the absence of information about another locality does not increase the probability that the conditions will be the same as they are in Luqa, for instance?

A. Uh-huh. Yes (76/9217-9218).

21.82 Major Mifsud accepted that there were certain entries in defence production number 7 which suggested that at 17.45 local time on 7 December cloud was forming and that over the previous six hours the cloud cover had been over at least half of the sky. He accepted that the observations on which those entries were based were made from a vantage point at the airport which enabled one to look around the rest of the island. Other entries for the same date showed that there was stratocumulus cloud at a height of about 5000 feet covering half of the sky. Major Mifsud accepted that stratocumulus cloud can give rain depending upon its thickness and the freezing level. He accepted that at 17.45 local time on 7 December there was cloud cover over Malta that could produce light rain, but he reiterated that it was not raining at Luqa at that time.

21.83 Major Mifsud was referred to the entries for 17.15 (18.15 local time) on 7 December which indicated that the cloud cover remained unchanged from the conditions noted at 16.45 (17.45 local time). The situation remained until 18.15 (19.15 local time) when the clouds changed from stratocumulus at 5000 feet to altocumulus at 9000 feet base. According to Major Mifsud, altocumulus could cause rain under special conditions depending upon its thickness.

Re-examination

21.84 Major Mifsud agreed that the figures contained in the Meteorological Office records were taken at that office rather than at a police station. Asked whether police officers were always assiduous in their duties in respect of meteorological matters, he replied "95, 98 per cent, yes."

21.85 Major Mifsud agreed that so far as the Luqa records were concerned, rain began falling as a shower at 04.15 on 8 December and continued until noon that day. He also agreed that aside from trace rain at Luqa airport between 08.44 and 08.45 on 7 December no rain was recorded as having fallen there on that date. Given that the Sliema police station records showed that there had been 3 millimetres of rain between noon on 7 December and noon on 8 December, Major Mifsud was asked for his opinion as to when that rain was likely to have fallen, taking into account the Luqa records for that date. His opinion was that most of the rain recorded at Sliema police station on 8 December had fallen on the morning of that day. Although there was still a possibility that some of that rain might have fallen on the evening of 7 December, he thought that most of it had fallen on 8 December.

21.86 Major Mifsud was then asked about the records for 7 December which gave details of the cloud cover between 17.45 and 19.15 local time. He did not accept that those records showed that there was "half cloud cover in the sky" during that period. Rather the records showed that there was half cloud cover of stratocumulus at 5000 feet. Major Mifsud expected that those cloud conditions would have covered the whole of Malta. He agreed, however, that at no time had those conditions produced any rain at Luqa. The clouds were moving from the north west to the south east. Sliema, he said, is situated north west of Luqa airport.

The trial court's approach

"There is no doubt that the weather on 23 November would be wholly consistent with a light shower between 6.30pm and 7.00pm. The possibility that there was a brief light shower on 7 December was not however ruled out by the evidence of

Major Mifsud. It is perhaps unfortunate that Mr Gauci was never asked if he had any recollection of the weather at any other time of the day, as evidence that this was the first rain of the day would have tended to favour 7 December over 23 November. While Major Mifsud's evidence was clear about the position at Luqa, he did not rule out the possibility of a light shower at Sliema. Mr Gauci's recollection of the weather was that "it started dripping – not raining heavily" or that there was a "drizzle" and it only appeared to last for the time that the purchaser was away from the shop to get a taxi, and the taxi rank was not far away… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December" (paragraph 67).

Consideration

21.87 In the Commission's view although the evidence of the weather does not necessarily exclude 7 December as the purchase date, as the trial court appeared to acknowledge, it provides little support for it. Indeed, on any view it provides much greater support for 23 November.

Conclusion

21.88 The Commission considers that in the present case, to paraphrase the words of the Lord Justice Clerk in *E v HMA*, the trial court, before even looking at any competing versions of the facts, had to consider the difficulties created by Mr Gauci's evidence which ultimately underpinned the Crown case. In line with the approach taken in *E* the Commission has therefore considered whether Mr Gauci's evidence implicating the applicant as the purchaser, when viewed together with the other criminative circumstances, can provide a reasonable basis for a verdict of guilty beyond reasonable doubt.

21.89 The Commission considers that the extraordinary length of time between the purchase and the identification parade, and the evidence of Mr Gauci's exposure to the photograph in *Focus* magazine in relatively close proximity to the parade, cast doubt upon the reliability of that identification, even though it was one of resemblance

only. Likewise, the even longer period between the purchase and the trial, Mr Gauci's exposure to the photograph in *Focus* magazine, the dangers inherent in dock identifications and the way in which this aspect of Mr Gauci's evidence was led by the Crown, cast significant doubt upon the reliability of Mr Gauci's identification of the applicant in court.

21.90 In the Commission's view, however, neither of these identifications is easily separated from Mr Gauci's identification of the applicant from a photo-spread shown to him on 15 February 1991. That identification was made at a time when Mr Gauci was not at any risk of exposure to the applicant's photograph in the media and at a point significantly closer to the purchase than his identifications at the parade and in court. However, like those other identifications, the identification by photograph in 1991 was one of resemblance only and was qualified and equivocal. It was also made over two years after the event and was undermined by Mr Gauci's initial descriptions of the purchaser, particularly of his height and age.

21.91 Accordingly, as the trial court acknowledged, there were "undoubtedly problems" in respect of Mr Gauci's identification of the applicant (paragraph 67). The approach which appears to have been taken by the court in drawing the inference that the applicant was the purchaser was to combine Mr Gauci's identification evidence with its finding that the purchase had taken place on 7 December 1988, a date on which it was established that the applicant was in Malta staying at a hotel close to Mary's House. As well as potentially providing support for the identification, the finding that the purchase took place on that date was important because a finding of any other date would, on the evidence before the court, effectively have excluded the applicant as the purchaser. As noted earlier in this chapter there was no evidence that the applicant was in Malta in November 1988 and, although it was established that he was there on several occasions in December 1988, in terms of the evidence 7 December was the only date on which he would have had the opportunity to purchase the items. To that extent the Commission considers that the finding that the purchase took place on 7 December was crucial to the applicant's conviction.

21.92 The Commission accepts that there was evidence before the trial court from which it could reasonably conclude that Paul Gauci had gone home to watch football

on the date of purchase. Although the court misconstrued the terms of joint minute number 7 there was clear evidence that live football was broadcast by RAI on 23 November and 7 December 1988. In the Commission's view, based on those pieces of evidence, the court was entitled to view the purchase as having occurred on one or other of those dates.

21.93 In establishing the date of purchase the court also relied upon Mr Gauci's evidence that it "must have been about a fortnight before Christmas". Although Mr Gauci was not directly challenged on this aspect of his evidence, the trial court was aware that he had never mentioned such a time frame in those statements that were put to him. The court knew, for example, that in his first police statement Mr Gauci was able to say only that the purchase had occurred "during the winter in 1988". The court was also aware that in his statement of 10 September 1990 he told the police that it had taken place "at the end of November." While in other statements put to him Mr Gauci indicated that the purchase had occurred "in November or December 1988" or "November/December 1988", the fact that these left open the possibility that it had occurred in November makes it even more difficult to understand why the court was prepared to accept as reliable an account which, on any reasonable interpretation, tends to exclude that month.

21.94 The trial court also accepted Mr Gauci's evidence to the effect that the Christmas lights were "going up" at the time of the purchase. However, the court was aware that in two of his previous statements (dated 19 September 1989 and 10 September 1990) Mr Gauci's recollection was that they were "not up" at the time. The court was also aware of Mr Gauci's confusion in cross examination as to whether he was being asked about the Christmas lights at the time of the purchase or at the time when the police came to collect him. Although the court might not have attached a great deal of weight to this aspect of the evidence, it was nevertheless viewed by the court as being "consistent with [Mr Gauci's] recollection that it was about two weeks before Christmas". It therefore played at least some part in the court's determination of the date of purchase.

21.95 As noted above it is not clear to the Commission to what extent the trial court relied upon Mr Gauci's evidence that the purchase had taken place "midweek", a term

which he understood to mean "Wednesday". However, in order to have done so the court would require to have ignored the many passages in Mr Gauci's evidence (and the terms of his statement of 10 September 1990) in which he made it clear that he was unable to remember the day or date of the purchase. In any event, evidence that the purchase took place midweek or on a Wednesday would not have supported 7 December any more than it would 23 November (both dates having fallen on a Wednesday in 1988).

21.96 Although the weather evidence did not necessarily exclude 7 December as the date of purchase, in any choice between that date and 23 November it strongly favoured the latter.

21.97 Having considered all the evidence before the court in this connection the Commission has reached the view that there is no reasonable basis for the conclusion that the purchase took place on 7 December 1988. The only evidence which favours that date over 23 November is Mr Gauci's account that the purchase must have been about a fortnight before Christmas and his confused description of the Christmas lights going up at the time. In light of the difficulties with those two pieces of evidence the Commission does not consider that a reasonable court, properly directed, could have placed greater weight upon them than upon evidence of the weather conditions and of Mr Gauci's statements (in which he said that the purchase had taken place in "November, December 1988", "November or December 1988" and "at the end of November"). In the Commission's view, those factors, taken together, point, if anything, to a purchase date of 23 November.

21.98 In the absence of a reasonable foundation for the date of purchase accepted by the trial court, and bearing in mind the problems with Mr Gauci's identification of the applicant, the Commission is of the view that no reasonable trial court could have drawn the inference that the applicant was the purchaser.

21.99 As well as being significant in itself such a finding might be capable of undermining the weight of other evidence against the applicant such as that relating to his presence at Luqa airport on the morning of 21 December 1988. It is clear that this piece of evidence gains its significance largely from the finding that the primary

suitcase was somehow placed on board KM180. However, it arguably takes on further significance when seen in the context of the court's conclusion that the applicant was the purchaser of the items established to have been within that suitcase.

21.100 The Commission has considered whether, leaving aside the evidence as to the date of purchase, there exists an alternative means by which a verdict of guilty could reasonably have been returned, based on the evidence not rejected by the court. Such an approach is consistent with that taken by the court in *King* in which it was held that the test to be applied under section 106(3)(b) is whether no reasonable jury *could* have returned a verdict of guilty on the evidence before them. However, given the importance of the date of purchase to the identification of the applicant as the purchaser, and the importance of that identification to his conviction, it seems to the Commission that this is a matter more appropriately determined by the High Court in the event that it arises at appeal. It is sufficient to say that in the Commission's view any finding that a reasonable court could not have inferred that the applicant was the purchaser would render the remaining evidence against him insufficient to convict.

21.101 Based on these conclusions the Commission is of the view that the verdict in the case is at least arguably one which no reasonable court, properly directed, could have returned. In these circumstances the Commission considers that a miscarriage of justice may have occurred in the applicant's case.

CHAPTER 22
UNDISCLOSED EVIDENCE CONCERNING *FOCUS* MAGAZINE

Introduction

22.1 In the Commission's view further doubts as to Mr Gauci's identification of the applicant as the purchaser of the items emerge from evidence which was not disclosed to the defence. This concerns Mr Gauci's exposure to images of the applicant in the media and, in particular, to photographs contained in the December 1998 edition of *Focus* magazine and in the Maltese language newspaper, *It Torca*. A copy of the *Focus* article was lodged by the Crown as a production at trial (CP 451, see appendix) and was spoken to by Mr Gauci in evidence. There was no evidence at trial concerning the *It Torca* articles (see appendix for copies of the articles).

22.2 Before setting out the content of the undisclosed material it is important, by way of context, to narrate the evidence concerning pre-trial publicity which was led at trial, together with the approaches taken to this on behalf of the applicant in closing submissions, and by the trial and appeal courts in their respective judgments.

The evidence at trial

Anthony Gauci

22.3 Mr Gauci's evidence regarding pre-trial publicity related only to his exposure to the *Focus* article. The relevant passage of his evidence is as follows.

