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LOCKERBIE: A SATISFACTORY PROCESS BUT A FLAWED RESULT*

Robert Black[†]

I. The Trial

A. Introduction

On January 31, 2001, after just over one hundred and thirty court days of a trial that had started on May 3, 2000, the three judges in the Lockerbie trial (Lords Sutherland, Coulsfield and MacLean) returned a unanimous verdict of guilty of murder in respect of the first accused, Abdelbaset Ali Mohamed Al-Megrahi, and a unanimous verdict of not guilty of murder in respect of the second accused, Al-Amin Khalifa Fhima.¹ Megrahi was sentenced to life imprisonment, with a recommendation that he serve at least twenty years.

The prosecution in their closing submissions conceded that the case against the accused was entirely circumstantial. That, of course, is no bar to a verdict of guilty. Circumstantial evidence can be just as persuasive and just as damning as the direct evidence of eyewitnesses to the commission of a crime. But to many observers, including me, it seemed that the case presented by the prosecution was a very weak circumstantial one, and was further undermined by the additional prosecution concession that they had

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¹ Fhima was acquitted largely because the judges were not satisfied beyond reasonable doubt that, even if he assisted Megrahi to launch the suitcase containing the bomb which destroyed Pan Am 103 on its progress from Luqa Airport in Malta, he knew that the suitcase contained a bomb. Her Majesty's Advocate v. Al Megrahi, (Case no. 1475/99) available at <http://www.scotcourts.gov.uk/download/lockerbiejudgment.pdf>.

not been able to prove how the bomb that destroyed Pan Am 103 got into the interline baggage system and onto the aircraft.

B. The Trial Court's Crucial Findings and Were They Justified?

From the ninety paragraph written judgment produced by the trial court it is clear that the court convicted Megrahi on the basis of the following nine factors.

1. The bomb was detonated through the mechanism of a MST-13 digital electronic timer manufactured by a Swiss company (MeBo) and supplied principally (but not exclusively) to Libya.

Commentary. The judges accepted prosecution evidence that a fragment of circuit board found among the wreckage of Pan Am 103 came from a MeBo MST-13 timer. The managing director of MeBo had denied this in his evidence, but his credibility was, unsurprisingly, assessed as being very low. The evidence established that timers of this model were supplied predominantly to Libya (though a few did go elsewhere, such as to the East German Stasi). This fragment is also important since it was the only piece of evidence that indicated that the Lockerbie bomb was detonated by a stand-alone, long-running timing mechanism, as distinct from a short-term timer triggered by a barometric device when the aircraft reached a pre-determined altitude (a method known to be favoured by certain Palestinian terrorist cells operating in Europe in 1988). The provenance of this vitally important piece of evidence was challenged by the defence and, in their written Opinion, the judges accept that in a substantial number of respects this fragment, for reasons that were never satisfactorily explained, was not dealt with by the investigators and forensic scientists in the same way as other pieces of electronic circuit board (of which there were a multitude). The judges say that they are satisfied that there was no sinister reason for the differential treatment. But regrettably they do not find it at all necessary to enlighten us regarding the reasons for their satisfaction.

2. A company of which a member of the Libyan intelligence services (Badri Hassan) was a principal for a time had office accommodation in the premises of the Swiss manufacturer, MeBo.

3. Megrahi was a member of the Libyan intelligence service.

Commentary. The only evidence to this effect came from a Libyan defector and CIA asset, Abdul Majid Giaka, now living in the United States under a witness protection programme. He gave evidence highly incriminating of both Megrahi and the co-accused Fhima. However, the trial judges rejected his evidence as wholly and utterly unworthy of credit, with the sole exception of his evidence regarding the Libyan intelligence service and Megrahi's position therein. The court provides no reasons for

accepting Giaka's evidence on this issue while comprehensively rejecting it on every other matter.

4. The suitcase which contained the bomb also contained clothes and an umbrella bought in a particular shop, Mary's House, in Sliema, Malta.

