APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 3
HCA/2020/5/XM

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Glennie
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

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

Appellant; Jackson QC, CM Mitchell QC, C Connelly; John Pryde & Co (for Aamer Anwar & Co, Glasgow)
Respondent: Clancy QC, AD, D Ross QC, N Gardiner; the Crown Agent

15 January 2021

1. Introduction

[1] The history of this case is well known. It was most recently set out in an opinion of the court dated 26 August 2020 ([2020] HCJAC 39, at para [8]), quoting from an earlier

statement of reasons relative to procedural matters. In summary, 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 aircraft (PA 103) which was flying from London Heathrow to New York. The plane disintegrated over Lockerbie at about 7.00pm on 21 December 1988. The trial was conducted without a jury by a bench of three judges. They produced a written opinion (*HM Advocate* v *Megrahi* 2001 GWD 5-177; https://www.scotcourts.gov.uk/docs/default-source/sc---lockerbie/lockerbiejudgement.pdf?sfvrsn=2), which set out their reasoning. This was a requirement of the Order in Council (High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (art 5(6))). A co-accused, namely Al Amin Khalifa Fhima, was acquitted.

[2] Mr Megrahi appealed against his conviction on multiple grounds. The appeal was refused on 14 March 2002 (*Megrahi* v *HM Advocate* 2002 JC 99) after what might reasonably be described as an exhaustive analysis of the evidence by a court of five judges. Five years later, on 28 June 2007, the case was referred back to the court by the Scottish Criminal Cases Review Commission under section 194B of the Criminal Procedure (Scotland) Act 1995 on certain specific grounds, which the SCCRC considered may have produced a miscarriage of justice. Mr Megrahi framed his subsequent appeal not only upon the grounds referred but also on others; some of which had been rejected by the SCCRC (see *Megrahi* v *HM Advocate* 2008 SLT 1008). Mr Megrahi abandoned his appeal on 17 August 2009 (*Al Megrahi* v *HM Advocate* 2009 GWD 29-467).

[3] On 6 March 2020 the SCCRC referred the case back to the court for a second time. The SCCRC considered a number of potential grounds of appeal, including some which had

been previously considered by the court in 2002. The subsequent Reference was restricted to two grounds. The first was that the verdict of the trial court was one which "no reasonable jury, properly directed, could have returned" (1995 Act s 106(3)(b)). This ground had been expressly disavowed by Mr Megrahi in the initial appeal (2002 JC 99 at para [369]). It is similar to one of the grounds which was abandoned in 2009. It was focused on whether the trial court had been entitled to find that Mr Megrahi had been the purchaser of certain items of clothing which had been in the suitcase carrying the bomb. The SCCRC were critical of the evidence of identification by the person who undoubtedly sold these items from his shop in Malta, namely Toni Gauci, and of the evidence from which the court concluded that the purchase had been made on 7 December 1988.

[4] The second was a contention that the Crown had failed to disclose certain specific documents to the defence. These mostly related to the reliability of Mr Gauci's identification of Mr Megrahi as the purchaser of the clothes and included various police statements and reports. This ground also encompassed the content of certain CIA cables relating to the testimony of Abdul Majid, otherwise known as Giaka. The SCCRC considered two protectively marked documents, which had been subject of a public interest immunity certificate at the instance of the Secretary of State for Foreign and Commonwealth Affairs. The SCCRC did not consider that the failure to disclose these two documents might have resulted in a miscarriage of justice. Having examined the PMDs, the court agreed and declined to override the PII certificate for the reasons given in its opinion of 20 November 2020 ([2020] HCJAC 54).

[5] The appeal in its current form encompasses the two grounds which were referred to the court by the SCCRC. The court did not permit the inclusion of an additional ground of appeal, which was based upon an allegation of a systematic failure of the Crown to disclose

documents, for the reasons set out in its opinion of 26 August 2020 (*supra* at paras [25] – [27]). The court did permit the inclusion of certain other documents, notably the CIA cables, to form part of the appeal in so far as they might have a bearing on the testimony of Mr Majid.

[6] This appeal is then concerned essentially only with two issues: (1) whether the verdict was unreasonable having regard to the quality of Mr Gauci's testimony; and (2) whether the disclosure of certain material would have created a real possibility of a different (ie an acquittal) verdict. In this context, the appeal is not directly concerned with an examination of evidence which might point to other persons or organisations being involved in the murder, except in so far as that involvement might exclude Mr Megrahi as a participant in the ingestion of the bomb onto an Air Malta flight to Frankfurt, from where it was transferred to the flight departing from London Heathrow.

2. Unreasonable Verdict

(1) Undisputed Facts

[7] The first ground of appeal is whether the trial court's verdict was unreasonable. The test for such a ground is considered later. The restricted nature of the grounds of appeal means that many facts, which were found by the trial court and were contested at the trial, in the original appeal and/or in the abandoned appeal, are not now challenged. The court must accept these facts as proved.

[8] They include that: (1) the bomb was located within a Toshiba RT-SF 16 radio cassette player, which had been placed in a suitcase containing a number of items of clothing and an umbrella; (2) these items and the umbrella had been bought in a single transaction from Toni Gauci's shop in St Mary's House, Sliema, Malta; (3) the clothing had been bought by a

Libyan; (4) Mr Megrahi was the head of airline security (a fairly high ranking post) with the Libyan Jamahiriya (people's republic) Security Organisation (JSO); (5) his co-accused was the station manager for Libyan Arab Airlines (LAA) at Luqa airport in Malta from 1985 to October 1988; (6) the co-accused travelled from Malta to Tripoli on 18 December 1988; (7) from 7 to 9 December 1988, Mr Megrahi was in Malta and staying at a hotel in Sliema, not far from the shop; (8) on the morning of 21 December, the suitcase left Luqa airport in Malta as unaccompanied baggage on Air Malta flight KM 180 to Frankfurt; (9) the check-in time for the flight was between 8.15 and 9.15am; (10) Mr Megrahi arrived in Luqa from Tripoli at 5.30pm on 20 December on the same flight as his co-accused; (11) he used a passport with a false name, which had been issued in June 1987 and was valid until June 1991; (12) Mr Megrahi had previously used this passport to travel to Nigeria in 1987 with Col. Nassr Ashur (*infra*); (13) Mr Megrahi and his co-accused visited the home of Vincent Vasallo, an associate of the co-accused, on the evening of 20 December; (14) at 7.11am on 21 December, Mr Megrahi telephoned his co-accused; (15) the check-in time for Mr Megrahi's flight back to Tripoli on 21 December was between 8.50 and 9.50am; (16) the passport with the false name was never used again; (17) Mr Megrahi usually used a passport in his own name, and had done so on 7 December, after which he had, on 9 December, left for Prague, returning to Libya via Zurich and Malta on 16 and 17 December; (18) there was no reason disclosed for Mr Megrahi's visit to Malta on 20/21 December; (19) from Frankfurt the suitcase was transferred by a feeder Pan Am flight PA 103A to Heathrow, where it was placed on board PA 103; (20) the timer which had been used in the bomb was an MST – 13, which had been manufactured by MEBO AG of Zurich, a company operated by Edwin Bollier and Erwin Meister; (21) several MST – 13 timers had been ordered from MEBO by the Libyan JSO; (22) the order had been made during a visit by Mr Bollier to Libya in July 1985

and had come from Said Rashid or Ezzadin Hinshiri, who were senior Libyan JSO officials; (23) Mr Rashid was Mr Megrahi's immediate superior; (24) 20 MST – 13 timers were supplied to Libya in three batches in 1985 and 1986; (25) in 1986 – 1987 Mr Bollier had acted as a technical expert at tests involving the use of MST – 13 timers, specifically in relation to air bombs, which were carried out by the Libyan military, including Col. Ashur, in the desert; (26) Mr Megrahi and Col. Ashur travelled together to Malta in August 1987, both using false passports; (27) Mr Megrahi would have been aware of airline security arrangements; (28) Mr Megrahi was involved in the procurement of military equipment including timers; (29) in 1988, MEBO leased part of their premises in Zurich to a firm, namely ABH, in which Mr Megrahi was a principal along with Badri Hassan; and (30) Mr Bollier travelled to Libya between 18 and 20 December 1988 in order to sell timers to the Libyan military.