> *Q. ... Do you remember, Mr Gauci, perhaps towards the end of 1998, or the beginning of 1999, another shopkeeper in the street showing you a magazine?*
>
> *A. Yes*
>
> *Q. Do you remember the name of the magazine?*

A. No, I don't remember. I remember seeing the magazine, but I don't remember the name.

Q. And do you remember taking the magazine and showing it to Mr Scicluna, the police officer?

A. Yes. Yes. I do

Q. Could we have on screen, please, production 451. And if we have image 67, please. Was that the article in the magazine which a fellow shopkeeper showed to you?

A. Yes.

Q. And did the magazine contain an article about the Lockerbie disaster?

A. Yes. Yes.

Q. Towards the bottom of the page in the article, is there a photograph in the centre, of a man wearing glasses?

A. Yes.

Q. Did you recognise that photograph?

A. That day, I thought he looked like the man who bought from me, but his hair was much shorter, and he didn't wear glasses.

Q. And did you show that photograph to Mr Scicluna?

A. Yes.

Q. Do you remember what you said to Mr Scicluna when you showed it to him?

A. Well, now, I told him, 'This chap looks like the man who bought the articles from me.' Something like that I told him.

Q. If Mr Scicluna says that you said 'that's him', would that be correct?

A. I don't remember now. I remember I told him, 'This man looks like the man who bought the articles from me.' This is what I said – I don't know exactly what I said. But I said he might have said that, but his hair and his glasses were not like that, the day he bought from me. And it was much shorter than that and he was without glasses (31/4473-4475).

22.4 Mr Gauci was not cross examined on the matter.

Inspector Brian Wilson

22.5 Inspector Wilson was responsible, along with Constable Calum Watson, for the conduct of the identification parade which took place at Kamp van Zeist on 13 April 1999. In evidence Inspector Wilson spoke to the contents of the parade report which had been prepared by him (CP 1324).

22.6 The applicant was the only accused to take part in the identification parade and Mr Gauci was the sole witness in attendance. Prior to its commencement the applicant's solicitor Mr Duff took issue with the inclusion of four stand-ins by reason of age. He also made the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten 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;*

- *"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;

- *"Finally, in my view, the stand-ins available in the original pool of 11 were 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"* (32/4899-4900).

22.7 In response to the objections taken to the inclusion of four of the stand-ins, Inspector Wilson informed the applicant and Mr Duff that these had been discarded from the original pool. With regard to those objections concerning the potential effects of pre-trial publicity; the lengthy period that had elapsed since the purchase; and the general objection to the age and ethnic background of the original pool of stand-ins, Inspector Wilson informed the applicant and Mr Duff that he was acting on the instructions of the Crown and intended to take no action other than to note the objections on the appropriate forms.

22.8 Prior to his viewing the parade Mr Gauci was read the following instructions by Inspector Wilson:

"The man whom you referred to in your statement to police entered your shop premises, Mary's House, 63 Tower Road, Sliema, Malta, midweek prior to 10 December 1988 and purchased clothing and an umbrella, may or may not be here, but, if you see him, tell me his number."

22.9 Mr Gauci's response, which was spoken by him in English, was noted by Inspector Wilson as follows:

> *"Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5."*

22.10 The applicant adopted position number 5 in the parade.

22.11 In cross examination Inspector Wilson was asked to narrate the description of the applicant contained within the parade report. This indicated that at the time of the parade the applicant was 47 years of age, five feet, eight inches tall and of stocky build with dark curly hair.

Submissions to the trial court

22.12 No submissions were made by the Crown in respect of the *Focus* article or on pre-trial publicity in general.

22.13 On behalf of the applicant (82/9916-9922) counsel highlighted the threat to the course of justice posed by media coverage and, in particular, by the publication of photographs of accused persons in newspapers. It was submitted that in the present case the court could not have failed to notice the photographs of both accused which had been shown on television and in newspapers across the world since 1991. If evidence were needed to vouch this it was provided by the *Focus* magazine which Mr Gauci had seen "at the end of 1998 or early in 1999".

22.14 In the normal case, counsel submitted, the publication of an accused person's photograph is a contempt of court, which implies a substantial risk of serious prejudice to the course of justice. Reference was thereafter made by counsel to a number of decisions by the High Court in which newspaper representatives had faced contempt of court charges in connection with the publication of photographs of accused persons and suspects.

22.15 Counsel then went on to narrate Mr Gauci's evidence concerning his partial identification of the incriminee Abo Talb ("Talb") in 1990 which came about following Mr Gauci's exposure to a newspaper article about the case in *The Sunday Times* in which Talb had been pictured beneath the caption "Bomber". Counsel submitted that Mr Gauci's identification of the applicant by resemblance was undermined by the fact that in evidence Mr Gauci described the newspaper photograph of Talb as resembling the purchaser "a lot".

The trial court's judgment

22.16 In respect of the identification parade (which the trial court mistakenly indicates took place on 13 August 1999 – in fact, as stated above, it was held on 13 April of that year) the trial court narrated the comment made by Mr Gauci in picking out the applicant, as recorded in the parade report and in the evidence of Inspector Wilson. The court then went on to quote Mr Gauci's evidence when identifying the applicant in court: "He is the man on this side. He resembles him a lot". Both identifications, the court observed, were criticised on the ground, *inter alia,* that photographs of the applicant had featured in the media many times over the years, and that accordingly purported identifications taking place more than 10 years after the event were of little if any value. Before assessing the quality and value of the identifications the court considered it important to look at the history of the matter, which entailed an examination of Mr Gauci's evidence and the terms of his previous statements that were put to him. As part of this exercise the court made reference to Mr Gauci's identification by resemblance of a photograph of the applicant shown to him by police officers on 15 February 1991.

22.17 The court went on to say the following about Mr Gauci's exposure to the *Focus* article:

> *"Finally, so far as police interviews were concerned, Mr Gauci was asked about a visit he made to Inspector Scicluna towards the end of 1998 or the beginning of 1999 after another shopkeeper showed him a magazine containing an article about the Lockerbie disaster. Towards the bottom of the page in the article there was a photograph in the centre of a man wearing glasses. Mr Gauci thought that*

that man looked like the man who had bought the clothes from him but his hair was much shorter and he didn't wear glasses. He showed the photograph in the article to Inspector Scicluna and, as Mr Gauci recalled it, he said "Well now I said, 'This chap looks like the man who bought articles from me.' Something like that I told him." He added that the hair of the man who bought from him was much shorter than that shown in the photograph and he was without glasses. The photograph was a photograph of the first accused" (paragraph 63).

22.18 Having examined the evidence in some detail the court then set out its conclusions regarding Mr Gauci's identification of the applicant. In its view Mr Gauci had 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, Mr Gauci was always careful to express any reservations he had and gave reasons why he thought there was a resemblance. The court observed that 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 per cent certain. The court formed the view from Mr Gauci's general demeanour and his approach to the difficult problem of identification that when he picked out the applicant at the identification parade and in court he was not doing so just because it was comparatively easy, but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser. While he had never made what could be described as an "absolutely positive identification", in the court's view, given the lapse of time, it would have been surprising if he had been able to do so. In these circumstances the court considered that Mr Gauci's identification of the applicant "so far as it went" was reliable and should be treated as a highly important element of the case.

The appeal court's opinion

22.19 Counsel for the applicant criticised the trial court's conclusions on the basis that while it had noted the defence submissions as to the prejudicial effect of pre-trial publicity it had failed to deal with these and, in particular, had failed to indicate

whether such publicity affected the value to be attached to Mr Gauci's identifications at the parade and in court. Counsel referred to the defence submissions at trial regarding the extent to which the applicant's photograph had been shown in the world media since 1991 and to Mr Gauci's exposure to the article in *Focus* magazine, which counsel informed the appeal court had occurred "not very long before the date of the identification parade". The issue of identification was clearly crucial and Mr Gauci, it was submitted, might have been influenced in his identification of the applicant by having seen his photograph in a magazine a short time before the identification parade was held. While the trial court had set out the defence submissions on the matter, it had not come to any express judgment as to whether Mr Gauci's evidence had been affected. Its failure to do so, it was submitted, amounted to a misdirection (paragraph 300).

22.20 On behalf of the Crown it was argued that there had been no evidence that any photographs of the applicant, other than that which appeared in *Focus* magazine, had been published or, if they were, that Mr Gauci had seen any of them. Mr Gauci had not been challenged in cross examination about his identification of the applicant at the parade or in court, and in particular it had not been suggested to him that his identification had been in any way affected by his having seen the photograph in *Focus* magazine or any other published photograph. The question whether the identification made by a witness had been affected by pre-trial publicity had to be examined in light of the evidence in each case. The trial court had considered all the evidence and the submissions by counsel and had come to a conclusion about the history of Mr Gauci's examination of photographs. In the advocate depute's submission there had been no misdirection (paragraph 301).

22.21 In the appeal court's view the submissions made on behalf of the Crown were well founded. The court observed that counsel's argument was based on the fact that Mr Gauci had seen the article in *Focus* magazine not long before the identification parade in April 1999. In narrating the history of Mr Gauci's accounts the trial court noted that he had picked out a photograph of the applicant in February 1991 and had concluded that his identification by resemblance was reliable. In the appeal court's view the defence must have been aware that Mr Gauci had seen the magazine containing the applicant's photograph. If it was going to be suggested that Mr

Gauci's identification of the applicant at the parade or in court had been influenced by seeing that photograph, then this should have been put to Mr Gauci in cross examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci, but the defence did not seek to challenge directly his evidence that the applicant resembled the purchaser of the clothing. In the appeal court's view the trial court had dealt with the issue of pre-trial publicity as far as was required, standing the fact that it was never suggested to Mr Gauci in cross examination that his evidence had been influenced by any pre-trial publicity. While counsel for the applicant alleged that photographs of the applicant had previously been published in the media across the world, even if this had happened there was no evidence that Mr Gauci had seen any of them other than the photograph contained in *Focus* magazine (paragraph 302).

22.22 In the circumstances the court considered there to be no substance in this ground of appeal.

The evidence not heard by the trial court

(i) Further evidence regarding the Focus magazine

22.23 As noted earlier the only indication at trial as to when Mr Gauci saw the *Focus* article came in the form of a question by the advocate depute in which he asked Mr Gauci if he could recall "perhaps towards the end of 1998, or the beginning of 1999" another shopkeeper in the street showing him a magazine. As can be seen from the accounts given above this rather vague timescale formed the basis of submissions on behalf of the applicant to both the trial and appeal courts.

22.24 However, further details as to the circumstances of Mr Gauci's exposure to the article are contained in an undated police statement by a Maltese officer, Sergeant Mario Busuttil (S5725, see appendix). The statement, which was noted by Mr Bell, was extracted from the HOLMES database of police statements supplied to the Commission by Crown Office. Its contents are reproduced, in precognition form, in chapter 11 of the Crown precognition volume (see appendix). The statement is in the following terms:

"On the morning of 1 April 1999 I accompanied Superintendent Scicluna to the shop premises at 63 Tower Road Malta occupied by the witnesses Anthony and Paul Gauci.

On this date Anthony Gauci informed Mr Scicluna that in December 1998 a local shop keeper, whom he did not wish to identify, had shown him a magazine which referred to the Lockerbie Air Disaster and also contained photographs of two Libyans. Anthony Gauci stated that one of the photographs was of the man who had bought the clothing in question.

Mr Scicluna asked Gauci to hand over the magazine and Gauci stated that he had it at home and that he would look for it. Mr Scicluna also stated to Gauci that under the circumstances it was the intention to hand the magazine to officers from the Lockerbie enquiry.

On 9 April 1999, I had occasion to call at the shop premises. I was alone at this time when witness Anthony Gauci handed over to me a Focus magazine dated December 1998 (DC1626). I examined the magazine and noted that there was an article referring to the Lockerbie Air Disaster.

Anthony Gauci pointed out to me a photograph on page 67 of a male who had the name shown as Abdelbasset Al Megrahi. The witness stated to me "Dan Hu" which translates in English as "That's him".

I retained this magazine as a production and on 12 April 1999 I travelled with the witnesses Anthony and Paul Gauci to Holland. On this date, I handed over to the witness, Detective Chief Superintendent Bell the magazine in question which he retained. I have signed the label prepared in respect of this magazine.

