



Case Western Reserve Journal of International Law

Volume 36 | Issue 2

2004

The Lockerbie Judgments: A Short Analysis

Julian B. Knowles

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Julian B. Knowles, *The Lockerbie Judgments: A Short Analysis*, 36 Case W. Res. J. Int'l L. 473 (2004)

Available at: <https://scholarlycommons.law.case.edu/jil/vol36/iss2/12>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE LOCKERBIE JUDGMENTS: A SHORT ANALYSIS*

Julian B. Knowles[†]

I. Introduction

The trial of Abdelbaset ali Mohamed al Megrahi and Al Amin Khalifa Fhimah for the bombing of Pan Am Flight PA103 began in the High Court of Justiciary at Camp Zeist, the Netherlands, in May 2000. The two men were accused of murdering the 259 passengers on board the aircraft and the 11 people on the ground that were killed when the plane blew up over Lockerbie, Scotland, at 7:03 pm on December 21, 1988 while *en route* from London to New York.

The trial resulted from a compromise worked out between the United Nations, Libya, the United States and the United Kingdom. The United States and United Kingdom initially demanded that Libya hand over the two suspects for trial. Libya argued that it had no legal obligation to surrender the suspects, and the United Kingdom and United States argued that nothing short of a trial in either Scotland or the United States was acceptable. This stalemate was broken only by a compromise brokered by the United Nations whereby the Libyans would be tried in a neutral venue, the Netherlands, before a panel of Scottish judges (with no jury) under Scots criminal law and procedure.

Under Scottish law¹ special legislation was necessary in order to permit a Scottish court to sit outside Scottish territory. Paragraph 3(1) of the High Court of Justiciary Order² provided that, for the purpose of conducting criminal proceedings against al Megrahi and Fhimah on charges of conspiracy to murder, murder and contravention of the Aviation Security

* Presented at the War Crimes Research Symposium: "Terrorism on Trial" at Case Western Reserve University School of Law, sponsored by the Frederick K. Cox International Law Center, on Friday, October 8, 2004.

[†] The author was one of a number of international lawyers who provided legal assistance to Mr. Al Megrahi during his appeal.

¹ Under the constitutional structure of the U.K., Scotland is part of the U.K. but has a distinct legal system from that of England and Wales. See Sarah Carter, *A Guide to the UK Legal System-Updated*, LLRX.com, at <http://www.llrx.com/features/uk2.htm> (last updated Oct. 1, 2002).

² Made under the UK's United Nations Act 1946 to give effect to UN Security Council Resolution 1192 of August 27, 1998. *The High Court of Justiciary* (proceedings in the Netherlands) (United Nations) Order 1998, SI (1998/2251), art. 3(1), available at <http://www.hmsso.gov.uk/si/si1998/19982251.htm>.

Act 1982, the Scottish High Court of Justiciary could sit in the Netherlands in accordance with the provisions of the Order.

Paragraph 5 of the Order contained provisions relating to the constitution of the Court, in particular providing that three judges should sit without a jury and should give reasons for their decision. Paragraph 5(4) made clear that apart from the absence of a jury the Court's jurisdiction and procedure should be precisely the same as a regular Scottish criminal court. It provided that the court should have all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury in Scotland, including power to determine any question and to make any finding which would, apart from article 5, be required to be determined or made by a jury, and provided that references in any enactment or other rule of law to a jury or the verdict or finding of a jury should be construed accordingly.

The trial began on May 3, 2000 before Lords Sutherland, Coulsfield and MacClean. On January 30, 2001 al-Megrahi was found guilty and was sentenced to life imprisonment with a recommendation that he serve a minimum of 20 years. Fhimah was found not guilty.³

Megrahi appealed to the Appeal Court of the High Court of Justiciary. On March 14, 2002 the Court (the Lord Justice-General sitting with Lords Kirkwood, Osborne, Macfadyen and Nimmo Smith) dismissed his appeal.

