APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 39
HCA/2020/5/XM

Lord Justice General
Lord Justice Clerk
Lord Menzies

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the applications in the appeal against conviction following upon a Reference from the Scottish Criminal Cases Review Commission

by

THE REPRESENTATIVE OF THE LATE ABDELBASET ALI MOHAMED AL MEGRAHI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

and

THE ADVOCATE GENERAL

Haver

Act: CM Mitchell QC; John Pryde & Co SSC (for Aamer Anwar & Co, Glasgow)
Alt: Clancy QC, AD; the Crown Agent
Haver: Duguid QC; the Office of the Advocate General

26 August 2020

Introduction

[1] This opinion records the reasoning behind the orders of the court dated 26 August

2020 following upon a Procedural Hearing which arose out of the lodging of a Note of Appeal subsequent to the Reference to the court by the Scottish Criminal Cases Review Commission.

[2] It is important to observe *in limine* that, although they explored a number of avenues of potential appeal, the SCCRC have referred only two grounds for the court's consideration. In broad terms these are, first, that no reasonable court could have found Mr Megrahi guilty in so far as its verdict was based on the testimony of Antonio Gauci. This testimony was held: (i) to be an identification of Mr Megrahi as the purchaser of clothing, which was later identified in the debris from Pan Am flight 103, from a shop in Malta; and (ii) to fix the date of that purchase as at 7 December 1988. The second ground is based upon the failure of the Crown to disclose a number of documents which could have had a material effect on Mr Gauci's evidence and hence the verdict. Although the SCCRC were asked to, and did, consider the significance of a failure to disclose two Protectively Marked Documents (PMDs), the SCCRC have not referred the case on the basis of any significance attaching to those documents.

[3] In the appeal resulting from an earlier reference by the SCCRC in 2007, the court determined that an appellant could base his appeal on grounds which had either not been considered by the SCCRC or actually rejected by them. This prompted Parliament to introduce section 194D into the Criminal Procedure (Scotland) Act 1995. This provides that:

> "(4A) The grounds for an appeal arising from a reference… must relate to one or more of the reasons for making the reference contained in the [SCCRC's] statement of reasons.
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> (4B) … the High Court may, if it considers it in the interests of justice to do so, grant leave for the appellant to found the appeal on additional grounds".

[4] The appellant has lodged a Note of Appeal consisting of 27 pages. Like the new Reference, it advances only two grounds of appeal. The first, which occupies the initial ten pages of the Note, reflects the Reference and relates to what are said to be deficiencies in Mr Gauci's testimony in so far as relating to his identification of Mr Megrahi and fixing the date of the purchase of the clothes. This poses no procedural problem. Examination of this evidence will form a substantial part of the court's task at the hearing of the appeal.

[5] The second ground also reflects the content of the Reference; but only up to a point. It is based on the non-disclosure of four categories of documents and other material. Part A of Ground 2 (pages 11 to 21 of the Note) largely relates to documents bearing upon the testimony of Mr Gauci. All of these documents have now been disclosed. Within the detail of this ground, however, a discrete issue is raised about an alleged systematic failure of the Crown to disclose documents, as distinct from a failure to disclose specific relevant items. As will be seen, this did not form part of the Reference although the SCCRC did make some oblique remarks about such a failure. Item 14 of Part A refers to the Crown precognition of Mr Gauci; the significance of which was discounted by the SCCRC.

[6] Part B (pp 21-23 of the Note) relates to certain Central Intelligence Agency cables which have a bearing on the evidence of Abdul Majid (also known as Giaka). His evidence, in so far as it incriminated Mr Megrahi, was rejected by the trial court. The cables did not form part of the Reference. Part C (pp 23-24) refers to the PMDs. Part D (pp 24-26) covers a number of items which are said to demonstrate the systematic disclosure failure.

[7] The appellant seeks orders: (1) under section 303A of the Criminal Procedure (Scotland) Act 1995, authorising Ali Abdulbasit Ali Almaqrahi to institute an appeal on behalf of the deceased Abdelbaset Ali Mohamed; (2) under section 194D(4B) of the 1995 Act for leave to found the appeal on additional grounds which do not relate to one or more of

the reasons contained in the SCCRC's Statement of Reasons; and (3) recovery of the two PMDs, which are in the possession of the United Kingdom Government and, it seems, Police Scotland. The first order is uncontroversial and will be granted. The representative is the son of Mr Megrahi. The issues for the court concern the remaining two orders sought.

