

3.1 MISSING EVIDENCE: THE IDENTIFICATION OF THE PURCHASER

There is a variety and combination of reasons why this material was not presented at trial. On the one hand, as a result of failures in the conduct of the defence to, first, properly investigate and examine the identification evidence, whereby the existence or the significance of evidence was not understood. And secondly, as a result of a failure in the conduct of the defence to lead the evidence or cross the witness, at trial. And as a result too, from the conduct of the prosecution case which omitted this evidence, whereby the full picture of the circumstances relevant to the various inferences the court had to draw, was not presented. Finally in a number of instances the absence derives from failures by the Lord Advocate to disclose information in breach of Article 6 of the European Convention on Human Rights (“ECHR”).

As stated above, however the reasons for the absence of this material are examined, the essential question, and ultimately the only question, is whether, in the light of this missing evidence the appellant was denied a fair trial, whereby there was a miscarriage of justice. The focus of this examination is the effect of the missing material upon the fairness of the trial.

It is plain that the conviction of the Applicant relies, in large measure, upon the evidence of the Crown Witness Anthony (Tony) Gauci. The Trial Court refers to him as an “important witness” (Trial Court Opinion: paragraph 55). His “identification so far as it went” of the Appellant as the purchaser of clothing found in the primary suitcase was

crucial - whether it is viewed as a positive identification or merely resemblance. This evidence “should be treated as a highly important element in this case” (Trial Court Opinion: paragraph 69) and “a major factor in the case”. (Trial Court Opinion: paragraph 88). The Appeal court agreed that this evidence was a “highly important element in the case” (Appeal Court Opinion: paragraph 297). It was also observed by the Appeal Court that there was no real challenge made to the identification evidence by the defence (Appeal Court Opinion: paragraph 301).

The missing evidence is addressed within the following different chapter headings –

3.1.1 Previous Inconsistent Statements regarding Identification

3.1.2 Previous Inconsistent Statements regarding the Purchase

3.1.3 Undisclosed Identification Evidence

3.1.4 Exposure to Prejudicial Publicity

3.1.5 New Witness

3.1.6 Financial Interest and Reward Monies

3.1.7 Expert Evidence – s.106(3) Criminal Procedure (Scotland) Act 1995

3.1.1 PREVIOUS INCONSISTENT STATEMENTS: IDENTIFICATION

In prior statements produced at trial Gauci claimed to have seen the purchaser or a man similar to the purchaser on 3 prior occasions. These are -

(1) Sighting at Tony's Bar

The following statements were produced and available at trial but were not put before the court -

(a) In Statement S4677C : CP456 : made on 13th September 1989 Gauci recalls that 3 months previously he saw four men at Tony's bar and recognised one of them as looking like the purchaser He could not be positive it was the same man. He looked very similar. [pdf-p2]

(b) In Statement S4677Q: CP469 : made on 10th September 1990 Gauci recalls that at this sighting, in June 1989, he thought that one of the men was the man who bought the clothing. He could not be definite he was the same man. He was similar. [pdf-p4]

(2) 2nd Purchase from Mary's House

The following statements were produced and available at trial, but not put before the court -

(a) In Statement S4677F: CP459: 26th September 1989 Gauci states that on the day before (25th September 1989) he was startled because he believed the same man (as the purchaser) came into the shop and bought girls dresses. [pdf - p1;p2;p3;p6;p7;p8]

(b) In Statement S4677I:CP462 : 4th October 1989 Gauci refers to the sale of dresses to the man who he thought was similar to the purchaser [pdf-p1]

(c) In Statement S4677Q:CP469:10th September 1990 Gauci suggests that this man and the man at Tony's bar were similar in appearance

(d) In Statement S4677T:CP471: 4th November 1991 Gauci states that this man really looked like the same man. It is put to Gauci that when he was interviewed on the morning of 26th September 1989 he had said that the man came into his shop on the 21st or 22nd September. He is asked if he can clarify this and explain why he appears to have mixed up the days but says he cannot do so.

The significance of these statements is enhanced by the recovery of material not disclosed at trial.

Undisclosed Information

The following information was not disclosed at trial and, consequently, not put before the court:-

(a) **JIG FAX 1438**: (5th March 1991) which was recovered by the SCCRC. This included -

(i) A Report by DCI Bell on his meeting with Gauci on 2nd October 1989. That Report narrates that on 2nd October 1989 the witness was interviewed by FBI agents and stated that he was now only 50% sure that it was the same man in the shop on the 25th September 1989.

[pdf-p7]

(ii) An attachment (headed “Malta Enquiry”) referred to as ‘contemporaneous notes’ by Bell regarding this “same man” sighting, which raises a concern over the witness' accuracy in that he “may be trying to please us” [pdf-p4] The reference to “contemporaneous notes” appears to relate to DCI Bell’s diaries. Bell told the SCCRC that the manuscript original diary for the relevant period is “missing”. The relevant entry in the dictated version of DCI Bell’s diaries is redacted but appears to summarise the notes quoted in the attachment to the JIG fax (see below).

(b) **Crown Precognition of Tony Gauci** (18th March 1999 & 25th August 1999) where the witness stated that the man who bought the dresses looked like the purchaser but it was not the same person

(c) Entries in DCI Bell's (dictated) diary (NB these all come from the dictated version as the original diary is "missing"):

(i) Entry for 26th September 1989 [pdf-p.6] This includes the following:

"Notation to the effect that Tony quickly stated that he thought he saw the ---- man/suspect last week, Thursday 21 or Friday 22 September 1989.

The man had come into the shop and bought children's skirts for a four year old. Agreed to meet Tony at 7.00 pm outside his shop.

A number of points for consideration are thereafter outlined regarding the fact that Tony Gauci was told to contact Scicluna should he see the man again. He did not telephone but this could be explained by the dominant attitudes of his father and brother....

2. The last possible sighting follows on our last visit to Malta. We all must take care that Tony is not trying to please us in any way....

3. If Tony is accurate and credible this means that the man possibly resides or works in the area of Sliema and that the man was in the shop between 18 November and 21 December 1988 purchasing the clothing. The man was apparently seen again in Tony's bar sometime in June, July 1989. The man was again seen in the shop allegedly on 21/22 September 1989 buying a child's skirt. The man spoke English but Tony is still satisfied that he is a Libyan.

Several notations follow thereafter outlining an assessment of these factors...

At 1900 hours Bell with Scicluna uplifted Tony Gauci near to his shop and noted an additional statement re the visit of the suspect to the shop at Tower Road on Monday 25 September 1989 when he purchased a child's dress.”

- (ii) Entry for 27th September 1989. This is redacted, but includes reference to a discussion with the FBI about the possibility of a bleeper being supplied to Tony Gauci direct to police headquarters should he see the man again. (This is referred to again in diary entries for 5th and 22nd March 1990, and in an undisclosed memo (D7076) from DCI Bell to SIO Henderson dated 16 January 1991).

- (iii) Entry for 28th September 1989. Records a notation that Mr Grech has an officer committed to the airport with a description of the suspect should he be attempting to leave the country.

- (iv) Entry for 11th October 1989. Although redacted, this mentions a meeting with Gauci, DCI Bell and Mr Henderson and makes “reference” to the fact that Tony’s judgement of age may be questionable, and that the number of photographs being shown to him may “confuse matters”

(3) Purchase of Blankets 1987

The following statements were produced and available at trial, but were not put before the court -

In his first statement - Statement S4677: CP452 : 1st September 1989 Gauci stated that the purchaser had not been in the shop before or since.

[pdf-p13]

In Statement S4677N: CP466 : 21st February 1990 Gauci states that in around May 1987 he sold some blankets to a man who was a resident at the Hilton Hotel, Room No 113. He thought that this may have been the same man as the purchaser.

[pdf-p2]:

In Statement S4677O: CP467: 5th March 1990 he states he was sure this event was in 1987, maybe June 1987. He had moved shops in April 1987 and it was sometime after that, maybe June. He could remember the room number. He suggested the manner of purchase was the same which is one of the reasons he thought it was the same man. He was similar to the purchaser if not the same man. [pdf-p2]

In Statement S4677Q: CP469: 10th September 1990 he suggests that all he can say is that he was similar to the purchaser. [pdf-p4]

Undisclosed Information

Entries in DCI Bell's (handwritten) diary:

Entry for 21 February 1990: "...Gauci states he may have seen the suspect before in May 1987 when he made a purchase of two or three blankets from the Sliema shop. Tony had delivered the blankets to room 113 of the Hilton Hotel where he had handed them over. He could not state positively that it was the same man but he was similar"

Entry for 22 February 1990 (made by DS Byrne): "...Grech and Godfrey Scicluna stated that they found it difficult to believe Tony's story about the Hilton Hotel and were of the opinion that he had become confused about things"

Entry for 5 March 1990: "...Requested that witness T.Gauci be made available to clarify Hilton Hotel re room 113. 1920 hrs met Tony Gauci at P/HQ...Tony adamant it was room 113 and an Arabic name on paper. Receptionist used push button type phone...in addition his explanation for recall of Hilton is that he feels the man had been in his shop before as he just walked in and did not look at the entrance displays as they normally do"

Undisclosed Statement

In addition to, and quite separately from, Gauci's statements relating to other contacts with the purchaser, there was further evidence of inconsistency in Gauci's position re

identification which was not put before the trial court. This evidence takes the form of a document entitled “Interview with Tony and Paul Gauci of Mary’s House.

On 18th March 1999 the witnesses Tony and Paul Gauci were precognosed by the Crown in Malta. The Crown precognition itself bears to record that the precognition was taken in Floriana. Reference is made to Interview with Tony and Paul Gauci of Mary’s House, an attendance note apparently relating to this event (although its wording tends to suggest that either at least part of the interview took place at the shop premises at Mary’s House or that separate interview(s) were conducted at those premises).

Reference is made to an interview with the Gauci brothers “with regard to the precognition exercise” at which time Tony Gauci states that the “photofits” that he had done “8 years ago” were similar to the man he saw “but a little younger”.

Assuming this is a reference to the photofit (CP430) and artist’s impression (CP427) (both made 9½ years previously), this is inconsistent with his prior statements made at the time of compilation, namely that the artist’s impression was slightly better than the photofit but they were similar (Statement CP456 13th September 1989); that the artist’s impression was a very close resemblance to the man (Statement CP457 13th September 1989) and the photofit was of a man aged 45-50 years which was “just about right” (Statement CP455 13th September 1989). This information was not disclosed to the defence. The attendance note was recovered from Maltese police files in 2007.

Reasons for Absence

These statements, which were produced, were not put before the court by either the Crown or the defence.

The Crown sought to rely upon the witness for his identification evidence. Given the specific risks of error inherent to this kind of evidence; to the specific dangers which arose in relation to the way the procedures were carried out with this witness; and to the nature and extent of the inconsistencies in the witness' prior statements, it was incumbent on the Crown to present the whole picture available and to lead these inconsistent statements, in order to secure a fair trial.

Given the nature and materiality of these inconsistent statements, it was incumbent on the defence to raise same but they did not do so. Had the additional material related above, or the other material rehearsed in the grounds of appeal below, been disclosed the defence might well have been conducted differently.

In any event, it is the effect of the conduct of defence and the Crown at the trial which matters, rather than an assessment of the conduct itself. Unfairness may arise irrespective of whether the defence conduct was reasonable in the circumstances or not.

Effect upon the Fairness of the Trial

As a result of the conduct of the prosecution and the defence in failing to put the statements available, the witness was left unchallenged as regards his identification

evidence. It was never put to the witness that he was wrong in respect of his identification or that he had made a series of prior inconsistent statements regarding his identification of the purchaser.

The significance of the missing material can be summarised as follows:-

(1) **Sightings at Tony's Bar** - These statements were significant in that they were inconsistent with the evidence of when the appellant was in Malta.

(2) **2nd Purchase from Mary's House**

These statements were of significance in that -

(1) The witness said he had seen the same man in the shop on a different occasion – this being a positive identification by the witness

(2) In his recorded statement Gauci says this happened the day before - a mistake is therefore unlikely. This is inconsistent with the evidence of when the appellant was in Malta.

(3) Even if Gauci also gave different dates - which dates were consistent with the appellant being in Malta - the fact that he changed his position so radically within the course of the same day, about an event so close in time, is damning of his reliability.

The undisclosed information from the JIG Fax 1438 is significant in that - (a) These statements suggests that less than one week later, Gauci shifts his position from stating positively the same man came into the shop again, to only being 50% sure it was the

same man. It is of import that the officer taking the statements raises a question mark over the reliability of the witness. Further question marks are raised by the diary entries for 11 October 1989 and 22 February 1990. Finally, at precognition the witness has reached a final shift of position whereby the man was not the same man as the purchaser.

(3) Purchase of the Blankets

(a) These statements concerning the blanket purchase contradict the witness' first position that he had never seen the purchaser before.

(b) Police enquiries showed that no Libyans were resident in room 113 during 1987 and only one Arab man guest in January 1987. This suggests that the witness must be mistaken. There is clear suggestion here that the Gauci's recall is unreliable and there is confusion between different purchases.

It was never raised that the witness had made a prior positive sighting of the purchaser, which sighting contradicted the Crown case that the purchaser was the appellant. Nothing was raised in respect of the reliability of the recall of the witness himself, in a context where there was extensive and damaging material regarding same.

The undisclosed material showed significant changes in position by the witness and points to his being unreliable. Information which bears upon the credibility and reliability of an important Crown witness and may undermine his evidence is information which falls to be disclosed. The effect of the failure to disclose is to deprive the defence of a proper opportunity to prepare their case. For example, had the defence been supplied with

information from the JIG Fax 1438 above, and/or the views of the investigators to Gaucis reliability on the issue, then, viewed objectively, their approach to raising the whole issue of the prior sighting might have been different.

As a result of the absence of this material, the court was left with the picture of an unchallenged and straightforward witness - “doing his best to tell the truth to the best of his recollection” (Appeal Court Opinion: paragraph 277) in his approach to the “difficult problem of identification” and there was “no suggestion was made to the contrary” (Appeal Court Opinion: paragraph 288). In this context the trial found him to be a careful witness and his evidence reliable. Whatever the reasons for the absence of this material, the result was that the court was left with a wholly distorted picture as to the reliability of the witness on the question of identification. This distortion was compounded by the failures to raise other significant inconsistencies in the prior statements of the witness.

3.1.2 PREVIOUS INCONSISTENT STATEMENTS Re THE PURCHASE

3.1.2.1 List of Items and Purchase Price

Position at Trial

On day 31/4730 the witness asserts that he remembers all the clothes sold [pdf - p6] provides a list of items [pdf - p7; p19; p21; p23] and provides the total purchase price [pdf -p64] Inadvertently in cross-examination (31/4788) the witness asserts he has never suggested a total purchase price of£56.[pdf-p64]. This is not pursued and there is no examination of previous inconsistent statements made.

In fact the witness has significantly changed his position over time regarding the items sold to the purchaser:-

(a) Statement S4677:CP452: 1st September 1989 he is very specific about what he sold, which list amounts to a sale of £76.50 [pdf-p19] and he lends weight to his list by recalling that the purchaser paid in Maltese £10 notes and he gave £4 change Yet within the same statement the witness gives a different amount for the sale of £56 [pdf-p9] and at the same time he sold identical pyjamas and an umbrella to the police for different amounts [invoice DC58]

(b) Statement S4677A: CP454:19th September 1989 he recalls selling the purchaser a second cardigan - increasing the sale to £88.00

(c) Statement S4677L: CP464: 30th January 1990 [pdf-p4] he changes his position over the sale price and change given

(d) Statement S4677Q: CP469: 10th September 1990 [pdf-p3] he changes his position to include in the sale 2 shirts - increasing the sale to £97 or £98.50

Undisclosed Information

(e) Crown Precognition (18th March and 25th August 1999): records the witness giving a wholly different list of items and prices [pdf-p11]

3.1.2.2 Details of Individual Items

In respect of nearly all the items of clothing the witness made inconsistent statements:-

(1) Pyjamas

As indicated above the witness changes his position regarding the numbers of pyjamas sold - from 3 pairs, to 2 pairs (Statement S4677) and asserts at Crown precognition that he told the police 2 pairs. In evidence, he stated he had sold 2 pairs and no prior statements were put. (Trial Court Transcript Day:31/4741).

(2) Jacket

Statement 4677: CP452 1st September 1989: the witness describes a jacket being bought which was too small for the purchaser [pdf-p13] and after searching the shop, provides a control sample of a similar jacket (DC41/L440). Subsequently the police search the shop and take a further control sample (DC413/L461) from another jacket. In evidence the witness identifies control sample DC41/L461 as the type of jacket sold and shifts his position regarding size where he states cannot tell whether it was smaller or larger (Trial Court Transcript Day: 31/4791)[pdf-p67]

(3) Babygro

The witness initially provides a precise description of a babygro sold to the purchaser - blue, with a sheep's face on the front supplied by Big Ben. He has none in stock (Statement S4677: CP452: 1st September 1989). In Statement S4677C :CP456: 13th September 1989 he states, on being shown a control sample by the police (DC34) that this was the same except that the one sold had a sheep's head on the front. He added that the control sample was one supplied after they stopped making those with the sheep's head motif. Police enquiries then establish that Big Ben had never made babygros with a sheep's head motif. On being re-interviewed the witness then changes his position and states he is not sure whether it had a sheep's head motif - Statement S4677I: CP462: 4th October 1989. On 4th October 1989 the witness provides from his stock, a pink babygro with a lambs body motif which matches the

control sample and subsequently states that he was "fairly certain" that the babygro sold to the purchaser had such a lambs motif. - Statement S4677Q: CP469: 10th September 1990. At trial there was no examination of these discrepancies by the Crown or the defence.

(4) Umbrella

In addition to the inconsistency regarding the price of the umbrella (above) the witness shifts his position from suggesting that it was he who suggested the purchase - Statement S4677:CP452:1st September 1989 [pdf-p7]; to the suggestion that the weather prompted the purchaser to purchase same - made in Statement S4677Q:CP469: 10th September 1990 [pdf-p2] and at trial (Trial Court Transcript Day: 31/4741)[pdf-p17]

(5) Cardigan

Initially the witness gives a clear and detailed description of a cardigan sold - large with black and red colours, with imitation leather buttons, which his brother got from a shop in Paulo -Statement 4677:CP452 :1st September 1989 [pdf-p9] and Statement S4677C :CP456 :13th September 1989 [pdf-p5]. This description did not match any of the fragments found or any of the cardigans supplied by the stated shop. Subsequently, and after the police select a blue cardigan from the shop, the witness then suggests that a second cardigan was purchased which was "the same" as the one selected by the police except for the colour - Statement S4677A :CP454 :19th September 1989 [pdf-p1]. This is then reinforced by the witness after being shown a

police photograph, which he suggests is the same - Statement S4677G:CP460:26th September 1989 [pdf-p1]. Subsequently on being shown additional fragments by the police (PI1111) the witness then again suggests that these match the first cardigan sold - Statement S4677N :CP464 : 30th January 1990, [pdf-p2]. He also then suggests that this (first) cardigan was obtained by him from an ex-policeman. Subsequently a police witness statement suggests that in the course of discussion with the police officer, the witness had changed his position again regarding the origin of the cardigan(s) - DC Crawford.

Undisclosed Information

At Crown precognition (18th March & 25th August 1999) there are further material changes in that

- (a) The 2nd cardigan is omitted from the list of items on the basis that the witness is not completely sure re same
- (b) The witness is recorded as stating that he had not been shown any material which matched the first cardigan - contrary to statement S4677G above

At trial the witness describes selling 2 cardigans but neither matches the initial description of the 1st (red and black) cardigan sold. Instead the witness gives evidence that they consisted of a brownish one and a blue one. (Trial Court Transcript Day: 31/4747)[pdf-p23]. This is the first time the witness has suggested that he sold a blue cardigan. Moreover it directly contradicts what is recorded at Crown

precognition - [pdf-p6-7]. In addition at trial the witness suggests that both cardigans had been obtained by his brother and he cannot remember where from.

Overall the real picture painted by the witness regarding the purchase of the cardigan(s) is one of utter confusion.

(6) Shirts

The previous statements of the witness made in respect of the sale of shirts to the purchaser demonstrate a radical turnaround in his position - from his initial list of the purchase which makes not mention of shirts, to a position where he accepted he stocked shirts but is definite that he did not sell any to the purchaser, to agreeing that he did sell shirts and finally providing detail of that sale which is consistent with his description of the purchaser.

(a) Statement S4677B:CP455: 13th September 1989 [pdf-p2] the witness describes the purchaser as about 16 1/2" or 17" collar

(b) Statement S4677:CP452:1st September 1989 where the initial list of items sold does not include any shirts

(c) Statement S4677L :CP464 :30th January 1990 [pdf-p1] where, after being shown pieces of a grey shirt (PK1978), a grey Slalom shirt and piece of blue and white cloth (PH999) the witness agrees he has the make of shirts in the shop but "is sure" he did not sell any to the purchaser

(d) On 31st January 1990 the witness sells to the police 2 blue and white control sample shirts

(e) Statement S4677Q :CP469 :10th September 1990 [pdf-p3] the witness states that he had remembered that the purchaser had also bought a Slalom shirt and a blue & white one. In his handwritten statement, the Slalom shirt is originally described as “beige”. However, this word has been specifically deleted.

(f) Crown precognition: 18th March & 25th August 1999 [pdf – p8] the shirt is now described as “beige” and the size of both shirts is given as 16½” collar.