(2) Identification in the Clothes Shop

[9] Mr Gauci ultimately identified Mr Megrahi in court as the purchaser of the clothes by saying: "He is the man on this side [of the dock]. He resembles him a lot".

[10] Mr Gauci had first been visited by the police on 1 September 1989. He was able to identify clothing and an umbrella, both of which had been in the bomb carrying suitcase, as originating from his shop. He had sold this clothing and the umbrella to a man, whom he said was a Libyan. The clothing included two pairs of trousers, three pairs of pyjamas, a Babygro, two cardigans and a faux Harris Tweed jacket. The man had said that the clothing was not for him.

[11] Parts of a typed statement of this date (Pro 452) were read to Mr Gauci during cross-examination. As with many of other parts of his statements, which were intermittently read

out by Mr Megrahi's counsel during the cross-examination of Mr Gauci, it was seldom confirmed whether Mr Gauci accepted that he had made these statements and, if so, whether what they contained was the truth. The cross-examination proceeded on a tacit assumption that the trial court would accept that he had made the statements, which were written by the police in English; albeit signed by Mr Gauci. Mr Gauci's native language is Maltese and he did not read English. Mr Gauci did say that he was being honest with the police and was telling them all that he could remember. In this first statement, Mr Gauci is recorded as having described the Libyan as 6 feet tall or more. This passage was read out to Mr Gauci in court, but he was not asked to comment on it. He testified that the person was "below 6 feet", of normal stature and with black hair.

[12] On 13 September, Mr Gauci collaborated with the police in composing a photofit image of the purchaser (Pro 430). This was followed by an artist's impression (Pro 427). Mr Gauci said that the resultant images were both "very close" to the face of the purchaser. The trial court's view on whether these images did bear a resemblance to photographs of Mr Megrahi is unknown. The court took the view (see 2002 JC 99 at para [102], which was prevalent at the time (*Gray* v *HM Advocate* 1999 SCCR 24), that it could not engage in an exercise of comparison. On the day after the visit by the police, Mr Gauci was shown 19 photographs (Pro 458). Although he said that one of the persons depicted was similar to the purchaser, that person was too young.

[13] On 6 December 1989 Mr Gauci was shown a photospread which included an image of an Egyptian, namely Abu Talb, whom Mr Megrahi, in due course, incriminated. Mr Talb had been in Malta from 19 to 26 October 1988. He was a member of the Palestinian Popular Struggle Front. Mr Gauci did not pick out any of the photographs. On 10 September 1990, Mr Gauci told the police (Pro 469) that he had not yet seen a photograph of the person who

had bought the clothes. On this occasion he was shown 36 photographs, one of which was of Mr Talb, but he did not pick it out. The statement of that date recorded that Mr Gauci had said that the purchaser had been about 50 years old. This was read out during cross-examination, but Mr Gauci was not asked to respond to it. On 26 September (Pro 461) and 31 August 1990 (Pro 468), Mr Gauci was shown further photospreads but did not pick out anyone, although he did say that some of the images showed persons with some similar characteristics to those of the purchaser.

[14] On 15 February 1991 (Pro 470), that is just over two years after the purchase of the clothing, Mr Gauci picked out Mr Megrahi's photograph (no 8) from a spreadsheet of twelve. Before being shown the photographs, the police had told him that the purchaser may not be shown in any of the photographs. In his statement of that date, Mr Gauci is recorded as saying that he had initially thought that the photographs were all of younger men. He was asked to look carefully at the photographs and to try to make allowances for any differences in age. He then selected the photograph of Mr Megrahi as similar, although the hair was too long. He is recorded as listing the facial features which had prompted his identification. He is noted as saying that the eyebrows, nose, chin and shape of the face were all "the same". The man in the photograph would have had to look about 10 years older or more to resemble the purchaser. This was the first occasion on which Mr Gauci had been shown a group of photographs which included one of Mr Megrahi. Mr Gauci is recorded as saying at that time: "I can only say that of all the photographs I have been shown, this photograph No 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". The latter part of the statement was an insertion into the statement suggested by one of the interviewing policemen. It was a reference to a photograph of Mr Talb which had been published in the

Sunday Times. Mr Gauci had seen this at the end of 1989 or the beginning of 1990. He had thought, at the time, that Mr Talb had been the purchaser. In his testimony Mr Gauci said that Mr Talb "resembled the [purchaser] a lot".

[15] On 13 April 1999, at an identity parade in the Netherlands, Mr Gauci picked out Mr Megrahi from a group of eight. He had again been told that the purchaser may not be in the line-up, but that, if he was there, he should give the number of the person referred to in his statement (ie the purchaser). Mr Gauci identified Mr Megrahi. He is recorded as saying: "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 No. 5" (Mr Megrahi). Prior to this, Mr Gauci had seen a photograph of Mr Megrahi in *Focus* magazine, but he did not know whether he was to be on the parade.

[16] At the trial, Mr Gauci was not challenged specifically on whether seeing the image in *Focus* had affected his identification. The defence tactic had been to draw out inconsistencies with earlier statements, but not to probe the matter of identification too deeply for fear of extracting a more definite one. Mr Gauci said that he had been shown the photograph of Mr Megrahi in *Focus* at the end of 1998 or 1999. He had shown it to the police and told them that the person depicted looked like the purchaser, but his hair was shorter and he was not wearing glasses.

[17] As already observed, the cross-examination of Mr Gauci often consisted of Mr Megrahi's counsel reading out parts of the many written statements which had been taken from him over the years, but generally not attempting to ascertain, presumably advisedly, what Mr Gauci's position was on what had been recorded and whether it was true.

[18] It was the trial court's impression that Mr Gauci had applied his mind carefully to the question of identification whenever he had been shown photographs. He did not just pick someone out at random. The court accepted that it was not an "absolutely positive identification" and commented that, after the lapse of time, it would have been surprising if it had been. The trial court's assessment was that Mr Gauci genuinely felt that he was correct in picking out Mr Megrahi as having a close resemblance to the purchaser. The judges were satisfied that the identification, so far as it went, was "reliable and should be treated as a highly important element in this case". They did so having regard not only to Mr Gauci's testimony, but to other evidence in the case.