Background

[8] The case has a very long history. This was recently set out by the court in a Statement of Reasons following upon the grant to the appellant of an extension of time to lodge a Note of Appeal. It read as follows:

> ***"The Trial***
> [2] …On 31 January 2001, after a trial in the High Court of Justiciary sitting in the Netherlands between 3 May 2000 and 18 January 2001, Mr Megrahi was convicted of the murders of 270 people by the deliberate introduction of an explosive device onto a civilian flight (PA 103) from London Heathrow to New York. The plane disintegrated and the debris fell in and around the village of Lockerbie. The trial had been conducted without a jury.
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> [3] The reasons for the conviction are set out in a written opinion of the court of three judges (*HM Advocate* v *Megrahi* 2001 GWD 5-177). This described the evidence which was relied upon by the court. In summary, many thousands of pieces of the debris had been recovered from the crash site and analysed. The court accepted that the bomb had been inside a Toshiba RT-SF 16 radio cassette player. This had been in a brown hard-shell Samsonite suitcase (the primary suitcase) which had been placed in luggage container AVE 4041. The container had been located in the port side forward cargo hold. The primary suitcase held 12 items of clothing. These had been sold from a shop in Malta run by the Gauci family, of whom Tony Gauci was a member. Mr Gauci said that he had sold the items to a Libyan. A fragment of a single sided circuit board from an MST-13 timing device, which had been manufactured by MEBO AG in Zurich, was found within a piece of shirt which had been in the primary suitcase.
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> [4] Members of the Libyan Jamahariya Security Organisation, in which Mr Megrahi was head of airline security, had ordered timers from MEBO. Twenty samples of single and double sided MST-13 timers had been sent to Libya and to its embassy in Berlin. Some of these had been tested by the Libyan military in connection with explosives. MEBO leased an office in their Zurich premises to a firm, namely ABH, in which Mr Megrahi was a principal. Mr Megrahi would have been aware of airline security arrangements. He was involved in military procurement, including timers.

[5] Mr Megrahi held a passport, which had been issued by the Libyan authorities, in a false name. The only use of this passport in 1988 was for an overnight visit to Malta on 20/21 December. Mr Megrahi had arrived in Malta by plane at 5.30pm and left the next day at 10.20am. The check in for his departure was between 8.50 and 9.50am. Mr Megrahi had, on several previous occasions in 1988, travelled to Malta using his own passport. He had done so on 7 December, after which he departed on 9 December to Prague; returning to Libya via Zurich and Malta on 16/17 December.

[6] It was the Crown's case, which was ultimately accepted by the court that, on 21 December, the primary suitcase had been carried on Air Malta flight KM 180 from Luqa airport in Malta to Frankfurt. The check-in for that flight was between 8.15 to 9.15am. In Frankfurt the baggage was transferred onto a Pan Am feeder flight (PA 103A) to Heathrow and there re-transferred onto PA 103. John Bedford, a Pan Am loader-driver had set aside container AVE 4041 to receive interline baggage; ie that arriving from one airline and leaving on another. He had had left the baggage shed for a time. When he returned, two suitcases had been added to the container; one being "a brown… hardshell Samsonite-type". Into the container also went the baggage which was transiting from PA 103A. No passenger on KM 180 had had an onward flight to London or the USA. However, a piece of baggage from KM 180 had been coded at the relevant baggage station in Frankfurt for PA 103A and was delivered to the gate to be loaded accordingly. An unidentified and unaccompanied bag had thus travelled on KM 180 and was loaded onto PA 103A. How the baggage had been loaded at Malta unaccompanied by a relative passenger remained a mystery. This was described by the court as a major difficulty in the Crown case.

[7] An identification parade [which had included Mr Megrahi,] had been held on 13 April 1999. At this, Mr Gauci had said: 'Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5', who was Mr Megrahi. Mr Gauci also identified Mr Megrahi in court, stating that he 'resembles him a lot'. The identification evidence was subject to some scrutiny, including the ascertainment of the time when Mr Megrahi had been in the shop. Questions were raised about whether the Christmas lights in the locality had been put up. The court concluded that the items had been bought on 7 December 1988. It concluded that Mr Gauci's identification of Mr Megrahi as the purchaser was, 'so far as it went', reliable and a 'highly important element' in the case.

[8] The trial court concluded that:

> '[H]aving considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of Mr Megrahi (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with [MEBO] and with members of the JSP or Libyan military who purchased MST-13

timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of Mr Megrahi, and accordingly we find him guilty…'.