II. The Crown's Case at Trial

The Crown's (prosecution) case was prepared by government lawyers working in Scotland and presented by a team of Scottish barristers. The investigation had been carried out by Scottish and American investigators, including the FBI and the CIA. The Crown's case was that the disaster was caused by an explosive device in the hold of the plane and that the two accused had put it there. This device exploded when the aircraft was in Scottish air space thus causing the aircraft to disintegrate.

The Crown originally contended that the accused were guilty of a number of offences including conspiracy to murder, alternatively murder, alternatively a contravention of section 2(1) and (5) of the Aviation Security Act 1982. At the conclusion of the Crown's case, however, the indictment was restricted to the charge of murder.

There was no real dispute at the trial that the aircraft had been brought down by a bomb, although a considerable part of the trial was taken up with forensic evidence concerning the destruction of the aircraft. The defence succeeded in discrediting a number of the prosecution scientists who had given evidence for the prosecution in IRA trials in England, where the

³ A copy of the trial and appeal judgments can be found on the Scottish courts website, available at <http://www.scotcourts.gov.uk/html/lockerbie.asp> (last visited Apr. 9, 2005).

defendants had subsequently found to be innocent. The main issue, however, was whether or not the Crown had proved beyond reasonable doubt that one or other or both of the accused was responsible for putting the bomb on the aircraft.

The Crown's case was that the men had been involved in putting an unaccompanied suitcase containing a bomb on an aircraft bound for Frankfurt at Luqa airport in Malta. The Crown alleged that this bag was transferred at Frankfurt to a flight for London where it was then loaded into a luggage container AVE 4041 and put into the hold of Flight 103.

III. On What Evidence Did the Court Convict al-Megrahi and acquit Fhimah?

The Court convicted al-Megrahi on the basis of circumstantial evidence. There was no direct evidence against him. The Court concluded that it could draw an inference of guilt beyond reasonable doubt from a chain of factual conclusions which it reached on the basis of the evidence that it had heard. These factual conclusions were as follows:

- a. A bomb placed in the luggage hold caused PA103 to crash. The bomb was contained in a brown Samsonite suitcase.
- b. Forensic evidence showed that clothing purchased from Mary's House, Sliema, Malta, a shop run by a Mr. Tony Gauci, was in the same suitcase as the bomb.
- c. A man identified by Tony Gauci as al-Megrahi, purchased the clothing on December 7, 1988.
- d. The bag containing the bomb was introduced onto KM180, a flight going from Luqa Airport, Malta, to Frankfurt where it was transferred to PA103A from Frankfurt to Heathrow Airport, which was a feeder flight for PA103. The unaccompanied bag was then transferred onto PA103. The evidence showed that an unaccompanied bag travelled on KM180 and was transferred onto PA103A.
- e. The introduction of the bag at Malta pointed to Libyan involvement.
- f. A fragment of a circuit board was allegedly found by the police in the neckband of a grey Slalom brand shirt which had explosion damage. This item was labelled PI/995 and became exhibit 168 at the trial. The fragment of circuit board was labelled PT/35(b). Fragments of a Toshiba radio cassette recorder model RT- SF 16 and its manual were also recovered from the shirt.
- g. The circuit board was identified as being from an MST-13 single soldered timing device.
- h. The MST-13 timers were made by MEBO, a Swiss firm, using Thuring AG circuit boards.

- i. The Libyan government were MEBO's major customer.
- j. A company called ABH in which al-Megrahi was involved rented offices from MEBO in Zurich some time in 1988.
- k. While the Court said that Tony Gauci did not make "an absolutely positive" identification of al-Megrahi as the purchaser of the clothes, and that his identification of him was "not unequivocal", the identification of him as the purchaser at an identification parade in April 1999 and in the dock was "so far as it went ... reliable".
- l. If the defendant bought the clothing for the bomb then he must have known why it was being bought.
- m. Mr al-Megrahi:
 - (1) Had a false passport. It was used for a trip to Malta in December 1988 and was never used again.
 - (2) Had a relatively high rank in the Libyan secret service, the JSO, including head of airline security.
 - (3) The clothing purchase was on December 7, 1988, he was in Malta on that date and stayed in the Holiday Inn, which is near to Mary's House.
 - (4) Was involved in military procurement and had connections with MEBO.