The reason I had accompanied the witness Anthony Gauci to Holland was to enable him to view an identification parade, act as interpreter and keep him calm. I was present with the witness during the identification parade when the witness Anthony Gauci identified a male person at position No 5. The police officer

conducting the identification parade asked the person at position No 5 to give his name but he did not answer.

I can now identify the person whom the witness Anthony Gauci identified at the identification parade."

22.25 In correspondence dated 5 February 2007 Crown Office confirmed to the Commission that Sergeant Busuttil's statement was not disclosed to the defence. According to Crown Office this was because it was not considered disclosable in terms of the principles laid down by the High Court in *McLeod v HMA* 1998 SCCR 77. Furthermore, Crown Office believed that the defence had full access to Sergeant Busuttil for the purposes of precognition and that the Maltese police had made his statement available to the defence during preparations for trial. According to Crown Office if the defence had experienced any problem in precognoscing Sergeant Busuttil the Crown would have endeavoured to assist them. However, there was no record of any such difficulty or request for assistance.

22.26 Contrary to the suggestion made by Crown Office it does not appear that the defence knew of Sergeant Busuttil's potential evidence as a result of its own enquiries. Although not called, Sergeant Busuttil featured on the Crown's list of witnesses (no. 662) and was precognosced by the defence prior to the trial (see appendix). While Sergeant Busuttil confirms in this precognition that on 12 April 1999 he travelled with Anthony and Paul Gauci to Kamp van Zeist in connection with the identification parade, he makes no reference to the *Focus* magazine. He does, however, make the following comment on the subject of pre-trial publicity:

"However, by 1999 most people had seen photographs of Megrahi. I could pick out Megrahi although I had never seen him personally myself. The others at the ID parade did not look enough like Megrahi to be confused with him."

22.27 There also appears to be no basis for the Crown's belief that a copy of Sergeant Busuttil's statement was supplied to the defence by the Maltese police during preparations for trial. One of the conditions imposed by the Maltese authorities in return for allowing the Scottish police to conduct enquiries there in 1989

was that the Maltese police be provided with copies of all statements obtained from Maltese witnesses. In 1999 the Maltese Attorney General passed copies of these statements to the defence following a request to do so by the co-accused's representatives. During preparations for the appeal in 2001 a list purportedly of all such statements was compiled by the Maltese Police Commissioner (see appendix). Sergeant Busuttil's statement does not appear on that list. The Commission also obtained from the McGrigors electronic files an index of statements they had obtained from the Maltese police (see appendix). This index includes a number of statements not mentioned in the list compiled by the Maltese Police Commissioner, including a number of statements taken in 1999. However, again there is no mention of Sergeant Busuttil's statement (although it does list a statement taken from him in April 1999 regarding a separate matter (S5725A, see appendix)).

22.28 Sergeant Busuttil's senior officer, Mr Scicluna, was also listed by the Crown as a witness (no. 661) but again was not called. In his Crown precognition (see appendix) he makes reference to the *Focus* magazine though not to the date, or even the month or year, in which it was handed over by Mr Gauci. Despite his having been seen on two occasions by the defence, there is no reference to the *Focus* magazine in either of Mr Scicluna's defence precognitions.

22.29 Although Mr Bell in his defence precognition makes reference to obtaining the *Focus* magazine while at Kamp van Zeist for the identification parade, his precognition contains no details as to the length of time the magazine was in Mr Gauci's possession or the proximity of this to the parade. Nor is there any reference to such matters in Mr Bell's police statement on the subject (S2632CO). Copies of this statement and his defence precognition are included in the appendix.

22.30 At interview with the Commission's enquiry team (see appendix of Commission interviews) none of the applicant's trial representatives could recall being aware of the information contained in Sergeant Busuttil's statement.

(ii) Evidence as to Mr Gauci's exposure to articles in It Torca newspaper

22.31 As explained in chapter 4, during the course of its review the Commission obtained from D&G a number of "protectively marked" (or classified) documents. One such item is a confidential report dated 20 March 1999, entitled "Threat Assessment – Gauci Brothers", certain passages of which the Commission has been given consent to disclose (see appendix of protectively marked materials). As its title suggests, this report appears to a have been intended as a basis for discussing witness safety issues in the lead-up to the trial and the various ways in which perceived risks might be addressed. It contains the following passage in relation to the difficulties posed by increasing press attention in the case:

> *"On 28 February 1999 the Malta local language newspaper It Torca (The Torch) published a two page spread on pages 16 and 17 in which a photograph of the two accused appeared along with other photo montages of the various scenes at Lockerbie. Just after this appeared a local (thought to be a shopkeeper) (unidentified at present) came into Marys* [sic] *House shop and showed Tony Gauci the article. The following week a further two page spread in the same newspaper was published which concluded the article begun the previous week, this was similar to the first with photographs supporting the main article. Needless to say the publication of this article had a profound effect on both of the brothers, it is more likely that Paul would be more worried than Tony as he can probably grasp the potential threat to his and his brothers* [sic] *safety."*

22.32 By letter dated 8 March 2007 Crown Office confirmed to the Commission that this report was not disclosed to the defence. It was explained in the letter that Crown Office has no record of the document in its files but that Mr Brisbane, now Deputy Crown Agent, was confident that as a member of the joint police and prosecution investigation team in Malta in early 1999 he would have been made aware of the information it contained.

Further enquiries

(i) Sergeant Mario Busuttil

22.33 Members of the Commission's enquiry team met with Sergeant Busuttil in Malta on 1 August 2006. A copy of his statement is contained in the appendix of Commission interviews.

22.34 Sergeant Busuttil explained that his first involvement in the case was from about 1991/2 until 1993/4 and that he was involved again from 1999 until the end of the trial. He had assisted generally in obtaining statements from witnesses as well as maintaining security arrangements for Anthony and Paul Gauci particularly in respect of their shop, Mary's House.

22.35 On being shown a copy of the HOLMES version of his statement Sergeant Busuttil confirmed that its contents accorded with his understanding of events. While he had not seen the original manuscript version of the statement, he said he would be content with the HOLMES version provided it was the same as the manuscript version. The Commission subsequently obtained the manuscript version of Sergeant Busuttil's statement which, as explained above, was noted by Mr Bell – it is in precisely the same terms as the HOLMES version (see appendix).

22.36 Sergeant Busuttil was generally unable to expand on the terms of the statement. He did not dispute that he had visited Mr Gauci on 1 April 1999 but could not recall clearly the purpose of the visit other than that during that time he would visit Mary's House quite often in connection with the Gaucis' protection and security. He specifically recalled Mr Gauci uttering the words "dan hu" when referring to the applicant's photograph within the article. Sergeant Busuttil took this to mean that Mr Gauci believed the man pictured in the photograph was the same as the man who purchased the items of clothing from his shop in "December 1988". Although it was possible that he had discussed the matter further with Mr Gauci that day he could not remember what else was said. He could not recall reading out the contents of the article to Mr Gauci but it was possible that he had done so.

22.37 Sergeant Busuttil confirmed that he had taken the magazine to Kamp van Zeist where he had travelled with Mr Gauci so that the latter could view the identification parade. There, Sergeant Busuttil had handed the magazine to Mr Bell. Sergeant Busuttil explained that as his stay in the Netherlands on this occasion was brief he would not have placed baggage in the hold of the aircraft and would have taken the magazine in his hand luggage. He could not recall discussing the article with, or showing it to, Mr Gauci while on the plane, but he explained that normally he would not talk about such matters on planes.

22.38 Prior to Sergeant Busuttil's interview a member of the Commission's enquiry team obtained archive copies of *It Torca* newspaper dated 28 February and 7 March 1999 from its publisher in Malta (see appendix). As detailed in the report dated 20 March 1999, both editions were found to contain articles about the case featuring photographs of the applicant and the co-accused. The photographs of the two accused in each article are different.

22.39 At interview Sergeant Busuttil was referred both to the relevant passage in the report of 10 March 1999 and to the *It Torca* articles themselves. He could not recall Mr Gauci discussing either article with him and indeed did not believe that Mr Gauci read newspapers. In Sergeant Busuttil's view it was more likely that Paul Gauci read newspaper articles and that Paul Gauci would have shown articles about the case to Anthony Gauci.

22.40 Asked if Mr Gauci had ever indicated to him an awareness that the man whose photograph appeared in the *Focus* article would be present in the line-up at the identification parade, Sergeant Busuttil answered: "Yes, because Tony knew he was going to the identification parade and had seen photographs of the suspects on the news etc."

(ii) Anthony Gauci

22.41 As explained in chapter 4 Mr Gauci has not approved the terms of his statement (see appendix of Commission interviews), although the Commission is confident that it reflects what was said at interview.

22.42 During the interview Mr Gauci was referred to a copy of the *Focus* article and was asked if he recalled discussing this with Mr Scicluna and Sergeant Busuttil following a visit they made to his shop in 1999. Mr Gauci explained that Mr Scicluna and Sergeant Busuttil used to come to his shop often so it was difficult to remember a particular visit in that year. He had seen many magazines, and customers would bring newspapers to his shop. The people who used to come into the shop to discuss the case used to annoy and stress his father. When people came into his shop and told him that his name was in the newspaper he would ask them to read the articles out to him. He recalled an occasion when the man from the next door shop, Mr Pollicini, had shown him a magazine or a book. According to Mr Gauci the photograph of the applicant contained in the *Focus* article shown to him by the Commission's enquiry team was the same as that which appeared in the magazine shown to him by Mr Pollicini. However, he could not recall the actual magazine.

22.43 Mr Gauci was read the relevant passages from Sergeant Busuttil's statement and was asked when in December 1998 he had received the magazine. He could not recall the exact date he had received it, other than that it was at the beginning of December 1998. He was also unable to recall whether he had the article in his possession from December 1998 to April 1999 or indeed how long he had it at all. He remembered going to the identification parade but could not recall discussing the article with anyone during the course of the journey to the Netherlands. Asked if he could recall discussing the article with anyone at any time, he replied that people would come into his shop every day to discuss the case. He would ask Mr Pollicini to read out articles to him or to give him the gist of what was in them. He recalled discussing the article with Mr Bell who "used to ask [him] if [he] recognised the man and [he] used to say that it was the man." Although Mr Gauci was not sure whether it was the *Focus* magazine, he recalled the photograph. He could not remember discussing the article with Mr Bell when he arrived in the Netherlands for the identification parade.

22.44 Asked whether he could recall seeing any newspaper reports or magazine articles about the case, other than the *Focus* article, before giving evidence, Mr Gauci explained that friends would sometimes give him newspaper cuttings. He did not

recall how many times this had actually happened. It did not happen lots of times but friends would tell him when there was a news story about him and they would give him the cutting. Sometimes Mr Gauci saw and heard about the case in news programmes on Maltese television. Asked whether this occurred frequently, he replied that it depended on the time he came home. If there was a news item on television then he would watch it. The local news programmes did not report on the case every day but he would watch what was reported both before and after the trial. Sometimes the applicant's photograph would appear in the television reports, along with pictures of the plane and the scene of the disaster. As he does not read English, Mr Gauci would not read the newspaper stories.

22.45 Mr Gauci was referred to the relevant passage in the confidential report dated 20 March 1999 and to the editions of *It Torca*, and was asked whether he recalled the incident in question. Mr Gauci explained that he did not buy *It Torca* usually, but that the articles could have been passed to him as cuttings. Although he could not recall seeing the articles he remembered seeing the photographs contained in them. Asked specifically whether he recalled seeing the photographs of the applicant and the co-accused which feature in the edition of *It Torca* dated 28 February 1999, Mr Gauci replied that he had seen hundreds of photographs at the police depot and had told the police that "it must have been him but he was much younger". The men shown in the photographs within the article looked younger to Mr Gauci than they did at trial. Contrary to his initial position at interview (that he had seen the photographs contained in both articles) Mr Gauci then said that he did not recall seeing at the time the photographs of the suspects which feature in the edition of *It Torca* of 7 March 1999. Asked whether he considered the contents of the report of 20 March 1999 wrong in its suggestion that he did see this article, Mr Gauci responded that when he spoke to the officer who produced the report "he was not speaking about these articles in particular". He reiterated that he did not recall seeing either of the articles and (again contrary to his initial position) said that he had not seen the photographs which featured in the edition of 7 March 1999. He did, however, recall seeing the photographs which featured in the edition dated 28 February 1999, but was unable to say whether this occurred prior to the trial. People came into his shop "every day" with newspaper cuttings. When it was put to him that the report of 20 March 1999 indicated that he had seen the article prior to the trial, Mr Gauci replied that he did not

dispute the terms of the report. It was just that he was not sure and he had seen many newspaper cuttings.