The Appeal

[9] The conviction was appealed on multiple grounds (*Megrahi* v *HM Advocate* 2002 JC 99). The appeal was presented by counsel who had appeared at the trial. It was accepted by Mr Megrahi that there was a sufficiency of evidence. Although there were a great many individual grounds of appeal, these were paraphrased into contentions that: (i) the court had failed to give adequate reasons; (ii) the appeal court could review the conviction on the basis of the evidence which the trial court had accepted as material; (iii) the trial court had erred in applying a presumption of the accuracy of business, notably the baggage, records; (iv) the Crown had failed to call the maker of these records; (v) expert evidence on the interpretation of the records ought to have been led and subjected to cross examination; and (vi) there was new evidence which pointed to a miscarriage of justice. Much of the criticism levelled at the trial judges in the appeal related to their interpretation of specific pieces of evidence. The appeal was refused on 14 March 2002.

[10] The appeal court's treatment of the evidence is much more detailed than the analysis which appears in the Opinion of the trial judges. However, a report on the grounds of appeal was called for in the appeal proceedings (cf *Megrahi* v *HM Advocate* 2002 JC 38). As it had been invited to do by Mr Megrahi, the court analysed the evidence at trial in painstaking detail. There was an intricate analysis of the accuracy of the baggage records at Frankfurt. The court rejected the argument that the trial judges had applied a presumption of accuracy. The judges had been entitled to reach the conclusions which they reached, having taken into account the criticisms which had been made by the defence. In particular, a suspect case had been coded in Frankfurt in the time window for baggage coming in from KM 180. The judges had been entitled to infer that an item of unaccompanied baggage had been transferred from KM 180 and loaded onto PA 103A. The judges had been entitled to have regard to evidence that the security procedures at Frankfurt, in so far as involving X-ray examination of baggage, had certain defects and to reject testimony that such an examination would have detected the explosive. The judges had properly considered the defence submissions about the existence of further items of unaccompanied baggage on PA 103A.

[11] There was an intricate analysis of the evidence of what had occurred at Heathrow and in particular the testimony of Mr Bedford (*supra*) in relation to the brown Samsonite suitcase. The contention was that, since the primary suitcase matched the description which Mr Bedford had given, it must have been infiltrated at Heathrow and not Luqa. The trial judges had rejected that submission. Mr Bedford had said that two suitcases of a type which matched the description of the primary suitcase had been loaded onto PA 103, albeit that the remnants of only one was found. The one that had been found contained the clothing which had been bought in Malta. Mr Bedford's description of where the interline suitcase had been placed in the container was not consistent with it being the primary suitcase.

[12] Mr Megrahi was allowed to introduce new evidence to the effect that there had been a break-in at Heathrow late on the evening of 20 December or in the early hours of 21 December. The appeal court accepted that this had happened, but that this only added to the other evidence of a possible infiltration at Heathrow. In the context of the whole circumstantial case, it was not material. There was no link between the break-in and the Bedford suitcases.

[13] The court then focused on the 'most fundamental issue raised in the appeal', *viz*. evidence which linked the bomb to Malta. This involved scrutinising the identification of Mr Megrahi by Mr Gauci. Many criticisms of Mr Gauci's testimony were advanced. These included consideration of Mr Gauci's earlier descriptions of the 'Libyan' to whom he had sold the clothes and his identification of photographs of other people. His descriptions were said to have been of an older person. By the time when Mr Gauci had picked out Mr Megrahi from photographs, some 26 months had elapsed since the purchase. Even then, Mr Gauci qualified his selection by saying that the man in the photograph would have had to be 10 years older. The quality of the photograph of Mr Megrahi had differed from the others. The appeal court emphasised that it was for the court of first instance to determine the weight to be attached to this evidence. No ground of unreasonable verdict had been tabled. The trial judges had been entitled to accept the identification, 'so far as it went' as credible and reliable. The appeal court considered the antecedents of the identification, notably Mr Gauci's reaction to a photograph of Mr Megrahi in a magazine which had been published at the end of 1998 or the beginning of 1999. Mr Gauci had thought that the person in the photograph looked like the man who had bought the clothing. This had prompted him to go to the police at that time. The appeal court considered the effect of pre-trial publicity on the issue. It noted that Mr Megrahi had not challenged Mr Gauci's testimony that Mr Megrahi resembled the person who had bought the clothing. The appeal court rejected the grounds of appeal which related to Mr Gauci's identification of Mr Megrahi.

[14] The evidence relating to the date of the purchase of the clothing was considered. This concerned the date upon which Mr Gauci's brother would have been watching a *Seria A* match; agreed as either 23 November or 7 December. The latter date was important, as Mr Megrahi had been staying in a hotel near the shop on that date. The appeal court was not persuaded that the trial judges had made any material error in deciding that the sale had been on that date. There was an exploration of the weather conditions on the date of purchase, and whether the local Christmas lights had been illuminated by then. Mr Megrahi's connections with MEBO and the use of the false passport were examined. The appeal court found no merit in Mr Megrahi's contentions on these matters.