So far as Fhimah was concerned, the Court said that diary entries referring to "taggs" was sinister in the context of airline baggage and the need to have special tags for unaccompanied bags. However unlike in Megrahi's case, the Crown had dropped its assertion he was a member of the JSO, the Libyan Secret Service, which enabled the Court to say that much of the Crown's case against him was speculation rather than legitimate inference.

The Crown also had difficulty linking Fhimah to the suitcase. Although the Crown's case was that Fhimah had taken the bag past security check points at Luqa, there was no evidence to suggest that Fhimah was even at Luqa airport on December 21, even though there were a number of witnesses who were there that day who knew him well who did not say he was there. This led the Court to conclude that there was insufficient corroboration for any adverse inference that might be drawn from the diary entries, which is a requirement of Scottish criminal law. The Court therefore acquitted Fhimah.

IV. The Maltese Connection and the Gauci Evidence

It is plain from the judgment that the single most important piece of evidence in the trial was the purported identification by Tony Gauci of al-Megrahi as the man who bought the clothing found in the wreckage from his shop some time shortly before the bombing. But for this 'identification'

there was little or no evidence to link al-Megrahi directly to the bombing. None of the other factors pointed irresistibly to guilt. As the Court recognised, although its case was that the two men had put the bomb on flight KM180 from Malta to Frankfurt, it could not show how or when this had been done. The Court described the absence of any explanation by the Crown of the method by which the bomb suitcase might have been placed on board KM180 as “a major difficulty” for the Crown’s case. It was therefore essential for the Crown to show that al-Megrahi was the man in the shop.

The Crown had further difficulties with two of its ‘star’ witnesses who gave incriminating evidence: Edwin Bollier, the owner of MEBO, and Abdul Majid, a Libyan CIA informant. The Court said that it was unable to accept Abdul Majid as a credible and reliable witness about anything, and it said that Mr. Bollier’s evidence belonged “to the realm of fiction where it may best be placed in the genre of the spy thriller.”

Almost everything, therefore, depended on Mr. Gauci and the reliability and accuracy of his evidence. His evidence therefore needed to be scrutinised with particular care.

Mr. Gauci first spoke to police in September 1989 when they went to his shop. He told them that he was able recall a particular sale about a fortnight before Christmas 1988, although he could not remember the exact date. The purchaser was a man, and he recognised him as being a Libyan. He bought an assortment of clothing, including Slalom shirts and other brands found in the wreckage. The Court said that although individual items could have been purchased in many other shops in Malta, or in other parts of the world, the exact match between so many of the items and the fragments found at Lockerbie was in its view more than just a coincidence. The Court said that it was satisfied that the items of clothing in the bomb suitcase were those described by Mr. Gauci as having been purchased in Mary’s House.

Mr. Gauci picked out al-Megrahi at an identification parade on August 13, 1999, using the words “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.” Number 5 in the parade was the first accused. He also identified him in Court, saying, “He is the man on this side. He resembles him a lot.”

These identifications were criticised by the defence on the ground that photographs of the accused had featured many times over the years in the media and accordingly purported identifications more than ten years after the event were of little, if any, value.