Undisclosed Information

At Crown precognition (18th March & 25th August 1999) the witness suggests that the size of shirts he sold was 16 1/2" collar

At trial the witness gives evidence that the purchaser had bought 2 shirts, Slalom make, size 16 1/2" collar and one was blue checked and the other greenish. He also suggests that he gave his description of the size of the purchaser because that was the size of shirts he bought. No prior inconsistent statements were put.

It should also be noted that the witness description of the size of shirts sold (16 1/2" collar) is inconsistent with the shirts identified from the fragments found by the forensic scientists (14 1/2") - see SCCRC Statement of Reasons paragraph 7.47 [pdf-p126]. This inconsistency was not raised at trial.

3.1.2.3 Presence of Paul at the Purchase

At trial the witness gave evidence that when the purchaser went to get into a taxi his brother Paul came in and he told his brother to keep an eye on the shop whilst he helped the purchaser. (Trial Court Transcript Day: 31/4779)[pdf-p55] He also suggested his brother must have been watching football that afternoon. This evidence was inconsistent with the prior statements of the witness -

Statement 1st September 1989 (S4677: CP452) [pdf-p17] where he stated he was alone in the shop at the time

Statement 21st February 1990 (S4677N: CP466)[pdf-p2] where he described the departure of the purchaser without any mention of Paul

Statement 5th March 1990 (S4677O:CP467)[pdf-p1] where after being asked to go over the circumstances of the departure of the purchaser he gives considerable detail but makes no mention of Paul.

Statement 10th September 1990 (S4677Q :CP 469)[pdf-p1-2] where again describing the departure of the purchaser in detail makes no mention of the presence of Paul

Undisclosed Information

There is a change of position by the witness (10 years after the event) at Crown precognition. (Crown Precognition 18th March 1999 & 25th August 1999 SCCRC Appendix: Chapter 24, Date of purchase, Number 19)[pdf-p14] where the witness stated that his recollection was that Paul came back into the shop just at the point where the Libyan came back. This was not disclosed to the defence. However, at defence precognition (8th October 1989) [pdf-p6] he also suggests Paul may have

appeared at the time the purchaser was leaving. This latter position was stated in even more definite terms at interview with the SCCRC Appendix: Interviews)[pdf-p4]

3.1.2.4 Departure of the Purchaser

The witness gave detailed but inconsistent statements regarding the departure of the purchaser from the shop by taxi -

(a) Statement S4677: CP452: 1st September 1989 [pdf -p11]- he states the purchaser said he was in a taxi, that he took the parcels from the witness and he exited, turned left and walked up the street where the witness saw a white Mercedes taxi parked and he assumed the purchaser got in the taxi. A similar account is given in Statement S4677N: CP466 21st February 1990.

(b) Statement S4677O: CP467: 5th March 1990 [pdf-p1] - he states he now remembers that the man walked downhill towards the seafront and 15 minutes later he saw a white Mercedes taxi driving up the road with the purchaser seated in the front passenger seat. The taxi pulled up and the man returned to the shop and he handed over his parcels. The man put the parcels on the back seat of the taxi, climbed into the front passenger seat and the taxi drove off.

(c) Statement S4677Q: CP469: 10th September 1990 [pdf-p2] - the differing versions are put to the witness and he states that what happened was he saw the taxi being driven up the street and as it passed he recognised the purchaser in the front passenger

seat, he saw the taxi turn the corner and the man came back in the shop and he met him in the hallway. He offered to carry the parcels but the man said he had a taxi and the man put the parcels in the taxi and got in.

At trial the witness gave evidence (in chief) that the man ordered the taxi from the Strand and he went down the hill. Then he came back and he, the witness, took the items to the taxi which was parked upwards from the shop. He repeated that he took the things himself to the taxi.

Neither the Crown nor the defence raised the inconsistencies between the evidence of the witness and his prior statements or the inconsistencies between his prior statements.

3.1.2.5 Number of Purchases or Visits

There are inconsistencies and ambiguities in the statements by the witness regarding the number of times he encountered the man in the shop. He suggests the purchase was in November or December 1988 (eg Statement S4677B: CP455: 13th September 1989) but also that he came in November and December 1988 (eg Statement S4677K :CP463 : 2nd October 1989; and Statement S4677Q :CP469:10th September 1990) [pdf-p4]. The witness is also recorded as stating specifically that the man came on two occasions (Cairns HOLMES statement of witness on 2nd October 1989) [pdf-

p1]. In another instance DCI Bell records the witness as referring to the purchase on "two occasions in November or December". At interview with the SCCRC DCI Bell states that he could not recall the witness ever making a reference to two occasions. (SCCRC Appendix: Interview Bell - pdf-p21). Yet the report made from the interview of 2nd October 1989 by DCI Bell, recovered by the SCCRC, contains a clear reference to two distinct occasions.

This ambiguity was not raised at trial. They add to the picture of confusion by the witness over the purchase. This confusion over the number of visits or transactions is allied to the inconsistencies and difficulties regarding the date of purchase (below).

Reasons for Absence

The majority of the inconsistent statements (including for the avoidance of doubt the statements of DC Cairns & DCI Bell referred to above) were available but not put before the court by either the Crown or the defence. In respect of the list of items and clothing there were small but significant pieces of information missing as a result of a failure by the Crown to disclose them. These pieces complete the picture of confusion by the witness and view of the fact they consisted of a change of position and/or new information by the witness, they fell to be disclosed.

Effect upon the Fairness of the Trial

In the absence of this material the court were left with the impression of a witness who had a clear and accurate recall of the items of clothing sold. The reality as revealed in this missing material is very different. In particular -

(1) Significance of Statements Re List of Items and Purchase Price

The position of the witness consistently fails to add up. His apparently clear recollection is almost immediately undermined. The witness assertion at trial that he had never suggested a purchase price of £56 suggests that he would have maintained that the previous statements were wrong and thereby undermine both his credibility and reliability. The potential for the defence would have been much clearer if the 'end point' at Crown precognition had been disclosed. The final change in position was material which ought to have been disclosed.

(2) Significance of Statements Re Details of Individual Items Sold

There was no evidence led by the Crown or defence regarding the inconsistent statements made by the witness regarding individual items of clothing sold. This left the impression of a witness who had a clear and accurate recall of the items of clothing sold and whom the trial court found "accurate" (Trial Court Opinion paragraph 12) and "entirely reliable" on this matter (Trial Court Opinion paragraph 67) This was significant, first, in that from this the court were "entirely satisfied" of the clothing sold. Secondly this matter was relied upon by the trial court in finding the

witness reliable generally and in respect of his identification (Trial Court Opinion paragraph 69).

In fact, the witness made inconsistent statements over numerous items of clothing sold. Some of the changes in position by the witness are radical. The number of inconsistencies has the cumulative effect of presenting a very different picture than that seen at trial. This information shows that witness has significantly changed his position over time regarding the items sold. In addition there is a clear inference from the timing and context of these inconsistent statements that the witness has been influenced in his recollection by the police enquiries - either by being shown articles such as control samples or fragments or by discussion. In, for example, the recall of the jacket, cardigan(s), babygro and shirts. This context conveys the impression that the witness, as described by DC Bell "is trying to please" (JIG fax 1438 supra) and is unreliable. This context is completely absent and the opposite impression is left at trial, namely that the witness gave a clear and detailed account of the clothing sold.

(3) Significance of Statements Re Presence of Paul

There was no suggestion of Paul being present in any of the witness' police statements. Indeed if this had been suggested one would expect Paul to be interviewed regarding same and a description sought. However, the police proceeded on the basis he was away watching football on the TV. Only in precognition is the

position changed. The defence did not pursue this. The Crown did not disclose this change of position.

This is a discrete and useful example of the witness demonstrating a significant u turn and suggests his recall was flawed. The absence of this information may not be significant, but taken with the other inconsistencies by the witness regarding the surrounding circumstances of the purchase, it adds to the cumulative effect.

(4) Significance of Statements Re Departure of Purchaser

This material is significant because on the one hand the witness gives great detail about this event of the departure of the purchaser, yet at the same time is inconsistent whereupon at the time of giving evidence he gives a detailed but different picture. This contrast is redolent of unreliability. It is often the case that a witness' credibility or reliability is fatally undermined by exposure of inconsistencies in collateral matters. In this way apparently peripheral issues become linked to the crucial issues at trial.

(5) Significance of Statements Re Number of Visits

The significance of these statements is that they can demonstrate again that the witness changed his position, this time over the number of visits.

Accordingly, in fact, the witness made inconsistent statements over numerous items of clothing sold. Many of the changes in position by the witness are radical, some amount to a complete turnaround. Accordingly the trial court found the witness to be "entirely reliable" on the matter of the clothing (Trial Court Opinion paragraph 67).

This is important for two reasons:-

- (a) This supported the Crown case to draw a link between Malta and the offence, and
- (b) Because this finding was then relied upon by the trial court to conclude that the witness was generally reliable and, crucially, reliable in respect of his identification (69).

The other inconsistencies concern what the witness said about the surrounding circumstances of the purchase. Their relevance relates to their use in demonstrating the unreliability of the witness and it matters not that the subject matter is collateral. They are material to the defence case because both the "striking" nature (SCCRC Statement of Reasons paragraph 18.144) of them and the number of the inconsistencies shown, significantly undermine the witness. Indeed they suggest the witness is confused and prone to suggestion. A witness whose account becomes more clear and fixed over time, when the reality is that his memory is likely to be unclear.

The cumulative effect of all of these inconsistencies and shifts in position is powerful. The court was left with a wholly distorted and different impression of the witness. In this way the appellant was denied a fair trial.

3. 1.3 Missing and Undisclosed Evidence Re the Identification

There were other missing parts to the true picture of the identification evidence, which were either not put before the court or were not raised as an issue before the court. There are two aspects to this. On the one hand the absence of any challenge to the reliability of the identification procedures and the identification evidence. On the other hand missing pieces of the identification evidence

1. Nothing is made of the evidence which suggested that important features of the identification procedures undermined the reliability of the identification evidence. The only issues raised by the defence were raised in submissions. These were (a) the quality of the photograph at the 15th February 1991 photo show; and (b) preceding publicity. But the defence did not lead any evidence of same. Given the absence of any evidential basis these submissions were rejected by the trial court. The issues which could have been raised are addressed in ground 3.2 below.

2. There are important missing pieces to the identification evidence. These consist of –

(a) Omissions in respect of prior identifications or selections of photos made by the appellant. Taken together they show that the impression of this background, given at trial, was misleading.

(b) An important undisclosed statement from DI Scicluna which presents a radically different picture of the conduct of the photo show on 15th February 1991 and which, in

itself, significantly undermines the reliability of both the identification evidence and the police evidence.

(c) Finally and most importantly there is the missing evidence of the witness' exposure to prejudicial publicity which included photographs of the appellant. Investigation by the Scottish Criminal Cases Review Commission ("SCCRC") has shown that this exposure was extensive, bearing upon the identification procedures and highly prejudicial and that there is evidence that it had an affect on the witness. This addressed in chapter 3.1.4 below.

It is important to recognise that had this information been disclosed then the whole approach by the defence is likely to have been different. Armed with the full picture it is likely that a proper challenge would have been made to the fairness and regularity of the identification procedures. As indicated above the basis of such a challenge is addressed at ground 3.2 below.

Here the missing pieces of evidence are addressed in detail as follows -

3.1.3.1 Undisclosed Photo Show: 8th September 1989

The SCCRC uncovered evidence which indicates that at the outset of the enquiry involving Gauci, on 8th September 1989, he was shown photograph(s) for the purpose of identifying the purchaser. This was not disclosed to the defence. There is no statement from Gauci produced; no police witness statements produced; no apparent record on

HOLMES and no mention of same in the list of photographs produced (listed as those which have been shown to the witness).

Missing Material

(a) **JIG FAX No 731** (SCCRC Appendix: Protectively Marked Materials [pdf -p1] this refers to a statement by Bell (not disclosed) in which he mentions a photo show on this date.

(b) **DC Bell SC CRC Interview** (SCCRC Appendix: Interviews) [pdf-p9 - 12] : At interview Bell confirms such a procedure took place but cannot explain the absence of reports. He is adamant that he is present at this photo show which he seeks to characterise as a non-event, without any identification being made.

Reasons for Absence

There is no explanation for the failure to disclose that this event occurred and no reason for the absence of any records of same. There is a suggestion in the information available that this identification procedure may have been irregular and conducted by Scicluna alone (JIG Fax731, supra). This could be a reason for the absence of records. But DC Bell insists he was involved and a photospread was compiled.

Effect upon the Fairness of the Trial

Any and all the information available on the conduct of identification procedures with the witness is material and ought to be disclosed. It matters not whether there was any identification made. The conduct of these procedures - their frequency, how they were

conducted, comparison of the photos shown and what was said by the witness - is directly relevant to an assessment of the reliability of any subsequent procedure and identification made. In any event here, the questioning at the SCCRC interview of Bell emphasises the similarity in the terms of selection made here (facial features and hair) and that made when selecting the appellant on 15th February 1991. This suggests a further significance to this evidence.

A number of questions arise from this absence of disclosure. DC Bell gave evidence that this first photo show was that conducted on 14th September 1989: Trial Evidence Day 32/4846, [pdf – p7]. Unknown to the defence this is wrong. DC Bell's description of the procedure appears at variance to the terms of the JIG Fax. His insistence that he was present is at variance with other information. The SCCRC failed to investigate this. Further disclosure will be sought.

3.1.3.3 Missing Evidence of Photo Identification of Appellant on 15th February 1991

Position at Trial

The Crown led and relied upon the evidence of Gauci that on 15th February 1991 he selected a photograph of the appellant, from a photo-spread (CP436) on the basis that he was similar to the purchaser. At trial, the Crown simply led the witness through his witness statement (CP470) which he adopted (Trial Transcript Day 31/4770-4813) [pdf-46]. This included the following:-

“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. I would say that the photograph at number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same. And his chin and shape of face are the same. The man in the photograph number 8 is, in my opinion, in his thirty years. He would perhaps have to look about ten years or more older, and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph 8 resembles the man who bought the clothing, but it is younger”

and " 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"

Whether this amounts to any kind of identification is addressed in other grounds of appeal.

The Crown also led DC Bell through the statement, without questions, for the purpose of establishing what was said when the appellant picked the photograph (Trial Transcript Day 32/4865-4868)[pdf-26]. The Crown did not lead DI Scicluna in evidence.

The Crown also led evidence from DC Bell regarding the compilation of the photospread (CP436) (Trial Transcript Day 32/4877-78) [pdf -p38] where he explained that the Maltese security supplied photos to make up the spread. The appellant's passport photo was of a different quality so these photos were dulled down to appear the same.

The defence, in cross-examination, also referred the witness to this statement and confirmed his reference to the photo shown to him by his brother, was the newspaper photo of Talb in CP1833 (Trial transcript Day 31/4829) [pdf-105]. The defence in submissions sought to suggest this selection was unreliable due the passage of time; because the photo of the appellant stood out in that it was of a different quality; because he said the man in the photograph was ten years or more too young; and the degree of resemblance was equiperated with the photograph of Abu Talb (Trial Transcript Day

82/9912-9913), [pdf pp.155-156]. At the same time the defence suggested that this was the “high point” of Gauci's evidence for the Crown.

The trial court rejected these criticisms (Trial Court Opinion paragraph 62) and considered that the witness had "applied his mind carefully to the problem of identification whenever he was shown photographs" (Trial Court Opinion paragraph 69)

Undisclosed Evidence

1. Statement from DI Scicluna : Holmes S5262D

In this statement, made on the 25th February 1991, DI Scicluna provides his record of what took place at the 15th February 1991 photo show, including his record of what Gauci said. This statement includes the following:-

“.. Gauci started examining the photographs and the first thing he said was that they are all too young. It was explained to him to allow for age discrepancy as the man he saw could be 10-15 years older. Here he looked at me and in Maltese said ‘Bring me that newspaper. He is similar’. (witness referring to a photograph in British Sunday Times - see statement 46770). During this time Gauci had already stopped at photograph No 8 which was the photo of Mr Megrahi. Gauci then looked through them and again stopped at Baset’s photo and indicating it he said ‘This is similar, but it is maybe 10-15 years younger’.

This statement is a very different record of the event than that presented by DCI Bell at trial. In particular –

(a) The request by Gauci for the newspaper puts the photo selection in an entirely different light. The newspaper in question is that previously identified with the photo of Talb.

(b) This statement suggests that it was suggested to the witness, not simply to make allowance for age discrepancy but rather that, specifically he was told that the target might be 10-15 years older. This is a more directed prompt to the witness and of import in respect of the reliability of identification procedure.

(c) This statement also suggests that the witness made a more specific qualification to his selection, that the man selected was 10-15 years younger than the purchaser. This is different to DCI Bells evidence at trial. It also implies the witness is unclear.

This statement is very different to the statements produced by DCI Bell, DC Crawford and FBI Agent Reid, the wording of which, in respect of this event, all show a "striking similarity."

2. Evidence of DCI Bell - (SCCRC Appendix: Interviews)

The SCCRC interviewed DCI Bell regarding this identification procedure and the statement he recorded from Gauci (CP470). DC Bell's rehearsal of this event at the interview significantly undermines the reliability and accuracy of that witness statement and the police witness statements in record of the event. In particular Bell suggests that final part of the statement that:

"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" were not the words of the witness. It was, he suggests, DI Scicluna who insisted on the equiperation with the photo of Talb shown by Gauci's brother.

DC Bell also volunteered this information under cross-examination at trial by the co-accused's counsel (Trial Transcript Day 32/4882-3) [pdf -p43-44]

3. Other undisclosed evidence

Further material has now been disclosed which bears upon the preparation and conduct of the 15th February 1991 photoshow:

HOLMES Record Print D6235 : This report by BKA Officer Kok re Tony Gauci's compilation of a photofit image of the purchaser on 13 September 1989 records Gauci's assessment of the image produced: "...DS Armstong asked the witness about the quality

of the simulated picture. Mr Gauci evaluated each individual section of the face as good or very similar, however the age was not corresponding. The unknown male person was about 10 years older than the person depicted in the simulated. An alteration to the picture to take this into account was not possible without reducing the otherwise high quality..." This provides (further) context of the witness Gauci's (consistent) position re his description of the age of the purchaser

Extract from DCI Bell Diary (9/8/90) "Met with ACC Grech...Advised him that the photographs were being prepared. He states that the only person who should be present when they are viewed by the witness should be Inspector Scicluna and I. In addition no one should be advised of any identification made by the witness. Advised him that the FBI would insist on being present.""I intend to discuss further witness protection scheme prior to showing photographs." (Manuscript version continues): "He is clearly not happy with FBI being aware of any identification."

Message M2509 (10/8/90) Bell reports Grech's position re American presence at photoshows to LICC

Extract from DCI Bell Diary (22/1/91) (HOLMES version) "They, the FBI, have supplied photocopies of photographs of Abdelbaset and Agilia, which is questionable, Majukhut and Oun and an M Sarhan." and in the margin the summary: "Reference to Americans having photocopies of Abdelbaset's photograph."

The Manuscript Version suggests that 2 photographs of the appellant were supplied: "...they have supplied photocopies of photographs of Abdelbaset (2)"

Extract from DCI Bell Diary (1/2/91) Lists names for line-up and comments re sources.

“...LICC are in possession of photos of no 3 Baset...” Entry also states “To be arranged for viewing by witness. Only Baset in Malta at the time. Masoud is a black.”

HOLMES Statement S5544 Margarett Buckis: Brief statement re collecting (8/2/91) sealed envelope from FBI HQ Washington and handing to SA Reid. She was unaware of contents

HOLMES Statement S5486C SA Philip Reid: “...on 8 February 1991 I received 4 photographs from intelligence information specialist Margarett Buckis of the FBI. The persons identified in the photographs were Abd Al-Basit Ali Muhammed, Abd Al-Hakim Ali Abu, Muhammed Ali Abu and Ibrahim Imbarak Musbah. I received these photographs while in the US. They are now contained within DC912. While in Malta on 14 February 1991 I provided these photographs to DCI Bell..” This statement also narrates events at the photoshow and records that, after selecting & signing photograph no. 8 Gauci appeared to be upset

Extract from DCI Bell Diary (11/2/91): “Attended US Embassy with McAdam. Met with SA Reid who produced a number of photos...Two photos of Abdelbaset one with collar/tie, one with open shirt. Point: Bollier in his statement picks out photo 18 stating it is Baset. We must confirm the ID and use this to show witness in spread.”

Extract from DCI Bell Diary (14/2/91): "I obtained suspect photograph from Special Agent Reid. I have thereafter recorded the following (1) Abdelbaset. Born (blank.) ...on Monday 11th February 1991 within the US Embassy I made reference to the fact that Reid produced these 2 photographs of Abdelbaset. He obviously retained them until he handed the one photograph to me on Thursday 14th February 1991."

Memo M2618 from SIO to WMFO (11/2/91): "...It would be very much appreciated if the Quantico team could introduce as early as possible the photographs of the Libyans to Bollier. It is imperative to determine which photograph of Abdelbaset is the best reproduction of how he looked in December 1988 before the photograph selection is shown to Gauci. Is it the one with the collar and tie or the one with the open neck shirt?...I would wish to avoid misleading the witness Gauci during the photograph viewing, if at all possible. It would avoid the impossible situation of showing two photos of the same suspect..."