The First Reference

[15] On 28 June 2007, the Scottish Criminal Cases Review Commission referred the case back to the High Court. This reference ran to some 790 pages in which a wide range of representations, which had been made by Mr Megrahi, were considered. The SCCRC had carried out its own investigations into some matters.

> Some of Mr Megrahi's points found favour with the SCCRC. Others did not. The SCCRC identified five reasons for a reference: unreasonable verdict; undisclosed evidence concerning *Focus* magazine; undisclosed evidence concerning rewards; the date of the purchase of the clothing; and undisclosed protectively marked documents. However, notwithstanding the restricted scope of the reference, Mr Megrahi's legal representatives, who were different from those who had conducted the trial and the appeal, lodged grounds of appeal running to 317 pages. These included matters which the SCCRC had considered and rejected. They encompassed issues which Mr Megrahi had not asked the SCCRC to consider. This gave rise to an objection from the Crown to the effect that Mr Megrahi could not, as of right, require the court to entertain grounds which did not form part of the reference. The Crown argued that there was no logic in Parliament creating a review body whose decision to refer certain matters but not others could simply be reversed by the appellant. Compulsory consideration by the court of grounds which had been rejected by the SCCRC would result in a waste of judicial time and resources in a great many cases.
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> [16] On a construction of section 194B(1) of the Criminal Procedure (Scotland) Act 1995, and after a substantial debate, the court rejected the Crown's contention (*Al Megrahi* v *HM Advocate* 2008 SLT 1008). However, the court pointedly commented:
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> > '[80] … Whether it is desirable, having regard to among other things the use of judicial resource, that a reference appellant should have unrestricted scope in what he lays before the court for adjudication is a matter for Parliament; but we must apply the statute as framed'.
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> On 17 August 2009, after many days of submissions on the substantive grounds of appeal, Mr Megrahi was allowed to abandon his appeal (*Al Megrahi v HM Advocate* 2009 GWD 29-467). He did so, the SCCRC have found, at least partly because he thought that by doing so his prospects of compassionate release would be increased."

The New Reference

[9] The new Reference has been lodged over a decade after the abandonment of the previous (second) appeal which had followed the original reference. The SCCRC considered six broad areas of potential concern about the conviction. They enumerated these as follows: (1) insufficiency of evidence; (2) unreasonable verdict; (3) fresh evidence concerning the putting up of the Christmas lights near the shop; (4) non-disclosure of documents relating to Mr Gauci's testimony; (5) the nature and source of the timer fragment; and (6) the possibility of suitcase ingestion at Heathrow and not Malta. The SCCRC rejected the argument that

there was an insufficiency of evidence. They discounted the idea that any new evidence in relation to the timing of the Christmas lights could have had any material effect on the verdict.

[10] The evidence relative to the timer, which Mr Megrahi's representatives had advanced as significant, had been known to the defence at the time of the trial. It had deliberately not been pursued. The contentions, which had been advanced by a Dr Kerr, concerning the possibility that the principal suitcase had been ingested at Heathrow rather than Malta, were analysed and rejected by the SCCRC. This last area had involved consideration of the testimony of a Heathrow Airport security guard, who had discovered what appeared to have been a break-in early on 21 December 1988. This had been part of the new evidence which had been introduced during the first (pre Reference) appeal and had been rejected by the court as not being material when examining the verdict. The SCCRC did not consider that Dr Kerr's theory was possible.

[11] The new Reference is made on two grounds only. The first is that the verdict was unreasonable in terms of section 106(3)(b) of the 1995 Act. This is broadly the same ground as had been previously referred in 2007. It is based on a contention that a reasonable jury could not have concluded, on the evidence presented to them, that Mr Megrahi had been the purchaser of the clothes from the Gaucis' shop. The trial court concluded that the date of purchase was 7 December 1988. This was said to be the only date on which Mr Megrahi could have bought the clothes. The SCCRC reasoned that it had been the acceptance of this date as correct, together with the resemblance identification made by Mr Gauci, that enabled the trial court to draw an inference that Mr Megrahi had been the purchaser. The SCCRC were "not persuaded" by the Crown's argument that the trial court's verdict had not simply been based on these two factors but on a combination of the resemblance identification, the

date of purchase and a variety other circumstances. The SCCRC were also not persuaded that the finding of 7 December as the date of purchase had not been an indispensable step in the proof of Mr Megrahi as the purchaser of the clothes. A finding that Mr Megrahi had been the purchaser was, on the SCCRC's analysis of the trial court's judgment, pivotal. The question then was whether it was reasonable for the Court to accept that Mr Megrahi had been adequately identified as the purchaser.