The evidence showed that Mr. Gauci had been interviewed a number of times and had changed his description of the man in the shop a number of times. Between 1989 and 1999 he was shown a number of photographs of different people, some of whom he said bore a resemblance to the man in the shop. The first time he made any link at all with al-Megrahi was on

February 15, 1991, when he attended police headquarters. He was asked to look at a number of photographs and a card of twelve photographs was put before him. He said: "The first impression I had was that all the photographs were of men younger than the man who bought the clothing ... 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." He said of the photograph of the person he had pointed out: "Number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same. And his chin and shape of face are the same. The man in the photograph number 8 is in my opinion in his 30 years. He would perhaps have to look about 10 years or more older, and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph 8 resembles the man who bought the clothing, but it is younger." He went on further to say: "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." He was then asked by a policeman if what he said was true and that this photograph was the only one really similar to the man who bought the clothing if he was a bit older, and he said: "Of course. He didn't have such long hair, either. His hair wasn't so large." DCI Bell later gave evidence that the person shown in photograph 8 was al-Megrahi.

One of the people identified by Mr. Gauci as the purchaser was a convicted Palestinian terrorist called Abo Talb, who later gave evidence that he had been in Malta in October 1988.

As to the date when the purchase occurred, Mr. Gauci was clear that it was raining while the man was in the shop. The defence called Major Mifsud, who between 1979 and 1988 was the Chief Meteorologist at the Meteorological Office at Luqa Airport. He was shown the meteorological records kept by his department for the two periods, December 7-8, 1988 and November 23-24, 1988. He said that on December 7, 1988 at Luqa there was a trace of rain which fell at 9:00 a.m., but apart from that no rain was recorded later in the day. Sliema is about five kilometres from Luqa. When he was asked whether rain might have fallen at Sliema between 6:00 p.m. and 7:00 p.m. in the evening of December 7, 1988, he explained that although there was cloud cover at the time he would say "that 90% was no rain" but there was however always the possibility that there could be some drops of rain, "about 10% probability, in other places." He thought a few drops of rain might have fallen but he would not think that the ground would have been made damp. To wet the ground the rain had to last for quite some time. The position so far as November 23, 1988 was concerned was different. At Luqa there was light intermittent rain on that day from noon onwards which by 1800 hours GMT had produced 0.6 of a millimetre of rain. He thought that the situation in the Sliema area would have been very much the same. Notwithstanding this evidence, however, the Court

concluded that the date of the purchase was December 7, which was a date upon which al-Megrahi's passport showed he was in Malta.

The Court's conclusion on Mr. Gauci's evidence and the date of the purchase was remarkable to say the least:

.... On the matter of identification of the first accused, there are undoubtedly problems. We are satisfied with Mr. Gauci's recollection, which he has maintained throughout, that his brother was watching football on the material date, and that narrows the field to 23 November or 7 December. There is no doubt that the weather on 23 November would be wholly consistent with a light shower between 6.30pm and 7.00pm. The possibility that there was a brief light shower on 7 December is not however ruled out by the evidence of Major Mifsud. It is perhaps unfortunate that Mr. Gauci was never asked if he had any recollection of the weather at any other time on that day, as evidence that this was the first rain of the day would have tended to favour 7 December over 23 November. While Major Mifsud's evidence was clear about the position at Luqa, he did not rule out the possibility of a light shower at Sliema. Mr. Gauci's recollection of the weather was that 'it started dripping – not raining heavily' or that there was a 'drizzle', and it only appeared to last for the time that the purchaser was away from the shop to get a taxi, and the taxi rank was not far away Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December.

Mr. Gauci's initial description to DCI Bell would not in a number of respects fit the first accused. At the identification parade the first accused's height was measured at 5'8". His age in December 1988 was 36. Mr. Gauci said that he did not have experience of height or age, but even so it has to be accepted that there was a substantial discrepancy ... We accept of course that he never made what could be described as an absolutely positive identification...but having regard to the lapse of time it would have been surprising if he had been able to do so. We have also not overlooked the difficulties in relation to his description of height and age. We are nevertheless satisfied that his identification so far as it went of the first accused as the purchaser was reliable and should be treated as a highly important element in this case

V. The Court's Treatment of the Defense Case

Prior to the start of the trial each of the defendants lodged a Notice in accordance with Scottish procedure in which they asserted that the bombing was carried out by members of the Palestinian Popular Struggle Front (PPSF) and the Popular Front for the Liberation of Palestine – General Command (PFLP – GC), including Abo Talb and others.