22.46 Mr Gauci could not recall ever seeing a televised interview with the applicant carried out by representatives of a US news channel.

22.47 Asked whether he considered his exposure to photographs of the applicant in the media before the trial might have affected his ability to identify the purchaser of the clothing, Mr Gauci replied that he did not believe this at all. He explained that before he had seen any photographs of the applicant he had required to assist in preparing the identi-kit of the purchaser. Asked if there was a risk that when he attended the identification parade he was simply identifying someone whose photograph he had seen in the media on a number of occasions, Mr Gauci repeated that he did not believe this.

(iii) Paul Gauci

22.48 In his statement to the Commission (see appendix of Commission interviews) Paul Gauci could not recall the visit made to his shop by Mr Scicluna and Sergeant Busuttil in connection with the *Focus* magazine and said that he was not present when it took place. He was shown a copy of the *Focus* article but could not recall having seen it before. He collected articles about the case as they were published and kept many press cuttings at home from before the trial. However, he could not recall this particular magazine and, despite the fact that they lived together in the same house (both then and now), could not recall Anthony Gauci keeping it at home. Paul Gauci also could not recall Sergeant Busuttil having the magazine in his possession when they both accompanied Anthony Gauci to the identification parade, nor could he recall any mention being made of the article while in the Netherlands on this occasion.

22.49 Paul Gauci confirmed that, generally, when articles about the case came to his attention he would give Anthony Gauci a summary of their contents. Asked how frequently he saw and read newspaper articles about the case, Paul Gauci replied that "[t]here was practically an article every week" as well as programmes about the case broadcast on the BBC and coverage in the Maltese press.

22.50 Paul Gauci was asked whether, leaving aside the *Focus* article, there were other occasions when he saw the applicant's photograph in the media. He replied that there were certainly pictures of the applicant in the British press and also in the television coverage. Asked whether he knew that the applicant would be in the line-up at the identification parade, he replied "[m]ost probably I knew this because it was reported that Gadaffi had consented to send the accused for trial." In his supplementary statement (see appendix of Commission interviews) Paul Gauci confirmed that he knew this and expected that Anthony Gauci would also have been aware.

22.51 On being read the relevant passage from the confidential report dated 20 March 1999 and shown the related newspaper articles, Paul Gauci explained that they did not buy *It Torca* and that someone must have shown Anthony Gauci the newspaper. Paul Gauci did not recall the newspapers, but one of Anthony Gauci's friends might have brought the article to him. He was not present when the articles were shown to Anthony Gauci.

Consideration

(i) The Crown's duty of disclosure

22.52 Clearly the regime whereby the Crown routinely discloses police witness statements to the defence, as required following the decision of the Privy Council in *Sinclair v HMA* 2005 SCCR 446, was not in place at the time of the applicant's trial. Similarly, although prior to that decision the Crown had introduced a system in which the defence in High Court cases were, subject to limited exceptions, provided with copies of all such statements in its possession, this did not take effect until some years after the conclusion of proceedings in the applicant's case.

22.53 At the time of the applicant's trial the Crown's obligations in respect of disclosure were as set out in *McLeod v HMA* 1998 SCCR 77. There the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown has a duty to disclose to

the defence information in its possession that would tend to exculpate the accused, or is likely to be of material assistance to the proper preparation or presentation of the accused's defence (Lord Justice General (Rodger) at p 97), as well as information in its possession and knowledge which is significant to any indicated line of defence, or which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt upon it (Lord Hamilton at p 100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the European Convention of Human Rights (Lord Rodger at paragraph 65). In terms of *McLeod* the Crown's obligations of disclosure subsist "at any time" (Lord Justice General (Rodger) at p 97).

22.54 In the Commission's view it is clear from these decisions that the Crown's duty of disclosure extends only to information within its possession and/or knowledge. Although in *Holland* Lord Rodger (at paragraph 74) suggested that the Crown was in certain circumstances obliged to search for information not readily in its possession, this was in the context of identifying outstanding charges faced by Crown witnesses, or in respect of specific requests by the defence. In the Commission's view it was not intended to impose a general duty upon the Crown to search materials held exclusively by the police or other agencies with a view to establishing whether they contain disclosable evidence.

(ii) The test to be applied in assessing undisclosed evidence

22.55 Generally, evidence not heard at trial can only be led at appeal where the appellant satisfies the requirements of sections 106(3)(a) and (3A) of the Act. These provide that such evidence may found an appeal only if there is a "reasonable explanation" as to why it was not led at the original proceedings. The test applied by the court in assessing the significance of evidence led under these provisions has been set out in a number of decisions, notably *Al Megrahi v HMA* 2002 SCCR 509. The most significant features of the test are that the court must be satisfied that the additional evidence is capable of being regarded as credible and reliable by a reasonable jury, was likely to have had a material bearing on its determination of a critical issue at trial and is of such significance that it is reasonable to conclude that a

verdict reached in ignorance of its existence must be regarded as a miscarriage of justice (paragraph 219).

22.56 That, however, is not the test applied in cases where the reason for the absence of the evidence at trial is the Crown's failure to disclose it. In *Holland*, for example, the Privy Council's assessment of the undisclosed evidence was based upon the approach taken by the High Court in *Hogg v Clark* 1959 JC 7, a decision concerning the improper exclusion at trial of a relevant line of cross examination by the defence. Lord Rodger said the following at paragraph 82:

> *"Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge (2). At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross examination would have been. But applying the test suggested by Lord Justice General Clyde in* Hogg v Clark*...I cannot say that the fact that counsel was unable to cross examine in this way might not possibly have affected the jury's (majority) verdict on charge (2) – and hence their verdict on charge (3)"* (a similar test is applied by the Court of Appeal in England: *R v Hadley* [2006] EWCA Crim 2544; *R v Smith* [2004] EWCA 2212 and *R v Ward* (1993) 96 Cr App R 1).

22.57 The same approach was taken by the Privy Council in *Sinclair*. There, it was held that the undisclosed evidence was plainly likely to be of material assistance to the defence and that it was "impossible therefore to say that the appellant's defence was not prejudiced by what happened in this case" (Lord Hope at paragraph 35).

22.58 Similarly, in *Gair v HMA* 2006 SCCR 419 the High Court held that statements and other evidence relating to an important Crown witness should have been disclosed to the defence. In allowing the appeal the court accepted that even with the benefit of the undisclosed evidence the jury might still have convicted the appellant. However, while one could not tell what the effect of the additional information would have been, "the possibility that the jury might have reached a different verdict if the police statements and other information about [the witness] had been disclosed is in our view real and certainly cannot be excluded" (at paragraph 39).

22.59 In *Kelly v HMA* 2006 SCCR 9 it was argued on behalf of the appellant that it was "impossible to assert" that an undisclosed police statement by the complainer would not have made a difference to the outcome of the case. In particular it was submitted that the approach adopted by the court to non-disclosure has been to "refuse to indulge in speculation as to how the failure might have impacted on the jury". In rejecting the appeal the court held that in determining whether the appellant's article 6 rights had been breached "the critical issues include the materiality of the statement in question and the nature and extent of any prejudice suffered by the appellant as a result of non-disclosure." In the court's view had the statement been disclosed its terms would not have assisted the defence in undermining the complainer's credibility or reliability.

22.60 In all of the above cases the undisclosed material which formed the basis of the appeals was in the possession of the Crown. In *Johnston v HMA* 2006 SCCR 236, however, the court was faced with a situation in which several material witness statements obtained by the police were not passed to the procurator fiscal and therefore were not made known to the Crown. While the appellants' grounds of appeal were based partly upon an alleged failure by the Crown to disclose the statements, in the event the court heard the evidence of the witnesses under section 106(3)(a) of the Act (the Crown having conceded at an earlier stage that there was a reasonable explanation in terms of subsection (3A) as to why their evidence was not heard at trial). Accordingly, in assessing the significance of the evidence the court applied the test set out in *Al Megrahi*, and not the *Hogg v Clark* test as adopted by the Privy Council in *Holland* and *Sinclair*. The court concluded that the evidence of the witnesses would have had a vital bearing on a critical issue at trial and that the jury's verdict returned in ignorance of it amounted to a miscarriage of justice (at paragraph 111).

22.61 On one reading *Johnston* might be considered as authority for the proposition that in assessing the significance of undisclosed evidence known only to the police, the court will be inclined to apply the *Al Megrahi* test as opposed to that adopted by the Privy Council in *Holland* and *Sinclair*. In the Commission's view, however, it is doubtful that this is the correct interpretation of that decision. In *Johnston* the court

approached the appeal on the basis of the evidence it heard from the witnesses, and not on the terms of the undisclosed statements themselves. In that sense, the decision can be distinguished from *Holland*, *Sinclair* and *Gair* which were argued and decided purely upon the basis of the material which the Crown had failed to disclose. Moreover, if *Johnston* is truly authority for the application of the *Al Megrahi* test in such circumstances, it would mean that there are effectively two tests for assessing undisclosed evidence: one where the evidence was in possession of the Crown and the other where it was known only to the police. In the Commission's view, given that from an appellant's perspective the identity of the party responsible for the non-disclosure of material evidence is irrelevant, it would seem unusual if the test for assessing the significance of such evidence was determined by this factor.

22.62 In conclusion, the Commission considers that the test it should adopt in assessing the materiality of undisclosed evidence, whether it is in the possession of the Crown, the police or both, is that applied by the Privy Council in *Holland* and *Sinclair*, and by the High Court in *Gair*.

(iii) Potential significance

Sergeant Busuttil's statement

22.63 As narrated above, the evidence at trial indicated that on a date towards the end of 1998 or the beginning of 1999 a shopkeeper showed to Mr Gauci the *Focus* magazine which contained an article about the Lockerbie case along with a photograph of the applicant, that Mr Gauci remembered taking the magazine and showing it to Mr Scicluna and that Mr Gauci told Mr Scicluna that the photograph of the applicant "looked like" the man who purchased the clothing from his shop.

22.64 In the Commission's view the contents of Sergeant Busuttil's police statement significantly expand on the circumstances surrounding Mr Gauci's exposure to the applicant's photograph in the magazine. In particular, whereas the evidence at trial perhaps gives the impression that the magazine was in Mr Gauci's possession only fleetingly, in terms of Sergeant Busuttil's statement the period seems to have been of the order of four months. During that time Mr Gauci appears to have kept the

magazine at his home where he would have been free to view the contents of the article, including the applicant's photograph, as and when he wished. Critically, Mr Gauci's possession of the magazine, and therefore his potential exposure to the applicant's photograph, came to an end, not months before the identification parade as the evidence at trial perhaps tends to convey, but on 9 April 1999, a matter of only four days. It was on that date, according to Sergeant Busuttil's statement, that Mr Gauci last saw the applicant's photograph in the article before travelling to the Netherlands on 12 April to view the parade the following day.

22.65 While Mr Gauci does not read English it is clear from his evidence that he was in no doubt as to the subject matter of the *Focus* article. Entitled "The Whole Truth About Lockerbie", it extends to four pages, two of which are occupied by a photograph of the nose-section of PA103, which appears alongside smaller images of officials from the US Department of Justice. There are also a large photograph of Colonel Gadaffi and, beneath the sub-heading, "Pan Am 103 Who planted the bomb?", photographs of the applicant and the co-accused, both of whom are named.

22.66 Given the contents of the article, and the fact that at interview Mr Gauci indicated that he had seen other photographs of the applicant in the media, it is unlikely that Mr Gauci would not have been aware that the applicant was an accused in the case. According to what Mr Gauci said at interview the photographs of the applicant contained in the *Focus* and *It Torca* articles are merely examples of those to which he was exposed throughout the years. Not only did Mr Gauci see such articles, but it appears that Paul Gauci kept a collection of press cuttings at their home.