(3) The Date of Purchase: the Christmas Lights, the Weather and the Football

(i) Mr Gauci

[19] During the course of examining Mr Gauci, the Crown attempted to establish the date of purchase of the clothing. There was no written record of this. Mr Gauci began by saying that he could not remember the date, but it was "slightly before Christmas… about a fortnight before Christmas". Some of the clothing had only been delivered to the shop on 18 November. The advocate depute asked when the street's Christmas lights had been put up. Mr Gauci replied that the lights were already on (at the date of the purchase). He was "sure". He then said that they were being put up. He said that he had told the police that the lights "were there" at the date of the purchase. The advocate depute put it to him that, in one of his police interviews (unspecified during the examination), he had said that the purchase had been made after the lights had gone up. He replied that he did not know. He was not sure of exactly what he told the police, but he believed that the lights were being put up. He repeated that it had been a fortnight before Christmas "or something like that".

[20] On the weather at the time, Mr Gauci said that it had not been raining when the purchaser had come in at first, but it had then started "dripping". Just what was meant by this was not pursued. The man bought an umbrella. He left the shop to find a taxi; returning with it to pick up the clothes. At this point Mr Gauci's brother had come into the shop, having been watching football on the television. At the end of his examination-in-chief, Mr Gauci said that he did not have any idea of what day of the week the purchase had taken place. It was agreed by joint minute that the Dresden v Roma game had been shown on television between 5.00 and 6.45 on Wednesday, 23 November 1988and the Juventus v Liege game had been on between 4.40 and 6.30 on Wednesday, 7 December. In cross-examination, parts of his statement of 1 September 1989 (Pro 452) were read out. These recorded Mr Gauci as saying that the purchase had been in the winter of 1988. The man had left the shop with the umbrella, which he had opened up as it was raining. Mr Gauci was not asked to respond to these passages during the cross-examination.

[21] The statement, in which Mr Gauci was recorded as saying that the lights were not up at the time of the purchase (Pro 454; 19 September 1989), was read out. This included a reference to the purchase having been "midweek". It recorded that the lights were put up about 15 days before Christmas. After some confusion caused by the interpretation facilities, Mr Gauci accepted that he had signed this statement. What he then said was that "there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes." He said that "maybe" at the time of the statement he thought that there had been no lights up at the time of the purchase.

[22] Part of the statement of 10 September 1990 (Pro 469) was read out. It recorded that Mr Gauci had said: "I can only say it was a weekday. There were no Christmas decorations

up, … and I believe it was at the end of November". Mr Gauci added that he could not tell whether it had been a weekday. They were already starting to put up the lights. He then digressed into whether the lights were up when the police had called at the shop. There was a shower of rain just before the man left the shop, but there was very little rain on the ground. There was no running water; it was just damp. There was no response by Mr Gauci to these parts of the statement.

[23] Parts of a statement of 21 February 1990 (Pro 466) were read out in cross-examination, whereby the man had bought and used an umbrella because it was raining. In court, Mr Gauci replied "Exactly" to this. The statement continued that, when the man returned to the shop, the umbrella was down because it had stopped raining; "it was just drops coming down". In court, Mr Gauci commented that when he (Mr Gauci) had collected the clothes to give to the man in the taxi, "it was not raining. It was just drizzling".

[24] Finally, in cross-examination, it was established that by "midweek", Mr Gauci was referring to Wednesday, but he did not know the dates. It was a day preceded by a Tuesday and followed by a Thursday.

(ii) Joseph Mifsud

[25] Mr Mifsud was a meteorologist who had been stationed at Luqa from 1979 to 1988. He gave evidence for the defence. He spoke to the records at the airport on 7 December 1988. These showed that there was no rain at Luqa airport on that date. He was 90% sure that there would have been no rain at Sliema either. It was 5 miles away as the crow flies. He could not exclude the possibility that there could have been a "drop of rain here and there" because there was cloud around. There had been rain showers on 23 November.

[26] In cross-examination, Mr Mifsud accepted that the weather varied from place to place in Malta. The cloud cover at Luqa on 7 December at 5.45pm was capable of producing rain. The records showed that, in the 24 hour period before noon on 8 December, there had been 3.3mm of rain in Sliema. In re-examination it was established that it had been raining from early in the morning of 8 December. Mr Mifsud accepted that there could have been some rain at Sliema on the evening of 7 December.

(4) The Luggage Tags

[27] The co-accused, as already observed, had been the station manager for LAA at Luqa from 1985 to October 1988. His 1988 diary was recovered from the office of Medtours in April 1991. Medtours had been set up by the co-accused and Mr Vasallo. At the back of the diary there were two pages of numbered notes. One, as translated, read "Take/collect tags from the airport Abdulbaset/Abdussalam". The word "tags" was written in English; the remainder was in Arabic. The diary entry for 15 December, which was preceded by an asterisk, read "Take taggs (*sic*) from Air Malta". At the end of that entry, and in a different coloured ink, was the annotation "OK". The word "taggs" was again in English. Another entry for 15 December read "Abdel-baset arriving from Zurich". Mr Megrahi passed through Malta on 17 December. As also already noted, the co-accused travelled to Tripoli on 18 December. He returned on 20 December on the same flight as Mr Megrahi.

[28] At 7.11am on 21 December there was a telephone call from the Holiday Inn in Sliema, where Mr Megrahi was staying, to the number of the co- accused's flat. In the context of the explosive device being placed on KM180 at Luqa in a suitcase, which must have had an interline tag attached to it to enable it to pass eventually on to PA 103, the trial

court regarded the diary entries as having "a sinister connotation, particularly in the complete absence of any form of explanation".

[29] The trial court held that the diary entries could not be used against Mr Megrahi. The court reasoned that they fell to be treated as the equivalent of a statement made by a co-accused outwith the presence of another. If both accused had been proved by other evidence to have been acting in concert, then the entries could perhaps have been used as general evidence in the case against them and any other person proved to have been acting in concert. As it had not been proved that the co-accused had been a party to the crime, it followed that the normal rule must apply and the entries could not be used against Mr Megrahi.

(5) Submissions

Appellant

[30] It was accepted that the test for a successful appeal under section 106(3)(b) of the 1995 Act was an objective and a high one (*Mackinnon* v *HM Advocate* [2015] HCJAC 6 at para [5], citing *McDonald* v *HM Advocate* 2010 SCCR 619 at para [27]). The appellant submitted that the evidence did not reach the required base line of quality for a conviction (*McDonald* v *HM Advocate* (*supra*) at paras [26]-[27]). In deciding whether the verdict was unreasonable, only the evidence which the trial court had accepted as credible and reliable could be taken into account. This did not include the evidence about the luggage tags which had been deemed inadmissible. It did not matter whether the court had been correct in that decision. The previous appeal court had not commented adversely on it.

[31] The Crown had relied on three important witnesses, *viz.* Mr Majid, Mr Bollier and Mr Gauci. There were significant difficulties with each of them. The trial court rejected

Mr Majid's evidence, other than in relation to the personnel of the Libyan JSO. It rejected Mr Bollier's testimony other than where there was extrinsic evidence to support it. Mr Gauci's evidence was "so riddled with deficiencies, contradictions and inconsistencies that no reasonable jury could have stamped it as reliable or credible" (*Mackinnon* v *HM Advocate* (*supra*) at para [10]). The appellate court required to reach a view on the evidence which the trial court saw and heard (*AJE* v *HM Advocate* 2002 JC 215 at paras [29]-[31]).