5. Megrahi was identified by the Maltese shopkeeper as the person who bought the clothes and umbrella.

Commentary. The most that the Maltese shopkeeper, Tony Gauci, would say (either in his evidence in court or at an identification parade before the trial or in a series of nineteen police statements over the years) was that Megrahi "resembled a lot" the purchaser, a phrase which he equally used with reference to Abu Talb, one of those mentioned in the special defence of incrimination lodged on behalf of Megrahi. Gauci had also described his customer to the police as being six feet [183 cms] tall and over fifty years of age. The evidence at the trial established (i) that Megrahi is five feet eight inches [173 cms] tall and (ii) that in late 1988 he was thirty-six years of age. On this material, the judges found in fact that Megrahi was the purchaser.

6. The purchases were made on 7 December 1988, a date when Megrahi was proved to be on Malta and not on 23 November 1988 when he was not.

Commentary. By reference to the dates on which international football matches were broadcast on television on Malta, Tony Gauci was able to narrow down the date of purchase of the items in question to either 23 November or 7 December. In an attempt to establish just which, the weather conditions in Sliema on these two days were explored. Gauci's evidence was that when the purchaser left his shop it was raining to such an extent that his customer thought it advisable to buy an umbrella to protect himself while he went in search of a taxi. The unchallenged meteorological evidence led by the defence established that while it had rained on 23 November at the relevant time, it was unlikely that it had rained at all on 7 December; and if there had been any rain, it would have been at most a few drops, insufficient to wet the ground. On this material, the judges found in fact that the clothes were purchased on 7 December.

7. The suitcase containing the bomb was sent as unaccompanied baggage from Luqa Airport in Malta, via Frankfurt, on the morning of 21 December 1988 on an Air Malta flight, KM 180.

Commentary. The trial judges held it proved that the bomb was contained in a piece of unaccompanied baggage which was transported on Air Malta flight KM 180 from Luqa to Frankfurt on 21 December 1988, and was then carried on a feeder flight to Heathrow where Pan Am flight 103 was loaded from empty. The evidence supporting the finding that there was such a piece of unaccompanied baggage was a computer printout which could be interpreted to indicate that a piece of baggage went through the particular luggage coding station at Frankfurt Airport used for baggage

from KM 180, and was routed towards the feeder flight to Heathrow, at a time consistent with its having been offloaded from KM 180. Against this, the evidence from Luqa Airport in Malta (whose baggage reconciliation and security systems were proven to be, by international standards, very effective) was that there was no unaccompanied bag on that flight to Frankfurt. All luggage on that flight was accounted for. The number of bags loaded into the hold matched the number of bags checked in (and subsequently collected) by the passengers on the aircraft. The court nevertheless held it proved that there had been a piece of unaccompanied baggage on flight KM 180.

8. Megrahi was in Malta on the night of December 20/21, 1988 and left for Tripoli from Luqa Airport on the morning of December 21.

9. On this visit Megrahi had been travelling on a passport (in a name other than his own) which was never subsequently used.

Commentary. Megrahi (inexplicably, in the view of many) was not called by his lawyers to give evidence on his own behalf at the trial; so no explanation of his use of this passport was ever supplied to the court. There is an innocent (ie non-Lockerbie related) explanation which could have been provided (involving his role in seeking to circumvent U.S. trade sanctions against Libya and obtain Boeing aircraft spare parts on behalf of his employers, Libyan Arab Airlines).

It is my firm view that the crucial incriminating findings made by the judges were unwarranted by the evidence led in court and were in many cases entirely contrary to the weight of that evidence. I am convinced that no Scottish jury, following the instructions traditionally given by judges regarding the assessment of evidence and the meaning and application of the concept of reasonable doubt, would or could have convicted Megrahi.

So how did it come about that the three distinguished and experienced judges who concurred in the verdict felt able to convict him?

In paragraph 89 of the Opinion of the Court it is stated: "We are aware that in relation to certain aspects of the case there are a number of uncertainties and qualifications. We are also aware that there is a danger that by selecting parts of the evidence which seem to fit together and ignoring parts which might not fit, it is possible to read into a mass of conflicting evidence a pattern or conclusion which is not really justified." Regrettably, in my submission, the judges' intellectual recognition of the danger does not appear to have enabled them to avoid it.²

² JOHN LAWTON, *A LITTLE WHITE DEATH* 501 (1999). In John Lawton's excellent novel—a fictionalised account of the Profumo affair and the Stephen Ward trial—the hero describes the presiding judge in the trial (Mr Justice Mirkeyn) as follows: "Everyone doing what they think is expected of them. Mirkeyn did the same. It's probably never crossed Mirkeyn's mind that he's a bad judge or a bent judge. He simply did what was expected. Didn't even need a nod or a wink."