HOLMES Statement S5503 Sgt Joseph Bartolo: At request of DCI Bell, made copies of the other 11 photographs to be used in the photospread and reproduced them as near a quality of the appellant's photograph as he could

HOLMES Statement S609BG DC John Crawford (14/2/91): Compilation of photospread DC912 and covering portion of photographs to conceal fact that appellant's photograph shows him wearing a tie

HOLMES Statement S2632AR DCI Bell: Re photoshow of DC839(including Baset)-he received 4 photos(DC912 - Source Photographs) from SA Reid, including one of the appellant and selection of 8 standin photos from Maltese Immigration Office; instruction to Bartolo to dull the other photos to match appellant(confirmed in Bartolo's statement S5503); Bell retained the original photos; manuscript statement DC997 produced for Gauci; names given for those in the spread; he retained DC912, 8 pink carbon copies of the visa applications and photos from Maltese Security Branch. Statement goes on to narrate events at photoshow (see below)

Extract from DCI Bell Diary (15/2/91):

" meeting with Special Agent Reid. He tried to imply that we were rushing showing the photograph spread.they were the ones that wanted it done before Bollier left the USA. Also if Baset was identified, Bollier would be the last person to be told as we know he is still in contact with the Libyans. Reid has been worried in case there is no identification made by the witness because [the photo]of Baset we have is too young. I explained that as we have no other and no indication that we will ever get one, then we can only proceed with what we have. If no identification is made and we later get a better photograph showing his true age and appearance in December '88, then the Lord Advocate may accept an argument for showing this to the witness.

The differences in any photos can be noted while accepting that to some degree it will weaken the identification at any trial. .. The SIO agrees we have a partial identification on the person named Abdelbaset considering all of the circumstances, namely (1) He arrived

in Malta on 7th December '88. This was the date of the purchase of the clothing. (2) He resided at the Holiday Inn Hotel, Sliema, which is within several hundred yards of the shop premises. (3) He travelled to Switzerland on 9th December 1988. He is known to Bollier, the person who supplied the IED timer. (4) He was involved in the company known as ABH on behalf of the Libyans. This company was set up to deal with contact with the MEBO company, Mr Bollier's firm. (5) He has a resemblance to the original photo fit and artist's impression. (6) ... (7) The SIO advises that Bollier has now been shown the photofit and he states that if the hair was shorter then it would indeed look like Abdelbaset, also if it was 10 to 15 years older. (8) The SIO also advises that the photograph we have of Abdelbaset is in fact 12 years old. He is a smart dresser, plenty of jewellery and there is no recollection of the watch according to Bollier and he is taller than Bollier at 5 foot 9 inches. Gauci thinks 6 foot tall."

HOLMES Statement S2632AR DCI Bell:

“ At this stage I could see that the witness was visibly upset. He stated to me that he was worried that he would become a Target' and that every time he heard a bang, he thought that they' had come to get him. He was obviously concerned in case there was any publicity. I attempted to reassure the witness and calm him”

Extract from DCI Bell Diary (15/2/91):

"He stated that they were all young and he was asked to view them to see if he could see any person who may resemble person he referred to. Allowing for age difference. He picked out No. 8 having looked at this 3 times before stating hair a bit long, however the

eyebrows, nose, lips, chin and overall (dictated version says "oval") face similar but the man in the photo would have to be 10 or more years older. He signed statement at corner of photo and Prod label. He showed concern should this "leak" stating every time he hears a bang he thinks they are coming for him."

Message from DCI Bell to SIO (15/2/91):

Partial ID of Abdel Baset made – “He has said if he was 10 years or older he would be a very good resemblance He stated initially that all the men were younger and then concentrated and looked at the photos three times. He pointed out the features of Abdel Baset as being similar in eyebrows, face, nose and shape of face. He stated that of all the photographs shown to him in Malta, this one was the closest to the clothing purchaser. Do you know boss how old that photograph is? He mentioned the person shown to him by his brother(which was the television photograph of Abu Talb as being the only other one that was near to the suspect. However we have that well documented. Godfrey Scicluna raised that point which was quite valid and once we agreed he stated that he was satisfied that with the circumstantial evidence available here, that Abdel Baset was more than likely the person in the shop. Godfrey then shook my hand. I asked Dick Marquise how old the photograph of Abdel Baset was, before he knew anything about the details of what you had told me and he stated that he had been informed that the photograph was about ten years old. Ed Marshman took it upon himself to show the Artist's impression to Bollier at Quantico, which was the wrong thing to do and. could have caused us several problems. However Bollier looked at it and stated that if the hair was shorter it could well pass for Abdel Baset. Reply Malta: That is first class, you could hardly believe that.

Reply LICC I Nothing of course will be said to Bollier or the Swiss in general but I have asked Jim to try and ascertain one or two features about Abdel Baset which could be helpful. Such as height, dress and any visible jewellery etc worn. I will hear about the results of that some time later."

HOLMES Statement S609AF DC John Crawford: Refers to discussion about clothing with Tony Gauci "during breaks in procedure" during 15 February 1991 photoshow

Report D8509 re A10486 Fluckiger (12/11/91): re source of Swiss documents and photographs of appellant – refers to appellant's 3 entries into Switzerland in 1988 and associated copies of passport (including photographs) made on 12/11/91. Also refers to statements re receipt of items including a copy of the photograph passed to the FBI which was selected by Gauci on 15 February 1991

Letter from Dumfries & Galloway Police to SCCRC (8/12/05): response to request for clarification of Bell's 15 February 1991 diary entry re appellant's photograph being 12 years old. The letter suggests statement S4710M (DCS Henderson) is the clearest indicator of age – under reference to a passage which does not say anything about the age of the photograph (nor does the rest of the statement – although it suggests FBI mentioned the photograph being 12 years old)

Reasons for Absence

Scicluna Statement

No police witness statements were disclosed by the Crown. All statements from those attending and conducting this identification procedure ought to have been disclosed. The defence were entitled to proceed on the basis that all material information in respect of this identification was disclosed by the Crown. This would include any material discrepancies regarding what the witness said and did, in making his identification.

It is clear that the Crown were fully aware of the position and DI Scicluna's version of the event. At Crown precognition (SCCRC Chapter 22 Appendix p.21) [pdf-23] DI Scicluna is asked about Gauci's request for the newspaper photo. He initially adopts his statement, but, after what appears to have been questioning, suggests he recalls the request by the witness, but nothing more specific. At interview with the SCCRC DI Scicluna stated he was not sure if the witness had the newspaper photo at the time he made the identification, but he was sure of Gauci saying bring me that newspaper. (SCCR Interview 1st December 2004; SCCRC Appendix: Interviews [pdf- p.30]) In this context there was a breach by the Lord Advocate of his duty to disclose material information.

In fact, this statement was included in the vast quantity of material produced by the Maltese authorities to the defence. The defence failed to examine or use the statement. This failure has to be considered in the context of their understanding that all material information regarding this event had been disclosed to them by the Crown.

Bell's Evidence

The statement of Gauci produced at trial was led and relied upon as his prior statement of this identification. The suggestion that part of what was recorded in Gauci's statement was not in fact his statement emerged inadvertently at trial – the defence caught by surprise did not take the matter further. Had this been known prior to trial then the defence may have investigated the whole event in a different way. In particular, they might have been told the more detailed picture, given by Bell at SCCRC interview. This picture suggests there are discrepancies between the records of this event and what actually took place.

Other undisclosed evidence

This was not disclosed to the defence and was accordingly not available to them at the trial.

Effect upon the Fairness of the Trial

The Crown relied upon this resemblance identification of the appellant in support of the identification made in court. As such it formed an important part of the Crown case. At trial the defence in submissions conceded that this identification was the "high point" of Gauci's evidence for the Crown (Trial Transcript Day: 82/9912) [pdf – p.155]. Apart from the issue asserted over the quality of the photo, there was no challenge made to the

fairness or regularity of the procedure. Had this information been disclosed the defence may well have taken a very different approach to same.

Moreover at trial the defence in submissions sought to suggest it was unreliable due to the passage of time, the quality of the appellant's photo and suggested the degree of resemblance was equiperated with that of Talb. If the defence had been aware of this statement then they could have pursued a different and far stronger line of defence to suggest to the witness that he thought he was selecting Talb or had Talb in mind when making the selection. In view of the specific terms of the prompt suggested and the witness' response as revealed in the Scicluna statement, the fairness and/or the admissibility of this evidence could have been challenged. In any event the reliability of the whole procedure and the identification made is seriously undermined by this statement.

Further and in any event there is a separate issue raised here, as to the reliability of both the civilian and police witness statements. On the one hand there is the omission, from the almost identical Scottish police statements, of the events spoke to by Scicluna. On the other hand there is Bell's evidence that the witness statement is in fact inaccurate. (Trial Transcript Day 32/4883) [pdf – p.44]. There is no police statement to this effect. Had this been known it is likely to have prompted a defence investigation about the police conduct of this procedure. This could have led to challenges as to the propriety and accuracy of these procedures. This line of enquiry is all the more likely in the context of the other failures to disclose information regarding the other identification procedures – for

example regarding the nondisclosure of the possession of the Focus photo immediately preceding the Identification Parade. The cumulative effect of what is missing regarding the identification procedures undermines the reliability of the records of the identification procedure as well as the identification evidence itself.

3.1.4. Exposure to Prejudicial Publicity

One key aspect regarding the identification evidence, which was not before the trial court, concerns the exposure of the witness to prejudicial publicity - identifying the appellant - prior to making his identification at the identification parade and at court. The failure to disclose information of this exposure is one basis of the reference to the court by the Scottish Criminal Cases Review Commission ("SCCRC") (SCCRC Statement of Reasons para.22.84)

Position at Trial

The only evidence led at trial which touched on such exposure was –

- (a) The evidence that the witness had seen and selected the photograph of Talb from the Sunday Times newspaper (Statement S46770: CP467 5th March 1990). What is notable here is this photo has "bomber" written above it and clearly identifies the photo as that of the perpetrator.

- (b) The evidence that the witness had also seen and selected a photo from Focus magazine. (CP451). The circumstances of same were kept vague and the Crown led the witness that he had been shown the magazine photo by another shopkeeper "perhaps towards the end of 1998 or the beginning of 1999". (Trial Transcript Day 31/4773)[pdf- p.49] This was the only information provided to the defence as to when the witness saw the Focus photo. What was made specific was the suggestion to the witness that, when he had shown the Focus article to the Maltese

police, he had said "that's him" (as per DI Scicluna Statement 1st April 1999 and Crown precognition – not disclosed). The witness however in evidence only accepted he made a resemblance identification. (Trial Transcript Day 31/4473-75)[pdf-pp49-51]

- (c) The record of the defence objections to the fairness of the identification parade, on the basis that the witness was likely to have seen a picture of the appellant in the press, which photo was released by the prosecuting authorities, was read out by the parade officer, Inspector Wilson, without any questions and nothing was made of this at the trial.

The defence did not lead any evidence of prejudicial publicity. They did not raise the issue with the witness. They did not pursue the objection to the fairness of the identification procedures, as raised at the identification parade. They nonetheless sought to suggest in submissions the identification was undermined, citing the Focus article as an example (Trial Transcript Day 82/9916-22) [pdf-p159]. In these circumstances the submissions were inevitably rejected.

The trial court in its judgement, simply refer to the evidence of Gauci's exposure to the Focus article. This conveys the impression given was that of fleeting possession. (Trial Court Opinion para.63)

The defence sought on appeal to suggest that the trial court had failed to deal with the issue of the effect of prejudicial publicity on the reliability of the identification. In resisting this ground of appeal, it is noteworthy that the Crown suggested the exposure to the Focus photo was "not very long before the identification parade" but did not divulge the true picture. Further, the Crown moved the appeal court to reject the defence submissions on the basis that there had been no evidence of any prejudicial publicity or the effect of same upon the witness. (Appeal Court Transcript Day 98/34) [pdf – pp34-41]

The appeal court considered the Crown position was well founded and pointed out there was no evidence and that the effect of any prejudicial publicity should have been put to the witness. Not only was this not done, but the defence in fact did not challenge the identification evidence of the witness: Appeal Court Opinion para.302.

Missing Material

3.1.4.1 The Focus Magazine December 1998

1. **Sgt Busuttil – Statement S572 5 : 12 th April 1999 - (SCCRC Appendix : Chapter 22)[pdf-p1]**

The SCCRC extracted this statement from the HOLMES database. This statement - noted by DC Bell - established that the witness had informed DI Scicluna in December 1998 that he had been shown and kept an article from the December

edition of the Focus magazine which included a photo of the purchaser. The witness handed it to the Maltese police on 9th April 1999 and said "that's him". Busuttil, travelling with the Gauci brothers, took the article, in his hand luggage, to Camp Zeist for the identification parade and handed it to DCI Bell on 12th April 1999. At interview with the SCCRC, Busuttil confirms that his statement corresponds to his understanding of events (SCCRC Appendix: Interviews) [pdf p1]

Focus Magazine: CP451

The magazine contains a photo of the appellant underneath the caption "Who planted the bomb?" thereby clearly identifying the appellant as the suspected bomber. Within the written article there is a passage which states that the description given by the witness is wrong and provides the 'correct' details for the appellant.

Sgt Busuttil - Crown Precognition : (SCCR Appendix Chapter 22) [pdf-p2]

This repeats the content of the statement taken by Bell. Busuttil suggests that the witness stated 'that's the man' to both him and DI Scicluna on 9th April 1999.

DI Scicluna - Crown Precognition - (SCCR Appendix Chapter 22) [pdf-p24]

This confirms the position of Busuttil and that he, Scicluna, viewed the identification of the photo by the witness as a positive identification.

DCI Bell - Statement S2632CO - (SCCRC Appendix Chapter 22) [pdf – p.2]

In this undisclosed statement Bell simply records being handed the article and the information that the witness had identified the photo.

Gauci SCCRC Interview - (SCCRC Appendix: Interviews) [pdf-pp.9-10]

The issue of the photo was raised with Gauci at interview. He stated that he had seen many magazines and newspapers. A next door shopkeeper, who used to bring him articles and read them to him, may have shown him the article. He could recall seeing the photo. He could also recall discussing the article with DCI Bell who "used to ask me if I recognised the man and I used to say that it was the man". He was not sure if this was the Focus article but he could recall the photo.

DS Dalglish – Statement S5703AC 19 April 1999

In this statement Dalglish simply records receiving the magazine from Bell and lodging it as a production at Dumfries police station.

(It is clear from now-disclosed Action Record Print A12169 that this statement was provided by Dalglish as a “continuity statement” on 4 April 2000)

Action Record Print A12168

This now-disclosed document is an instruction to take a statement from Tony Gauci re his possession of the Focus magazine:

“...Neither Bell or Busuttil obtained a statement from Gauci re this...Take statement from Gauci re his viewing the magazine his comments & subsequent handing over to Maltese police.”

The result of this instruction is also recorded:

“Result: Crown Office (Mr Brisbane) instructs no statement to be obtained from Gauci re Focus magazine. The matter has been covered in precognition. No further action required DS Dalgleish 10 April 2000”

Tony Gauci Crown Precognition 18 March & 25 August 1999 (SCCRC Appendix: Chapter 24)

The precognition does not contain any specific details re the timescale of Gauci viewing, possessing & handing over the magazine:

“...Not long ago a shop keeper from our street brought in a magazine and said that I was in it. I told this man I didn't know what he was talking about but I had a look in Focus magazine (DC1626) and in it I saw a picture which looked to me like the man who had come into the shop. He was wearing yellow glasses. I told Mr Scicluna about this and gave him the magazine...”

Reasons for Absence

The Crown had all of the above information, but did not disclose any of it to the defence. The Crown were aware of the timing of this event - both in terms of the length of time the witness possessed the photo and that it was handed over on the eve of the identification parade. Yet at trial, in the questioning of the witness the timescale was kept vague and only the specific circumstances of the positive identification was raised with the witness. The exposure of the witness to publicity and this photo was raised by the defence, at trial and at appeal, but still no disclosure of the relevant circumstances was made by the Crown.

As indicated there was no disclosure of police witness statements to the defence. In this instance these statements were not included in those obtained by the defence from the Maltese authorities. Surprisingly, no witness statement from Gauci appears to have been taken by DCI Bell regarding this event and nothing was raised about this matter at the time of the parade (despite the danger posed). None of the above police officers mentioned these circumstances at defence precognition. The only information provided is by Busuttill who makes reference to the Focus magazine at precognition, but does not provide details. And by DCI Bell who mentions retrieving the article at Zeist but gives no further details. Nor is there any reference to such matters in Bell's now disclosed police statement on the subject (S2632CO - above).

At interview with the SCCRC, DCI Bell is questioned regarding the magazine. He suggests that he did not know that the witness had the magazine in his possession on 9 April 1999; that he (Bell) must have heard about the magazine when he was in Malta and

had asked the Maltese police to recover it. And further that his recollection was that the witness was shown the magazine shortly before it was taken from him. None of this is accurate and contradicts the statement from Busuttil which was taken by DCI Bell himself. (SCCRC Appendix: Interviews: Bell p33)

The failure to disclose this information was in breach of the Lord Advocate's duty to disclose information which would tend to undermine the prosecution's case or to assist the case for the defence.

3.1.4.2 It Torca Newspaper

The SCCRC recovered the following:-

1. Il Torca : editions 28th February 1999 and 7th March 1999 (SCCRC Appendix: Chapter 22)

This is a local Maltese language newspaper which covered Lockerbie. In the edition of 28th February there was a photo of the appellant clearly identified as one of the accused. In the 7th March edition, the following week, there were further photos. In addition the text of the articles discusses the potential evidence and in particular details what the witness is said to have told the police –

“...[pdf - p4] "... Toni Gauci informed investigators that on the day he sold the shirt and other objects, *he was alone in the Sliema shop, since his brother had stayed home to*

watch a football match on TV. At around 6.30 pm, an Arab-looking client entered the shop...

...The date when the clothes were supposedly purchased also gives rise to conflicting evidence.

Gauci states that he recalls the date as being the 7th of December, the day when his brother was watching a European competition football match. Investigators found that the match played on the 7th of December was broadcast on TV at 1 pm. This was the return leg of a match which had been played on the 23rd of November in the evening.

Hence, if as Tony Gauci stated, he was alone in the shop because his brother stayed at home watching a football match in the evening, the day the Arab purchased the clothes was the 23rd of November and not the 7th of December, as stated by Tony Gauci. Weather reports revealed that it had rained on the 23rd of December (sic) and not on the 7th December, the day Gauci claims the umbrella was bought...

...According to Maltese Immigration Police records, which keep embarkation cards, one of the accused, Ali Megrahi, was in Malta on the 7th of December but was not in Malta on the 23rd November. If this fact is established, Megrahi could never have been the Arab person who bought clothes from "Mary's House" as alleged by the American Department of State, since on that date he was not present in Malta..."

(Translations of both 28th February and 7th March 1999 are lodged herewith)

This clearly has a material bearing on the witness' recall and evidence regarding *inter alia* the date of purchase.

2. Confidential Report - Dumfries & Galloway Police 25 March 1999 [D10252], (incomplete) (SCCRC Appendix: Protectively Marked Materials, Dumfries & Galloway)

This report, apparently compiled with a view to the witness protection programme, refers to the witness' exposure to these articles and records that the publication "had a profound effect on both the brothers"

3. SCCRC Interview with T Gauci (SCCRC Appendix: Interviews Volume 2)

The witness admits in his SCCRC interview (paragraph 39) [pdf - p12] to having seen this It Torca article. When this material was shown to the witness and he accepted that he had seen the photos but could not recall specifics. (SCCRC Statement of Reasons para.22.45) Subsequently in his interview he changed his position and said he did not recall seeing the Il Torca photos. Finally, he again suggested - contrary to his initial position - that he had not seen the coverage (See SCCRC Statement of Reasons para.22.45).

Other Undisclosed Material

4. It Torca: edition 21 July 1991 DC1549 (Translation: DC7940)

Now-disclosed material shows that, as early as 1991, It Torca magazine was mentioning Tony Gauci's involvement in the Lockerbie enquiry and in particular his identification of the purchaser of items of clothing as a Libyan. It is not known whether Gauci saw this

edition of the newspaper, but it is apparent that its publication prompted follow-up enquiries by the Scottish police

5. Action Record Print & Action Log Print A10628

This is an action raised 8 August 1991 following receipt of a summary of the above article from the US Embassy in Valetta. "...Obtain copy of It Torca newspaper of 21 July 1991".

DCI Bell reports "...on 12 August 1991 the attached translation and copy of the It Torca newspaper was received by fax from the BHC Malta. The translation does not cover the reference to the photographs, and BHC will be requested to update this and forward by post a photocopy of the paper for better quality reproduction of the photographs..."

Action is marked "changed to filed" 20 November 1991

Reasons for Absence

The newspaper articles and police report were not disclosed to the defence. There is no witness statement from Gauci regarding his concerns over the newspaper coverage. The Crown accepted by letter of 8th March 2007 that they would have been aware of the police report (SCCRC Statement of Reasons para.22.32). There was no exploration with the witness by the Crown regarding his exposure to prejudicial publicity.

The failure to disclose this information was in breach of the Lord Advocate's duty to disclose information which would tend to undermine the prosecution's case or to assist the case for the defence.

3.1.4.3 Extent of Exposure to Prejudicial Publicity

The SCCRC have discovered that the witness and his influential brother have been exposed to very extensive media coverage and publicity prior to trial and importantly, prior to the identification procedures. This exposure includes photos and pictures of the appellant where he was identified as the suspected bomber. This emerges from the following information -

Panorama Coverage: 23rd March 1999 - Minutes D10253 (SCCRC – Appendix:

Protectively Marked Materials, Dumfries & Galloway)

The SCCRC recovered a document consisting of Minutes of a Meeting between the Gauci brothers and Scottish and Maltese police held on 23rd March 1999. In now-disclosed un-redacted form this document reveals that Paul Gauci complained of the press coverage and made reference to his brother's photo appearing in an Italian Magazine, Panorama.