[32] Although the testimony of Mr Gauci started with the identification of the purchaser and went on to look at the date of the purchase, the trial court considered the date of purchase first and then used it as an adminicle to support the case for Mr Megrahi being the purchaser. There were difficulties with this.

[33] Eye witness evidence of identification was often regarded as potentially unreliable (*Carloway Review* (2011) at para 7.2.37). The problem was compounded when, as here, the witness was accepted as credible. The fallibility of eye witness identification had been highlighted in the *Bryden Report* on Identification Procedures (Cmnd 7096 (1978) at para 3.02). The nearer the time of the event to the date on which a witness is asked to identify the suspect, the greater the prospect of an accurate identification. The longer the period between the event and the identification, the greater the risk of error. Memory altered and faded over time (Scottish Court Service: *Evidence and Procedure Review Report* (2015) at para 1.20). It was well known that anything shown to a witness, which tended to suggest that a particular individual had been charged or was guilty of the offence, was likely to reduce or destroy the value of the identification.

[34] Mr Gauci's resemblance identification had to be seen in the context of his other resemblance identifications and against his original description of the purchaser. He had identified Mr Talb from the *Sunday Times* article. When he had said that, after that, he had

not seen a photograph of the purchaser, he was referring only to the police photographs. When asked about the photospread containing an image of Mr Megrahi, he had been invited to make allowances for any age difference. That was not normal. By being asked to look again, the identification process became improper. The identification parade had been tainted by Mr Gauci's possession of a photograph of Mr Megrahi from *Il Torca* (see *infra*). Similarly the dock identification was of no value.

[35] The evidence of Mr Gauci about the date of purchase was unreliable. The trial court had focused on two dates in 1988: 23 November and 7 December. This had been because it had misinterpreted the terms of the joint minute which had agreed the times of the football transmissions. The references to the purchase taking place "midweek", when Mr Gauci's brother had been watching a football match, did not take the Crown any distance in establishing when the purchase had taken place. Had the court held that it had been 23 November, Mr Megrahi would have been excluded as the purchaser and the link between him and the clothing would have been broken. The date of purchase as 7 December had been crucial to the Crown case.

[36] The trial court found that the evidence in relation to the weather and the Christmas lights enabled it to reach the view that the purchase had been on 7 December. There was undisputed scientific evidence that there had been rain on 23 November between 6.00pm and 7.00pm. Mr Gauci had said that, at the time of the purchase, it had been raining to the extent that the purchaser had bought and used an umbrella. The trial court said that the meteorologist had not ruled out a brief light rain shower, but Mr Mifsud had been referring to drops of rain and not to a shower. The trial court had not explained why it had rejected the expert evidence that the ground would not have been damp.

[37] No court could have been satisfied on Mr Gauci's evidence that the Christmas lights had been up at the time of the purchase, yet the trial court had held that to be the case. The evidence about the lights was hopelessly muddled. Mr Gauci had not, previous to his testimony, mentioned the period of two weeks before Christmas. It did not accord with his previous statements. The trial court had not explained its preference for the testimony over the prior statements. Whatever technicalities there may be in relation to the use of the statements, the trial court had proceeded on the basis that they had been made and could be taken into account.

[38] Mr Gauci's evidence was that a number of people in the photographs which had been shown to him bore similarities to, or resembled, the purchaser. At no point did he make an unequivocal identification of Mr Megrahi. The closest he came to such an identification was in identifying Mr Talb from the photograph in the *Sunday Times*. That had been sufficient to demonstrate that he had been the bomber, or at least to raise a reasonable doubt in the case against Mr Megrahi. Mr Talb had been in Malta in October 1988. Clothing manufactured in Malta and a barometric timer had been found in his home in Sweden. He was a trained and convicted terrorist. He travelled under different passports and was a member of the Palestinian Popular Struggle Front, which had a shared purpose with the Popular Front for the Liberation of Palestine – General Command.

[39] Although, in his testimony, Mr Gauci described the purchaser as below 6 foot tall, of normal stature with black hair and under 60, he had originally stated that he was 6 foot tall or more. When Mr Gauci picked out Mr Megrahi on 15 February 1991, he thought that the photographs were all of younger men. It was only after prompting that he had selected the photograph of Mr Megrahi. The identification at the parade had followed Mr Gauci having sight of the *Focus* magazine photograph. By the time of the parade, there had been

worldwide publicity in relation to the identification of Mr Megrahi as the bomber. The dock identification was similarly tainted. The trial court had not considered the inherent difficulties in eye witness identification evidence (see *Jenkins* v *HM Advocate* 2011 SCCR 575 at paras [42], [44] and [48]; *R* v *Reitsma* 1997 BCJ (British Columbia Judgments) No 2314; *Holland* v *HM Advocate* 2005 SC (PC) 3 at paras [47] – [50]).

(ii) Crown

[40] The advocate depute replied that the appellant had failed to meet the test of showing that no reasonable jury could have made the relevant findings and convicted Mr Megrahi. The Order in Council (*supra*), had not altered the statutory grounds of appeal. The criticisms of the trial court did not pay sufficient regard to: the role of the judges as finders of fact; this court's limited role in reviewing first instance findings; and the proper application of the test in section 106(3)(b) of the 1995 Act. It was not for the appellate court, but for the first instance judges, to weigh the testimony in an endeavour to ascertain where the balance should come to rest (*Al Megrahi* v *HM Advocate* 2002 JC 99 at para [33]). The assessment of the quality of the evidence was a jury matter (*Henry* v *HM Advocate* 2012 SCCR 768 at para [18]). The weight to be given to contradictions and inconsistencies in the evidence and whether they produced a reasonable doubt were all matter for the jury to decide (*Toal* v *HM Advocate* 2012 SCCR 735 at para [61]) as were questions of credibility and reliability (*Jenkins* v *HM Advocate* (*supra*) at para [44]).

[41] In deciding whether a verdict was unreasonable, individual items in the evidence should not be looked at in isolation but should be considered along with, and in the context of, the other testimony at the trial (*McDonald* v *HM Advocate* (*supra*) at para [27]). All the evidence could be looked at, not just that deemed admissible and accepted by the trial court.

Three areas of the trial court's reasoning, which were open to criticism, all operated in favour of Mr Megrahi. These were the misinterpretation of the joint minute, the exclusion of the co-accused's diary and the *laissez faire* approach to the statements.

[42] A mere reference to a statement when questioning a witness had no evidential value (Renton & Brown: *Criminal Procedure* (6th ed) at para 24-142.1). Such value could only arise if the reference was for a recognised purpose, such as contradiction (1995 Act s 263(4)), to prompt memory recall (*Jamieson* v *HM Advocate (No 2)* 1994 JC 251) or for adoption by the witness (1995 Act, s 260(2)(b)). Each required the use of particular questions; not just the reading out of passages (*A* v *HM Advocate* 2012 SCCR 384). In very few instances during the testimony of Mr Gauci were the requirements met. This had been a deliberate tactical decision made by the defence. It was intended to reduce the risk of Mr Gauci firming up in his identification of Mr Megrahi. The Crown did not accept that the court had treated all of the statements which were referred to in evidence as having been adopted and having become the equivalent of testimony.