22.67 In the circumstances it is difficult to avoid the conclusion that Mr Gauci would also have been aware that the applicant was to be present on the identification parade. If that is true, then no matter what attempts were made to select stand-ins of similar appearance there was a substantial risk that the applicant would be instantly recognisable to Mr Gauci, not from any genuine memory of the purchaser, but rather as a result of his exposure to photographs of the applicant in the media and, in particular, to the one he saw only four days previously.

22.68 The dangers posed by witnesses seeing suspects prior to viewing them in parades are obvious and are fully acknowledged in the Lord Advocate's guidelines to Chief Constables on the conduct of identification procedures issued in 2007:

> *"It is essential that the witnesses who are to view the parade do not, at any time, have an opportunity of seeing the suspect or accused, or the other parade members" (*p20; an identical passage is contained in an amendment made in 1991 to the Guidelines on the Conduct of Identification Parades issued by the Scottish Office in 1982: see chapter 21).

22.69 In the Commission's view while this provision relates solely to the conduct of identification procedures such as parades, the risk it seeks to avoid applies equally to situations in which a witness has been exposed to images of the accused in the media.

22.70 Indeed, there are indications that Mr Gauci may in the past have been influenced by his exposure to photographs of suspects in the media. In his statement of 5 March 1990 (CP 467) Mr Gauci is noted as having told police that he thought that a photograph of the incriminee Talb, which featured in an article about the Lockerbie case in *The Sunday Times* of 5 November 1989 (CP1833), "may have been" and "looks the same as" the man who bought the clothing. As noted above the photograph in question was one of two which appeared under the caption "Bomber". In an earlier, undated statement relating to an interview which took place on 2 October 1989 (CP 463), Mr Gauci was shown an image of Talb which the police had obtained by using the freeze frame facility of a video recorder. Although Mr Gauci was unable to say that the image was definitely the same as the purchaser he believed it to be similar. In evidence Mr Gauci was not referred specifically to his statement of 5 March 1990 but was shown the relevant pages of the newspaper (31/4766-4770). Referring to the photograph of Talb in the article, Mr Gauci commented: "I thought it was the man on this side, I thought. That was the man who bought the articles from me" (31/4767).

22.71 However, at interview on 10 September 1990 (see CP 469) Mr Gauci did not select Talb's photograph from a large number shown to him by the police (CP 1244;

31/4762-4764). Similarly, on 6 December 1989 Talb's photograph was among a number shown to Mr Gauci but again he did not pick this out as even resembling the purchaser (31/4765-4766). While it is impossible to tell whether Mr Gauci's exposure to *The Sunday Times* article in fact influenced his identification of Talb on 5 March 1990 (and in evidence), in the Commission's view the fact that he failed to pick out photographs of Talb when these were shown to him in less suggestive circumstances certainly does not assist in dispelling such a concern. It is worth adding that, in terms of the Crown case at least, Talb could not have been the purchaser of the clothing.

22.72 At an early stage in the review the Commission instructed Professors Tim Valentine and Ray Bull, both of whom specialise in the psychology of eyewitness identification, to provide opinions on aspects of Mr Gauci's evidence (see appendix). The Commission recognises that these opinions are by and large inadmissible in terms of current law. The purpose in instructing them was to obtain a general insight into the psychology of eyewitness identifications and an assessment of how factors such as delay and exposure to media coverage might have impacted upon Mr Gauci's evidence. Neither opinion has played any part in the Commission's decision to refer the case on this ground, and the Commission would merely note that both experts expressed concern over the possible effect of Mr Gauci's exposure to the *Focus* magazine so close to the date of the parade.

22.73 At interview with the Commission's enquiry team, Mr Gauci did not believe at all that the photographs of the applicant he had seen affected his ability to identify the purchaser of the clothing. In particular, he did not believe that when he attended the identification parade there was a risk that he was simply identifying someone whose photograph he had seen in the media on a number of occasions. In the Commission's view it is unlikely that at the parade Mr Gauci was able to put these photographs, including the one he saw only four days previously, out of his mind completely. In any event his assurances in this connection do not lessen the risk that his identification was influenced by such factors. This is not to suggest that Mr Gauci was seeking at interview to hide the possibility that his identification of the applicant was unreliable, simply that he himself may not be fully aware of the extent to which his identification evidence was affected by what he had seen in the media. It is perhaps worth noting in this connection that at interview Mr Gauci's partial

identification of the applicant was elevated to one in which the applicant was "100 per cent the right person".

22.74 The Commission recognises that nothing in Sergeant Busuttil's statement detracts from the fact that Mr Gauci picked out the applicant from a photo-spread on 15 February 1991 as resembling the purchaser of the clothing, and that he did so at a time when photographs of the applicant had not yet appeared in the media. Understandably the Crown cited this as a factor in support of the reliability of Mr Gauci's identification evidence and, as indicated, both the trial and appeal courts considered this to be of some significance. In the Commission's view, however, this aspect of the identification evidence must be seen in context. Mr Gauci's identification of the applicant by photograph was, on any view, equivocal. His initial position in his statement of 15 February 1991 is that the applicant's photograph was "similar" to the man who bought the clothing. He told the police that it had "been a long time now", and that he could "only say that [the applicant's photograph] resembles the man who bought the clothing, but it is younger". Later in the statement Mr Gauci adds that he could "only say that of all the photographs I have been shown [the applicant's photograph] 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." This last comment was a reference to the photograph of Talb which appeared in *The Sunday Times*, as described above.

22.75 In the Commission's view it is also important to bear in mind that Mr Gauci's identification of the applicant by photograph occurred well over two years after the events themselves took place and after he had been shown numerous other photographs of potential suspects. It is also impossible to view the photographic identification in isolation from the substantial discrepancies between Mr Gauci's original description of the height and age of the purchaser and the applicant's height and age at the relevant time; and, indeed, of the Commission's doubts as to the date of the purchase as established by the trial court (see chapters 21 and 24). In any event the trial court's acceptance of Mr Gauci's evidence was based not just on his selection of the applicant's photograph on 15 February 1991 but also on his identification of the applicant at the parade and in evidence.

22.76 Taking these factors into account the Commission does not consider the potential significance of Mr Gauci's exposure to the *Focus* magazine and other publications to be significantly diminished by his earlier identification of the applicant by photograph.

22.77 A further issue that requires to be considered in assessing the significance of the failure to disclose Sergeant Busuttil's statement relates to the passage in which he describes Mr Gauci as having pointed to the photograph of the applicant in the *Focus* article and having uttered the words "dan hu" (or, in English, "that's him"). Had Sergeant Busuttil's statement been disclosed to the defence it is clear that this passage would have played a significant part in the defence assessment of the evidence and whether it should be led. In examination in chief Mr Gauci could not remember uttering these words and seemed to recall that he had told Mr Scicluna something like, "This chap looks like the man who bought the articles from me". Nevertheless, one can understand that the defence might well have been reluctant to call Sergeant Busuttil given the possibility that his evidence would support the Crown case.

22.78 This view was reflected in the accounts given at interview by some of the applicant's former representatives. On being shown a copy of Sergeant Busuttil's statement, Mr Beckett observed that it was "slightly fortuitous" that Mr Gauci did not speak in evidence to the words attributed to him in the statement. Mr Duff considered that the statement might have posed a dilemma on the basis that if the defence had led it in evidence the Crown would have been able to rely on Mr Gauci's identification of the photograph as correct. In Mr Duff's view "[i]t would have been in our minds at the time whether to use it or to leave it alone". If Mr Gauci had indeed said "that's him", as Sergeant Busuttil maintained, according to Mr Duff this would have been the "high point of his evidence". Mr Duff considered Mr Gauci to be a difficult witness who was a "moving target" and who "never spoke precisely".

22.79 Mr Taylor, on the other hand, considered Sergeant Busuttil's statement as "potentially very significant". This was because it could have shown that Mr Gauci still had the *Focus* article in his possession four days before the identification parade, and so raised the issue of suggestibility. According to Mr Taylor if the statement had been disclosed it would have provoked enquiries by the defence which might have

started the process of undermining the identification completely. Mr Taylor's attention was drawn to the passage in the statement in which Mr Gauci reportedly uttered "that's him", and to Mr Gauci's earlier identification of the applicant by photograph. While Mr Taylor still maintained that the defence would have wanted to find out everything it could about the contents of the statement, he conceded that the evidence would not necessarily have been used.

22.80 In the Commission's view the extent to which the Crown could have relied upon Mr Gauci's "identification" of the applicant's photograph in *Focus* magazine cannot be separated from the highly suggestive context in which it appeared. In other words any positive "identification" of the applicant from a published photograph of him which appears beneath the caption "Who planted the bomb?" is not, in the Commission's view, capable of bolstering an otherwise equivocal identification.

The confidential report dated 20 March 1999 and the *It Torca* articles

22.81 Viewed alongside Sergeant Busuttil's statement, the report of 20 March 1999, and the *It Torca* articles themselves, assist in shedding further light upon the extent to which Mr Gauci was exposed to images of the applicant prior to the trial. At the very least, the report constitutes evidence of the kind which at appeal was considered important by the court (and by the Crown) in the context of the applicant's submissions on the prejudicial effect of pre-trial publicity.

22.82 At interview Mr Taylor claimed that if he had been aware of the report of 20 March 1999 or the *It Torca* articles he would have used these in his cross examination of Mr Gauci. As the articles were published in 1999 Mr Taylor considered them to be of great significance. In particular, he would have made something of the fact that the officer who prepared the report had said that the publication of "the article" had a "profound effect" on Anthony and Paul Gauci. If he had had articles of the kind which appeared in *It Torca* it would, Mr Taylor said, have undermined the evidence of the identification parade and was patently something that would have to be taken into account. The evidence of the *It Torca* articles was, in Mr Taylor's view, of a similar kind to the evidence in Sergeant Busuttil's statement and would have been used in a similar way. If one had personal knowledge that a witness had recently been

shown a photograph of an accused then, according to Mr Taylor, "nobody could fail to use it". Indeed, Mr Taylor suggested that it might even have vitiated the identification parade. He compared the situation to one in which, at a video identification parade, a photograph of an accused person was shown on the screen before the witness viewed the parade. Mr Taylor said that in such a case he would want to argue that evidence of the identification parade was inadmissible on the basis of the conduct of the police.

22.83 Asked why, in these circumstances, the defence had not led evidence as to the extent to which the applicant's photograph had appeared in the media, Mr Taylor replied that he considered this to be common knowledge and therefore within judicial knowledge. In response to the suggestion that the precise extent to which Mr Gauci had been exposed to such photographs would not have been within judicial knowledge, Mr Taylor maintained that it was within judicial knowledge that Mr Gauci was unlikely to have escaped such exposure. He accepted that, using hindsight, it could be said that the defence ought to have led evidence as to the extent of the pre-trial publicity and cross examined Mr Gauci as to his experiences of this, but he questioned whether it would have been possible for the defence to review all the Maltese publications to which Mr Gauci might have been exposed. According to Mr Taylor the view taken by all the members of the defence team was that the issue of media coverage was so obvious that it would have been pointless to show a list of the publications. He added that the defence believed – wrongly, as it turned out – that the judges were not going to accept the identification evidence.

Conclusions

22.84 Applying the principles in *McLeod* and those set out by the Privy Council in *Holland* and *Sinclair*, the Commission is of the view that Sergeant Busuttil's police statement and the report of 20 March 1999 should have been disclosed to the defence. Both items were likely to have been of material assistance in the proper preparation or presentation of the applicant's defence and to have been of real importance in undermining of the Crown case.

22.85 Even with the benefit of the court's reasons for the conviction it is difficult to assess the potential impact of these items on the course of the trial and the eventual verdict. In terms of the accounts given by the defence representatives it is by no means clear that the contents of Sergeant Busuttil's statement would have been led in evidence by the defence. The defence might well have concluded that the value of Sergeant Busuttil's statement in casting doubt upon Mr Gauci's identification of the applicant at the parade was outweighed by his "identification" of the applicant's photograph in the article. While the same risk perhaps did not apply to leading evidence of the report of 20 March 1999 and the *It Torca* articles it is possible, notwithstanding Mr Taylor's comments at interview, that the defence would have opted not to raise such matters with Mr Gauci for fear of an unhelpful response from him.