SCCRC Interview T Gauci (SCCRC Appendix: Interviews) [pdf-p8]

During this interview the witness is recorded as saying -

(a) He had seen many magazines and customers would bring newspapers to his shop. When people told him his name was in the newspaper he would ask them to read the articles out to him. People would come into the shop everyday to discuss the case. The next door shopkeeper would read out articles. He did not read English.

(b) Friends would give him press cuttings about the case.

(c) The photos in the Focus article and It Torca were merely examples of those to which he had seen over the years

(d) Sometimes he heard about the case from TV coverage - if there was a news item he would watch it. Sometimes the appellant's photo would appear in TV reports along with pictures of the plane and the disaster.

SCCRC Interview with P Gauci (SCCRC Appendix: Interviews Volume 2, number 24)

[pdf-p21]

During his interview Paul Gauci confirmed that when media articles came to his attention he would give his brother a summary of their contents. He collected and kept many press cuttings at their home. He saw and read "practically an article every week" as well as programmes on the BBC and coverage in Malta. He saw pictures of the appellant in both the British press and the TV coverage.

US Department of Justice Photo & Description

Now-disclosed photograph and description of the appellant issued worldwide by the US Department of Justice in November 1991 at the time of the issuing of the US indictment.

Examples of the media coverage from the British press, Maltese press and TV, and the Panorama article will be produced.

Reasons for Absence

None of this information was produced by the Crown or the defence at trial. In particular the Panorama coverage has not been disclosed to the defence and it was not recovered by them from the Maltese authorities until 2007. Again it was incumbent on the Crown, not only to disclose the relevant information here, but also to lead all the relevant circumstances regarding the reliability of same, before the court. At appeal, the Crown relied upon the failure of the defence to lead such evidence.

The only reason provided by the defence for failing to lead any evidence of the extent to which the appellant's photograph had been publicised prior to the identification procedures, was their view that this was within judicial knowledge and the issue so obvious it would have been pointless to show same (SCCRC Statement of Reasons para.22.83; p.640; SCCRC Appendix: Interviews -Taylor) [pdf-p18]. The decisions of both the trial and appeal court demonstrate the error of this view. It is worth noting it is said now by the defence, that this approach would not have been taken had there been disclosure of the Focus photo. (SCCRC Statement of Reasons para.22.79, p.639; SCCRC Appendix: Chapter 22 Taylor Interview, 6th October 2006, para.46 p19; 7th November 2006, para.8, p.4)

3.1.4.4 Effect of Exposure on the Witness

In his interview with the SCCRC the witness suggested that he did not believe that this exposure had affected his identification of the appellant at the parade and at court. (SCCRC Statement of Reasons para.22.47; SCCRC Appendix: Interviews)[pdf-p14]. At the same time, it is a reasonable inference from the nature and degree of this media exposure that the witness knew that the appellant was one of the accused prior to the identification parade and at court. This is also confirmed by -

(a) Paul Gauci at his SCCRC interview who suggested his brother knew the appellant would be in the identification parade line up (SCCRC Statement of Reasons para.22.50; SCCRC Appendix: Interviews) [pdf-p21]

(b) Sgt Busuttil in his defence precognition, in respect of the identification parade comments that by 1999 most people had seen photos of Megrahi. :- "However by 1999 most people had seen photographs of Megrahi. I could pick out Megrahi although I had never seen him personally myself." (Defence Precognition - SCCRC Appendix Chapter 22) [pdf-p1]

(c) The SCCRC conclusion that it was unlikely that the witness would not have been aware of that the appellant was one of the accused (SCCRC Statement of Reasons paras.22.66-22.67)

(d) The terms of the confused statement made by the witness in making his identification at the parade. The statement implies he is selecting someone from those shown rather than considering the purchaser may not be present.

(e) The indications that suggest that the witness has been influenced by the media coverage in the past in his selection of the photo from the Sunday Times which had a photo of Talb underneath the caption "bomber" and his failure to select the same photo in less suggestive circumstances. (See SCCRC Statement of Reasons para.22.70). Or the suggestion that most recently, in the wake of the conviction, the witness now states he is 100% sure he has identified the right person. (SCCRC-Appendix: Interviews)[pdf-p18]

Reasons for Absence

Most of this information was only recovered post-trial by the SCCRC who investigated, for the first time the issue with the witness. The statement of Busuttil was not disclosed to the defence. This failure was in breach of the Lord Advocates duty to disclose information which would tend to undermine the prosecutions' case or assist the case for the defence.

Effect upon the Fairness of the Trial

The missing information here consists of substantial and significant material which undermines the reliability of the crucial identification evidence. In the unusual circumstances of this case the nature and degree of publicity gave rise to greatly

heightened risk of wrongful identification. There is too, a substantial basis to conclude that this publicity did in fact have a detrimental effect. In the absence of this information the appellant did not receive a fair trial.

Focus

In respect of the Focus photograph, the wrong impression was presented by the Crown at trial - that is an impression of vague or fleeting possession. The reality is very different and impinges directly on the fairness and reliability of the identification procedures. The reality is that the witness had held a photo of the appellant, identifying him as one of the accused, for a period of about 4 months and leading up to the eve of the identification parade – at least 4 days before.

There was nothing before the trial court to convey the reality that the witness knew who the appellant was at the identification parade, or even that there was a substantial risk that he would recognise the appellant. Had the information been disclosed then there would have been a basis, with a reasonable prospect of success, to exclude the identification parade evidence. The exposure to the Focus photo was in breach of the Lord Advocate's Guidelines (see 3.2 below). It was incumbent on the Crown not only to disclose the relevant information but also to lead same.

In any event, on any view, this information presents a very serious risk to the reliability of the identification of the appellant.

It Torca

The materiality of this undisclosed information relates both to the likely influence arising from the publication of the photo of the appellant as one of the accused, and in respect of the influence arising from the terms of the text and comments therein. This was a Maltese paper and written in the witness' mother tongue. Whilst not factually accurate the article provides feedback to the witness that –

- (a) That the accused, the purchaser, was not in Malta on 23rd November, but only on 7th December
- (b) It identifies the absence of Paul from the shop watching football as a means of identifying the date
- (c) It identifies another means of identifying the date from the weather conditions

It is noteworthy that this article is followed by a chronological shift in position by the witness in respect of the presence of Paul in the shop. There is perhaps also a change of emphasis in the witness' subsequent description of the weather conditions. We now know too, that these articles had “a profound effect” upon the witness. - Confidential Report: D10252 above.

The Lord Advocate sought to rely upon the identification evidence and in view of the special dangers attached to same; he required to lead all of the relevant circumstances bearing upon the reliability of the identification before the court. He failed to do so. Indeed, rather, the Crown deliberately presented a distorted picture of this evidence.

The absence of the accurate information regarding the possession of the Focus photograph and the absence of the It Torca material wholly undermines the safety and reliability of the identification evidence at trial. The reliance placed upon the identification made at those procedures means that the non-disclosure of this information, even when viewed in isolation renders the trial unfair.

3.1.5. EXPERT EVIDENCE REGARDING IDENTIFICATION: Section 106(3), Criminal Procedure (Scotland) Act 1995

Position at Trial

As has been rehearsed above, the conviction of the appellant crucially relies upon the identification evidence of Tony Gauci. The Trial Court refers to him as an “important witness” (Trial Court Opinion para.55). His “identification so far as it went” of the appellant as the purchaser of clothing found in the primary suitcase was crucial - whether it is viewed as a positive identification or merely resemblance. Both the trial and appeal court repeatedly refer to this evidence “as a highly important element in this case”. (See Trial Court Opinion at paras.69 & 88 and Appeal Court Opinion at paras.297 and 301.

Also, as indicated above, there was no real challenge by the defence to the identification made. In 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” (Trial Transcript Day: 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. The only other issue raised was that the description was inconsistent with the appellant.

The difficulty with these submissions is that the witness was not challenged as wrong and - with the exception of the time interval - there was no proper evidential basis for any of the assertions made.

How it was that the trial court assessed the reliability of the identification evidence is not at all clear. For example, as suggested above, it is not clear that the standard directions given to a jury have been followed. The reasonableness of the approach taken is addressed in Ground 2 above. It can be seen from the judgment that the trial court had regard to the following -

- (1) The history of the identification evidence as led by the Crown
- (2) The criticism that the appellant's photo at the 15th February photo show was of a different quality - but this was rejected (Trial Court Opinion para.62)
- (3) The criticism that the witness' demeanour suggested he was unreliable - this was rejected (Trial Court Opinion para.67)
- (4) That the witness' description did not in a number of respects fit the appellant and there was a "substantial discrepancy".

And that the trial court placed particular reliance upon the following in concluding the identification evidence was reliable -

- (1) That the witness applied his mind carefully to the problem of identification whenever he was shown photographs and he was a careful witness (Trial Court Opinion para.69)

(2) That "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 at Court, he was doing so not just because it was comparatively easy to do so, but because he genuinely felt that he was correct" (Trial Court Opinion para.69)

The materiality or otherwise of a witness's carefulness & confidence are addressed in the expert reports upon which the appellant seeks to rely. This is discussed further below.

Expert Evidence

The appellant has instructed reports from experts in the field of psychology and human memory. The appellant has lodged a report, dated 19th December 2008, obtained from Professor Tim Valentine, Professor of Psychology at Goldsmiths, University of London. Professor Valentine is a recognised expert in the field of eye-witness identification. He has advised the Home Office and police forces in England in relation to identification issues, and his research has informed and influenced the English code of practice governing the conduct of identity parades.

The appellant has also lodged a report, dated 18th December 2008, obtained from Professor Steven Clark, Professor of Psychology at the University of California, Riverside. Professor Clark is also a recognised expert in the field of eye-witness identification.

Purpose of the Evidence

The appellant seeks to rely upon this expert evidence insofar as it is capable of assisting the trier of fact. It can do so by informing as to the general and undisputed factors which psychological science has recognised as rendering visual identification more or less reliable. The appellant does not seek to rely upon parts of the reports lodged which may appear to comment upon the reliability of any particular witness. The appellant seeks to, and is entitled to, rely upon expert opinion evidence such as that offered which is directed to the whole circumstances of identification and to the risks, which may exist, from the presence of any recognised factors which have been established by psychological science, as likely to reduce the accuracy of visual identification. Expert evidence cannot tell us about the individual ability of the witness to recall a visual image, but it can assist by providing the means by which the trier of fact can evaluate the assertion of identification made. The aim is to assist the trier of fact in carrying out its evaluation of the identification evidence. Armed with the knowledge of such relevant factors it can, if it chooses to do so, consider them in the assessment of the reliability of the identification made.

Visual identification evidence is recognised by Scots law and universally, as inherently unreliable. It carries with it a special risk of wrongful conviction. (*Departmental Committee on Evidence of Identification in Criminal Cases (Devlin) HC 338 (1976)1.24; 4.24-4.26*)

This is recognised by the special rules of evidence which have developed - whereby an earlier identification made by a witness can substitute for the identification evidence made in court (*Muldoon v Herron 1970 JC 30*). This has developed in recognition that an earlier identification is more likely to be reliable. And it can be seen in the development of special judicial directions which are designed to identify the risks of error likely in such evidence. The contents of such directions mirror the factors to which expert evidence speaks and in so doing demonstrates the appropriateness and relevance of such expert evidence. A primary purpose for the admission and use of this kind of expert evidence is to safeguard against the special risks attached to this kind of evidence, by ensuring that the trier of fact is fully informed of the dangers and nature of the problem.

Admissibility

Exclusionary Rules

At common law there are well established rules which will result in the exclusion of expert evidence, unless met. The expert evidence which the appellant seeks to rely upon does not fall foul of any of these rules.

Notable here are the following rules –

(1) *That the opinions expressed arise from some recognised branch of knowledge*

Eyewitness identification and the factors which affect its accuracy is the most researched of all psychological legal topics and has been subject to extensive study - not least since the Devlin Report which called for same. (*Departmental Committee on Evidence of Identification in Criminal Cases (Devlin) HC 338 (1976) - para 4.15*). The breadth of this study indicates this is an established area of expertise. The science has identified certain risk factors which are now undisputed and well established.

(2) *That the subject matter of this skilled evidence is outwith the knowledge and experience of the jury.*

This opinion evidence derives from expertise in cognitive psychology and knowledge of how the human mind works and how memory recall works. It is not generally known or understood that visual memory recall is a reconstructive process - it is not as many people imagine a question of retrieving a fixed image stored away like a photograph in someone's memory. How visual recall operates has many implications for the reliability of witness' memory. Examples include the recognition that recall of visual images is highly susceptible to suggestion and results in distorted reconstruction; or that the process of reconstruction is such that the witness may hold strong belief in the image reconstructed – whereas, in fact, confidence expressed at a late stage or belief is not a reliable indicator of accuracy. These examples demonstrate that this evidence is outwith the ken of a jury. See Professor Valentine's report at section 5; Professor Clark's report at paragraphs 40 – 44.

Further, whilst some of the relevant 'situational risk factors' here may at first sight appear as common-sense – e.g. that the longer the time interval the less reliable recall of a visual memory is likely to be - the reasons for this and the degree of risk posed, are not readily understood, especially when combined with other factors such as post event suggestion. See Professor Clark's report at paragraphs 61 – 69.

Finally, psychological research has established that juries do not commonly understand the factors which affect eyewitness identification. See Professor Clark's report at paragraphs 45 – 53.

(3) That the opinion evidence does not usurp the function of the jury

The purpose of this evidence is addressed above. The purpose is to provide *assistance* to the trier of fact in the determination of the issue of eyewitness identification, directed to the relevant situational factors, not readily understood which increase the risk of error.

Reference is made to:

Dickson on Evidence (2nd ed.) at (397) - (399)

Departmental Committee on Evidence of Identification in Criminal Cases (Devlin) HC 338 (1976)

Muldoon v Herron 1970 JC 30

Opening door

Traditionally Scots criminal law has been cautious to the admission of expert evidence. That tradition has recently been significantly departed from. This is seen in decisions which take a less restrictive approach to admissibility and which recognise the relevance of expert testimony; a marked increase in the use of expert testimony (often by the Crown); the greater scope for the kinds of expertise which are now established and new statutory provisions (Sections 274-275 Criminal Procedure (Scotland) Act 1995)

Campbell v HM Advocate 2004 SCCR 220 opened the door to the admission of expert psychological (and linguistic) evidence, the effect of which had a significant bearing upon the credibility and reliability of police accounts of a statement by the accused. Akin to the expert evidence here, the expert knowledge derived from cognitive psychology and knowledge of how the human mind works and how memory recall works. In *Campbell* the issue was the generally recognised limits of verbatim recall established in psychological science. This evidence was considered to be relevant and admissible.

Subsequent cases have viewed as admissible -

- expert psychological evidence regarding the reliability of accounts given by children at interview in the light of allegedly flawed interviewing techniques (*E v HMA*);
- expert evidence regarding false memory and medical evidence that a witness was a pathological liar (*McBrearty v HMA*; *HMA vA*)

- expert psychologist evidence to assist the evaluation of the reliability of confessions by review of both the personality of the witness and situational factors (*HMA v Gilmour*)
- evidence on the effect of the witness' psychiatric condition on her general credibility and reliability were admitted, but not in respect of the credibility and reliability of the particular allegations made (*HMA v Ronald*) .

All of these decisions involve more controversial areas of expertise, and are more closely related to the ability of a particular witness, than the expert evidence here. And they show a significant shift from the position in *HMA v Grimmond* which approach echoed the view held at the time of this trial.

Reference is made to:

HMA v Grimmond 2001 SCCR 708

Campbell v HMA 2004 SCCR 220

E v HMA 2002 JC 215

McBrearty v HMA 2004 SCCR 337

HMA v A 2005 SCCR 593

HMA v Gilmour 2007 SCCR 417

HMA v Ronald 2007 HCJ 11

R v Blackburn 2005 EWCA Crim 1349

Scope of the Evidence

In this case the expert evidence can assist in two aspects of the identification evidence. First it identifies and explains the undisputed factors which tend to render any identification made unreliable, which apply here. In the unusual circumstances of this case, these factors are of particular import. They include the extraordinary delay and the information of the linear decline established; the extraordinary amount of post-event suggestion present - notably the exposure to photos of the appellant and number of interviews - and the implications from the fact that the witness became more certain over time. Finally, this evidence provides the knowledge which warns against viewing witness confidence or belief as an indicator of accuracy. See Professor Valentine's report at sections 5 and 7; Professor Clark's report at paragraphs 61 – 69, 78 – 83, 111 – 116, 119 – 120, 122 – 125, 127.

Secondly, this evidence assists in the assessment of the implications arising from the way the identification evidence was obtained in this case and the various risks introduced by the way the identification procedures were conducted. It is this body of expertise which forms the basis for the development and introduction of the various guidelines and best practice in the conduct of these procedures. Expert evidence explains the purpose of such guidelines and identifies the risks incurred where they are breached. See Professor Valentine's report at sections 5 and 7; Professor Clark's report at paragraphs 21 – 53, 73, 75, 91, 96 – 101, 105 – 106, 108.

Reasons for Absence - Fresh Evidence

This is evidence for which there is a reasonable explanation as to why it was not led at trial. It meets the various statutory tests set out in Section 106(3) the Criminal Procedure (Scotland) Act 1995. This provision was introduced to enable a broad and flexible approach to be taken to appeals based on evidence which was not heard at the original proceedings. Further and in any event, interpretation of the requirements of Section 106(3) require to be read in a way which ensures the right to a fair trial. (Section 3 of the Human Rights Act 1998).

Reasonable Explanation

At the time of trial the defence were guided by the approach taken to the admissibility of expert evidence as decided upon in *HMA v Grimmond*, *supra* (see Mr. Beckett interview with SCCRC Appendix: Interviews) [pdf-p23]. On that basis it was felt that this kind of expert evidence would not be admitted. This is not unreasonable. The defence also considered that such evidence would not add to what the trial judges knew (SCCRC Statement of Reasons para.18.76; Mr. Beckett interview SCCRC Interview – Appendix: Interviews) [pdf-p23]. This proved to be wrong and in any event was an uniformed view of the scope and purpose of such evidence. No expert opinion was obtained. The shift in the approach to admissibility of this kind of evidence - rehearsed above - post-dates this trial. In addition the potential and basis for any challenge to the way identification evidence was obtained was not readily understood until the Privy Council decision in *Holland v HMA (2005)*, *supra*. On this basis there is a reasonable explanation as to why this evidence was not led at trial.

The reasonableness of any explanation is determined by reference to the interests of justice. The interests of justice are determined by the right to a fair trial. In any event subsection (3A) does no more than identify the different considerations to which the Court is required to have regard to when exercising its discretion, in consideration of whether or not there has been a miscarriage of justice. In this context emphasis is placed on the effect of the absence of this evidence upon the fairness of the trial.

Effect upon the Fairness of the Trial

The essential question and ultimately the only question, is whether in the light of the fresh evidence, the appellant was deprived of a fair trial and there was a miscarriage of justice.

Thus the conclusion that the absence of the evidence deprived the appellant of a fair trial is determinative of the appeal. The test to be applied in considering the effect or impact of such evidence is whether it would have been likely to have had a material bearing upon, or a material part to play in, a reasonable jury's determination of a critical issue at trial.

Materiality or Significance

There were substantial problems and weaknesses in the identification evidence in this case. These are addressed elsewhere in the grounds of appeal. On the one hand the quality of the identification made was poor - at best the identification "*as far as it went*" only reached resemblance. On the other hand, the circumstances in which it was made

presented extreme difficulties. Finally, the identification was critical to the conviction. This is the background against which the materiality of the fresh evidence falls to be assessed.

There was of course some (but not enough) evidence led at trial as to the surrounding circumstances and the way the identification procedures were conducted, which the court were aware of and ought to have had regard to in assessing the reliability of the identification made. But there was nothing before them to help them to evaluate that evidence. There were very special risks present here which are not readily identifiable and which are not addressed in standard judicial directions (assuming these were considered by the trial court).

No-one can be sure what would have happened if this evidence had been led. But we do know something of the approach taken by the trial court. This is rehearsed above. It is confused. The expert evidence bears upon the factors – identified above – which the trial court appears to have particularly relied upon in concluding that the identification evidence was reliable. It informs as to the proper assessment of, for example, a witness's carefulness and/or confidence, and the relationship if any of these factors to the accuracy of any visual identification made.

The expert evidence too, would put into a proper context the Crown submissions made regarding the situational factors present which suggested the evidence was reliable: Crown Submissions Appeal Court Transcript Day:97/56-57) Appeal Court Opinion

para.285. In particular, the evidence bears upon the Crown's submissions about what might be described as the conditions of observation, and the significance that should be attached to them in assessing the reliability of a witness identification. See Professor Valentine's report at section 5, Professor Clark's report at paragraphs 55 – 60.

In this context the expert evidence is material and significant. It would have provided significant assistance to the trial court in the evaluation of the identification evidence. This evidence would have been likely to have had a material bearing upon, or a material part to play in a reasonable jury's determination of the critical issue of identification at trial (*Cameron*). The absence of this evidence in the context of the dangers presented by this evidence, and the absence of other safeguards, was of such significance as to render the trial unfair. (*McGinty*).