[43] Mr Gauci's testimony was not to be considered in isolation (*McDonald* v *HM Advocate* (*supra*) at para [33]). His identification of Mr Megrahi was supported by other evidence. The suitcase had contained clothing and an umbrella from Mr Gauci's shop. It had been unaccompanied from Luqa. The bombing was a Libyan plot. Mr Megrahi was connected to MEBO and Mr Bollier. He was a member of the Libyan JSO. He was connected to the purchasers of the timers. The timers were relatively scarce. Mr Megrahi was using a false passport at the critical time.

[44] The trial court's unchallenged findings were important in assisting it to find Mr Gauci's identification of Mr Megrahi to be reliable. They were also significant for the determination of this ground of appeal. The court found Mr Gauci to be entirely reliable in

so far as he said that the purchaser was a Libyan. That had been his position since the outset. This chimed well with Mr Megrahi's contacts with the sellers and buyers of the timers. The trial court heard of four occasions on which Mr Gauci had identified Mr Megrahi as resembling the purchaser, including when, on 15 February 1991, he had been shown photographs, which for the first time included one of Mr Megrahi. The real importance of this was that he spotted a resemblance, despite the fact that his photograph showed Mr Megrahi as a younger man than the purchaser. It was significant that he had picked out a person who was: a Libyan; at Luqa airport using a false passport when the bomb was ingested; a member of the Libyan secret intelligence services; connected to the timer's suppliers and recipients; and had little interest in the clothing which he bought. The fact that, during the identification exercise, Mr Gauci had been asked to take account of any potential age difference did not direct him to any particular photograph.

[45] The second identification was at the identity parade in 1999. This identification was in response to the primary question of whether Mr Gauci saw the purchaser, as referred to in his statement, on the parade. It was not the secondary question of whether anyone on the parade resembled the purchaser. Mr Gauci had already seen the photograph in *Focus* magazine, but it was not put to him in cross-examination that this had affected his identification. That was a factor which the trial court was entitled take into account in relation to reliability (*Mailley* v *HM Advocate* 1993 JC 138 at 143). The third identification occurred at the trial when Mr Gauci was asked about the photograph in *Focus.* He had said that he had shown it to a Maltese police officer and said that it looked like the purchaser. There was no cross-examination in relation to the fourth (dock) identification based on any prejudicial influence of having earlier seen the *Focus* photograph.

[46] Mr Gauci had thought, when he had been shown the picture of Mr Talb from the *Sunday Times*, that it resembled the purchaser "a lot", but he did not say that Mr Talb was the purchaser. Mr Gauci had twice failed to pick out Mr Talb as the purchaser from selections of photographs. The court had regard to the resemblance identification of Mr Talb, but that did not undermine his identification of Mr Megrahi (see *Kelly* v *HM Advocate* 1998 SCCR 660). Mr Talb was not Libyan. As the trial court held, there was no evidence that he had either the means or the intention to destroy aircraft in December 1988. The various similarities, to which Mr Gauci referred when speaking of photographs of others, were all prior to his statement on 10 September 1990 that he had yet to be shown a photograph of the purchaser. These similarities did not, as the trial court also held, detract from his evidence about Mr Megrahi.

[47] The trial court held that Mr Gauci had applied his mind carefully to the question of identification. When he was shown photographs, he did not just pick someone out at random. When he did identify Mr Megrahi on 15 February 1991, he explained why; by reference to certain physical features being the same. This was noted by the trial court. It was not suggested that the features did not apply to Mr Megrahi. There was no evidence that this identification had been influenced by Mr Gauci having previously seen a photograph of Mr Megrahi. The trial court had been impressed by the way in which Mr Gauci had expressed reservations about the identification. It took into account the time lapse, but also the earlier identification from the photographs. The court had regard to the discrepancies in descriptions. It concluded that Mr Gauci's identification at the parade had been made because he genuinely felt that he was correct that this person bore a close resemblance to the purchaser. The trial court's conclusion on the reliability of the

identification was one which it was entitled to make. The court was entitled to take into account the dock identification as being consistent with the earlier ones.

[48] The trial court had first stated that it could infer from Mr Gauci's testimony that Mr Megrahi could be the purchaser. It held that Mr Gauci had definitely sold the clothes to a Libyan who closely resembled Mr Megrahi. The court said that it had determined that the date of purchase had been 7 December, and Mr Megrahi's presence in Malta on that date was consistent with the identification. The final stage in the analysis was when the court held that it had been Mr Megrahi who had bought the clothes by matching Mr Gauci's testimony with the other findings concerning his connections to MEBO and the Libyan purchasers of the timers.

[49] On the date of the purchase, the first component was that Mr Gauci's brother had been watching football. The trial court said that this had narrowed the date to a choice between 23 November and 7 December, but this had been based on a misreading of the Joint Minute. The second element was the weather; described by Mr Gauci as dripping/drizzling. This was not inconsistent with the testimony of the meteorologist.

[50] On the Christmas lights, Mr Gauci had said twice in his testimony that the purchase had been made about two weeks before Christmas. The trial court was entitled to accept that testimony. It was not inconsistent with the previous statements about this, which, in any event, had not been adopted by Mr Gauci or properly put to him as inconsistent with his testimony. Any confusion about whether the lights were or were not up did not detract from the testimony that the purchase was about two weeks before Christmas. It was the latter which the trial court had focused upon. In so far as the SCCRC had criticised the trial court in relation to inconsistencies with prior statements, they had misunderstood the approach of the trial court and the importance of testimony (ie evidence under oath). In any

event, the finding that the appellant was the purchaser was not dependent upon the purchase having occurred on 7 December. The date of purchase was not referred to in the trial court's final analysis.

[51] The Crown sought to prove that the purchase could have taken place on 7 December; not, as it had been said on appeal, that it must have taken place then. The defence had introduced the possibility that it might have been on 23 November. Mr Gauci had said that his brother had not been in the shop when the purchase had taken place and that he had probably been watching football; a matter which was not challenged by the defence. The court which heard the original appeal concluded that the trial court had misinterpreted the joint minute as confining the inquiry to the two Wednesdays, but that this had not been material as no other dates had been advanced. The evidence did not exclude the presence of Mr Megrahi in Malta on dates other than, as had been proved, 7 to 9 December. It was incorrect to conclude that Mr Megrahi could not have been in Malta on 23 November.

[52] Contrary to the trial court's decision, the evidence of the co-accused's diary was admissible against the appellant. The entries were part of the *res gestae* (*Hamill* v *HM Advocate* 1999 JC 190; Dickson: *Evidence* para 363; *McGaw* v *HM Advocate* [2019] HCJAC 78). They indicated that the co-accused had obtained Air Malta luggage tags for Mr Megrahi. Following *Gubinas* v *HM Advocate* 2018 JC 45, it may have been possible for the trial court to look at the photofit which Mr Gauci had produced and to draw its own conclusions on its value as identification by comparing it with other images in the case, including that of Mr Megrahi. The Crown were neutral on that.