22.86 In that sense the present case bears some similarity to the circumstances in *Holland*. There the undisclosed evidence consisted partly of details of outstanding charges faced by the two complainers which could have been used to undermine their credibility. One of the factors relied upon by the High Court in rejecting the initial appeal was that cross examination of the complainers as to their character "would have risked the disastrous consequence that the court might permit the Crown to refer to the appellant's criminal record" (*Holland* (High Court) 2003 SCCR 616, Lord Justice Clerk (Gill) at paragraph 43). On appeal to the Privy Council, however, Lord Rodger, while recognising the existence of such a risk, was unable to say that cross examination of the complainers on this basis "would inevitably have led to the Crown being permitted to cross examine the appellant on his previous convictions" (at paragraph 82). The Privy Council thereafter quashed the appellant's convictions.

22.87 In other words the approach taken by the Privy Council was that while the appellant would have faced the risk of adverse consequences to his own defence if he had made use of the undisclosed evidence, that was not a sufficient basis for upholding the conviction unless these consequences were inevitable.

22.88 Applying the same approach to the present case, the Commission is of the view that it cannot be said that evidence of Sergeant Busuttil's statement, the report of 20 March 1999 and the *It Torca* articles would inevitably have had adverse

consequences for the applicant's defence. Indeed, if the trial court had rejected the evidence of the parade because of the undisclosed evidence, it might also have rejected the dock identification on the same basis. In such circumstances it might well have rejected the identification evidence in its entirety. That this is more than a mere possibility is perhaps demonstrated by the court's acknowledgment in its judgment that there were "undoubtedly problems" with Mr Gauci's identification of the applicant (at paragraph 64), and that the differences between Mr Gauci's initial description of the purchaser and that of the applicant at the time amounted to a "substantial discrepancy" (at paragraph 68). Moreover if, as paragraph 55 of its judgment suggests, the trial court was under the mistaken impression that the identification parade took place on 13 August 1999 (as opposed to 13 April) evidence that Mr Gauci had seen the *Focus* article at the end of 1998 or beginning of 1999 might not have been considered particularly significant given that, on this view, the period between exposure and the parade was about 8 months. Sergeant Busuttil's statement, of course, shows that this period was in fact four days, a time frame which the court might well have considered critical in determining whether the identification evidence should be accepted.

22.89 In any event, standing the approach taken in *Holland* it was for the defence to decide upon the use to which the information might be put, if any, and for the court to determine its significance as appropriate (Lord Rodger at paragraph 72).

22.90 Adopting the test applied by the Privy Council in *Holland* and *Sinclair*, the Commission is unable to conclude that evidence of the undisclosed items "might not possibly" have affected the verdict in the applicant's case. Accordingly the Commission considers that the failure to disclose the items may have resulted in a miscarriage of justice.

22.91 In referring the case on this ground, the Commission recognises that by taking part in a television interview with the US journalist Pierre Salinger on 26 November 1991 (CP 1728; evidence 72/8855-8899) the applicant may himself have contributed to the dissemination of his own image in the media. As noted above, however, Mr Gauci had no recollection of seeing this interview. In other words, unlike the position in relation to the *Focus* and *It Torca* articles, there is no indication

that Mr Gauci's identification of the applicant at the parade or in evidence was in any way influenced by his having seen the Salinger interview.

CHAPTER 23
UNDISCLOSED EVIDENCE CONCERNING"REWARD" MONIES

Introduction

23.1 During the course of its enquiries the Commission obtained from D&G various "diaries" that were kept by Mr Bell during his time in Malta in which he recorded developments in the police investigation there. The present ground relates not to an entry in those diaries but to a typewritten memorandum by Mr Bell found within one of them. The memorandum, dated 21 February 1991, was sent by Mr Bell to Supt James Gilchrist, the deputy senior investigating officer at the time, and relates to the events of 15 February 1991 when Anthony Gauci picked out the applicant from a photo-spread. A copy of the memorandum is contained in the appendix.

23.2 In the Commission's view the contents of the memorandum are potentially significant in any assessment of Mr Gauci's credibility. Two other documents recovered by the Commission - a further memorandum by Mr Bell dated 14 June 1991 (see appendix) and a confidential report by officers from Strathclyde Police dated 10 June 1999 (see appendix of protectively marked materials) - are also relevant to this issue.

23.3 By letter dated 8 March 2007 Crown Office confirmed to the Commission that Mr Bell's memorandum of 21 February 1991 was not disclosed to the defence. According to the letter, Crown Office has no record of this document in its files and no one there who dealt with this part of the case has any recollection of having seen it before. By letter dated 16 February 2007 Crown Office confirmed that the report by Strathclyde Police dated 10 June 1999 was also not disclosed to the defence. In terms of a further letter dated 27 April 2007 Crown Office explained that although a copy of the report could not be found in its files, given its nature the possibility could not be excluded that a copy was made available to them at the time or that they were made aware of its contents. As Mr Bell's memorandum of 14 June 1991 is only significant when seen in the context of his earlier memorandum, in the Commission's view there would have been no reason to disclose this in isolation.

23.4 In this chapter any references to "Mr Gauci" are to Anthony Gauci and not to his brother, Paul Gauci.

Background

23.5 Before setting out the contents of the three documents it is important to have regard to the manner in which the Crown and the defence approached the issue of Mr Gauci's credibility in their respective submissions and to how the matter was dealt with by the trial and appeal courts.

23.6 Since no challenge was made in cross examination to Mr Gauci's credibility the Crown's submissions to the trial court on this issue were brief, the advocate depute suggesting simply that "Mr Gauci appears as a credible witness and a witness whose reliability can be tested by other evidence in the case" (78/9444).

23.7 For the same reason the defence submissions make only passing reference to Mr Gauci's credibility as a witness. While counsel for the applicant variously described Mr Gauci's identification of the applicant as "utterly unreliable" (82/9871) and "plainly wrong" (82/9872) he expressly excluded from his submissions any suggestion that Mr Gauci was deliberately lying (82/9911). Counsel went on, however, to make the following observations about Mr Gauci's demeanour while giving evidence:

> *"An obviously important factor in assessing the reliability of any witness is the impression which the witness makes in court. The submission I make is that this witness's demeanour could not give the court much confidence at all in his reliability. He was reluctant to look his questioner in the eye during cross examination. He was, it's submitted, a slightly strange and lonely man. He may have given Your Lordships the impression that he's rather enjoyed the attention he's been paid as a result of the incident"* (82/9911-9912).

23.8 In the event the trial court rejected these criticisms:

"In assessing Mr Gauci's evidence we should first deal with a suggestion made in the submissions of the first accused that his demeanour was unsatisfactory – reluctant to look the cross examiner in the eye, a strange and lonely man, and enjoying the attention he was getting. We have to say that we find no substance in any of these criticisms. We are not clear on what basis it was said that he was strange and lonely, and as far as enjoying attention is concerned, he made it clear that his co-operation with the investigation was a source of friction within his family. The clear impression we formed was that he was in the first place entirely credible, that is to say doing his best to tell the truth to the best of his recollection, and indeed no suggestion was made to the contrary" (paragraph 67).

23.9 The court went on to say the following about Mr Gauci's identification of the applicant:

"From his general demeanour and his approach to the difficult question 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" (paragraph 69).

23.10 Although counsel made a further sustained attack on Mr Gauci's reliability in his submissions in the appeal, there were again no submissions on the subject of his credibility.

The evidence not heard by the trial court

(i) Mr Bell's memorandum dated 21 February 1991

23.11 As noted above Mr Bell's memorandum consists of a report to Supt Gilchrist following upon Mr Gauci's identification of the applicant from a photo-spread on 15 February 1991. Entitled "Security of Witness Anthony Gauci, Malta", the memorandum details Mr Bell's concerns as to Mr Gauci's personal security in light of

that identification and discusses the possibility of his inclusion in a witness protection programme. Its final paragraph, however, makes reference to a different matter:

> *"During recent meetings with Tony he has expressed an interest in receiving money. It would appear that he is aware of the US reward monies which have been reported in the press. If a monetary offer was made to Gauci this may well change his view and allow him to consider a witness protection programme as a serious avenue."*

23.12 As indicated Crown Office has confirmed to the Commission that no part of Mr Bell's memorandum of 21 February 1991 was disclosed to the defence. Nor does it appear that the defence was made aware of the information through its own enquiries. In particular there is no reference to Mr Gauci's alleged interest in money in Mr Bell's defence precognition or in the precognition obtained from Mr Gauci himself. In addition none of the applicant's former representatives who were interviewed could recall being aware of evidence of this kind.

(ii) Mr Bell's memorandum dated 14 June 1991

23.13 Additional information as to when these alleged meetings with Mr Gauci might have taken place is given in a further memorandum by Mr Bell to senior officers, the final paragraph of which reads as follows:

> *"I have had no personal contact with the witness Anthony Gauci since he made the 'Partial Identification of Abdel Baset'. The overall security of this witness will obviously require to be assessed should there be further developments or press attention."*

23.14 In other words, given that Mr Bell had no contact with Mr Gauci in the period between 15 February 1991 and 14 June 1991, it follows that any reference in his memorandum of 21 February 1991 to "recent meetings" must relate to dates on or before 15 February 1991, the date on which Mr Gauci identified the applicant from a photo-spread.

(iii) Report by Strathclyde Police dated 10 June 1999

23.15 In 1999 steps were taken to assess Mr Gauci for possible inclusion in a witness protection programme administered by Strathclyde Police. The results of this assessment are contained in a confidential report dated 10 June 1999 prepared by officers of that force. Although the Commission has seen this document in its entirety, it sought the consent of D&G to refer to only four paragraphs in the statement of reasons. D&G has consented to the disclosure of these paragraphs but does not wish the remainder of the report to be disclosed. Furthermore, as at least one of the officers involved in the production of the report continues to work in the field of witness protection no reference is made to their identities here or in the copy of the report contained in the appendix of protectively marked materials.

23.16 In the report Mr Gauci is described as being "somewhat frustrated that he will not be compensated in any financial way for his contribution to the case". The report adds, however, that he has not at any stage been offered inducements of any kind in return for giving evidence and that "great care" had been taken in this connection. Mr Gauci is described in the report as a "humble man who leads a very simple life which is firmly built on a strong sense of honesty and decency."

23.17 The officers concerned also interviewed Paul Gauci in connection with his inclusion in the programme. The following passage in the report details their conclusions in this respect:

> *"It is apparent from speaking to him for any length of time that he has a clear desire to gain financial benefit from the position he and his brother are in relative to the case. As a consequence he exaggerates his own importance as a witness and clearly inflates the fears that he and his brother have. He is anxious to establish what advantage he can gain from the Scottish police. Although demanding, Paul Gauci remains an asset to the case but will continue to explore any means he can to identify where financial advantage can be gained. However, if this area is explored in court with this witness however* (sic) *he will also strongly refute that he has been advantaged."*

23.18 The report makes clear that at that stage the Gaucis had received no payment in respect of their participation as witnesses in the case:

> *"Nonetheless it is important that any liaison with the subject should display an element of understanding of their personal difficulties notwithstanding of the need to demonstrate the complete lack of any incentive for the subject to cooperate with the judicial authorities."*

Further enquiries

(i) Dumfries and Galloway Police

23.19 Enquiries with D&G have established that, some time after the conclusion of the applicant's appeal against conviction, Anthony and Paul Gauci were each paid sums of money under the "Rewards for Justice" programme administered by the US Department of State. Under that programme the US Secretary of State was initially authorised to offer rewards of up to $5m for information leading to the arrest or conviction of persons involved in acts of terrorism against US persons or property worldwide. The upper limit on such payments was increased by legislation passed in the US in 2001.

23.20 The background to the payments made to Anthony and Paul Gauci is given in a number of protectively marked documents recovered by the Commission from D&G. Again clearance has been given to disclose redacted versions of these items, copies of which are contained in the appendix of protectively marked materials.