Reference is made to:

Gilmour v HMA supra (109)

Campbell v HMA 1998 SCCR 214 - pp243; 261- 263B

Cameron v HMA 1987 SCCR 608; 1991 JC 251

E v HMA 2002 JC 215

Sutherland Committee report on Miscarriages of Justice paras

McGinty v HMA 2006 supra (10)

Kidd v HMA 2000 SCCR 513

Megrahi v HMA 2002 JC 99

Kelly v HMA 2004 SCCR

R v Pendleton 2001 1 Cr App R 34 - (19)

R v Blackburn 2005 EWCA Crim 1349

R v G.D.B 2001 1 S.C.R 520 -(19)

R. v Wolkins 2005 NCA 2 (CaNLII) (59)-(60)

R v Bain 2004 1 NZLR 638 (CA) at (22)

R v Johnston CA Crim 24th October 2000 at (18)

3.1.6. UNDISCLOSED WITNESS

In addition to the wealth of material regarding the reliability of the identification evidence, there is further relevant evidence which bears upon the credibility and reliability of the witness who made the identification. The evidence of Tony Gauci was crucial both to providing the link between the clothing and the primary suitcase and to the identification of the purchaser. Both were central to the conviction. Any evidence which might undermine his credibility or reliability is therefore material and requires to be disclosed to the defence.

Context

On the 6th November 1989 the BBC six o'clock news covered the Lockerbie bombing and showed footage which mentioned for the first time that the suitcase containing the bomb was introduced at Malta and showed footage of the Mary's House shop whilst mentioning that clothes found in the wreckage had been sold there to an Arab man.

On 13th November 1989 a man called David Wright called Dumfries and Galloway Police. He had recently returned from a visit to Malta and after his return had seen TV coverage on the Lockerbie bombing, which included footage of Mary's House. He wanted to tell the police what he knew. On the 18th December 1989 a statement S5114 was taken from him by DS Armstrong and DC Kirk.

Undisclosed Statement of David Wright S5114 (HOLMES)

The HOLMES version of this statement was produced by the SCCRC (Appendix: chapter 26).

In this statement the witness indicates that he is a longstanding visitor to Malta and a friend of Tony Gauci. He describes how when in Malta he would spend time at Tony's shop. One visit made was between 28th October and 27th or 28th November 1988. During this visit he went to see Tony in his shop. He then describes witnessing a purchase by two Libyan men. The statement is referred to for its terms. The following is relevant -

(1) He describes the witness referring to the purchasers as "Libyan pigs"

(2) He gave descriptions of the men, neither of which fits the appellant.

(3) The impression given of the purchase holds distinct similarities to the purchase of the clothing provided by the witness, in that it involves -

(a) The purchase of many and varied items of clothing, many of the items having been suggested by Tony Gauci and items were selected apparently without reference to size

(b) The two men appeared smartly dressed, one had a dark grey suit and dark skin (compare description in Statement S4677:CP452) and they had a lot of money

(c) The age was in excess of 45 years

(d) The men spoke English, said they were Libyan and they were staying at the
Holiday Inn

(4) His reference to a statement by Tony Gauci during the purchase, that from his experience, he could tell the size of people by looking at them

(5) He subsequently recognised the younger of the men from a TV programme when the man appeared as spokesman for the Libyan government

(6) He states that he spoke to the witness to say that one of the Libyan men he saw in the shop had been on TV speaking for the Libyan government. The witness did not appear to remember them.

Subsequent Enquiries

In a reply to enquiry by the SCCRC (HOLMES document D12904 - dated 16.5.07) DCI Dalglish says that - "Research of the HOLMES database indicates no further enquiries were instigated or carried out in relation to the events described by this witness". (In contrast to the HOLMES records mentioned below, this reply states that the statement S5114 was taken on 15 December 1989).

Documents now disclosed by the Crown tend to confirm that the statement obtained from David Wright was not followed up or further investigated:

- (i) HOLMES message M2092 (13 November 1989): Wright contacts police
- (ii) HOLMES action record print re action A8995 (16 November 1989): statement to be taken from the witness
- (iii) HOLMES action log print re action A8895: statement taken 18 December 1989; changed to filed 13 February 1990

An affidavit from David Wright was obtained on behalf of the appellant on 5 December 2007 and is attached herewith and referred to for its terms.

Reasons for Absence

This statement was not disclosed to the defence. The SCCRC recovered the statement towards the end of their investigation and decided they did not have the time to pursue the matter - see SCCRC Statement of Reasons para.26.11.

Given the similarities of this event to the crucial purchase, this statement was material and ought to have been disclosed. The failure to disclose this statement by the Lord Advocate is in breach of his duty to disclose.

Effect Upon the Fairness of the Trial

This statement comes from an independent witness who speaks to an unusual purchase of clothing, by two Libyan men, at about the material time, when the witness Gauci was alone in the shop. This cries out for investigation. It is difficult to assess at this stage what the line of enquiry could have led to. Enquiries by the appellants defence team to date - outlined above - suggest that any such enquiries are fruitful and support the statement made by the witness.

The statement is significant for the following reasons :-

1. The similarities of the purchase he describes, to that described by Gauci, suggest that either this is the same event or Tony Gauci is wrong about important features of the purchase, not least the two purchasers and the different clothing. Or this is a different purchase but one which is very similar.

2. If this is a different purchase then it is significant in that it suggests that –

(a) Tony Gauci is wrong to suggest that the purchase he remembers was unusual. Accordingly the basis for which he claims he is able to recall this event is undermined.

(b) The similarities of this event, provide a significant likelihood for interference with the ability of the witness to make an accurate recall of the material purchase.

Expert opinion suggest this event provides a basis to infer unconscious transference by Gauci - that is to say, it is an event likely to result in a confused recall of the purchase in question. Reference is made to the expert psychological reports attached.

3. In any event, the description of Gauci making reference to "Libyan pigs" is significant and suggests he was hostile to this nationality - a fact which could undermine his recall of the purchaser as Libyan. A matter upon which the trial court considered the witness to be "entirely reliable": Trial Court Opinion para.67. Had this been known by the defence then this could have led to further enquiry regarding the reliability of the identification of the purchaser as Libyan.

3.1.7 FINANCIAL INTEREST AND REWARD MONIES

There is significant evidence regarding the credibility of the witness Tony Gauci in respect of his having a financial interest in, and his having received substantial monetary payment for giving evidence. This interest and payment was not disclosed at trial and the various documents which indicate same were not disclosed at trial.

The SCCRC has recovered undisclosed material which indicates that:

- (a) The witness Tony Gauci had, at an early stage, expressed an interest in receiving payment or compensation for his co-operation in giving evidence, and that this interest persisted until after the trial
- (b) that the witness Paul Gauci had " a clear desire to gain financial benefit" from his and his brothers co-operation and that Paul Gauci exercised considerable influence over his brother
- (c) that the U.S. authorities offered to make substantial payments to the witness Tony Gauci from an early stage
- (d) that an application for reward monies was made on behalf of the SIO of the investigation team of the Scottish police to the U.S. Department of Justice, after the trial, and that substantial payments were received by both Tony (in excess of \$2m) and Paul Gauci (in excess of \$1m) after the appeal.

Undisclosed Documents

The material consists of the following:

1. Re Financial Interest of the witness

(1) **Memo from DCI Bell to DSIO Gilchrist** (21/2/91) [SCCRC Appendix: chapter 23/1] which states that Tony Gauci had expressed an interest in receiving money in recent meetings and that "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"

(1a) **Message M2616 from DSIO Gilchrist to DCI Bell** (21/2/91) The above memo was sent in response to this message, instructing Bell to report re whether Gauci had been approached re inclusion in US witness protection programme.

(1b) **Letter from SIO to Maltese police security branch** (18/8/99) Advises that Paul & Tony Gauci have now been accepted onto the witness protection programme and gives details of (Strathclyde police) contact officer. Letter records belief that Gaucis have "expressed some dissatisfaction at the Scottish response to their particular circumstances".

(2) **Strathclyde Police Witness Protection Report** (10/6/99) (incomplete) [SCCRC Appendix: Protectively Marked Materials/D&G] which records *inter alia*:

(a) the frustration of Tony Gauci that he will not be compensated

(b) that in respect of Paul Gauci "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 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."

(c) that the Gauci family had financial problems

(3) Tony Gauci Crown Precognition (18/3/99 & 25/8/99) [SCCRC Appendix: chapter 24/19, pdf – p16] which records that Tony Gauci has never at any stage sought to benefit but that Paul Gauci whilst not "openly" seeking a reward has been "more alive to the possibility of receiving substantive assistance"

(4) Impact Assessment Report (12/1/01) [SCCRC Appendix: Protectively Marked Materials/D&G] [Now disclosed in unredacted form: author DCI McCusker] This was attached to letter of application for reward to U.S. Department of Justice) and records that

–

(a) "the issue of financial remuneration has not been discussed in detail with the witnesses and no promises exist"

(b) "It is considered that the witnesses may harbour some expectation of their situation being recognised, however whilst proceedings are still live they displayed a clear understanding that such matters could not be explored"

(c) "It is therefore vital that they [Gauci brothers] continue to perceive that their position is recognised and they continue to receive the respect their conduct has earned"

(d) 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...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".

(5) Briefing Note D12915 DI Dalgleish to ACC Graham (16/5/07) Refers to the "expectation that the SCCRC's statement of reasons, which will be furnished to Mr Megrahi and his defence team, is likely to question the integrity of Anthony Gauci's evidence and also reveal that he and his brother have received substantial payments from the American authorities. While Mr Scicluna recognises that the issue of payments by the American Rewards for Justice programme was engineered only after the trial and subsequent appeal process had concluded, he agrees there is scope for distorted or malicious reporting of the facts and a real danger that if SCCRC's statement of reasons is

leaked to the media, Anthony Gauci could be portrayed as having given flawed evidence for financial reward...Providing these witnesses with the financial ability to leave the island whenever they wished to avoid media or other unwanted attention was a significant factor in the nomination being made to the Rewards for Justice programme in the first place..."

2. Re. Rewards

(1) Extract from DCI Bell Diary (HOLMES version) (28/9/1989) [SCCRC Appendix: chapter 23/3] which indicates that on 28th September 1989 the FBI discussed with the Scottish Police an offer of unlimited money to Tony Gauci, with \$10,000 being available immediately. Thereafter there is a comment about challenging Murray as to what he thought Gauci could give in return that he was not already giving

(2) Extract from DCI Bell Diary (HOLMES version) (5/3/90) [SCCRC Appendix: chapter 23/4] (Manuscript diary entry for 5/3/90 now disclosed but omitting this reference) At a meeting with the FBI and Inspector Scicluna the following was discussed - "reward money as a last resort"

(2a) Extract from DCI Bell Diary (HOLMES & manuscript versions) (7/3/90)
"Attended at police headquarters. Met with Mr. Grech and FBI Agent Knisley. Discussed reward and Maltese reaction.. Attended at the US Embassy. Met with

FBI Agent Knisley and (manuscript version) "He mentioned reward and polygraph of certain people." . (In dictated version): "discussed passengers Lockett, Caruana, TV crew and the four Czechoslovakians along with the check-in attendants, the baggage system and possible MO's. He mentioned the reward and a polygraph system used in America. Advised that we would not refer to this and it would be up to him to bring this up to Mr. Grech but he should tread carefully. FBI Knisley referred to any reports submitted by me re Malta and advised that Mr. Henderson would have to clear this before they could be handed over to him."

(2b) Extract from DCI Bell Diary (HOLMES version) 9/8/90)

"Met with ACC Grech and discussed witness protection regarding Tony Gauci. Mr. Grech says no need for concern at this time... "I intend to discuss further witness protection scheme prior to showing photographs."

(2c) Extract from DCI Bell Diary (HOLMES & manuscript versions) (21/2/91)

Refers to preparation of a security report re Tony Gauci faxed to LICC. Dictated version states that a typed report dated 21.2.91 is attached to the diary page: this is a reference to the Memo from DCI Bell to DSIO Gilchrist referred to above (which states inter alia that Tony Gauci had expressed an interest in receiving money in recent meetings)

(2d) Extract from DCI Bell Diary (HOLMES & manuscript versions) (25/2/91)

(Dictated version) "I also asked him to see the witness regarding protection."

(Manuscript) "spoke with SIO re Glasgow Herald report of Libyan involvement and indictment for one person. Its only a matter of time before it is all out. I suggest that I speak with the witness and suggest a trip away and speak to him re. long term witness protection."

(2e) Extract from DCI Bell Diary (HOLMES version) (26/2/91)

"Witness Gauci's father was spoken to regarding the trip with no mention that Tony had been approached directly. He agreed but only by land and sea. He also mentioned that they would argue and Inspector Scicluna suggested that Sergeant Albert Galea could accompany them. The father apparently agreed to this. Witness Gauci has been advised to speak with his father and get back to Inspector Scicluna to clarify. It has been pointed out that such a trip would be for more than one week. Inspector Scicluna was asked how Tony Gauci's reaction was and he stated that he appears to be calm at this time. The father offered to pay for any trip."

(2f) Extract from DCI Bell Diary (manuscript version) (26/2/91)

Note stuck in diary that : Scicluna spoke to Gauci today –

" He is not keen on going to [redacted]. However he would consider [redacted] but would like his father with him even although they may argue. He wondered how he would explain the cost of such a trip. He was told to suggest the National Lotto as having won a prize! His father was spoken to re a trip with (obscured)...No mention that Tony had been approached. He agreed but only by

land and sea. He also mentioned that they would argue and Inspector Scicluna suggested [redacted] (Galea?) could accompany them. The father agreed to this. Tony has been advised to speak with his father and get back to Inspector Scicluna. It was pointed out that such a trip would be for more than one week. Inspector Scicluna was asked how Tony's reaction was and he states that he appears to be calm at this time. The father offered to pay for any trip."

(2g) Extract from DCI Bell Diary (HOLMES version) (8/3/91)

"Meeting at Lockerbie with team and discussion with Department of Justice" (No corresponding entry in the manuscript diaries has been disclosed)

(2h) Extract from DCI Bell Diary (HOLMES & manuscript versions) (8/1/92)

"The manuscript version states "Bhiel states DOJ(Department of Justice) will give Magid \$2 million dollars. Advised of our concern." The dictated version has the same first sentence but continues "He was immediately advised of our concern regarding this. I also clarified with him about the Gauci reward and the response was only if he gave evidence." (This last comment is also unredacted in more recently disclosed manuscript version)

(3) **Letter re Nomination for Reward** (7/2/01) (author: SIO DCS McCulloch) [SCCRC Appendix: Protectively Marked Materials/D&G] sent to the US Embassy from Zeist after trial.

(3a) **Letter from SIO McCulloch to PF Brisbane (1/2/01)** seeks Crown's comments on proposed application for US reward for Gauci brothers. Encloses report from McCulloch (see below)

(4) **Impact Assessment Report** (12/1/01) (see above) [SCCRC Appendix: Protectively Marked Materials/D&G] - attached to letter of 7/2/01, which in support of a reward states:

(a) " the issue of financial remuneration has not been discussed *in detail* with the witnesses and no promises exist"

(b) " It is considered that the witnesses may harbour some expectation of their situation being recognised, however whilst proceedings are still 'live' they displayed a clear understanding that such matters could not be explored"

(c) " 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."

(5) Anthony and Paul Gauci Reward/Compensation Payments (date

unknown) [SCCRC Appendix: Protectively Marked Materials/D&G] (now disclosed in unredacted form) - this is a confidential record which mirrors the Impact Assessment Report supra and, according to the SCCRC [Reference at 23.24] sets out certain "key considerations" in the payment of any reward. This includes a rehearsal of the financial difficulties of the witnesses. It also records that

(a) "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."

(b) "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).”

(6) Dumfries and Galloway Constabulary Memo (27/01/02) (author unknown; to DS McCulloch) (incomplete) [SCCRC Appendix: Protectively Marked Materials/D&G] prepared following press reports regarding trips made by Tony Gauci. The memo records that no discussion/promises were made of financial rewards.

(7) Further Letter re Application for Reward (19/4/02) [SCCRC Appendix: Protectively Marked Materials/D&G] (unredacted copy now disclosed) which records a meeting held with the US Department of Justice where the reward was discussed and supported by the FBI and refers to a suggestion made at the meeting that the sums applied for - \$2m for Tony Gauci and \$1m for Paul Gauci could be increased.

The SCCRC states that at some time after the appeal the two witnesses were each paid sums of money under the "Rewards for Justice" programme administered by the U.S. Department of Justice [SCCRC Reference at 23.19]

Further Information

Interviews conducted by the SCCRC provide further support for the existence of financial interest by the witnesses:

(a) **DCI Bell SCCRC Interview** (24/10/06) [SCCRC Appendix: Interviews (vol 1/4), pdf-p55] DCI Bell is recorded as stating:

"I would shut down Tony straight away when he mentioned a reward. Paul was more difficult to shut down though" and Paul was "more forceful on the subject". And that "the issue could have been raised by Tony because of press reports or because it was raised with him by Paul"

(b) Tony Gauci SCCRC interview (2-3/8/06) [SCCRC Appendix (Interviews) (vol 2/22)] - at interview, he denied ever asking for money.

(c) Paul Gauci SCCRC interview (2-3/8/06) [SCCRC Appendix (Interviews) (vol 2/24)] - at interview he stated that it was well known in the press that a reward would be given. He also stated that he had insisted on this payment after the appeal but there was no encouragement by the police in the way of offers of this kind.

Reasons For Absence

This information was not disclosed to the defence at any stage of the proceedings. In particular -

(a) The Lord Advocate did not disclose the information above - namely the relevant HOLMES entries, the Memorandum by DCI Bell to DS Gilchrist, the Impact Assessment Report (12/1/01) or indeed any information in respect of the application for a reward. Crown Office had access to the HOLMES system prior to trial. In relation to the Strathclyde Police Report (supra of 10/6/99) Crown Office indicated to the SCCRC that whilst it had no record of the report in its own files,, the possibility could not be excluded that the Crown had seen a copy of it. [SCCRC Reference at 23.3] The terms of Tony Gauci's Crown precognition (referred to above) suggest that there was some information available regarding the witnesses position regarding rewards or benefit. Post-trial, Crown Office was informed of the reward application (see Letter by SIO McCulloch 19/4/02 referred to above).

(b) There were no statements or records disclosed by the FBI agents in respect of the offers of rewards or payments to the witnesses.

(c) The Scottish Police did not record any statements by either of the Gauci brothers in respect of any interest in receiving a reward or compensation; nor are there any statements from police witnesses which record any mention by the Gauci brothers of rewards or compensation; nor are there any such statements from others such as the FBI

agents who had contact with the Gauci brothers. As a result of the absence of such records there was no disclosure.

(d) Moreover some of the records which did exist (but were not disclosed) in respect of the application for a reward and witness protection presented a picture which was very different from the true position ~ in that statements were made that the Gauci brothers had not expressed any financial interest and that at no time prior to trial was the subject of a reward or compensation discussed. [See “Anthony and Paul Gauci Reward/Compensation Payments”; Dumfries and Galloway Memo 27/01/02 – both referred to above]

The Duty to Disclose

It is a matter of common-sense, and it has long been recognised in Scots law, that the existence of a financial interest and/or the offer of rewards to a witness is of considerable importance in relation to the credibility of that witness. Depending upon the nature and degree of any such interest or reward, the law may exclude the evidence of the witness, or leave the effect of same on the witness to be weighed by the jury. Examples of instances where evidence has been excluded include (a) where any pecuniary interest can be said to place the witness under an obligation to give favourable evidence; (b) where a reward is offered by the prosecutor or those close to him, with corrupt intentions or using undue means with the witness or (c) where the extravagance of the reward is such as to infer

undue influence. Otherwise any such interest or reward is always of importance in weighing the credibility of the witness.

References:

Hume II 364; 377; 414-416; 446-449

Alison II 438; 493-496

Burnett 415

Dickson on Evidence (1737) at p867; (1742) at p870

The right to a fair trial incorporates the requirement of equality of arms which means, in our adversarial system, that the prosecuting authorities must disclose information which may assist the defence and which may assist in undermining the Crown case. This includes information relating to the credibility of any Crown witness. The failure here to disclose the information suggesting that there has been an expression of financial interest by Tony Gauci and/or Paul Gauci is in breach of that duty to disclose. The failure to disclose the information that reward monies have been discussed, that offers of rewards related to the witness have been discussed and that substantial rewards have in fact been paid to the witnesses is in breach of that duty to disclose. In the context of the information which suggested that Paul Gauci held considerable influence over his brother, and given the detail of the closeness and nature of their relationship, any motivation or interest on the part of Paul Gauci becomes directly relevant to, and has a direct bearing upon, the credibility of Tony Gauci. Accordingly the failure to disclose the information of the influence and motivation of Paul Gauci is in breach of the duty to disclose.