Evidence was given which pointed to the possibility that the bombing had been carried out by these Syrian backed Palestinian terrorists who were based in East Germany who also had access to timing devices and explosives. As is well known, the United States initially blamed the Syrians for the Lockerbie bombing and only began to accuse Libya when Syria became an ally against Iraq during the Gulf War in August 1990. The Court accepted that the evidence showed that the East German PFLP – GC cell had both the means and the intention to manufacture bombs which could be used to destroy civil aircraft.

The Court concluded, however, that although there was a great deal of suspicion as to the actings of Abo Talb and his circle, but there was no evidence to indicate that they had either the means or the intention to destroy a civil aircraft in December 1988.

VI. The Court's Conclusion on al-Megrahi

The Court said that a major factor in the case against al-Megrahi was the identification evidence of Gauci and that from his evidence it could be inferred that al-Megrahi was the person who bought the clothing which surrounded the explosive device. If he was the purchaser of the clothing, the Court reasoned, it was entitled to infer that he must have been aware of the purpose for which it was being bought. The Court said that having considered the whole evidence in the case, including the uncertainties and qualifications, it was 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 in particular fitted together to form a real and convincing pattern that al-Megrahi was guilty.

VII. The Appeal

The grounds of appeal lodged on behalf of al-Megrahi did not include any allegation that there was insufficient evidence to sustain a conviction. Some of the grounds of appeal asserted that the evidence was not of such character, quality or strength to enable a certain conclusion to be drawn or to justify a particular finding. The majority of the grounds were directed to the trial court's treatment of the evidence and defense submissions. More specifically it was maintained that the trial court misinterpreted evidence, had improper regard to collateral issues or wrongly treated certain factors as supportive of guilt. There were also challenges based upon an asserted failure to give adequate reasons or take proper account of certain evidence, factors and considerations. It was also maintained that the trial court misunderstood, or failed to deal with, or properly take account of, certain submissions for the defense.

The Appeal Court rejected these submissions in a lengthy 300 paragraph judgment. In relation to the crucial issue of Gauci's purported identification of al-Megrahi, the Court's conclusion was brief: the trial court heard Gauci, and was entitled to conclude as it did. Despite concluding at paragraph 293 that "Mr. Gauci did not make a positive identification of the appellant," the Court nevertheless concluded at paragraph 297 that "we are satisfied that it was entitled to treat Mr. Gauci's evidence of identification, so far as it went, as being reliable and as being a highly important element in the case."

VIII. Commentary

Despite their length and detail the two Lockerbie judgments have failed to convince many people that al-Megrahi truly is guilty and that Pan Am 103 was destroyed on the orders of the Libyan Government. Professor Hans Kuchler, one of the official UN observers of the trial and appeal, said: "I am sorry to admit that my impression is that justice was not done and that we are dealing here with a rather spectacular case of a miscarriage of justice." Although Professor Kuchler's views were criticised on the grounds that he did not understand adversarial procedure, many others who do also voiced their concerns about the conclusions reached by the two Scottish Courts. At the heart of the case was Gauci's evidence.⁴ This evidence and the use the Court made of it underpins many of the concerns about the verdict.

A. Identification Evidence

It has long been recognised that identification evidence is a form of evidence which is particularly prone to error. In 1972 in the 11th Report of the English Criminal Law Revision Committee, Evidence (General) (1972) (Cmnd. 4991), paras. 196, 197 and 199, the Committee stated that it had been much concerned by the danger of wrong convictions on account of mistaken identification of the accused. This it regarded as "by far the greatest cause of actual or possible wrong convictions." The Committee highlighted the difficulty that the identifying witness might very well be perfectly honest and clearly appear to be so and his evidence therefore might seem entirely convincing.