[12] The SCCRC were of the view that Mr Gauci's police statements and testimony, concerning the identification of Mr Megrahi, contained substantial discrepancies and inconsistencies. His identification from a spreadsheet of photographs in February 1991 had been equivocal and qualified. It was, on the SCCRC's reasoning, arguably not an identification at all, since it only amounted to evidence that the man in the selected photograph was similar or "really similar" to the purchaser if he had been older. The value of Mr Gauci's identification of Mr Megrahi must have been reduced by his having previously seen a photograph of him in *Focus* magazine. The identity parade had been held some three to four months after Mr Megrahi had obtained a copy of *Focus* and 10 years after the purchase of the clothing. Similar considerations applied to the dock identification which Mr Gauci had made during the course of his testimony. The SCCRC considered that a reasonable court would have had grave doubts about the identification. Mr Gauci's evidence about the date of purchase was grossly riddled with deficiencies. The trial court had focused on Mr Gauci's evidence that he thought that the date of purchase had been 7 December (and not 23 November) because the Christmas lights were being put up and that it had been a fortnight before Christmas. Neither reason had been mentioned by Mr Gauci to the police, when they had spoken to him repeatedly throughout 1989 and 1990. No reasonable court could have accepted that Mr Megrahi had been properly identified by

Mr Gauci as the purchaser. That identification was integral to the court's conclusion that he was guilty. Notwithstanding the remaining chapters of the evidence about the involvement of Libya and Mr Megrahi, the SCCRC concluded that a miscarriage of justice may have occurred.

[13] The second ground of reference is, in large part, a contention that the Crown failed to disclose certain specific matters to the defence. In order to succeed on this ground, in so far as it is based on a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights, an appellant has to satisfy a test whereby, had the material been disclosed, there would have been a real possibility of a different verdict (*McInnes* v *HM Advocate* 2010 SC (UKSC) 28, Lord Hope at para 20).

[14] Much of the material which was identified by the SCCRC as disclosable relates to the identification of Mr Megrahi by Mr Gauci,; notably evidence of Mr Gauci being exposed to a photograph of Mr Megrahi in *Focus* magazine and being aware of the possibility of a payment to Mr Gauci of a substantial reward. Thus, the SCCRC identify, as disclosable, statements from a Sergeant Busuttil and an Inspector Scicluna that on 1 April 99 Mr Gauci had, when speaking to the police, referred to seeing the purchaser's photograph. On 9 April, Mr Gauci had handed the magazine, which was dated December 1998, to the police and had said "That's him". On 12 April 1999, Mr Gauci had attended the identification parade, which had included Mr Megrahi, in the Netherlands. A police report of 20 March 1999 stated that another magazine, *Il Torca*, had published a photograph of Mr Megrahi and his co-accused on 28 February 1999, This too had been shown to Mr Gauci, who knew that the accused were going to be on the parade. Mr Gauci had said that DCI Bell had discussed the *Focus* photo with him and that Mr Gauci had said that it showed the purchaser. The Busuttil statement suggested that Mr Gauci had had the copy of *Focus* at his home for

4 months prior to the parade. He had relinquished possession of it only a few days before the trial. The impression created at the trial had been that he had only had fleeting possession of the magazine. The SCCRC considered that there was a substantial risk that Mr Gauci's identification had been prompted from his having seen the photograph of Mr Megrahi and not from his memory. Even although it was recognised that Mr Gauci had picked out Mr Megrahi in February 1991, the statements and the report ought to have been disclosed. This might possibly have affected the verdict.

[15] The SCCRC identified a DCI Bell memorandum dated 21 February 1991 concerning Mr Gauci's security. It referred to a recent meeting with Mr Gauci at which he had expressed an interest in receiving the reward money, which had been available from the United States of America's Government and had been reported in the press. There was a further memorandum from DCI Bell on 14 June 1991 which said that he had had no recent personal contact with Mr Gauci after the identification parade in February 1991. On 7 February 2001, after trial, DC Supt McCulloch wrote to the US Embassy nominating Mr Gauci for a reward under the USA "Rewards for Justice" programme. There was a report of 12 January 2001 concerning witness protection for Mr Gauci. It had said that Mr Gauci had declined offers of a reward. An undated report stated that rewards had not been discussed in advance of trial. All of these items, the SCCRC reasoned, were likely to have been material to the presentation of defence. It could not be said that they would not have affected the verdict.

[16] The SCCRC referred to Mr Gauci's Crown precognition dated 25 August 1999, in which he had stated that the date of purchase had been at the end of November or the beginning of December 1988. It might have been 29 November (a Tuesday) as he had had an argument with a girlfriend. However, his brother had been at home so it was a Wednesday.