References

Holland v HMA 2005 SC (PC) 3
R v Turner 1976 61 Cr App R 67
Taylor & Taylor [1994] Cr App R 361
R v Brown (Winston) [1995] Cr App R 19
R v Brown (Winston) UKHL
R v Rasheed 1994 Justice of the Peace Reports Vol 158 at p941
R v Bigley 2001 EWCA Crim 3012
CPS Disclosure Manual: paras 10.1; 12.14; 31.34
Giglio v United States 405 U.S. 150(1972)
U.S. v Bagley 473 U.S. 667 (1985)
U.S. v Levenite (2002)
Reynso v Giurbino (2006)

Effect on the Fairness of the Trial

Position at Trial

There was no information or basis upon which the defence could challenge the credibility of Tony Gauci at trial under reference to this issue, and no challenge was made in cross examination or in submissions. The defence did seek to suggest, in submissions, that the witness was "utterly unreliable" [Trial Defence Submissions: Day 82/9871] and "plainly wrong" [Day 82/9872] but expressly disavowed any suggestion that he was lying [Trial Defence Submissions: Day 82/9911]. The defence also suggested that the witness' demeanour in giving evidence suggested that he was unreliable [Trial Defence Submissions: Day 82/9911-9912] which suggestion was roundly rejected by the trial court [Trial court opinion paragraph [67], pdf – p63]In the absence of any defence

challenge, the Crown simply submitted that the witness appeared as a credible witness [Trial Crown Submissions: Day 78/9444].

Accordingly, there was nothing to suggest that Tony Gauci was other than a straightforward eyewitness doing his best to give credible and reliable evidence.

The judgement of the trial court relied crucially upon the evidence of this witness. The trial court found the witness to be "entirely credible" [Trial court opinion paragraph [67]] and, importantly, relied upon this finding of credibility in assessing whether or not the identification evidence was reliable [Trial court opinion paragraph [69]]

Had this information been disclosed, it is clear that the position of the defence would have been materially altered and it is likely the defence would have been conducted differently. This information raises, for the first time, a substantial basis for challenging the credibility of the crucial witness. The potential of the undisclosed information requires to be viewed on an objective basis. However, in any event, it is acknowledged by senior counsel that this information would have altered the defence approach. [William Taylor QC SCCRC Interview – SCCRC Appendix (interviews) (vol 4/51) @ [30], pdf – p11]

Effect on Defence Case - Preparation

The potential of this information relates not simply to consideration of the material which has been recovered by the SCCRC and how it could have been used at trial, but extends to the potential opening up of a new and significant line of defence. For example:

(1) Additional defence preparation would have been undertaken with further investigation being undertaken. It is likely that further documents, statements and material would have been recovered in support of this line of defence. At this stage, and in the context of the limited disclosure and material recovered by the SCCRC, it is not possible to know what the outcome of these investigations would have been.

(2) Certain features of the material now recovered suggest that further rigorous investigation was called for, which could potentially lead to issues as to police conduct and the use of "undue means" with the witness. These include:

(a) the apparent absence of proper records - it seems likely that there would have been much more detailed enquiry into what passed between the police and the witness which was not recorded.

(b) the fact that various of the records recovered cannot be easily reconciled with each other. For example, in some documents statements are made that at no time prior to trial was the subject of a reward discussed or that the witnesses had never expressed any financial interest. These statements are in conflict with other information discovered by the SCCRC. (See above)

(c) records in relation to the application for a reward and in respect of witness protection, indicate that discussion has taken place with the witnesses and assurances given to them, but that if asked about receipt of any "advantage" the witnesses would refute any such suggestion

It is, of course, not possible to know at this stage whether there were deliberate failures to record and disclose such relevant information by those conducting the investigation, or whether in respect of rewards any "undue means" were employed with the witness. But while it is not possible to know but only to speculate on what these features mean, they highlight the importance of the opportunity to fully investigate the circumstances.

(3) The potential of this line of defence must be viewed in the context of other information now recovered (such as the witness Tony Gauci's possession of the Focus magazine photograph) and in the context of other information available (e.g. his prior inconsistent statements, the effect of publicity etc). For example, deployment of the numerous prior inconsistent statements regarding the witness's identification, combined with a question mark as to his credibility, is likely to have resulted in a very different picture of the witness.

The significance of the effect of the failure to disclose this information derives, in part, from the unknown potential in the preparation as well as presentation of the defence case. The unfairness here results from the fact that the defence have been deprived of a proper opportunity to prepare its case.

Effect of Failure - challenge of the witness

In any event, had the information detailed above been available, at the very least a challenge to the credibility of Tony Gauci could have been pursued in court in respect of :

(1) The record of his expressions of interest in money or compensation contained in the diary of DCI Bell & in the Memo of 10/6/99 (see above)

(2) The statements by DCI Bell that Tony Gauci had raised the issue and "been shut down".

(3) At the same time Tony Gauci's denial, in SCCRC interview, that he raised the issue, which position represents a conflict between the witness and DCI Bell, the main investigating officer (See SCCRC Statement of Reasons paragraphs 23.54-23.55)

(4) The influence of his brother Paul, Paul's financial motivation and his and the family interest in receiving financial reward

(5) The timing of his raising the issue, such as it being at about the time of his making significant photo identifications; it corresponding to changes in his position in his police statements and his persistence in raising the issue both before and after trial

(6) His knowledge of the reward on offer and his receipt of the reward and the substantial amount involved.

Again it is not possible to know the outcome if the witness had been cross-examined on this information. But on any view, this information was likely to have been of importance to the defence.

Materiality of the Undisclosed Information

If there was evidence which suggested that either Gauci witness was unduly influenced by financial gain - either by his motivation or by the prospect of extravagant sums – or there was evidence which suggested that undue means were used to obtain evidence by the offer or prospect of a reward, then there would be a basis for seeking to exclude the evidence of the witness.

In any event, this information is of significance in respect of the credibility of the witness which was unchallenged at trial. There is no dispute that the identification evidence of Tony Gauci was "highly important" and his credibility was relied upon by the trial court in accepting his evidence.

The Test

The undisclosed information would have introduced a new line of defence providing a basis to challenge the credibility of the witness, and it is likely to have played a useful part in the defence effort to undermine the reliability of this crucial witness. Neither of

these possibilities can be excluded. One cannot tell, for certain, what further defence investigation would have led to, or what the effect of cross-examination would have been. But, applying the test suggested by Lord Justice General Clyde in *Hogg v Clark*, as applied in *Holland v HMA*, one cannot say that the fact that counsel was deprived of this information and unable to cross-examine in this way might not possibly have affected the verdict.

Accordingly as a result of this loss of opportunity to investigate and challenge the credibility of the witness, the appellant did not receive a fair trial.

References

MM v HMA 2007 SCCR 159

Gair V HMA 2006 SCCR 419

Johnston and Allison v HMA 2006 SCCR 236

McClymont v HMA 2006 SCCR. 348

R v Pendleton 2001 UKHL 66 at [27] -[28]

Hogg v Clark 1959 JC 7 – LJG Clyde at p10

Holland v HMA 2005 SC (PC) 3 - Lord Rodger at [82]

Patterson v Howdle 1999 SCCR. 41

Murray v HMA 2001 SCCR 114

3.2 Breach of Article 6(1) - Identification Evidence

Introduction

In this case the identification evidence incorporates unusual features which substantially enhance the risk of error or wrongful identification. In addition, the way in which the identification evidence was obtained, which involved the use of irregular and unfair procedures, seriously undermines the reliability of the evidence.

It is incumbent on the Crown to take particular care to ensure that the way identification evidence is obtained and presented is compatible with the appellant's right in terms of Article 6(1) of European Convention on Human Rights ("ECHR") to a fair trial. In this case there was a wholesale failure to so ensure.

At the same time in this case there was an absence of safeguards which would otherwise secure a fair trial. The identification evidence was crucial to the appellant's conviction. In this context the admission of, and reliance upon, the identification evidence of the witness Tony Gauci rendered the trial unfair and in breach of Article 6(1) of ECHR.

Reference is made to:

Nulty v HMA 2003 SCCR 378 – as approved in Daly v HMA 2003 SCCR 393 – Lord Justice General at (11)

Holland v HMA 2005 SC (PC) 3 - Lord Hope @ [6], Lord Rodger @ [41]-[42] & [48]-[49]

3.2.1 Presence of Risk Factors

There are highly unusual features attaching to the circumstances surrounding the identification evidence in this case. These substantially enhance the risk of error or wrongful identification. It is difficult to envisage another case where such a high degree of risk exists. Some of these circumstances were before the trial court. Some were not.

(A) Evidence Before the Trial Court :

In the first place, assessment can be made by having regard to the features of the evidence which were before the trial court. These circumstances include the following:

1. The exceptional passage of time between event and identification

The witness Tony Gauci was first interviewed, and first provided a description, on 1st September 1989 regarding an event which he suggested took place in about November or December 1988. The witness selected a photograph of the appellant, on the basis of resemblance, on 15th February 1991. The witness made a resemblance identification of the appellant at an identification parade on 13th April 1999 and in court on 11th July 2000.

It has long been recognised that the passage of time undermines the reliability of identification evidence. The time periods in this case are exceptionally long. Scots law has long recognised the importance of the proximity between the event and the identification made by giving preference to the earlier identification.

Alison: Practice of the Criminal Law in Scotland – at p627

Dickson on Evidence (2nd ed.) Vol. II at para 263

The Thomson Committee Report – Criminal Procedure in Scotland: Cmnd 6218 (1975) at 46.10

Holland v HMA 2003 SCCR 616 per Lord Justice Clerk at (30).

2. The unremarkable nature of the event in question

This was an identification of a purchaser by a shopkeeper. Tony Gauci explained (in his first statement to the police CP452) his ability to recall this particular sale on the basis that the purchaser's behaviour was strange and in particular that he seemed prepared to buy anything that he, Gauci suggested to him. Nonetheless, this event does not appear all that remarkable.

3. The fact that this was stranger identification

There was no suggestion at trial that the witness Tony Gauci knew the purchaser

5. The inconsistencies of the witness

As indicated above (3.1.1 and 3.1.2) not all of the witness Tony Gauci's inconsistencies were brought out at trial. One matter that was brought out was that his description of the purchaser (shown to be consistent over many statements) did not fit the appellant.

Tony Gauci described the purchaser as a man of about 50 years of age and 6ft or more in height. In 1988 the appellant was 36 years of age and 5ft 8" tall. The difference between these descriptions is marked.

6. The extreme degree of post-event information to which the witness was exposed

Information - both correct information and misinformation - which reaches a witness may come from a variety of sources. It may come from interviewers; other witnesses; the television or print media; photographs; inaccurate composite drawings or photographs; or it may be self-generated by the witness, who in the course of being interviewed makes mistakes, and then later comes to believe in them.

There was little evidence before the trial court that the witness Tony Gauci had been exposed to information from outside sources. The limited information brought out at trial can be categorised as follows:

(1) Prejudicial Publicity

As indicated above (3.1.4) the only information before the trial court regarding the exposure of the witness to prejudicial publicity related to:

Sunday Times Newspaper: 5th November 1989 (CP 1833) [referred to in Tony Gauci statement S46770 (CP467) (5th March 1990)]

This is significant in that the witness Tony Gauci told the police that a photograph (of Abu Talb) which was underneath the caption "bomber" may have been the man who bought the clothing from his shop. Tony Gauci failed to identify Abu Talb in less suggestive circumstances.

Sunday Times article 5th November 1989 CP 1833

Statement S46770 CP 467

Trial evidence: Day 31/4766-8 [pdf - p42]

Photograph from Focus Magazine (issue December 1998) (CP 451)

The limited information presented at trial was not a complete picture.

However in this context, it was clear to the trial court that once again Tony Gauci identified a photograph whose subject was clearly identified as the suspect in the media article.

Focus Magazine December 1998 Issue CP 451 (DC1626-67)

Trial evidence: Day 31/4773-4775, [pdf - p49-51]

(2) The history of and number of photos shown

The witness Tony Gauci was subjected to repeated photo shows. From the evidence at trial these appeared to total 7 in number, over a period from 14th September 1989 to 15th February 1991. There were repeated selections made by the witness. This information was led without any issue being raised at trial. [Trial day 31/4753-73 , pdf-p29-49] Where the witness has made a selection, he is more likely to be influenced by the photograph or image chosen. The photo shows were:

13th September 1989: Compilation of artist's impression

Artist's impression CP 427

Statement S4677D, CP 457

Trial evidence: Day 31/4754 & 4798-99 [pdf - p30 & p74]

13th September 1989: Compilation of photofit

Photofit CP 430 (DC119)

Statement S4677B, CP 455

Trial evidence: Day 31/4753 [pdf - p29]

14th September 1989: Witness shown photographs - CP 425 & CP 426. Selects a photo (Mohammed Salam) from Pro 426 as someone who "is similar to the man who bought the clothing" but "too young... If the man in the photograph was older by about 20 years he would look like the man who bought the clothing".

Photographs CP 425 (DC113)

Photographs CP 426 (DC114)

List of photographs shown

Named photograph of Mohammed Salam [pdf - p62]

Statement S4677E, CP 458

Trial evidence: Day 31/4755 [pdf - p31]

26th September 1989: Witness shown photographs - CP 431. Selects "a man who had the same hair style", but notes that "this is not the man I sold the clothing to as the man in the photograph is too young".

Photographs CP 431 (DC156)

Statement S4677H, CP 461

Trial evidence: Day 31/4759-4760 [pdf - p35]

2nd October 1989: Witness shown video "freeze frame" of Abu Talb - describes him as "similar to the man that came into my shop although I am unable to say that it is definitely the same person". States the eyebrows are the same, hairstyle different, thinner face.

Freeze frame image - not produced or disclosed

Statement S4677K, CP 463

Trial evidence - not mentioned

6th December 1989: According to police, witness shown photographs - CP 1246 (a line up including a photo of Abu Talb). Witness does not identify anyone.

Photographs CP 1246 (DC315)

List of photographs shown [pdf - p147]

Statement S4677S - This statement was produced (on 8th October 1991) by DS Byrne "as continuity". Gauci was not interviewed and the words are therefore not his. There is no contemporaneous witness statement from Gauci.

Statement (DCI Bell) [pdf - p1]

Statement (DC Crawford) [pdf - p1]

Trial evidence: Day 31/4765-4766 [pdf - p41]

31st August 1990 (CP 437 & 438) (Statement S4677P, CP 468): selects 4 photos from 2 sets of 12; one on the basis that 'similar in the shape of the face and style of hair, but it was not the photograph of the man I have described' and 3 others 'of men the correct age of the man I have described'.

10th September 1990: Witness shown Photographs (applications for work permit and extension of stay applications) - selects 3 persons as similar to purchaser re. Facial features. According to the police, although not mentioned either in Tony Gauci's statement relating neither to this meeting, nor in the police statements of DCI Bell and DC Byrne, the witness Gauci was also shown a further album containing a photo of Abu Talb - whom he failed to identify. In DCI

Bells handwritten statement selection as 'slightly similar' is on basis that they were all similar in some aspect to the purchaser. At trial DC Bell erroneously suggested that CP 1246 had been shown to the witness on this date. (Trial day 31/4762-64; 4769-70; 4802-05; 4817-19) "...I have been shown many photographs over the last year, but I have never seen a photograph of the man who bought the clothing."

Photographs (extension of stay applications) - not produced or disclosed

Photograph album CP 1244 (DC717)

Statement S4677Q, CP 469

Trial evidence: Day 31/4762-4 & 4769-70 & 4818-9 [pdf - p38 & p45 & p94]

Trial evidence (DCI Bell): Day 32/4860 & 4876 [pdf - p21 & p37]

15th February 1991 Witness shown photographs including photograph of appellant (CP 436 / DC839) (Statement S4677R: CP 470) selection of appellant (Trial day 31/4770-73; 4811-13;4828-29)

Photographs CP 436 (DC839)

Statement S4677R, CP 470

Trial evidence: Day 31/4770-3 & 4811-3 & 4828-9 [pdf - p46 & p87 & p104]

(B) Undisclosed and Missing Evidence

1. The unremarkable nature of the event in question

The unremarkable nature of this event is reinforced by information which was not before the trial court. In particular:

(a) The prior inconsistent statements from the witness Tony Gauci regarding the number of transactions. In his first recorded statement, Gauci suggested that he could recall the transaction because of the purchaser's unusual behaviour. But in later statements he appears to import other, apparently unremarkable, encounters with the purchaser into his account of his dealings with this man. **(See ground of appeal 3.1.2 above)**. At least one of these other descriptions of an encounter is demonstrably unreliable. Gauci's statements also suggest confusion on his part as to whether the purchaser visited his shop on one or more occasions. These statements indicate a tendency on the part of the witness to confuse different transactions or events with the event in question (i.e. the sale described in his statement of 1st September 1989).

(b) The undisclosed evidence of the witness David Wright. **(See ground of appeal 3.1.6)**. If this witness is not speaking about the same transaction described by Gauci in his first statement, then he (Wright) has witnessed a very similar transaction. This belies the evidence of Gauci that the

transaction described initially by him stood out because of its unusual character.

2. The inconsistencies of the witness

It is apparent from the prior statements of the witness (which were available at trial but not put before the court) that the witness had a history of making repeated and radically different statements regarding the purchaser (e.g. whether the witness had seen him on other occasions), the purchase (e.g. the number of transactions and the details of the items sold), and the surrounding circumstances of the event (e.g. the details of the purchaser's departure and the presence or absence of the witness's brother Paul). **(See ground of appeal 3.1.2 above).**

3. The extreme degree of post-event information

Material not before the trial court demonstrates the extent to which the witness Tony Gauci was exposed to outside information potentially affecting the reliability of his identification of the appellant as the purchaser of items of clothing from his shop:

(1) The nature of and degree of exposure to publicity

In this case this was extreme. Information now recovered by the SCCRC demonstrates that not only was the witness exposed to extensive prejudicial publicity (including the photograph of the appellant), but that this exposure had an affect. **This is addressed in detail in ground 3.1.4 above.**

(2) The history of and number of photographs shown to the witness

The court heard evidence of seven separate occasions when photographs were shown to the witness Tony Gauci [Trial Transcript Day 31/4753-73, pdf – p29-49; see above]. In addition, however, it is apparent from material not placed before the trial court that there were other occasions when photographs were shown to the witness:

- **JIG Fax 731** (SCCRC: Appendix, Protectively Marked Materials) [pdf - p1] - this fax dated 8th September 1989 reports that the witness was (against the wishes of DCI Bell) shown a number of photographs by the Maltese police. This is considered at 3.1.3 above.
- **Memo from BKA agent Pinsdorf** 3rd October 1989 [pdf - p90] - this tends to suggest another occasion on which the witness was seen by foreign police officers possibly outwith the presence of the Scottish police

(3) *The history of and number of interviews and statements made*

No less than 20 witness statements attributed to the witness Tony Gauci were available at trial (although not all placed before the court). In addition, however, it is apparent that there were many other meetings between the witness and the Scottish police, FBI and possibly other agencies which were unrecorded. For example:

Strathclyde Police Report 10th June 1999 (recovered by SCCRC:

Appendix, Protectively Marked Materials) [pdf - p3] - this refers to the closeness of the witness to DCI Bell and to there having been over 50 meetings between them

DCI Bell diary entry (extract) 2nd October 1989 (recovered by

SCCRC: appended to JIG Fax 1438 – Appendix, Protectively Marked Materials [pdf - p7] - this narrates the occurrence of one unrecorded meeting between the witness and officers of the FBI and BKA

Memo from BKA agent Pinsdorf 3rd October 1989 [pdf - p90] - this

tends to suggest another occasion on which the witness was seen by foreign police officers possibly without the presence of the Scottish police.

(See above).

3.2.2 Unfair and Irregular Procedures

1. The Photo Show on 15th February 1991

Introduction: Material before the Trial Court

On 15th February 1991 the witness was taken to police HQ and shown a photo-spread CP436 (DC839). This included (at position no 8) a photograph of the appellant. The Crown relied upon this resemblance identification of the appellant in support of the identification made in court. As such it formed an important part of the Crown case.

At trial the defence in submissions conceded that this identification was the "high point" of Gauci's evidence for the Crown (Trial Transcript Day 82/9912) [pdf-p155]. Apart from taking issue with the quality of the photograph of the appellant, there was no challenge made by the defence as to the regularity or otherwise of the identification procedures adopted.

The conduct of this procedure was unfair and irregular. There was information before the trial court about this procedure which showed it to be unfair and irregular - albeit no issue was raised by the Crown or defence. The unfairness and irregularity included the following:

(1) Conduct of the procedure by Investigating Officers

The photo show was conducted by the investigating officers, contrary to best practice.

(2) The composition of the line up was unfair

DC Bell gave evidence of how the photo-spread was compiled: Trial Transcript Day 32/4877-78 [pdf-p38]. The line up of 11 foils was made up from three photos supplied by the FBI and the rest from embarkation papers held by the Maltese police. The basis of the selection was allegedly to match the appellant. This is contrary to best practice which recommends selection on the basis of likeness to the description given by the witness. Analysis of the line up suggests it is not fair and does not correspond to the standards of best practice. Notably there is no-one whose age and nationality correspond to that of the appellant

(3) The Conduct of the Photo Show was Irregular and Unfair

At trial, evidence of the photo show procedure was adduced by leading the witness Tony Gauci through his police statement S4677R CP470 [Day 31/4770 (pdf p46)]. The procedure adopted by DCI Bell as narrated in that statement was highly irregular. The witness was asked if he could identify anyone from the photographs, and responded by saying that they were all too young. This was a "non-identifying response" by the witness. DC Bell did not accept this response, and directed the witness to look again, discounting discrepancies in age. This procedure is irregular. It is a strong cue to the witness that the suspect is present in the photographs shown. The direction to look again at the photographs could be understood by the witness as an indication that he is expected to make a selection. At previous photo shows, very similar "non-identifying" responses were accepted, and not met with a direction to look again at the photographs. They were accepted as indications

that he witness was unable to pick out anyone. This renders the cue all the stronger. These circumstances significantly increase the likelihood of error on the part of the "identifying" witness.