II. The Appeal

A. Introduction

Megrahi duly intimated his intention to appeal against his conviction. Pending the appeal he remained incarcerated in the Netherlands in HM Prison, Zeist. On March 14, 2002 the appeal was dismissed. An Opinion of the Court extending to 200 typed pages divided into 370 paragraphs was delivered.³ The appeal was against conviction only: there was no attempt to challenge the recommendation, that a minimum of twenty years should be served before release was considered, which accompanied the trial court's mandatory sentence of life imprisonment.

As required by the provisions of the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, the Appeal Court consisted of five Lords Commissioners of Justiciary and sat in the premises of the Scottish Court at Camp Zeist in the Netherlands.⁴ The hearing extended from January 23 to February 14, 2002. The proceedings (except when the evidence of witnesses was being heard) were televised live over the internet on a website maintained by the BBC, the first occasion in Scotland (or elsewhere in the United Kingdom) that live public broadcasting of judicial proceedings has been permitted. The consensus of opinion was that the administration of justice was not impaired by the presence of the television cameras, but that the level of excitement and drama was such that there is unlikely to be much clamour in the foreseeable future from either broadcasters or the viewing public for the experiment to be repeated.

B. The Grounds of Appeal

The only ground upon which a criminal appeal can succeed in Scotland is if there has been a miscarriage of justice. In the Note of Appeal lodged on behalf of Megrahi there were set out in twenty-one paragraphs (many of them subdivided) the grounds upon which, individually or in combination, it was contended that a miscarriage had occurred. One of those grounds related to the existence and significance of evidence which was not heard during the original proceedings. This evidence related to a breach of security at Heathrow Terminal 3 (potentially giving access to the

³ *Al Megrahi v H M Advocate 2002 SCCR 509*, available at <http://www.scotcourts.gov.uk/index1.asp>.

⁴ The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, Statutory Instrument 1998 No. 2251, art 14(1), (2), available at <http://www.hmso.gov.uk/si/si1998/19982251.htm>.

baggage build-up area) the night before Pan Am 103 departed from that terminal on its fatal flight. The Appeal Court allowed the new evidence to be led before it, but ultimately concluded that it could not be regarded as possessing such importance as to have been likely to have had a material bearing on the trial court's determination of the critical issue of whether the suitcase containing the bomb was launched on its progress from Luqa Airport in Malta (an essential plank in the prosecution case) or from Heathrow. This ground of appeal was accordingly rejected.

As far as the appeal based on the remaining twenty paragraphs of the written grounds of appeal was concerned, its failure appears to have been rendered virtually inevitable by two concessions made in the course of argument by the appellant's counsel. The first of these, as recorded in the Opinion of the Court (paragraph 4) is as follows:

"At the trial it was not submitted on the appellant's behalf that there was insufficient evidence in law to convict him. In its judgment the trial court rejected parts of the evidence relied upon by the Crown at the trial. Nevertheless, it was not contended in the appeal that those parts of the evidence not rejected by the trial court did not afford a sufficient basis in law for conviction."

The second concession is recorded in the following terms (paragraph 5):

"Under subsection (3) [of s106 of the Criminal Procedure (Scotland) Act 1995] an appellant may bring under review of the High Court:

'any alleged miscarriage of justice, which may include such a miscarriage based on –

(b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.' ...

Mr. Taylor, who appeared for the appellant, expressly disavowed any reliance on paragraph (b)."

The importance of these concessions is emphasized by the Appeal Court in the penultimate paragraph of its Opinion (paragraph 369):

"When opening the case for the appellant before this court Mr Taylor stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the

basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence.”

C. The Issues that the Appeal Did Not Address

The limitations under which the Appeal Court was thus constrained to operate effectively disabled it from considering the issues of (a) whether there was sufficient evidence in law to justify such absolutely crucial findings-in-fact by the trial court as (i) that the date of purchase in Malta of the clothes surrounding the bomb was December 7, 1988, (ii) that Megrahi was the purchaser and (iii) that the case containing the bomb started its progress from Malta’s Luqa Airport and (b) whether those findings or any of them (on the assumption that there was a legal sufficiency of evidence) were such as no reasonable trial court, properly directing itself, could have made, or been satisfied of beyond reasonable doubt, in the light of (i) justifiable criticisms of the evidence and witnesses supporting them and (ii) *ex facie* credible contrary evidence.