23.21 On 7 February 2001, a week after the conclusion of the trial proceedings, the then senior investigating officer in the case, Det Chief Supt McCulloch, wrote to the US Embassy in The Hague nominating Mr Gauci for a reward under the programme. In the letter DCS McCulloch highlighted the significance of Mr Gauci's evidence to the applicant's conviction and also referred to an occasion when Mr Gauci was allegedly visited by two men at his shop who invited him to Tripoli for a "meeting with Government officials and members of the Defence Team". According to the letter Mr Gauci had been informed by the men that he "would not return home empty

handed" and would be "handsomely rewarded". Although Mr Gauci had refused the invitation DCS McCulloch suggests in the letter that the alleged incident was evidence of Mr Gauci's continued vulnerability.

23.22 In support of Mr Gauci's nomination DCS McCulloch enclosed with his letter a confidential report dated 12 January 2001 prepared by one of the officers who had interviewed Mr Gauci in 1999 in connection with his inclusion in the witness protection programme. The Commission sought and obtained the consent of D&G to disclose various passages in this report, a redacted version of which is contained in the appendix of protectively marked materials. Entitled "Impact Assessment Anthony and Paul Gauci", the report highlights the contributions made to the case by both witnesses and the anxiety they had experienced as a result of their involvement. Both witnesses, the report explains, have refused all requests for interviews and offers of payment in this connection. Although the specific threat against them was considered low, according to the report it was not possible to rule out the possibility of "some form of action being taken against them". Their relocation, it is explained, would be an extremely expensive option and would have a severely detrimental impact upon them.

23.23 The report concludes with the following passages:

> *"The issue of financial remuneration has not previously been discussed in detail with the witnesses and no promises exist. It is considered that the witnesses may harbour some expectation of their situation being recognised however whilst proceedings were still 'live' they displayed a clear understanding that such matters could not be explored.*
>
> *From the outset of the investigation the efforts of the Scottish Police Service and the Crown Office have established a strong reputation for integrity and professionalism. The management of these witnesses who are the subject of this report has reflected the established regard that not only the witnesses but the Maltese police have for the Scottish police. Dumfries and Galloway Constabulary have of course ensured that the highest standards have been maintained through not only the last ten years but also the immediate pre-trial phase and during the*

trial. The conduct of the Gauci brothers reflects both their own integrity and their response to the manner with which the police have dealt with them. It is therefore vital that they continue to perceive that their position is recognised and they continue to receive the respect that their conduct has earned.

It is considered that the implementation of the foregoing recommendations will ensure that when the inevitable reflections and media examinations take place in future years the witnesses who are the subject of this report will maintain their current position and not seek to make adverse comment regarding any perceived lack of recognition of their position. Nor is it anticipated would they ever seek to highlight any remuneration received."

23.24 The sequence of events following upon Mr Gauci's initial nomination for a reward is not entirely clear. An undated, confidential document obtained from D&G entitled "Anthony and Paul Gauci Reward/Compensation Payments" (see appendix of protectively marked materials) sets out certain "key considerations" in the payment of any rewards. The document broadly reflects the "Impact Assessment" report sent to the US Embassy in connection with Mr Gauci's initial nomination for a reward and refers to such matters as the Gaucis' refusal of offers of payment from the media, their fear of repercussions and their reluctance to be relocated. It also highlights that both witnesses depended on their shop for income and that their current financial position would suffer considerably if they left the business. The report also contains the following passage on the subject of reward payments:

"At no time prior to the conclusion of the trial was the subject of a reward/compensation payment discussed. The motivation of both witnesses has never at any stage been financial, as can be seen from their refusal of money from the media. They have received no financial gain from the Scottish Police; as a result, their integrity as witnesses remains intact. This has been the priority from the outset… The very fact that the witness was not motivated by financial gain and as a result his integrity as a crucial witness was maintained, reinforces the need to ensure that at this stage his contribution and more importantly the manner of his contribution is recognised."

23.25 The report concludes with the following passage regarding Paul Gauci:

"In relation to Paul Gauci, it was a decision of the Crown not to call him to give evidence and agree a joint minute for elements of his evidence. His evidence was important as it related to the identification of the clothing. However, it should never be overlooked that his major contribution has been maintaining the resolve of his brother. Although younger, Paul has taken on the role of his father (died 7 years ago) with regard to family affairs. His influence over Anthony has been considerable (It is considered critical that the contribution of Paul is recognised in order to preserve their relationship and prevent any difficulties arising in the future)."

23.26 Despite Mr Gauci's nomination for a reward by DCS McCulloch on 7 February 2001 it appears that the matter was not in fact followed up until shortly after the rejection of the applicant's appeal. On 19 April 2002 DCS McCulloch wrote to the US Department of Justice confirming Anthony and Paul Gauci's nominations for rewards. DCS McCulloch's letter followed an earlier meeting with a member of staff at the Department of Justice on 9 April 2002 when DCS McCulloch had proposed payment of specific sums of money to both witnesses. In the letter, DCS McCulloch explains that although he had consulted with Crown Office about the nominations, they could not become involved and it would therefore be improper for them to offer a view on the matter. According to the letter, however, Crown Office recognised the contribution to the case made by both witnesses.

23.27 It is worth adding in this connection the contents of a note which appears at the end of Mr Gauci's Crown precognition (a copy of the precognition is contained in the appendix to chapter 24):

"He [Mr Gauci] *has never at any stage sought to benefit from his involvement. His brother, whilst not openly seeking any reward, has been more alive to the possibility of obtaining substantive assistance from the police which, in accordance with good practice, has been restricted to matters ensuring their immediate safety."*

(ii) Anthony Gauci

23.28 As explained in previous chapters Mr Gauci has not approved the terms of his statement to the Commission and the following account has therefore not been verified by him. The Commission is confident, however, that it reflects what he said at interview.

23.29 Mr Gauci was asked to comment on the terms of Mr Bell's memorandum of 21 February 1991. It is worth quoting the relevant passages from his statement in full:

> *"I am asked if I can recall the discussions referred to in the above passage. I did not ever ask for money. I refused all offers of money from news reporters. I met with Harry Bell many times but I did not ask for money. I asked for protection. I agreed with Harry Bell and Godfrey Scicluna that all of what I told them should remain secret and confidential. However, I was betrayed because what I said appeared in newspaper reports. I never asked for money. Not only the local journalists but also British journalists called into the shop to offer money.*
>
> *I dispute the passage of Harry Bell's report which has been read out to me. I could have taken money from the newspapers. I am asked if at the time of the report in 1991 I was aware of the US reward money on offer. I was aware of the reward money because it had been reported on television in 1991, but I was not interested in a reward. I was interested in my personal security and the security of my shop.*
>
> *I am asked whether I recall any discussion of financial payment between my first meeting with the Scottish Police and my giving evidence. I recall that Gadaffi sent for me. I recall that a person came into the shop to sell me some goods. The person had lived in Libya. He told me that Gadaffi had offered to send a private jet for me and he had said that I would not return empty-handed. I said that I was not interested.*
>
> *I am asked whether, given the terms of Mr Bell's report, I can recall the issue of money ever being discussed at my police interview on 15 February 1991 when I*

partially identified Megrahi from photographs. There was no discussion of money at this meeting. I recall that after the trial my brother Paul mentioned that there was a reward.

I am asked whether at any time prior to the trial I was ever promised payment of a reward in return for giving statements or evidence. No, I was never promised this. I am asked whether police officers ever tried to encourage me to give statements in return for a financial payment. No, this did not happen" (at paragraphs 50-53 and 55).

(iii) Paul Gauci

23.30 Paul Gauci was also asked to comment on the passage in Mr Bell's memorandum on 21 February 1991. He explained that he was not present at the meeting referred to by Mr Bell but that it was well known in the press that a reward would be given. He had insisted on this payment after the appeal but no encouragement was given by police officers in the way of offers of this kind.

(iv) Harry Bell

23.31 Mr Bell was questioned extensively about the contents of his memoranda and on the subject of reward monies in general.

23.32 Asked whether he could recall what Mr Gauci had said during the meetings referred to in his memorandum of 21 February 1991 Mr Bell said only that the discussions would have involved Paul Gauci. According to Mr Bell, Paul Gauci was pushing the issue of a reward as compensation for the hassle caused to him and his family by the case. Mr Bell had explained to Paul Gauci that he could not discuss the issue of rewards with him. Paul Gauci raised the issue on a number of occasions and Mr Bell would "clamp down" on such discussions. If Anthony Gauci was present during such a discussion then he (Mr Bell) would clamp down on it as well. The American officers involved in the enquiry had made it clear to Mr Bell that they would pay money to the Gaucis.

23.33 According to Mr Bell there was no discussion of money at his meeting with Mr Gauci on 15 February 1991 when Mr Gauci had picked out the applicant from a series of photographs shown to him. Mr Bell was referred to the passage in his memorandum of 14 June 1991, in which he had reported having no personal contact with Mr Gauci since 15 February 1991, and it was suggested to him that if that was correct Mr Gauci must have raised the issue of money on or prior to that date. Mr Bell repeated that there had been no discussion of a reward on 15 February 1991 and said that it would have been inappropriate to discuss such a thing. Mr Bell was reminded that the last statement taken from Mr Gauci prior to his statement of 15 February 1991 is dated 10 September 1990. In light of this, Mr Bell was asked again when Mr Gauci was likely to have discussed the issue of a reward with him. In response Mr Bell explained that he might have seen Mr Gauci on an occasion when a statement was not taken.

23.34 Given the reference in his memorandum of 21 February 1991 to "recent meetings" with Mr Gauci, Mr Bell was asked if he could recall on how many occasions Mr Gauci had raised the issue of money. Mr Bell replied that "you would have to rely upon what is in the memo". He repeated that he would "shut down Tony straight away when he mentioned a reward", but that "Paul was more difficult to shut down". Paul Gauci, Mr Bell said, was "more forceful on the subject".

23.35 Mr Bell was asked when it was that Paul Gauci had raised the issue of a reward and, in particular, whether he recalled any discussions with him on the subject during the early stages of the latter's involvement in the case. Mr Bell replied that the discussions about money did not come about until "way past that point". Paul Gauci was, to Mr Bell's mind, the first to bring up the subject of a reward "because of what was reported in the media".

23.36 Mr Bell was asked how his assertion that he was able to quell any discussions of a reward with Mr Gauci squared with the fact that, according to his memorandum of 21 February 1991, Mr Gauci appears to have raised the issue at more than one meeting. In reply he said that "the issue could have been raised by Tony because of press reports or because it was raised with him by Paul."

23.37 Mr Bell denied that offers or promises of money were made to the Gaucis by any police officers in order to secure their cooperation in the enquiry. He was referred in this connection to the following entry in his diary for 28 September 1989 (see appendix):

> *"He* [Agent Murray of the FBI] *had authority to arrange unlimited money for Tony Gauci and relocation is available. Murray states that he could arrange $10,000 immediately."*

23.38 Mr Bell was asked if Agent Murray had ever met Mr Gauci, to which he replied "I cannot say that he did not do so". Mr Bell recalled that when he went to Malta during the Crown's preparations for trial he told Agent Murray "not to make any comments which might upset Tony". With regard to an earlier reply by him to the effect that FBI Agent Hosinski had met with Mr Gauci alone on 2 October 1989, Mr Bell said that he would "seriously doubt that any offer of money was made to Tony during that meeting". According to Mr Bell there had been no communication of the $10,000 offer to Mr Gauci by him or anyone else.

23.39 Mr Bell was referred to a further entry in his diary for 5 March 1990 (the date on which Mr Gauci partially identified Abo Talb ("Talb") from a photograph in *The Sunday Times*) in which he detailed various discussions he had had that day with FBI Agent Knisely and, separately, with the Maltese police officers, Mr Grech and Mr Scicluna. Mr Bell's attention was specifically drawn to the entry: "reward money mentioned but as a last resort". According to Mr Bell it must have been Agent Knisely who had raised this issue. A copy of the diary entry is contained in the appendix.

23.40 Mr Bell was also referred to an entry in his diary for 19 April 1990 (see appendix) in which he recorded that the US would be putting out a notice regarding an award of $3m for any form of information on the terrorists. He believed that this notice was "a standing one in general terms for combating terrorists" and that it may have generated awareness of the US reward monies.