The SCCRC concluded that the decision not to disclose the precognition had not been justified. Information about the date of the purchase was "of obvious significance to the defence", which had been deprived of the opportunity to trace the girlfriend. However, it was not possible to say that this might have affected the verdict since what might have been discovered was speculative.

[17] The SCCRC considered the two protectively marked documents (Reference paras 10.9.1 *et seq)*, as they had also done in 2007. They noted that their request to have the PMDs declassified had been rejected. The SCCRC were allowed to see the PMDs. The SCCRC observe that they could have applied to the court for an order requiring Police Scotland, who had the documents, to disclose them (1995 Act s 194I). They did not do so, apparently on the basis that the application would have been opposed either by Police Scotland or the UK Government. The SCCRC describe the material in the PMDs as secondary hearsay and thus inadmissible. The information could not therefore, of itself, sustain a reference on non-disclosure grounds. They continued (para 10.9.5):

> "One might conclude, however, that the Crown, by not disclosing… that piece of information, failed in its duty of disclosure and, as a result, deprived the defence the opportunity of investigating the matter. But even if the [SCCRC] were to draw such a conclusion – and the [SCCRC] could draw it – the [SCCRC] has no way of knowing now where those investigations would have led."

[18] On the basis that it would be speculation to reach any view on such investigations, the SCCRC did not consider that the non-disclosure of the PMDs met the real possibility of a different verdict test. In that respect, they reached a different view from that which they had held in 2007, when they did refer the case on this ground. The SCCRC went on to question why the Crown had not investigated the matter on the basis that "it ought to have been obvious… that the crucial piece of information in the [PMDs] would, if correct, strengthen the defence case". Upon inquiry from the SCCRC, the Crown responded that they had

contacted officials of a "foreign authority" who, in 2000, had told them that the information in the PMDs was incorrect. On that basis, the Crown had deemed the material non-disclosable. The SCCRC did not consider that the Crown's explanation for not investigating the information to be "a convincing rationale". It was "at best, curious".

[19] The SCCRC continued (para 10.9.15):

> "The [SCCRC] has already ruled out the possibility that this failure may meet the test for miscarriage of justice by way of non-disclosure. In spite of this, the common law provides a separate legal framework that may be applicable in this instance. Particularly if there are questions about the good faith of the authorities in reaching their decisions on disclosure, the law of oppression may become important…".

The SCCRC noted that the previous abandoned appeal had a ground based on oppression, but it had not been suggested that the Crown had acted other than in good faith. Although the SCCRC regarded the Crown's approach to the PMDs as *prima facie* strange, they doubted whether disclosure would have altered their approach to this ground. However, they added that there was now another significant piece of information in the form of the findings of the Sandwood report in relation to the CIA cables (*supra*). Sandwood had concluded that this issue raised concerns about the Crown's "conduct and apparent contempt for the rules of disclosure". There were, the SCCRC reasoned, parallels with the Crown's treatment of the PMDs.

[20] In concluding, the SCCRC observed (para 10.9.17) somewhat cryptically that:

> "It strikes the [SCCRC] that those advising the appellants, if in possession of all of the material available to the [SCCRC], could reasonably elect to frame an arguable ground of appeal based upon oppression, suggesting that the failure of prosecutors to disclose materials was systemic [*sic*] and, potentially, questioning the good faith of the Crown. Such a ground of appeal could reasonably refer to a number of other failures of disclosure. The centrepieces, however, would be the materials addressed in… Sandwood and the [PMDs]. As a result of the continuing restrictions on onward disclosure of the relevant material, the [SCCRC] is unable at this time to investigate this matter properly and thereafter to provide any reasoned analysis of the foregoing argument".

The Application to found upon Grounds of Appeal which did not form part of the Reference

[21] There is no difficulty with the court proceeding to hear the first ground of appeal. It falls squarely within the Statement of Reason for the Reference. In due course, the court will examine the evidence in relation to Mr Gauci's purported identification of Mr Megrahi and his testimony on the date of purchase of the clothing in order to determine whether a miscarriage has occurred because the verdict is found to be unreasonable.

[22] The second ground of appeal, in so far as it relates to the non-disclosure of documents which have a bearing on Mr Gauci's testimony, also presents no problem. The failure to disclose the documents enumerated in Part A of Ground 2 falls with the Statement of Reasons for the Reference, with the exception of the Crown precognition of Mr Gauci, which the SCCRC did not consider to be significant.