(6) Decision on Unreasonable Verdict

(i) The Legal Test

[53] There is no dispute about the test which applies to this ground of appeal. It was recently outlined in *Smith* v *HM Advocate* 2017 JC 54 (LJG (Carloway) delivering the opinion of the court) as follows:

> "[37] The test in relation to the unreasonableness of a jury's verdict, as described in section 106(3)(b) of the 1995 Act, is an objective and a high one (*Geddes* v *HM Advocate* 2015 JC 229, LJC (Carloway), paras 4 and 88). It is only in the most exceptional of circumstances that an appeal on this ground will succeed (*Harris* v *HM Advocate* 2012 SCCR 234, Lord Bonomy, para 67). A verdict will be quashed only if the court is satisfied that no reasonable jury could have been satisfied beyond reasonable doubt that the appellant was guilty (*King v HM Advocate* 1999 JC 226, LJG (Rodger) p 230). The determination of fact remains the province of the jury, even if there must be a base line of quality (*McDonald* v *HM Advocate*, 2010 SCCR 619, Lord Carloway, para 27)."

[54] That high test having been set out, the final words of it remind an appeal court that the issue of reasonable doubt is not "at all times within the exclusive province of the jury" (*AJE* v *HM Advocate* 2002 JC 215, LJC (Gill) at para [29]). Although an appeal court is not at liberty to quash a verdict merely because it disagrees with it:

> "The court has to make a judgement on the evidence… and assess the reasonableness of the verdict with the benefit of its collective knowledge and experience" (*ibid* para [30]).

[55] The test is intended to apply only to the verdict of a jury, for which no reasons are given, rather than that of a judge or judges. Thus, the test does not feature expressly, for example, in summary cases in which the decision is made by a sheriff or justice of the peace sitting alone (cf 1995 Act s 175(2) and (5)). In summary cases, the grounds of appeal can be various but, if they relate to a finding in fact, the question of whether a miscarriage of justice has occurred will depend upon whether the evidence, as narrated by the sheriff or JP, was sufficient to justify the finding set out in the stated case. The question of reasonableness

may enter the equation if the court considers that the sheriff's or JP's reasoning for making the finding the fact is in some way flawed.

[56] In a solemn case involving a jury, where there is no such reasoning, the exercise which the court requires to carry out involves a consideration of the whole evidence and a determination of whether, on the evidence adduced at trial, a reasonable jury, properly directed, could have reached a verdict of guilt beyond reasonable doubt. The words "properly directed" are important. The appellate court must proceed upon a hypothesis that the jury was properly directed. If they were not, the court has to make adjustments. Thus, if it appears that a jury was wrongly directed to ignore certain evidence, that evidence falls to be reinstated into the equation (*Geddes* v *HM Advocate* 2015 JC 229, LJC (Carloway), delivering the opinion of the court, at para [89]). That has significance in relation to the trial court's treatment of the photofit image and subsequent drawing, to which Mr Gauci contributed on 13 September 1999, and, of more significance, to the court's approach to the Air Malta tags.

(ii) The Value of Written Statements

[57] It remains a significant aspect of the criminal justice system that accused persons are tried on the basis of evidence and not on the content of police statements. Evidence consists of the testimony of witnesses. Testimony is what the witness says under oath in court (or on commission) and is subject to cross-examination. Despite the prolific and, at least in the past, sometimes almost uncontrolled use of written statements by both the Crown and the defence in the wake of the Crown's declaration in *McLeod* v *HM Advocate (No 2)* 1998 JC 67 (see LJG (Rodger) at 71), this basic principle remains. Subject to certain statutory exceptions which do not apply here, written statements are not evidence unless and until they are

adopted by the witness (1995 Act, s 260(2)(b)). They cannot be used to prove fact (*Moynihan* v *HM Advocate* 2017 JC 71, LJG (Carloway), delivering the opinion of the court, at para [20]) unless that adoption takes place.

[58] There are sound reasons for this. In the modern era, the significance of the oath may not be as strong as it once was, but it is not entirely devoid of importance; especially when combined with the solemnity of the trial setting. There may be a difference between what a witness may say, and even sign, outwith the courtroom and what he or she may be prepared to swear in a public forum in which he or she knows that the testimony given may be the subject of close scrutiny and any falsity prosecuted as perjury.

[59] Of more significance is that a written statement may not, and in many occasions does not, wholly or accurately, reflect the words spoken by the witness. Rather they are, generally, a prose narrative of what the police officer, who is interviewing the witness, has interpreted as the witness's account from a question and answer session. This is easily illustrated from the first statement given by Mr Gauci on 19 September 1989, which contains, *inter alia*, the following:

> "DESCRIPTION
>
> I would describe this man as follows:
>
> He was about 6' or more in height. He had a big chest and a large head. He was well built but he was not fat or with a big stomach. His hair was very black. He was speaking Libyan to me. He was clearly from Libya. He had an Arab appearance and I would say he was in fact a Libyan, I can tell the difference between Libyans and Tunisians when I speak to them for a while. Tunisians often start speaking French if you talk to them for a while. He was clean shaven with no facial hair. He had dark coloured skin. He was wearing a dark coloured two piece suit. I think it may have been blue coloured. His overall appearance was smart. I will think things over tonight and try to recall anything else about the man. I cannot recall any rings or a watch on this man.
>
> I would say that the jacket was too small for him, although it was a 42 inch size, that is British inches. The man spoke to me all the time as a Libyan. He has not been in the shop before or since."

This is not the type of language which the witness would have used in answer to a general single question about the appearance of the purchaser. In this way, such statements are in a different category from pre-trial statements which are video/audio recorded and where there can be little doubt that the words of the witness were as replayed digitally in court. It is this type of recording that was recommended as the way forward in the Scottish Court Service: *Evidence and Procedure Review Report* (2015) (at para 1.2).

[60] Prosecutors and defence representatives may, and often do, seek to attribute great importance to what is recorded in a written statement. They may recite in questioning the well-known formula whereby persons are generally expected to have a better memory of events nearer the time of the incident about which they are being asked. This may be bolstered with a broad proposition, which many witnesses will accept with little reflection, that, at the time of the statement, they were trying to tell the police the truth. For a written statement to have any value as proof of fact, the witness must agree that what is recorded is what was said and that it was the truth (*Rehman* v *HM Advocate* 2014 SCCR 166, LJC (Carloway), delivering the opinion of the court, at para [50]). Even then, the court may not be prepared to accept exactly what is recorded as truth, given that its adoption by the witness in court may have been during what is effectively a leading of the witness and where the language used does not reflect that which the witness might normally employ. Where, as here, the witness is a native Maltese speaker, who cannot read English, the prospect of things being lost in translation (or rather the lack of it) increases. In any event, experience dictates that the importance of what is contained in written statements, as perceived by the legal representatives, is not necessarily shared by either judge or jury. The fact finder may prefer what is said in court rather than what has been said on earlier

occasions. There was therefore no reason for the trial court to have explained why testimony was "preferred", as it was put in submissions, to a written statement. One is evidence of fact; the other is not (see *Moynihan* v *HM Advocate* 2017 JC 71, LJG (Carloway) at para [20]).