23.41 Mr Bell confirmed that he had no knowledge of Anthony and Paul Gauci having received money in respect of their involvement in the case. Although he might have favoured such a reward in his memorandum of 21 February 1991 he had not raised the issue with Anthony Gauci.

Potential significance

23.42 The principles governing the Crown's duty of disclosure have been highlighted in chapter 22, along with the test which has been applied by both the High Court and the Privy Council in assessing the significance of undisclosed evidence.

23.43 As noted above, there was no challenge to Mr Gauci's credibility in cross examination and consequently there were no submissions by the defence on this issue to either the trial or appeal courts. At least part of the reason for this was that the defence had little or no material on which to found such a challenge. In the Commission's view the memoranda by Mr Bell and the report by officers of Strathclyde Police dated 10 June 1999 would have provided such a basis had they been disclosed to the defence.

23.44 The contents of Mr Bell's memorandum of 21 February 1991 suggest not only that Mr Gauci expressed an interest in money during the police investigation but also, when taken together with Mr Bell's memorandum of 14 June 1991, that he might have done so at the time of his identification of the applicant on 15 February 1991 or shortly before. Furthermore, the report by Strathclyde Police dated 10 June 1999 is capable of demonstrating that Mr Gauci's interest in a reward continued in the period leading up to his giving evidence, and also that he was frustrated at apparent indications that he would not be compensated financially for his involvement. The same report indicates that Paul Gauci had also shown an interest in a financial reward.

23.45 There is little doubt that the defence would have regarded such information as significant. At interview Mr Taylor confirmed that the defence had no evidence at the time of the trial or appeal to the effect that Mr Gauci had asked for, or received, payment in connection with his role as a witness. According to Mr Taylor any such information would have affected the approach he had taken to cross examination, in

that he would have treated Mr Gauci as a hostile witness. As it was, Mr Taylor had tried to "coax [Mr Gauci] into the correct position for the defence". If he had known that Mr Gauci had been asking for money he would have approached his cross examination in the same manner as he had the cross examination of the witness Abdul Majid Giaka.

23.46 Mr Taylor's views were reflected by those of Mr Duff. According to him all the defence knew about were the "fishing trips that Gauci had been taken on" and that "it was very vague". In Mr Duff's view, evidence that Mr Gauci had been paid a large sum of money, or that he had asked about the possibility of such payment, would have been significant.

23.47 Mr Beckett could not remember evidence to the effect that Anthony and Paul Gauci had been paid a sum of money or had expressed an interest in such payment prior to the trial. Asked whether evidence of this kind would have been used in Mr Gauci's cross examination, Mr Beckett considered that this would "very much depend on the circumstances". Without details of such evidence, however (which were not revealed at interview), Mr Beckett felt unable to answer the question fully.

23.48 It is impossible to say for certain what evidence would have been adduced had the various items been disclosed and what, if any, impact this would have had upon the court's verdict. It has to be said that if Anthony and Paul Gauci were motivated primarily by money, one might have expected them to display a greater degree of enthusiasm for the police enquiry than is often evident from their police statements. In his statement of 26 September 1989 (CP 460), for example, Anthony Gauci stated that Paul Gauci had told him not to say anything more to the police "because they will keep coming back and the man might come back and then there will be bother". Referring to Paul Gauci and their father, Mr Gauci added "They are frightened". In his statement of 30 January 1990 (CP 464) Mr Gauci told police that he would try to get them access to his shop while Paul Gauci and their father were away. Similarly, in his statement of 10 September 1990 (CP 469) Mr Gauci is noted as saying that his father and his brother did not wish him to help the police. It is also clear from his statements that on several occasions Mr Gauci declined requests to sign police production labels.

23.49 Paul Gauci was himself on occasions unwilling to assist the police in their enquiries. For example it is clear from the note inserted at the foot of the HOLMES version of his statement of 19 October 1989 (S4680D, see appendix) that on 14 December of that year he refused to provide the police with a statement concerning the football matches he might have watched on television in November and December 1988.

23.50 Likewise, the nature and quality of Mr Gauci's identification evidence are not necessarily supportive of any allegation that he was influenced by the prospect of a financial reward. In particular it does not seem that Mr Gauci's limited identification of the applicant from a photo-spread in 1991 was subsequently enhanced at the identification parade or in evidence. In terms of his statement of 15 February 1991 Mr Gauci believed the photograph of the applicant to be "similar" to the purchaser and "the only one really similar to the man who bought the clothing…other than the one my brother showed me". While it is confused, Mr Gauci's comment at the identification parade ("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 number five") can hardly be described as an unequivocal identification. The same applies to his evidence at trial in which he said that the applicant resembled the purchaser "a lot" (31/4777).

23.51 There is also no indication in Mr Gauci's evidence of any corresponding "dilution" of his identification of Talb, something one might perhaps have expected if Mr Gauci had been driven by the prospect of a financial reward. In an undated statement (CP 463) relating to an interview which took place on 2 October 1989 Mr Gauci is reported as saying that a photograph of Talb obtained by utilising the freeze-frame facility on a video recorder was "similar" to the purchaser but was unable to say that it was definitely the same person. In his statement of 5 March 1990 (CP 467) he said of a photograph of Talb which featured in an article in *The Sunday Times* that he thought it "may have been the same man who bought the clothing". In evidence Mr Gauci's identification of Talb was, if anything, stronger. Referring to the photograph of Talb in *The Sunday Times* Mr Gauci "thought it was the one on this side, I thought.

That was the man who bought the articles from me" (31/4767). In cross examination he said of the same photograph, "He resembles him a lot" (31/4829).

23.52 One might also have expected that if Mr Gauci was truly motivated by financial considerations, he would have given the Crown a more helpful response to questioning regarding what he allegedly told Mr Scicluna when he first showed them the applicant's photograph in *Focus* magazine. As explained in chapter 22 above, however, Mr Gauci's position in evidence was that he could not remember uttering the words "that's him" to Mr Scicluna and recalled saying only that the applicant's photograph "looked like" the purchaser.

23.53 In addition, challenging Mr Gauci on the basis of the undisclosed items would not have been without risk to the defence. As noted earlier, in his letter to the US Embassy in the Hague of 7 February 2001 DCS McCulloch makes reference to an alleged incident in which Mr Gauci was invited to Tripoli for a "meeting with Government officials and members of the Defence Team". A similar allegation was made by Mr Gauci at interview with members of the Commission's enquiry team. Had it been put to Mr Gauci that he had expressed an interest in money it is at least possible that he would have referred to this alleged incident. On any view this would not have been helpful to the defence.

23.54 On the other hand there are several factors which suggest that the trial court, having heard evidence of the undisclosed items, might have rejected Mr Gauci's identification of the applicant. While one cannot say for certain what would have transpired had Mr Gauci been cross examined on this basis, it is at least possible that his position would have been similar to that which he adopted at interview with members of the Commission's enquiry team. If so his denial that he had ever expressed an interest in money to Mr Bell would have placed his evidence in sharp conflict with the terms of Mr Bell's memorandum of 21 February 1991. One might expect that if Mr Bell had been cross examined on the contents of his memorandum he too would have given answers similar to those he gave at interview. In that case he might have confirmed that both Anthony and Paul Gauci had expressed an interest in money during the investigation and specifically that he had "shut Tony down straight away when he mentioned a reward", but that "Paul was more difficult to shut down".

23.55 In light of such evidence, the defence could have relied not only on Mr Gauci's alleged expression of interest in a reward at or close to the time of his identification of the applicant by photograph, but also upon his denial of this and the resultant conflict which would then have opened up between his own evidence on the matter and that of Mr Bell. In the Commission's view any such conflict was likely to have been resolved in Mr Bell's favour. It is difficult to accept that he simply made up the relevant passage in his memorandum, and it is clear from the report produced by Strathclyde Police that Mr Gauci raised the subject of a reward again in 1999. It is also important to note that at interview with the Commission Mr Gauci did not dispute the entire passage in Mr Bell's memorandum. While he denied having raised the issue of money with Mr Bell he fully accepted that in 1991 he was aware of the US reward monies on offer.

23.56 In addition, while it is true that the nature and quality of Mr Gauci's identification of the applicant have remained relatively consistent, there are several aspects of his accounts which clearly have not. One example of this concerns Mr Gauci's assessment of the purchaser's height and age. In his statement of 1 September 1989 (CP 452) Mr Gauci described the purchaser as "about 6 feet or more in height". In his statement of 13 September 1989 (CP 455), he added that the purchaser was "about 50 years of age". A similar account was given in his statement of 10 September 1990 (CP 469) in which he said that his description of the purchaser was "exactly the same", and that he was "about 50 years".

23.57 In examination in chief, however, when Mr Gauci was asked about the purchaser's build, he replied "I think he was below six feet. I'm not an expert on these things. I can't say" (31/4752). Similarly, when asked the purchaser's age, he replied "…under 60… I don't have experience on height and age" (31/4753). Similar responses were given in cross examination. There, when the relevant passage in his statement of 1 September 1989 was put to him, Mr Gauci replied "I always said six foot, not more than six feet" (31/4789). He adopted a similar position in his Crown precognition dated 18 March/25 August 1999, in which again he said that he was not an expert on age or height.

23.58 Accordingly, Mr Gauci's position in evidence regarding the purchaser's height and age differed from that adopted in his prior statements. Specifically, in contrast to what he said in his statements, he claimed that the purchaser was below 6 feet and under 60 years of age. He also sought to emphasise that he had "no experience" of height and age.

23.59 As detailed in chapter 22, shortly before the identification parade Mr Gauci saw an article in *Focus* magazine concerning the case. Within the text of the article is the following passage:

> *"Eighteen months later, Gauci told* [the police] *the shopper had actually been al-Megrahi. He even described him: 50 years old, 6 ft tall and of strong build. But al-Megrahi was actually 36 when he's alleged to have met Gauci, 5 ft 8in tall and not particularly strongly built."*

23.60 At interview with members of the Commission's enquiry team, Mr Gauci recalled this passage having been read to him by someone. According to Mr Gauci, his response at the time was that he "did not have a tape measure to measure the man's height".

23.61 In the Commission's view, the passage in question is an example of the kind of issues which might have been raised with Mr Gauci in cross examination, had the decision been taken to challenge his credibility as well as his reliability. In particular, the Commission considers that it might have been possible for the defence to suggest that the passage had given forewarning to Mr Gauci of possible challenges to his identification of the applicant, and had influenced what he said in evidence regarding the height and age of the purchaser. The defence might then have gone on to suggest that the change in his description of the purchaser had itself been influenced by the hope of a reward. Although at interview the applicant's former representatives offered differing views as to the significance of the passage in *Focus* magazine, in the Commission's view there is no telling what approach might have been taken had Mr Bell's memoranda and the report by Strathclyde police been disclosed.

Conclusions

23.62 Applying the principles in *McLeod* and those set out by the Privy Council in *Holland* and *Sinclair*, the Commission is of the view that Mr Bell's memoranda and the passages from Strathclyde Police report quoted above ought to have been disclosed to the defence. Taken together, all three items were likely to have been of material assistance to the proper preparation or presentation of the applicant's defence and were likely to have been of real importance in undermining the Crown case.

23.63 As to whether the Crown's failure to disclose the items has resulted in a possible miscarriage of justice, the Commission, again adopting the test applied by the Privy Council in *Holland* and *Sinclair*, is unable to conclude that evidence of the reports "might not possibly" have affected the verdict in the applicant's case.

23.64 In referring the case on this ground the Commission is concious of the potential impact of its decision upon Mr Gauci who may well have given entirely credible evidence notwithstanding an alleged interest in financial payment. On the other hand there are sound reasons to believe that the information in question would have been used by the defence as a means of challenging his credibility. Such a challenge may well have been justified, and in the Commission's view was capable of affecting the course of the evidence and the eventual outcome of the trial. Although there were risks in taking such a course, in the Commission's view they were no greater than those described in *Holland*, nor any more likely to have had undesirable consequences for the defence (Lord Rodger's opinion at paragraph 82). In any event, standing the approach taken in that case, it was for the defence to decide upon the use to which the information might be put, if any (Lord Rodger at paragraph 72) and for the court to determine its significance as appropriate.