[23] The remaining elements of Ground 2 are problematic because they do not fall within the terms of the Reference. The primary purpose of an appeal under a Reference from the SCCRC is to consider whether a miscarriage of justice has occurred for the reasons stated by the SCCRC in that Reference. The SCCRC do not refer cases in abstract but on specific grounds which they have considered and determined to be meritorious in the context of whether a miscarriage of justice may have occurred. They may have rejected other grounds which they did not consider to merit the court's attention. They did so in the Statement of Reasons in relation to the contentions on behalf of Mr Megrahi that: (a) there was a legal insufficiency of evidence; (b) there was fresh evidence about the installation of the Christmas lights; (c) the nature and source of the timer fragments were such as to indicate a source different from the Libyan Government; and (d) the ingestion of the suitcase had been at Heathrow following the break-in.

[24] As already noted, when allowing grounds, which had not formed part of the Reference, to be argued in *Al Megrahi* v *HM Advocate* 2008 SLT 1008, the court questioned the desirability of having an unrestricted appeal having regard to the proper use of judicial resources. It was this which led to section 194(4A) of the 1995 Act. This states that the grounds of appeal must relate to one or more of the SCCRC's reasons, unless the court considers that it in the interests of justice to found the appeal on additional grounds. The default position is thus to confine any appeal to the grounds in the Reference.

[25] The effect of this is, first, to exclude from consideration any part of Ground of Appeal 2 which alleges that there was a systematic failure on the part of the Crown to disclose relevant material as a generality, as distinct from a failure to disclose particular material. Despite their cryptic comments about the possibility of the appellant being able to frame an arguable ground of appeal based on oppression, the SCCRC did not refer the case to the court on the basis of any systematic failure. They were correct to do, albeit for a rather different reason.

[26] The only ground upon which an appeal against a conviction can succeed is one which maintains that a miscarriage of justice has occurred (1995 Act s 106(3)). Although conduct which is oppressive may form part of a ground of appeal, it is not definitive. In solemn cases, oppression on the part of the Crown tends to be a ground which is used in connection with pleas in bar of trial or the exclusion of evidence rather than as a basis for a post-verdict review (*Bakhjam* v *HM Advocate* 2018 JC 127, LJG (Carloway), delivering the opinion of the court, at para [28]). It normally relates to conduct which has resulted in an identified procedural unfairness which in turn has created a miscarriage of justice.

[27] In the context of an appeal against conviction which is based upon an allegation of a failure to disclose relevant material, it is of peripheral, if any, significance to examine

whether the Crown, or a particular prosecutor, acted in good faith or to analyse whether the Crown's systems were efficient or not. If a failure to have an efficient system in place were available as a ground of appeal, a finding of inefficiency would jeopardise all convictions at the time of such a system; even if proper disclosure had been made. That is why it cannot form the basis of a successful appeal. The questions in a particular case are simply: (1) whether the Crown failed to disclose a document, or other matter, which fell to be disclosed as material to the proper preparation or presentation of the defence (*McLeod* v *HM Advocate (No 2)* 1998 JC 67, LJG (Rodger) at 80); and (2) whether that failure resulted in a miscarriage of justice by applying the test of whether, had it been disclosed, there was a real possibility of a different verdict (*McInnes* v *HM Advocate* 2010 SC (UKSC) 28, Lord Hope at para 20). Since systematic failure cannot form the basis of a successful ground of appeal, the court does not consider that it is the interests of justice to explore the general system which the Crown had in place for disclosure in this case.

[28] This also means that consideration of the material in Part D of Ground 2 ought also to be excluded as relating to the allegation of general system failure. These did not form part of the Reference and were not regarded as of any materiality in connection with the assessment of the testimony of Mr Gauci. Similar considerations apply to the material in Part B. However, the Crown requested that the CIA cables should form part of the appeal since it would provide the Crown with an opportunity to explain the gradual disclosure of the cables during the course of the trial and avoid the possibility of a third Reference from the SCCRC, should the present appeal fail. On that basis, the court will allow the non-disclosure Ground 2 to include reference to the Part B material on the basis that it is in the interests of justice to do so.

The Recovery of the Protectively Marked Documents and their inclusion in Ground 2

[29] The SCCRC were, no doubt correctly, very reticent about revealing the contents of the PMDs in their new Statement of Reasons; as they had been in the 2007 Reference. It is reasonable to conclude from the description of the PMDs in the new Reference, and the content of the new Public Interest Immunity certificate which was produced shortly after the Procedural Hearing with which this opinion is concerned, that they are documents emanating from an agency of a foreign state. Beyond that, the court does not know what they contain or what their significance might be in the context of the non-disclosure ground of appeal. The abandoned appeal had contained a ground based upon the PMDs and they had formed part of the 2007 Reference. Although they are not part of the present Reference, the SCCRC has commented on their inability to reach a final view on the matter because they were hampered in their ability to investigate the information in the PMDs.