[61] The next reason to be careful in relation to reliance being placed on a written statement as proof of fact, or as a contradictor of testimony given, is the limited scope within which a statement is normally made. It will have been circumscribed by the nature of the questions asked. That in turn will depend on the police officer's knowledge of the facts at the material time. In this case, in its typed form, Mr Gauci's first statement runs to some thirteen pages. There were at least another 19 statements of varying length available for use during the trial. Many of these were simply a formal recording of the answers to sometimes only a very few questions on a specific topic. The questions and answers are not recorded; merely the police officer's prose precis of what he or she thought was said or assented to. The central purpose of these statements is the progression of the investigation rather than a future trial; albeit that the latter may be a consideration in some situations.

[62] At the other end of the spectrum of value is the testimony at trial; the transcription of which in Mr Gauci's case runs to 105 pages. By the time of an examination-in-chief, a considerable portion of what is in a witness's statements will have ceased to have relevance or importance. Focus can be given, both at precognition and in court, on that which is relevant and important. These areas can then be subject to cross-examination. It is sometimes only then that the true meaning of what the witness was recorded earlier as saying comes to light. Misunderstandings may be uncovered and ironed out. With a witness who is accepted as credible, it is primarily on a consideration of what he or she says in the witness box that the judge or jury can gauge his or her reliability.

[63] All of this is intended to sound a cautionary note to those who might seek to place undue importance on the content of a written statement in comparison to, and its value as a testing tool of, testimony in the courtroom. This criticism becomes acute in a case such as this in which, for reasons of apparent caution, the prior written statements of Mr Gauci, whose provenance as signed documents was not an issue, were seldom the subject of questions posed to Mr Gauci to see if he agreed that what was written was what he had said and, if he had said it, what his explanation might be if a particular passage apparently contradicted his testimony. The method used by the defence consisted of reading out large selected passages from the statements and then refraining from asking a question which related to those passages. This has been explained as being accounted for by the defence's fear of Mr Gauci, if pressed too hard, becoming, or appearing to become, more certain in his identification of Mr Megrahi.

[64] Neither the prosecution nor the court sought to control what, in a jury trial, would now be recognised as an inappropriate use of statements. This may have been because of a hesitant approach to the use of such statements at the time of the trial in the immediate post *McLeod* (*supra*) era. It predated the detailed analysis of the problems which this form of statement use causes in *A* v *HM Advocate* 2012 JC 343 and, ultimately, *Rehman* v *HM Advocate* (*supra*, LJC (Carloway) at para [51]). Alternatively, it may have been that there was little concern on the part of those at the trial because it was being conducted not before a jury but before judges who would know what value to attribute to the statements either as proof of fact or as undermining reliability.

[65] What is clear now is that, if a witness's written statement is to be used during the course of his or her testimony, the legal representative seeking to make use of it must be in a position to tell the court at the time what the purpose of that use is intended to be. This was

made clear in the Practice Note (No 2 of 2017) which outlined the three most common uses, *viz*: (1) where a witness is unable, or purports to be unable, to recall the events but acknowledges that a statement was made and that it was true (*Jamieson* v *HM Advocate (No 2)* 1995 JC 251; (2) where the intention is that the witness adopts the content of a written or recorded statement (possibly in similar circumstances) in terms of section 260 of the 1995 Act; and (3) where the statement differs from the testimony and the purpose is to discredit the testimony (1995 Act, s 263(4)). Ascertaining which of three purposes had been intended by Mr Megrahi's defence at any given moment in the course of Mr Gauci's testimony is at best difficult and at worst impossible.

(iii) The Trial Court's Use of the Statements

[66] The evidential value of the statements in the context of this trial was very limited. It was a matter for the trial court to make of them what it thought appropriate. The extent to which the court had regard to the content of the statements, other than in the context of Mr Gauci's identifications from photographs or at the parade is within a narrow compass. The court did have regard to Mr Gauci's answer when it was put to him by the Crown that he had previously said that the purchase had been before the Christmas lights had been put up. His reply was not to adopt that statement, but rather to say that he was not sure what he had said to the police but that he believed that the lights were in the process of being put up. The court also considered Mr Gauci's response in cross-examination when it was put to him that he had said, in his first statement dated 1 September 1989, that the purchaser was six feet or more in height etc. The court accepted that in a later statement of 13 September, Mr Gauci had described the purchaser as about 50 years of age, when Mr Megrahi would only have been 36 at the time.

[67] The trial court had regard to the descriptions in the statements in the overall context of an identification process which had begun with the statement of 1 September 1989 and progressed through various stages, at which Mr Gauci picked out certain features of different individuals as resembling those of the purchaser from photographs shown to him, and culminated in the resemblance identification of Mr Megrahi on 15 February 1991. The interview after Mr Gauci had shown the police the photograph in *Focus* was also taken into account. He maintained that he had told the police something along the lines of "This chap looks like the man…".

[68] The statement of 19 September 1989 was noted as involving Mr Gauci saying that the purchase had been on a weekday when he had been alone in the shop because his brother had been watching football. The purchaser had bought and opened up an umbrella because it was raining. Mr Gauci agreed with that in his testimony, as he did in relation to a later statement of 10 September 1990, when he had said that a light shower had been just beginning. The trial court paid particular attention to the "difficulties in relation to his description of height and age" but it was satisfied that the identification of Mr Megrahi was reliable. This was a course which was open to the court when the whole of the evidence was considered. In so far as they did consider the contradictions in the statements as potentially undermining Mr Gauci's testimony, the court was giving to them an importance and relevance which was favourable to Mr Megrahi. The court was not obliged to place any significant value on many of the passages of the statements which were read out at some length, given the manner in which they were deployed by the defence.

(iv) The Evidence Overall

[69] The critical question for the trial court was not whether Mr Megrahi had been

identified beyond reasonable doubt as the purchaser of the clothes. It was whether it had been proved beyond reasonable doubt that Mr Megrahi had participated in the deliberate delivery of the bomb onto the Frankfurt flight from Luqa, with the bomb's eventual destination being on flight PA 103 from Heathrow. Mr Gauci's identification of Mr Megrahi as resembling the purchaser was but one of several elements in that proof. In analysing the evidence, it is not appropriate to isolate that of Mr Gauci's identification from these other elements. The evidence has to be looked at overall. In order to fulfil its obligation to provide reasons, the trial court had to narrate some of the evidence. That, of necessity, meant that one aspect (such as the date of purchase) may have been dealt with in the opinion before others. That does not mean that the trial court dealt with that aspect in isolation without looking at the whole of the evidence, with the various different elements intermingling with one another, before the court reached a verdict.

[70] In looking objectively at the evidence in order to determine whether a reasonable jury could have reached a guilty verdict, strictly the reasons as set out by the trial court are of little significance. They do throw light on how the trial court, as distinct from a hypothetical reasonable jury, reached the verdict which it did. The reasoning of the court was what was examined in the original appeal. In that appeal (2002 JC 100) the court was at pains to explain (para [22]) that the role of the appellate court was not to substitute its own views on what inferences ought to be drawn from the evidence. An appellate court, in this jurisdiction, does not retry the case (*ibid*). If evidence is capable of giving rise to more than one inference, it is primarily for the trial court to decide whether any inference should be drawn and, if so, which one (*ibid* para [25]). It is only if it was impossible, or under section 106(3)(b) unreasonable, to draw the relevant inference that an appellate court could hold that a miscarriage of justice has occurred.