Following this report a number of cases established that juries in England and the Commonwealth have to be given a special warning about

⁴ *Id.* at para. 12, Day 31, *see* Lockerbie transcript at p. 4683 *et seq* (on file with author).

the dangers of mistaken identity because of the large numbers of erroneous convictions that have been based on faulty identification evidence.⁵

B. Gauci's Evidence

The trial Court concluded that Gauci's identification was "not an unequivocal identification" (para. 88). This is another way of saying "this is an equivocal identification", which is another way of saying that the man who bought the clothes was not proved beyond reasonable doubt to be Megrabi. The Court's conclusion that Mr. Gauci's evidence was reliable (para. 69) is contradicted by this conclusion. An identification cannot be both equivocal and reliable. The trial Court said that "a major factor in the case against the first accused is the identification evidence of Mr. Gauci." Therefore, if either the court's finding of fact was perverse, or the evidence was inadmissible, i.e. of no weight, and ought not to have been admitted, then the verdict against the defendant cannot properly stand.

There are good grounds for arguing that if the trial had taken place under English law Mr. Gauci's evidence would have been excluded under section 78 of the Police and Criminal Evidence Act 1984 on the grounds that it had been so undermined as to render it of no value.

It was not disputed that Mr. Gauci had seen photographs of the defendant in the newspapers⁶ long before he identified him at the identification parade in August 1999.⁷ Nor was it disputed that he had been shown numerous albums of photographs since 1989 in which he had identified other people as being the man in the shop.

On Day 31 of the trial, at page 4732 of the transcript, Gauci referred to the fact that he'd been shown a magazine photograph by another shopkeeper showing a man wearing glasses which he had shown a Mr. Scicluna and told him that the man looked like him, although the man in the shop was shorter and did not wear glasses.

On Day 31, at page 4787, Gauci agreed he had pointed out a photograph of Abo Talb and said that it resembled the man in shop a lot. This was confirmed by DCS Bell on Day 32, at page 4813. DCS Bell said, on the same day at page 4807, the man in the photo was similar to the man in the shop but the man in the shop was about 20 years older than the man in the photo. On Day 32, at page 4823, DCS Bell confirmed that Mr. Gauci had been shown a passport photo of a man named Abdelbaset and he said the man in the photo would have to look about 10 years older to look like the man in the shop. On Day 31, Mr. Gauci summed up what had happened

⁵ See, e.g., *R. v. Turnbull* [1977] Q.B. 224, 228 - 231; *Reid v. The Queen* [1990] A.C. 363; *R. v. Fergus*, 98 Cr. App. R. 313. This point is considered below.

⁶ *Lockerbie*, Day 31, see *Lockerbie* transcript, p. 4732 *et seq.*

⁷ *Id.* at *Lockerbie* transcript paras. 55 to 64; Day 31, p. 4735.

between 1989 and 1999 during the course of his interviews by the police: “I’ve seen so many photos.” (p. 4776.)

His eventual identification of the defendant at the parade in 1999 was unclear and far from definite.⁸ “Not exactly the man I saw in the shop 10 years ago. I saw him, but the man who look [sic] a little bit like exactly is the number five.”

It therefore seems clear that Mr. Gauci’s evidence was so hopelessly contaminated by what he had seen in the years between 1989 and 1999 that his evidence could not be regarded as reliable. Put simply, to the extent that he identified anyone at all, he identified someone he had seen in the newspapers rather than someone whom he had seen in his shop.

The reasoning the Court used to justify its conclusion that Mr. Gauci identified the defendant is extraordinary. It is also totally unconvincing and an affront to common sense. (Para. 69). The Court’s reasoning is essentially that because Mr. Gauci said he was less than certain, he was more reliable than someone who expresses themselves to be totally convinced. No doubt, if Mr. Gauci had expressed himself to be totally certain, the Court would not then have concluded that he was in any way unreliable. This shows the total lack of logic in the Court’s reasoning and that it made the fatal mistake of confusing credibility with reliability.