Ref: Tony Gauci statement S4677R CP 470 [pdf - p2]

Undisclosed or Missing Evidence

The undisclosed evidence we now know about this procedure significantly adds to the unfairness and irregularity of this procedure. This includes the following:-

(1) Breach of Guidelines

At the time of this procedure the appellant was the prime suspect. The purpose of this kind of procedure is to establish a basis for an identification parade. That basis already existed. As such the procedure is not one recognised by the Scottish Home and Health Department Guidelines, 1982 or Police and Criminal Evidence Act or guidelines thereunder.

R v Finley 1993 Crim LR 50

(2) Breach of the Guidelines

At trial, the defence submitted that the witness's resemblance identification at the photo show was unreliable, founding upon the fact that the photograph of the appellant was of a different quality to the other photographs. No evidence was led in support of this submission. The trial court rejected this criticism. However, expert evidence obtained by the SCCRC suggests that the photograph of the appellant was sufficiently distinctive to introduce a risk of error and was in breach of the Scottish Home and Health Department Guidelines. (SCCRC Appendix Chapter22: Letter Professor Valentine 5th January 2006)

Reference is made to:

Trial Court Opinion paragraph [62] [pdf - p60]

Letter from Professor Valentine dated 5th January 2006 (SCCRC Appendix, Chapter 22)

SHHD Guidelines - para 29

PACE Code D

(3) Evidence of Heightened Expectations

The conditions of this photo show were different from any other and clearly involved heightened expectations. This is evident from (i) the presence of so many interested investigators, (ii) the differences in the way the procedure was conducted: e.g. the witness's statement was for the first time told that the person may not be among the photographs & the witness was told to look again at the photographs and make

allowances for age differences, (iii) suggestions in the statements of DCI Bell [pdf – p6], & SA Reid [pdf – p4] that the witness became upset.

Reference is made to

Tony Gauci statement S4677R

DCI Bell statement [pdf - p 6]

SA Reid statement [pdf – p4]

Information obtained by the SCCRC and elsewhere further demonstrates that the procedure involved heightened expectations. The significance of heightened expectations is that it is likely to increase the pressure on a witness to make a selection. In the context of how this selection was made, this atmosphere of heightened expectations is important. The combined effect of holding a photo show of the prime suspect in such an atmosphere increases the risk of error and undermines the reliability of the evidence.

- *DCI Bell SCCRC Interview* (SCCRC Appendix: interviews)[pdf-p29] confirmed that there was a certain amount of anticipation at the possibility that the witness might identify the suspect
- *Inspector Scicluna SCCRC Interview* (SCCRC Appendix: interviews) [pdf - p29] - stated that the witness realised that he had identified the suspect.
- *DC Crawford "A Detective's Tale"* (published post-trial) pp219-220 [pdf - p211] - describes the sense of anticipation among the officers present that the witness was going to pick the "right" man.

(4) Evidence of Further Irregularity from DI Scicluna

This undisclosed evidence is detailed above at ground of appeal 3.1.3. It consists of DI Scicluna's statement narrating his presence at the photo show on 15th February 1991. His account of events at the photo show differs in material respects from the statements of the Scottish police officers in attendance, and provides evidence that further irregularity occurred. It suggests that the witness was given a very directed prompt (in relation to the age of the man), and that the witness responded with a more specific qualification to his resemblance identification than is recorded elsewhere. Moreover this statement suggests that the witness's full response and the proper context of his selection was ignored, was not recorded and was not disclosed. The reliability of the whole procedure is seriously undermined by this statement.

Reference is made to :

DI Scicluna statement 25th February 1991 S5262D [pdf - p2]

Scottish Home and Health Department Guidelines 1982

PACE - Code D – Archbold Appendix A

U.S. Department of Justice Guidelines - Section V

Guidelines re Line-Ups and Photospreads: American Psychology/Law Society - Wells et al 1998; Law & Human Behaviour Vol. 22 No6

2. The Identification Parade

Introduction: Material before the trial court

At trial, evidence was led from the witness Tony Gauci that he had attended at an identification parade on 13th April 1999. He stated in evidence that he believed that the purchaser was number 5 but also added, at the time, that the case was 11 years ago. He then adopted words attributed to him in the Identification Parade Report on 13th April 1999 where he said he wasn't sure but the man who looked most like him was number 5. [Trial Day 31/4777, pdf - p53]

Evidence was led from the officer conducting the parade (Inspector Wilson) and the parade report was led which recorded the selection as: "...not exactly the man I saw in the shop ten years ago I saw him, but the man who looks a little bit like exactly is number 5" (Trial Day 32/4905) [pdf-p69]. The officer conducting the parade also spoke in evidence to the record of the objections made by the defence solicitor at the parade. (Day 32/4898) [pdf-p1]

See: Identification Parade Report Pro 1324 (DN33) [pdf-p10]

The defence did not cross-examine any witness regarding the identification parade and did not repeat the objections made at the time of the parade. In submissions, the only issue raised by the defence concerned the reliability of the identification in the context of the publicity preceding the procedure: Trial Transcript Day 82/9916) [pdf-p159]. But the

defence did not lead any evidence of same. This is addressed in ground 4 below. No objections or submissions were made regarding the fairness and reliability of the identification parade procedure. No submissions were made as to the import of the terms of the selection made

The trial court concluded that the witness picked out the appellant because he genuinely felt he was correct in his having a close resemblance to the purchaser. [Trial Court Opinion para.[69], [pdf - p65]. Whether this is a reasonable approach is addressed elsewhere. Partly on this basis the court inferred that the appellant was the purchaser: Trial Court Opinion at para.[88] [pdf-p80]

There are a number of factors which demonstrate that the conduct of this parade was irregular and increased the risk of error. In this way, these factors can be said to render the identification evidence unfairly obtained. The admission of the identification parade evidence in these circumstances arguably rendered the trial unfair, taken together with the unfair and irregular prior photo show, and the subsequent unfair dock identification. Examination of this identification procedure, even on the basis of the information before the court, reveals significant unfairness. This results from the following:

Delay

The parade was being held after such an extraordinary length of time that no identification could be reliably made. This objection was made at the time (objection no5) and rejected on the basis that the police officers conducting the parade had been instructed by the Crown to take no action.

Preceding Publicity & Photos

As indicated above, objection at the parade was taken on the basis that, prior to the procedure, photographs of the appellant had been given to the press and there had been inordinate publicity, the effect of which was prejudicial and rendered any identification procedure unfair. This objection was rejected on the basis that the police officers conducting the parade had been instructed by the Crown to take no action. Again as narrated above, this objection was re-raised by the defence in submissions, but the trial court rejected it in the absence of any evidence. At trial the only evidence of preceding exposure was:

- The selection of the photo of the appellant at the preceding photo show on 15th February 1991.
- The imprecise information that the witness had seen a photograph of the appellant in Focus magazine, leaving the impression this was a fleeting exposure at some distance from the parade procedure. It is clear that this was indeed the impression gained by the trial court [Trial Court Opinion: para.63] [pdf - p60]

Undisclosed Information

(1) *Preceding Publicity*

It is now apparent that prior to the parade the witness was subject to extensive prejudicial publicity - including the appellant's photograph. In particular he was exposed to the Focus magazine photograph of the appellant (under the caption "who is the bomber") for some 4 months immediately preceding the parade. It is also now apparent that the witness was affected by such publicity. The details of this exposure are referred to in **Ground 3.1.4** above.

Notwithstanding that he was alerted to the exposure to the Focus photo, DC Bell did nothing about this at the parade. The circumstances of the possession of the Focus photo have a direct bearing on the viability of the parade procedure. It is basic to the fairness of any such procedure that the witness is not exposed to such influence - hence the guidelines on the use of photographs and the conduct of the parade.

Scottish Home and Health Department Guidelines at (22)
Lord Advocates Guidelines to Chief Constables (2007)
PACE - Code D – Archbold Appendix A
U.S. Dept of Justice Guidelines - Section V

(2) Composition of the Parade - Unfair Line Up

It is difficult to ascertain the process involved in selecting the stand-ins from the information produced, which is incomplete and confusing. The basis of selection is not explained. The ethnic origin of the stand-ins is unclear. It was accepted in evidence (by PC Watson) that there were no other Libyans in the line-up: Trial Transcript Day 32/4907) [pdf - p71]. It is not clear from the photographs produced of the stand ins who

was in the final line up. A video was made but not disclosed to the defence. However it is clear that the final line up, amended to a degree after defence objections, fell short of what was fair.

Objections to four stand ins (as too young) resulted in the changes to the line up. The other objection made at the time (no7), that the stand-ins were not sufficiently similar - on the basis of age and ethnic appearance, was not resolved at the parade and nothing was made of this at trial. The Identification Parade Report [Pro 12134 part C] describes the final line-up as follows :

- | | |
|-------------------------|---|
| Appellant (47) | Dark track suit with stripe across: 5' 8" stocky build; dark grey curly hair casual outdoor (footwear disputed- footwear = red shoes |
| (i) Van Nijk (47) | Navy blue jeans black shirt and waistcoat : 6' medium build dark hair |
| (x) Abdel Laiche (33) | Light top dark trousers: 5' 8" stocky build short dark hair |
| (ii) Jendoobi (38) | Light coloured casual top dark trousers : 5'9" stocky |
| (v) Mhd Bousanguar (49) | Light suit white shirt: 5' 3" stocky build dark curly hair - greying and receding |
| (xi) Mhd Lezoul : (44) | Dark suit white shirt dark jacket & tie : 5' 7" stocky build short dark hair (sub stand in) |

(ix) Khacef (32) Dark suit dark shirt: 5' 9" stocky build short
dark hair

There has now been disclosed further information which relates to the fairness or otherwise of the composition of the line-up

Holmes Statement S5715 (Inspector Jones) :disclosed 12.12.08 : got 24 volunteers for line up

Holmes Statement S5716 (Henrick Beeftinck) [pdf 36] - Netherlands police officer - arranged standins for parade - refers to difficulty in model agency getting these despite having thousands on books

HOLMES Stat ement S5717 (Wim Duin) [pdf 37-40] 2 copies - runs Dutch model agency - supplied standins for parade - was difficult - he had 12,000 on books and could only find 2 who were suitable, despite trying elsewhere too - hairstyle of accused was particular problem

CP1323(DN28) : disclosed 9.1.09 and 17.3.09 [pdf p126-139] :

Envelope containing photos of 12 standins for parade, with label.

DN27 –CO disclosure 17.3.09 [pdf 92-93]: 3 strips of negatives of standins for parade, with label

DN31 - Action plan re ID parade 13.4.99 (label): disclosed 9.1.09 [pdf p6-13] :

Arrangements for the 2 Dutch standins and the 9 supplied by the Metropolitan police - 7 standins to be selected by defence

Letter /Document D12489 (26.4.05):disclosed 17.3.09 [pdf 44-45] -26.4.05 – reply from D&G to letter from SCCRC dated 26.4.05 re DN28- seeks to explain identity of standins by use of the video of parade preparations.

CP1323(DN28) : disclosed 9.1.09 and 17.3.09 [pdf p126-139] :

Envelope containing photos of 12 standins for parade, with label.

Document D10311 : disclosed 17.3.09 [pdf 46-51]

Summary of Evidence re arrest of accused - summary of various police statements - mentions DCI Gordon being able to speak to difficulties in locating suitable standins for ID parade(pdf 46); Inspector Jones can also speak to problems in getting standins(pdf50)

Document D10395 : disclosed 17.3.09[pdf 55-62] Draft action plan for ID parade copy of DN31

Document DN 26: disclosed 17.3.09 - Camcorder tape recording of ID parade on 13.4.99 - Indictment number 523

The problems with this line up are –

(1) That there are insufficient numbers in the line up (only 7 stand-ins), and

(2) That the stand-ins are not sufficiently similar - notably re. Age, height or ethnic appearance - to the appellant. Scottish Home and Health Department Guidelines stipulate that it is important that the suspect be placed beside persons of similar age, height, dress and general appearance.

That the line up was unfair is supported by the statement of Sgt Busuttil at defence precognition (SCCRC – Appendix Chapter 22) [pdf-p1] where he states:

“However, by April 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.”

Reference is made to:

Scottish Home and Health Department Guidelines (paras 10 & 16)

(3) Conduct of the Parade

Presence of Investigating Officers

Statement S2632CO by DCI Bell shows that he went to Camp Zeist and accompanied the witness immediately prior to the conduct of the parade. Statements by Sgt Busuttil show

that he also accompanied the witness and that in his case he was present during the identification procedure. Attendance of an investigating officer at a parade is contrary to the Scottish Home and Health Department Guidelines and well known as a practice which is disapproved.

Reference is made to

DCI Bell statement S2632CO (SCCRC Appendix, Chapter 22) [pdf - p1]

Sgt Busuttil statement S5725 [pdf - p2]

Sgt Busuttil Crown precognition (SCCRC Appendix, Chapter 22) [pdf - p2]

Scottish Home and Health Department Guidelines

PACE - Code D

Archbold 14-40

Thomson Committee 2nd Report, supra

There has now been disclosed further information which relates to the fairness or otherwise of the conduct of the parade

Action Plan re ID Parade DN31 (see above) Confirms that Tony Gauci would arrive with his brother Paul, DCI Bell & Sgt Busuttil and they would stay together until the parade

HOLMES Statement S4455O (Christopher Hope) He video recorded the selection of standins by defence and, after the parade, the ID parade suite - tape is DN26.

HOLMES Statement S4638A (Brian Wilson) Officer in charge of ID parade

HOLMES Statement S3549A (Callum Watson) Corroborated ID parade procedure

HOLMES Statement S4680E (Paul Gauci) - came to Zeist with Tony for parade – to keep him calm.

HOLMES Statement S5710 (Peter Stevenson)- took Gauci's statement after parade

(4) Discussion with the witness Tony Gauci immediately after the ID Parade

Further information has now been disclosed which bears directly upon the fairness and reliability of the identification evidence given in court in regard to the identification generally and to the identification evidence given in respect of the identification parade in particular.

Report from PF Jim Brisbane: ‘ Identification Parade held at Zeist 13.4.99’

This ‘confidential report’ contains a summary of the parade procedure and discloses that:

The witness Gauci was with Maltese Police throughout procedure

After the parade and after the witness had made a police statement Mr Brisbane spoke to him “about his identification” and “asked if the face was the same and did he think it was him”; he replied ‘I think so’.

This information is significant because :

Any discussion by the police or personnel involved in the investigation or prosecution introduces the significant risk of influencing the witness and even inadvertently providing feedback to the witness as to the correctness of his selection. In this way the reliability of any subsequent identification evidence is undermined. As such this is information which ought to have been disclosed to the defence prior to trial.

Reference is made to:

Holland v HMA 2005 SC (PC) 3

3. The Dock Identification

Particular care must be taken with leading evidence of a dock identification which carries with it inherent risks of error (see the observations of Lord Rodger in *Holland v HMA* 2005 SC (PC) 3) In *Holland* the particular risk posed was the leading of and reliance upon dock identification evidence in circumstances where there had been no prior identification at a parade. In the present case the particular risks arise from two factors:

- (1) The whole background of the identification procedures and in particular the unfair and irregular photo show and identification parade; and
- (2) The way in which the dock identification was led in court by the Crown

The background is addressed above. The way the evidence was led in court was unfair and designed to lead the witness toward making an identification of the appellant, in particular by:

- (1) The use of leading questions and the leading of the witness through prior statements, and
- (2) The showing of (i) the Focus magazine photograph and (ii) the photograph from the photo show of 15th February 1991 to the witness before asking him to make a dock identification.

By seeking a dock identification and by leading the evidence in this way the Crown deliberately exacerbated the risks of wrongful identification.

Alison Practice of the Criminal Law of Scotland, p 628

Thomson Committee 2nd Report Cmnd 6218 (1975) 46.13

Departmental Committee on Evidence of Identification in Criminal Cases (Devlin) HC
338 (1976) Chapter 8.7

Holland v HMA 2005 SC (PC) 3 (Lord Rodger @ [47] - [63])

R v Turnbull 1977 1QB 224

3.2.3 Absence Of Safeguards

In the peculiar circumstances of this case there was a critical absence of safeguards whereby the effect of the identification evidence was to render the trial unfair and in breach of Article 6 ECHR.

In considering this issue, regard must be had to the whole circumstances of the trial. Relevant considerations include (i) how the defence was conducted, (ii) the judicial directions given about the identification evidence, and (iii) the significance of the contested evidence in the context of the prosecution case as a whole. This last matter is not in dispute - there is no doubt that the identification evidence was a "highly important" element of the Crown case and indeed crucial to the appellant's conviction.

The recognised safeguards which were absent here include:

1. Absence of Directions and Errors in Approach

In this tribunal there was no jury. However the fact that in this case the trier of fact was a panel of judges does not appear to have provided any effective safeguard. The court faced difficulties in that (i) there was no challenge made and little or no evidence led of the circumstances which tended to undermine the reliability of the witness, and (ii) there was no assistance provided by examination of the relevant factors or of expert opinion. Nevertheless, the approach taken by the trial court to the evidence which was led, which

can be ascertained from the judgement, is demonstrative of a flawed approach whereby significant issues relating to the reliability appear not to have been properly addressed.

In view of the absence of any challenge or any focus at the trial upon the unfairness of the identification procedures, it is perhaps not surprising that little is made by the trial court of the difficulties of the identification evidence. Consideration only appears to have been given to the lapse of time, the inconsistency in the description given by the witness and the issue of the quality of the photograph from the 15th February 1991 photo show. The latter was dismissed as without merit. But there were other significant features which arose from the evidence led at trial, which ought to have caused concern. In the ordinary case, these would have called for specific directions. These are (i) The conduct of the 15th February photo show and in particular the initial "non-identifying response" by the witness and the intervention of DCI Bell, (ii) The objections made by the defence and recorded at the time of the identification parade, and (iii) The way the dock identification was led at trial.

Even if it were to be assumed that the trial court did apply its mind to the standard judicial directions, the directions applicable at the time do not provide an adequate safeguard. In particular:

- (a) They do not address the general misconception that the confidence of the witness is an indicator of reliability of the identification. There is no such relationship. This is a real issue in this case.

- (b) They do not address the inherent risks of dock identification or the particular risks created by the way the evidence was obtained here.

- (c) They do not address in their consideration of the lapse of time, the obvious risk that at the dock identification the witness is likely to be influenced by his more recent exposure to the image of the appellant.

Judicial Studies Jury Manual

Holland v HMA 2005 SC (PC) 3 -per L Rodger at [58]

R v Turnbull 1977 1 QB 224

R v Johnston CA (Cr) 24th October 2000 at [18]

Further and in any event, the reasons given by the trial court in their judgement demonstrate a wrong approach. For example (i) the court's conclusion that the witness was "entirely reliable" in his evidence that the purchaser was Libyan and about the clothing purchased, has no bearing upon the reliability of his visual identification evidence, and (ii) the court's conclusion that the identification evidence was reliable was based, in part, on its conclusion that he was an honest witness, on his demeanour and on the witness's belief in his own accuracy. Whereas, in reality, any such honesty, belief or confidence, has no bearing on the reliability of the identification.

R v Turnbull 1977 1 QB 224

Departmental Committee on Evidence of Identification in Criminal Cases (Devlin) HC 338 (1976) at Chapter 8.7

2. Absence of Corroboration

This was not only a wholly circumstantial case but an unusually tenuous one, where the verdict rests upon inferences drawn upon other inferences and upon circumstances remote from the appellant. The only purported support for the identification evidence was found in the circumstances from which it was inferred that the appellant was in Sliema, on the date of purchase. That these circumstances yield such an inference is challenged, and in any event the presence of the appellant in the same town on that date is too remote to provide any such support.

3. Absence of Defence Challenge

In this case there was no real challenge made to the identification evidence presented. This is rehearsed at ground 4 below. The witness was not properly challenged: for example, it was never suggested to him that he may be wrong. There was no issue made of the fairness or reliability of the identification procedures carried out. Objections made at the time of the identification parade were not pursued at trial and there was no objection taken to the dock identification.

The defence failed to raise, examine or lead evidence of the important background circumstances which were likely to have had an effect on the recall of the witness: for example the effect of repeated photo shows and interviews and the effect of the widespread publicity. In this context, not surprisingly, the defence submissions that the trial court should find the identification evidence unreliable lacked any evidential support and were restricted in their scope. It is noteworthy that the Appeal Court considered that there had been no direct challenge on the reliability of the identification evidence and on this basis rejected attempts to raise concerns at the appeal: Appeal Court opinion: para.302 [pdf - p167]. Accordingly the fact in this case that the appellant was legally represented did not provide any real safeguard in respect of this issue.

Conclusion

Having regard to the above, the way the identification evidence was obtained and presented in this case was incompatible with the appellant's right to a fair trial under Article 6(1).

3.3 THE DATE OF PURCHASE

Introduction

The only direct evidence about the date of purchase came from the witness Tony Gauci. In evidence he suggested that the purchase was "about a fortnight before Christmas". There was some evidence from prior statements that he had given differing dates. He was unclear about whether Christmas decorations were on or not (see below). He also suggested that his brother was not present, at least initially, because he was watching football on TV. He had told the police in September 1989 that he thought the sale took place "midweek", and when asked said that he thought Wednesday was midweek.

There was no evidence at trial as to the date of illumination of the Christmas lights outside Tony Gauci's shop in 1988. The only evidence about televised football matches was a joint minute agreeing the timings of certain matches broadcast on Italian TV stations on 23rd December and 7th December 1988.