[30] On 29 May 2008, the court, which had allowed unrestricted grounds of appeal following upon the 2007 Reference, ordered the production of the PMDs to the court. It had planned to assign "closed sessions" to decide upon whether the PII certificate should be overruled and thus that PMDs should be disclosed to the appellant and be available for consideration in the appeal. This procedure would have involved submissions from the Advocate General, on behalf of the Secretary of State for Foreign and Commonwealth Affairs, and the respondent. The interests of the appellant would be looked after by a special counsel. Although a hearing *in camera* was fixed for 19 August 2008, a subsequent interlocutor of 28 November 2008 indicates that no decision had been taken even by then. That seems to have remained the position at the time when the appeal was abandoned in August 2009.

[31] The Advocate General has produced a new PII certificate dated 17 August 2020 and signed by the Foreign Secretary. This states that the Foreign Secretary has considered whether there is a real risk that disclosure of the PMDs, in whole or in part, would cause serious harm to the public interest, notably national security and the international relations of the United Kingdom. The Foreign Secretary states that he has balanced public interest with that of doing justice in the present proceedings; noting that the ultimate decision is one for the court. The certificate continues:

> "8 … I am satisfied that the production of the documents would cause real harm to the United Kingdom Government's international relations. It would also cause real harm to the national security of the United Kingdom, because of damage to counter-terrorism liaison and intelligence gathering between the United Kingdom and other States.
>
> 9. The documents were provided in confidence to the United Kingdom Government by another State. Disclosure of the documents would harm the United Kingdom's international relations with that State. It would undermine trust in the United Kingdom of the State whose confidence were disclosed. It would reduce the willingness of that State (i) to confide information to the United Kingdom, (ii) to co-operate with the United Kingdom in various fields, including counter-terrorism liaison. It would raise serious questions in the minds of other Governments around the world about the confidentiality of their communications with the United Kingdom Government and therefore their willingness to make such a disclosure commitment. … [I]t is essential for the conduct of international relations, and for national security, that other States should be able to communicate with the United Kingdom Government in the knowledge that those communications will not be liable to be produced and discussed in open court."

The Foreign Secretary explains that he cannot be more specific in the certificate, since to do so would undermine its purpose.

[32] In these circumstances, the court considers that it must see the PMDs before reaching a decision. The court will adopt the procedure which was planned in 2008 and order the production of the PMDs to the court. It will appoint a hearing at which the Advocate General and the respondent, who is in favour of disclosure, will be represented along with a special counsel to look after the interests of the appellant. Only after that hearing can it be

decided whether the PMDs should be disclosed and form part of Ground of Appeal 2.

Meantime, the court will provide a schedule for the hearing of the appeal.

[33] The following order has been pronounced:

> "The Court, having resumed consideration of the reference …
>
> (1) under section 303A of the Criminal Procedure (Scotland) Act 1995, authorise Ali Abdulbasit Ali Almaqrahi to institute an appeal on behalf of the deceased Abdelbaset Ali Mohamed Al Megrahi;
>
> (2) under section 194D(4B) of the 1995 Act, allow the appellant to found the appeal on additional grounds which do not relate to one or more of the reasons contained in the Statement of Reasons by the SCCRC for making the Reference; these grounds being non−disclosure of the documents specified in Ground of Appeal 2 Part B;
>
> (3) refuse the application in relation to Ground 2 Part A para 14 and Part D (in its entirety); therefore the court will hear Ground 1 and Ground 2 Part A (with the exception of para 14) and Part B;
>
> (4) refuse to allow, as a ground of appeal, those parts of the Note of Appeal which refer to a "system of disclosure which was not fit for the purpose of ensuring that all relevant information was identified and disclosed", the absence of a "robust system of disclosure", a "systemic failure of disclosure; and bad faith on the part of the respondent";
>
> (5) order the production to the court of the two protectively marked documents in Part C; appoint a hearing to consider the new PII certificate; and appoint special counsel to represent the appellant at that hearing; continue meantime the application to allow Part C to form part of the appeal; and
>
> (6) appoint: (i) 24 November 2020 and the three following days as the date for the hearing of the appeal; 16 October 2020 as the date by which the appellant shall lodge a Case and Argument; (ii) 30 October 2020 as the date by which the respondent shall lodge a Case and Argument; and 6 November 2020 as the date by which all productions (including a core bundle if the productions exceed 500 pages), a joint reading list and a joint list of authorities shall be lodged."