As explained above, there is a clear and consistent line of common law authority about the dangers of identification evidence. There is little trace in the judgements that the Court had conscious regard to these dangers. These dangers are not peculiar to England and the Commonwealth but also apply in Scotland also. The Court should have directed itself to have regard to the dangers inherent in this sort of evidence. The three principal cases are: *R. v. Turnbull*, *Reid v. The Queen*, and *R. v. Fergus*.⁹ Where a case depends wholly or substantially upon the correctness of identification evidence (as this case plainly does), *Turnbull* requires that a judge should: (i) warn the jury of the special need for caution before convicting on that evidence; (ii) instruct the jury as to the reason for such need; (iii) refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken; (iv) direct the jury to examine closely the circumstances in which each identification was made; (v) remind the jury of any specific weaknesses in the identification evidence; (vi) identify to the jury the evidence capable of supporting the identification; (vii) identify evidence which might appear to support the identification but which does not in fact have that quality.

Although it would not necessarily have been expected that the Court would refer to these principles in terms, the Court’s judgment does not

⁸ *Id.* Day 31, p. 4735.

⁹ *R. v. Turnbull* [1977] Q.B. 224, 228 - 231; *Reid v. The Queen* [1990] A.C. 363; *R. v. Fergus*, 98 Cr. App. R. 313.

show that it had regard to their underlying rationale, namely that identification evidence, more than any other evidence, is prone to error.

The Court also drew support from Mr Gauci's dock identification of the defendant as the man who bought the clothes.¹⁰ This type of evidence is generally worthless and for many years English courts have warned against its use.¹¹ The reason dock identifications have little value is that the witness is identifying the suspect because he is in the dock and not necessarily because he is the person the witness saw.

There is a further, very important, criticism that can be made of the judgement. The Court corroborated Mr. Gauci's evidence by reference to the fact that the defendant's passport showed he had been in Malta on December 7, 1988, which was the day the court concluded the clothes had been purchased. It therefore follows that if the Court was not entitled to reach this conclusion on the evidence then the corroboration of Mr. Gauci's evidence is weakened.

The Court's conclusion¹² that the clothing was bought on December 7, 1988 is also vulnerable to challenge. It is based upon an adverse inference drawn from primary evidence, namely, the evidence of the weather on November 23, 1988 and December 7. Mr. Gauci said the purchaser bought an umbrella because it was raining and that he put it up because of the rain. Major Mifsud said that on December 7, 1988 there was no rain all day apart from a trace at 9:00 a.m. He said that there was the possibility of a few drops of rain in Sliema. On November 23 at Luqa airport, where his office was situated, there was light intermittent rain. This evidence therefore is much more consistent with the clothing purchase having been on November 23 than December 7. Nevertheless, the Court concluded beyond reasonable doubt that the purchase was made on December 7. However because the burden of proof was on the prosecution, it can be strongly argued that an inference favourable to the defence should have been drawn, in accordance with the usual rules.

IX. Conclusion

The trial court's judgment contains numerous leaps of reasoning and analysis that on occasion defies logic. A reading of the appeal judgment makes clear that it is far from an independent determination that the trial court was right in the conclusions it reached. Until the findings of the trial court are subjected to a proper and rigorous scrutiny then doubts about the Lockerbie verdict will remain. In a case of such gravity and such

¹⁰ *Id.* Day 31, Lockerbie transcript, p. 4736 & 4737.

¹¹ *See, e.g.,* R. v. Cartwright, 10 Cr. App. R. 219; Noel Williams v. The Queen, [1997] 1 W.L.R. 548 (P.C.).

¹² *Id.* para. 67.

importance it is not acceptable that a man should be serving life imprisonment on the basis of such poorly scrutinised and flimsy material. It also does a grave disservice to the victims of this awful tragedy and their families to have so many questions remaining about whether a true verdict was returned or whether Libya was made a scapegoat for reasons of political expediency.