D. The Issues that the Appeal Did Address

What the appellant instead invited the Appeal Court to do was to hold that various findings-in-fact made by the trial court (a) were based upon a misunderstanding of the evidence or were without a basis in the evidence; or (b) were arrived at by giving undue weight to evidence that supported them or insufficient weight or “proper regard”⁵ to evidence that contradicted them; or (c) were in the nature of inferences from primary facts drawn in situations where other, non-incriminating, inferences were equally open.

Regarding (a), the Appeal Court held that in two or three instances the trial court had found a fact proved on the basis of a misunderstanding of the evidence led, or where there was no evidential basis for the finding. But in each such case the Appeal Court went on to decide that the error was insignificant, could not have affected the ultimate outcome of the case and, hence, was not such as to give rise to a miscarriage of justice.

With respect to (b) and (c), the Appeal Court insisted that, as long it was (as here) not contended that no reasonable trial court could have made the finding-in-fact, challenge of findings on these grounds was simply not competent. The weight to be given to evidence or the “proper regard” to be accorded to it were matters entirely for the trial court, as was the question of what inferences to draw from the primary facts that it held proved. Even

⁵ “Proper regard” is an expression used frequently in the written grounds of appeal.

where, as here, the tribunal of fact was not an inscrutable jury but a bench of judges who gave reasons for their findings, the Appeal Court was simply not entitled to substitute its own views for those of the trial judges. It followed that all of the grounds of appeal directed towards issues of "weight" or "proper regard" fell to be rejected as raising matters not within the competence or powers of the Appeal Court. This is emphasized at various points in the Opinion of the Court⁶ but principally in the section headed "The function of an appeal court."⁷

III. Conclusion

Before the verdicts in the original trial were delivered, I expressed the view that for the judges to return verdicts of guilty they would require (i) to accept every incriminating inference that the Crown invited them to draw from evidence that was on the face of it neutral and capable of supporting quite innocent inferences, (ii) to be satisfied beyond reasonable doubt that the Maltese shopkeeper, Tony Gauci, positively identified Megrahi as the person who bought from his shop in Sliema the clothes and umbrella contained in the suitcase that held the bomb and (iii) to accept that the date of purchase of these items was proved to be December 7, 1988 (as distinct from November 23, 1988 when Megrahi was not present on Malta). I went on rashly to express the opinion that, for the judges to be satisfied of all these matters on the evidence led at the trial, they would require to adopt the posture of the White Queen in *Through the Looking-Glass*, when she informed Alice "Why, sometimes I've believed as many as six impossible things before breakfast." In convicting Megrahi, it is submitted that this is precisely what the trial judges did.

As far as the outcome of the appeal is concerned, some commentators have confidently opined that, in dismissing Megrahi's appeal, the Appeal Court endorsed the findings of the trial court. This is not so. The Appeal Court repeatedly stresses that it is not its function to approve or disapprove of the trial court's findings-in-fact, given that it was not contended on behalf of the appellant that there was insufficient evidence to warrant them or that no reasonable court could have made them. These findings-in-fact accordingly continue, as before the appeal, to have the authority only of the court which, and the three judges who, made them.

Until such time as an appellate court (perhaps on a reference from the Scottish Criminal Cases Review Commission) is required to address the fundamental issues of (i) whether there was sufficient evidence to warrant the incriminating findings, (ii) whether any reasonable trial court could

⁶ For examples of grounds of appeal being rejected on this basis, see Opinion of the Court, paras. 76, 80, 84, 118, 129, 262, 274, 288, 327, 351, *Al Megrahi v. H.M. Advocate*, 2002 S.C.C.R. 509.

⁷ *Id.*, paras. 20-27.

have made those findings (and could have been satisfied beyond reasonable doubt of the guilt of Megrahi) on the evidence led at Camp Zeist and (iii) whether Megrahi's representation at the trial and the appeal was adequate, I will continue to maintain that a shameful miscarriage of justice has been perpetrated and that the Scottish criminal justice system has been gravely sullied.