The trial court interpreted the evidence of enquiries into the broadcast football matches and the joint minute regarding same as narrowing down the possible dates of purchase to either 23rd November 1988 or 7th December 1988 [Trial Court Opinion: para [67], pdf - p64] The trial court accepted the Crown submissions that the witness's confused recollection about the state of the Christmas lights was consistent with the purchase having taken place around the

time the lights were being put up, and "having regard to all the factors" the court concluded that the date of purchase was 7th December 1988. [Trial Court Opinion: para.[67], [pdf-p63] It is contended above (Ground 2) that this is an unreasonable inference.

The appeal court concluded that the trial court were entitled to find that the witness's evidence, although confused, was consistent with his recollection that the purchase about the time the lights would be going up, which in turn was consistent with his evidence that the purchase was about two weeks before Christmas.[Appeal Court Opinion paragraph [332], pdf - p186]

The date of purchase was crucial to the Crown case because the 7th December 1988 was the only date on which the appellant could have been the purchaser of the clothing [Appeal Court Opinion para.[319], pdf - p179] (See also SCCRC Statement of Reasons para. 21.91) [pdf-p607]

The trial court were presented with a distorted picture of the facts at trial. There exists important evidence regarding the date of purchase which was not put (or properly put) before the trial court. This consists on the one hand of prior inconsistent statements by the witness (1) regarding the time of year and including a statement providing a definite and specific date and (2) clearly and consistently placing the date of purchase prior to the putting up of the Christmas lights. And on the other hand fresh evidence which establishes the exact timing of the illumination of the Christmas lights, which evidence is

inconsistent with the date of purchase as 7th December 1988. This is detailed below.

Further, it is now apparent that there is important evidence relevant to the date of purchase and regarding Paul Gauci's football watching habits in 1988 which was not before the trial court. This is also detailed below.

3.3.1 Time of Year

Position at trial

At trial, in examination in chief, Tony Gauci's starting position was that he could not remember the date when this particular sale had taken place. [Trial Transcript Day 31/4730, pdf - p6] He then responded to a leading question as follows:

“ 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... “

He went on to qualify this evidence by saying that he could not be exact, twice using the expression "...something like that, yes..." [Trial Transcript Day 31/4738, pdf - p14] & [Trial Transcript Day 31/4741, pdf - p17]. He said that he had no idea what day of the week on which the incident happened. [Trial Transcript Day 31/4779, pdf - p55]

In cross-examination he accepted that, while doing his best to help the police when giving his first statement on 1st September 1989, he had said that the sale took place "...one day during the winter of 1988" and "...I would think it was a weekday". He later said that to him "midweek" meant Wednesday) [Trial Transcript Day 31/4821, pdf - p97]

In the course of cross-examination, part of his statement S4677Q Pro 469 (10/9/90) was read out, where the witness had said "...I believe it [i.e. the date of purchase] was at the end of November.." However, Gauci was never asked about this apparent inconsistency, - despite an indication from defence counsel that he would be [Trial Transcript Day 31/4802-3, pdf - p78]. Nor was he asked about the inconsistencies in the undernoted statements:

Missing evidence: prior inconsistent statements

The witness had given a large number of prior statements to the police in which he had referred to the date of purchase in terms which were inconsistent with his evidence that the sale took place about a fortnight before Christmas:

Statement S4677B (CP455) (13/9/89) [pdf - p1] "...the man that I described in my previous statement who had bought some clothing in my shop in November or December 1988..."

Statement S4677D (CP 457) (13/9/89) [pdf - p1] "...a man who bought clothing from my shop - December 1988..."

Statement S4677E (CP 458) (14/9/89) [pdf - p1] "...the man I sold clothing to in November or December 1988..."

Statement S4677K (CP 463) (2/10/89) [pdf - p1] "...the same person that had entered my shop in November and December 1988..."

Statement S4677M (CP465) (31/1/90) [pdf - p1] "...the stuff bought by the man in December 1988..."

Statement S4677N (CP 466) (21/2/90) [pdf - p2] "...the same man who bought the clothing in November or December 1988..."

Statement S4677O (CP 467) (5/3/90) [pdf - p2] "...the man who bought the clothing in November/December 1988..."

Statement S4677Q (CP 469) (10/9/90) [pdf - pp3&4] "...I believe it was at the end of November..." "...the man who bought the clothing in November/December 1988..."

Missing evidence: undisclosed statement

At Crown Precognition the witness, for the first time, indicated that he thought he could attribute a specific date to the sale of the clothing, and provided a reason for remembering the date:

"...I have been asked to go over the date. It was sometime at the end of November beginning of December 1988. Something makes me think it might have been 29th November 1988 (a Tuesday) because something happened that day.

(At this point the witness became flustered and lapsed into Maltese and a discussion with DS Mario Bussutil who sat in the precognition of 25th August 1999; through him he said that he had a row with his girlfriend that day but he doesn't want to think about it any more..."

[Tony Gauci **Crown Precognition: SCCRC Appendi x - Ch 24** (18/3/99 & 25/8/99), pdf - p14]

Reasons for absence

The prior inconsistent statements by the witness were available at trial but not put before the court. Although the defence read one passage (see above) in the prior statement S4677Q Pro 469 which referred to the date being at the end of November, nothing was made of this inconsistency and the witness was not questioned on it. The Crown presented a misleading picture and in these circumstances it was incumbent on them to correct the misleading impression given regarding the previous statements by the witness.

The statement by the witness giving a specific date for the transaction, and the reason why he did so, was a material change in position and ought to have been

disclosed to the defence. There can be no doubt this statement undermined the Crown case and assisted the defence. [See SCCRC Statement of Reasons 24.99, pdf-p704].

Effect upon fairness of trial

For the first time at trial, 11 years after the event, the witness suggested that the date of purchase was about two weeks before Christmas, which evidence supported the Crown case that the date of purchase was 7th December 1988.

Albeit there was reference to the initial statement by the witness that the purchase took place "...one day during the winter..." [Trial Transcript Day 31/4786: see above], it was not evident that the witness's position at trial represented a radical change in his position. Indeed, the impression created by the way the evidence was led by the Crown was that the witness had said before that the date was a fortnight before Christmas.[Trial Transcript Day 31/4740-1: see Missing Evidence re Christmas Lights below].

It is apparent from the trial court judgment that this wrong impression did in fact mislead the court. [Trial Court Opinion para.[12], pdf - p15] It is a reasonable inference that reliance was placed on this by the court.

The missing prior inconsistent statements detailed above demonstrate the difference between the impression created and the witness's true position - i.e. that (i) he had previously, on at least 6 occasions, been no clearer than "November or December 1988" and (ii) previously his most definite position had been that the purchase had been at the end of November. The statements show too that the witness consistently failed, much closer to the event, to fix the event as he purported to do at trial. This material significantly undermines the reliability of the witness's evidence as to the timing of the purchase.

The undisclosed statement (at Crown precognition) had considerable potential in undermining the Crown case and assisting the defence. Here was the first and only definite date given for the date of purchase. Further, the witness not only gave a date but explained why he remembered this specific date. Armed with this information, the defence could have carried out investigation to test this recollection. The outcome can now only be a matter of speculation. It could have proved to be unsupported and the explanation false. It could have proved to be substantiated. Either way the defence would have been in a position to seriously undermine the witness' reliability in relation to his evidence about the date of purchase.

Moreover, it would have been even more difficult for the court to accept the witness's evidence and to conclude that the date of purchase was 7th December

1988. See the conclusion of the SCCRC that the failure to disclose this statement
[SCCRC Statement of Reasons para.24.109, pdf - p708]

3.3.2. Christmas Lights

Position at trial

In examination in chief, Tony Gauci's position initially was that the Christmas lights were on, and that he had told the police that. [Trial Transcript Day 31/4739, pdf - p15] He then changed his position (see below), stating that he believed that the lights were being put up. In cross-examination, it became obvious that the witness was unclear whether he was remembering the Christmas lights being up at the date of purchase or when the police investigators were later visiting his shop [Trial Transcript Day 31/4803-4, pdf - p79]

In the course of cross-examination, reference was made [Trial Transcript Day 31/4802, pdf - p78] & [Trial Transcript Day 31/4809, pdf - p85] to the only two prior statements where the witness had used the Christmas lights as a reference point for the date of purchase. However, see Missing Evidence of Context below.

Statement S4677Q: "...There were no Christmas decorations up, as I have already said..." [pdf - p3]

Statement S4677A: "...At Christmas time we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothing..." [Trial Transcript Day 31/4809, pdf - p85].

Missing evidence: context

The missing evidence in this chapter is not missing material per se. Rather, it is missing evidence of context: as a result of which a false and misleading impression of the witness's position was left unchallenged and uncorrected. This impression was created in the following way:

Tony Gauci's initial position in examination in chief (i.e. that the Christmas lights were on and that he had told the police that) was factually incorrect. In none of his prior statements does he say that the lights were illuminated. [Trial Transcript Day 31/4739, pdf - p15]

This prompted the advocate depute to put a prior inconsistent position to the witness which led to Gauci changing his position about the Christmas lights:
[Trial Transcript Day 31/4740, pdf - p16]

“ 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...”

The advocate depute's first question was factually incorrect and misleading. Gauci had said that the sale predated the Christmas decorations in two prior statements. He had never previously said that the lights were up.

The advocate depute's second question was also misleading, in that it appeared to suggest that Gauci had told the police that the date of purchase was about a fortnight before Christmas. This impression was not corrected, either by the Crown in examination in chief or by the defence in cross-examination. Accordingly, it was not made clear before the trial court that the witness had never told the police (i) that the Christmas lights were up, nor (ii) that the purchase was about a fortnight before Christmas.

Missing evidence: undisclosed

As narrated above, the prior statements of Tony Gauci were available at the trial but not put before the court. There was further evidence of context which was not disclosed:

Extract from DCI Bell Diary (HOLMES version) (19/9/89):

“...Bell, Crawford and Scicluna visited the shop premises, spoke to Tony and Paul Gauci who confirmed that there were no Xmas decorations in the street on the date in question and that the decorations were not normally put up until about 15 days before Xmas...”

Extract from DCI Bell Diary (HOLMES version) (3/12/90):

“...Notation to the effect that there was no Christmas lights in Tower Road in Malta and have obviously been supplied with that information from CI McLean.” (This entry appears to have been redacted from the disclosed version of DCI Bell’s manuscript diaries)

Extract from DCI Bell Diary (HOLMES version) (7/12/90):

“...Time at 1815 hrs, Christmas lights all erected in Tower Road to point where witness states taxi was parked. Lights were switched on on our arrival...”

DCI Bell Statement S2632AM

“...During November and December 1990 I instructed that daily checks be made in the area of Tower Road, Sliema, Malta in order to establish a day and date when Christmas decorations were erected and eventually illuminated. I had issued these instructions following my examination of witness Anthony Gauci’s various statements in particular statement S4677Q dated 10 September 1990 which indicated he was of the opinion that there were no Christmas decorations in Tower Road on the day he had sold various articles of clothing now identified as productions to a Libyan person. On the basis of witness Gauci’s evidence coupled with daily checks in Tower Road and subsequent interviews of any organisers, I hoped to clarify or at least narrow down a possible purchase date...”

It is clear from this evidence that (1) the police were in no doubt that Gauci was clear in his recollection that there were no Christmas lights up on the date of purchase, and (2) that

the police proceeded with their enquiries on that basis with a view to identifying the date of purchase.

Fresh evidence: date of illumination

In 1990-91 the police tried & failed to establish when the Christmas lights outside Tony Gauci's shop were illuminated in 1988. (For details of these enquiries, see SCCRC Statement of Reasons para.24.15) [pdf - p673]

Pre-trial, the defence learned from defence precognition that the police had investigated this matter unsuccessfully. The defence did attempt to make its own enquiries with a view to establishing when the lights were illuminated, but these efforts were also unsuccessful. (SCCRC Statement of Reasons para.24.16) [pdf - p674]

Evidence which was not available at the trial has subsequently been discovered, following further defence enquiries in 2002 and investigations by the SCCRC in 2005. This is detailed in the SCCRC Statement of Reasons paras.24.17-24, 24.32, 24.39-24, 24.56 & 24.58-24.64. The most significant evidence now available is that provided by Dr Michael Refalo, in 1988 Maltese Minister of Tourism & constituency MP for Sliema (i.e. the area in which Tony Gauci's shop was situated) and now High Commissioner to the UK. Under reference to his official diary, Dr Refalo states that he performed the ceremony to switch on the Christmas lights for the area including Gauci's shop on 6th December 1988. (SCCRC Appendix: Interviews, Michael Refalo Vol.4/49)

Reasons for absence of missing evidence

The evidence of context was available but was not put before the court by either the Crown or the defence. Given the misleading impression created by the absence of such evidence, it was incumbent upon the Crown to lead same. The defence failed to rectify this omission.

The evidence that the Christmas lights outside Mary's House were illuminated on 6th December 1988 is fresh evidence in terms of s.106(3) of the Criminal Procedure (Scotland) Act 1995. There is a reasonable explanation as to why the evidence was not heard at the trial.

Police enquiries in Malta in 1990-1991 established that Tony Gauci was clear that there were no Christmas decorations in the street outside his shop on the date of purchase. (See DCI Bell's (dictated) Diary: entry for 19th September 1989; Tony Gauci police statements S4677A (CP454) 19th September 1989 & S4677Q (CP469) 10th September 1990). It accordingly became a matter of considerable significance for the police to try to establish the date on which the Christmas decorations were put up in 1988, as a means of helping to identify the date of purchase. It is apparent from witness statements that police enquiries were ongoing between November 1990 and June 1991 with a view to obtaining this information. (The extent of the police enquiries is summarised in the SCCRC statement of reasons paragraph 24.10-24.15. See also DCI Bell's SCCRC interview (25-26 July 2006) @ p.48).

Given the obvious significance of the date of putting up the decorations for the Scottish police investigation in Malta, it is reasonable to assume that the police took all reasonable steps to obtain the evidence at that time.

In the course of preparation for trial, the defence learned that the police had tried and failed to establish the date on which the Christmas decorations were put up. Notwithstanding the above assumption, and the obvious fact that it would be much more difficult to obtain the information ten years later, the defence (in January 2000) instructed Maltese solicitors to make further enquiries with a view to attempting to discover when the decorations were put up in 1988. Further enquiries were made but without success. (See letters from Guido de Marco & Associates to McCourts 19th January & 22nd February 2000; Dr Gianella Curran defence precognition 23rd January 2002). Accordingly, neither the Crown nor the defence at trial knew, or could reasonably be expected to have known, when the Christmas decorations outside Mary's House were put up in 1988.

Effect upon fairness of trial

The absence of the evidence of context tended to obscure the extent of the inconsistencies in Tony Gauci's position in evidence in relation to the crucial issue of the date of purchase. Had the evidence been before the court, it would have been even more difficult for the court to conclude that the date of purchase was 7th December 1988.

The evidence that the Christmas lights were illuminated on 6th December 1988 is capable of being considered as credible and reliable by a reasonable court. It would be likely to have a material part to play in the determination of a reasonable court of the critical issue of the date of purchase of clothing from Tony Gauci's shop. It is capable of undermining the trial court's conclusion that the date of purchase was 7th December 1988. (See SCCRC Statement of Reasons paras.24.65-24.70) [pdf - p688]

3.3.3 Football

Position at trial

In examination in chief, Tony Gauci's evidence was that his brother Paul had not been present in the shop during the sale transaction, but that he had come in when the purchaser went to get his taxi. He said that his brother "...must have been watching football, and when he comes late, that is what usually happens, so I think that was what happened that day." [Trial Transcript Day 31/4779, pdf - p55]

In cross-examination, he agreed that he had told the police in his first statement that Paul had been at home watching football on television. [Trial Transcript Day 31/4793, pdf - p69]

A joint minute agreed the timings of certain football matches broadcast on Italian television channels on 23rd November and 7th December 1988. [Trial Transcript Day 31/4830, pdf - p126]

Missing evidence: Paul Gauci's football watching habits

Paul Gauci was not called to give evidence at the trial. As narrated above, the trial court interpreted the evidence that was before it relating to televised football matches as narrowing down the possible dates of purchase to either 23rd November 1988 or 7th December 1988. Statements produced prior to the trial

tended to suggest that the police had established that Paul Gauci watched football on television on only those two dates during the relevant period. However, investigation by the SCCRC has produced information that Paul Gauci's position regarding televised football he may have seen is considerably less certain than previously suggested. This information is as follows:

(1) Tony Gauci SCCRC interview (2/8/06)

@ [16] *"...Paul loves football so he would watch every match. I do not know whether at that time Paul watched live football, or highlights of matches..."*

Paul Gauci SCCRC interview (2-3/8/06)

@ [16] *"...Most probably, I stayed at home to watch a football match. If I went home at 1pm then I would have stayed at home to watch a match..."*

@ [27] *"I am asked whether in 1988 I would watch live football, or recorded highlights or both. At that time, I would watch live televised matches as well as highlights of matches..."*

@ [40] *"I am asked whether it is possible that on the day when the man purchased the items from Mary's House I may have been watching a programme of football highlights rather than live football. It is possible that I was watching football highlights that day."*

@ [46] *"I have been shown the tables of football matches [played on 23rd November & 7th December 1988]...I would have stayed home to watch all of*

the matches shown on 23rd November 1988. I would not have returned to the shop after the first match..."

@ [47] *"With regard to those matches broadcast on 7th December given that the Internazionale v Bayern match kicked off shortly after the Juventus v Liege game finished, again I would not have missed that match to return to Tower Road."*

@ [48] *"...I would not have chosen one date or the other. Most probably, I saw all of the matches broadcast on both dates."*

@ [52] *"...the police were asking me to pinpoint one day. That was the wrong approach to take by the police, as I would have watched football matches on both dates."*

@ [57] *"...I cannot recall watching one match and not the others. That has been my position all along. In my view, if the matches were televised then most probably I saw them all"*

@ [63] *"...it is possible that I watched one match and then only part of a second one."*

@ [69] *"...I am asked whether I have a specific recollection of returning to Tower Road after watching football on television. No, I do not have any recollection of this."*

@ [102] *"...It is, however, probably that I watched all of the football matches televised on 23rd November and 7th December. I cannot recollect whether I returned to the shop on either of those dates."*

Paul Gauci supplementary SCCRC interview (31/1/07)

@ [7] [re Roma v Dresden matches on 23rd Nov & 7th Dec] *"...I am asked whether it is possible that I told the police that I could remember watching both these fixtures. It is possible, but most probably I saw them all. The police used to come to me with two specific dates but I could not remember on which dates I had watched football matches."*

(2) DI Bell SCCRC interview (25-26/7/06)

@ p37 *"...The evidence of the football matches was confusing and in the end we did not manage to bottom it out..."*

@ p42 *"...I am asked whether at the time I felt that the evidence of the football matches was strongly indicative of 7th December 1988 as the purchase date. No, I did not. Both dates 23rd Nov & 7th Dec 1988 looked likely. Either date looked good. This exercise with Paul was carried out to assist in the search of the embarkation cards. Later on, we could prove that the applicant fitted all the pieces of the jigsaw... ...[under ref to statement of 14/12/89] the selection of 7th December 1988 was purely to assist us in our searches of the embarkation cards..."*

@ p43 *"...It really has to be acknowledged how confusing this all was. No date was significant for me at the time. Ultimately it was the applicant's presence on the island on 7th December 1988 that persuaded me that the purchase took place on that date. Paul specified 7th December when I met with him on 14th December 1989 and I recorded this..."*

Reasons for absence

The Crown chose not to call Paul Gauci as a witness. At the appeal, the Crown explained this on the basis that:

"...when Mr. Gauci's evidence about his brother watching football on the day of the purchase was not challenged, but was actually firmed up in the course of cross-examination, there was no need to call Paul Gauci. The defence had had the opportunity to precognose him and they could have called him as a witness if they had thought that he could advance the defence case that the sale had taken place on 23 November." [Appeal Court Opinion para.[318], pdf - p178]

SCCRC enquiries established that the defence did not call Paul Gauci as a witness for tactical reasons. He was regarded as a dangerous witness, because of the indication in DCI Bell's defence precognition that Paul Gauci "...agreed that the probably date was 7th December..." [See SCCRC Statement of Reasons para.18.226, pdf - p513]. The missing evidence suggests that the defence were misled into thinking that Paul Gauci was a potentially damaging witness, when in reality he had from the start been quite unable to give any positive indication as to date(s) on which he had been watching televised football, and had not expressed any positive preference for that particular date to the police.

Effect upon fairness of trial

At best for the appellant, the missing evidence demonstrates that there was no basis for an assumption that Paul Gauci was watching *live* football on the occasion described by his brother. In that event, the whole basis of the evidence that led to the trial court's conclusion that the date of purchase was either 23rd November or 7th December is undermined. The defence would still have been able to argue that 23rd November was a more likely date than 7th December without being taken to have accepted that "...the only real competing date was 23rd November..." [Appeal Court Opinion para.[319], pdf - p179]

It is clear from DCI Bell's missing evidence that the identification of the two dates in question did no more than establish them as possible dates of purchase. It did not exclude other possibilities. This also tends to undermine the conclusion that the date of purchase ultimately came down to a choice between two dates.

Even if it were to be concluded that either 23rd November or 7th December *was* the likely date of purchase, the missing evidence tends to undermine Tony Gauci's evidence that his brother returned to the shop at some stage of the transaction. As such, it further undermines the reliability of that evidence: see ground of appeal 3.1.2 above.