[71] The court in the original appeal examined in detail the evidence of identification given by Mr Gauci (*ibid* para [288] *et seq*). In the context of an appeal based on a contention that the trial court had misdirected itself on the facts by failing to attribute sufficient weight to certain aspects of the evidence, the appellant faced an uphill struggle. Matters of weight are primarily for the trial court (*ibid* para [290]). The appellate court had regard to the criticisms which stemmed from differences between prior statements and testimony in relation to age and height. It concluded that the trial court had been entitled to come to the view that these factors were not of sufficient strength to justify rejection of the identification (*ibid* para [291]). The same applied to the prior resemblance identification of Mr Talb (*ibid* para [292]). Ultimately, the appellate court considered that the trial court had been entitled to accept Mr Gauci's testimony as reliable and as a highly important element in the case (*ibid* para [297]). In a sense, the appeal raises a very similar question to that which the court was asked in 2002. The answer may turn on whether the introduction of unreasonable verdict as the ground of appeal is capable of producing a different result. If there is a useful starting point in a quest for the answer, and there may be several to choose from, one is the MST - 13 timers. It is not disputed in this appeal that the timers, which were used to detonate the bomb, were sourced, by those directly involved in the ingestion of the bomb at Luqa, from Libya. It was to the Libyan JSO that MEBO had sold them. That is therefore where the bomb originated. Mr Megrahi was a senior member of the Libyan JSO. He had been involved in the purchase of timers. He was in Malta at the material time on a false passport. Not only that, he was in Luqa airport at the time when the bomb must have been ingested onto the flight to Frankfurt. In all of this, it is not without significance that Mr Megrahi did not testify at his trial. There was no account given by him to the trial court which might have explained any criminative circumstances.

[72] The trial court misdirected itself in relation to the evidential value of the co-accused's diary entries. These entries were not in the nature of hearsay statements, which are made by one co-accused outwith the presence of the other, after the event. They constituted direct evidence, if the court had chosen to accept it, which, coupled with other circumstances, could have led to an inference that the co-accused had been tasked with securing Air Malta luggage tags for Mr Megrahi. This formed part of the *res* gestae (see *McGaw* v *HM Advocate* [2019] HCJAC 78, LJG (Carloway), delivering the opinion of the court, at para [36]). As the court put it, this evidence was capable of having a "sinister connotation, particularly in the absence of any form of explanation". This must be so given that the suitcase must have had an interline tag attached to it to enable it to reach PA 103 unnoticed. This can be combined with the fact that the co-accused had been the station manager for LAA until October 1988. Mr Megrahi was head of airline security within the Libyan JSO. They had both travelled together to Malta from Tripoli on 20 December. Mr Bollier had been in Tripoli to sell timers between 18 and 20 December. On the following morning at 7.11am, on the day of the ingestion of the bomb, a call was made from the hotel in which Mr Megrahi was staying in Sliema to the co-accused's flat. These several latter factors added to the circumstantial case. That case would have been substantially stronger had the evidence of the luggage tags been taken into account, as it should have been.

[73] It is in the context of all the circumstantial evidence that the identification of Mr Megrahi as the purchaser of the clothes must be looked at. The testimony of Mr Gauci, in so far as he identified the purchaser as a Libyan, was not challenged at the trial. Mr Megrahi is a Libyan who was not only in Malta on several occasions prior to the ingestion of the bomb, but also stayed in an hotel in Sliema which was proximate to Mr Gauci's shop. That shop is on the same street as the Libyan Cultural Office (ie Embassy).

The purchase of the clothes was sinister in that the items which were bought were random. It would be a reasonable inference that they were being obtained for a purpose other than that they would ever be worn. The presence of Mr Megrahi as a member of the Libyan JSO in Malta on a false passport without explanation remains highly relevant to this aspect of the case.

(v) The Identification Evidence

[74] Eye-witness identification evidence can, in certain circumstances, be unreliable. This is well known and was something of which the trial court judges would have been acutely aware, given their many years of experience of High Court trials, both on the Bench and, prior to that, on both sides of the Bar. The problems can be particularly difficult where what is being relied upon by the Crown for a conviction is exclusively eye witness testimony which purports to identify a stranger of whom the witnesses have had but a fleeting glimpse. Concerns about eye witness identifications were expressly recognised in the court's Practice Note of 18 February 1977 and in the *Bryden Report* on Identification Procedure of the following year. Similar considerations apply where a witness has identified an accused in circumstances in which the witness has already been led to believe by others, or by circumstances, that the accused was the perpetrator. This may occur if the perpetrator has been pointed out to the witness, whether in person or by reference to a photograph, or where the witness is asked to identify the person for the first time some months or years after the event, when that person is readily seen in the dock of the court sitting between two security officers.

[75] These situations do not apply with any great force to Mr Gauci's identification of Mr Megrahi. This is so, albeit that there were several points of criticism of the identification

which could have been, and were, made at the trial. In the first place, this was not a fleeting glimpse situation. What happened in Mr Gauci's shop was unusual. It involved a person acting in an odd manner, by randomly purchasing a significant number of different items of apparel which were not for himself. This would have taken some time. The purchaser left and returned in a taxi. The ability of Mr Gauci to recall the details of the clothing which had been purchased was a factor to be considered in relation to his powers of recollection.

[76] Secondly, the trial court listened to a fairly full history of how Mr Gauci came to identify Mr Megrahi. He did not just suddenly pick him out in the dock of the court or even at the identity parade in 1999. On the first occasion that Mr Gauci was shown a photograph of Mr Megrahi, on 15 February 1991, he picked him out from a group of 12 images. He explained why he had done so under reference to several features of his face, which he described as "the same". When it is noticed that Mr Megrahi was a person who visited the area where the shop was located, and did so on the night before the ingestion of the bomb at Luqa, this identification takes on an air of considerable plausibility especially as it was not disputed that the purchaser was, as Mr Gauci always said, a Libyan. This then was a significant resemblance identification which the trial court was entitled to accept as reliable. It was not subject to any form of prior taint. The suggestion that this identification is somehow tainted by him being asked to make due allowance for any age difference is of no substance. It did not point Mr Gauci towards any particular individual in the images presented. Of course, the identification can be put into a context which involved identifying other persons in the many images shown to Mr Gauci as having certain similar facial characteristics to the purchaser. Nevertheless, his statement that the image of Mr Megrahi was the only one "really similar" to the purchaser was something which the court was entitled to regard as important, even if it was subject to a prompted qualification concerning

a previous identification of Mr Talb from his photograph in the *Sunday Times*. What is known is that the purchaser was not Mr Talb. He is not a Libyan but an Egyptian. There was no evidence that he was in Malta in November or December 1988. He may well have been involved in prior plots to destroy civilian aircraft, but there was no evidence that he had access to a MEBO-13, as distinct from a barometric, timer.

[77] In some cases, an identification of a suspect may be undermined by the circumstances in which it was made. Demonstrating that the witness has been pointed, whether deliberately or not, towards a particular image on a photospread or to a person on an identity parade is one method. Another is proving that the witness had access to an image of the suspect in advance of the identification. The passage of a substantial period of time between the relevant event and the identification can itself be a factor which might persuade a court to reject the identification as unreliable or even incredible. The fallibility of dock identifications was explored in detail in *Holland* v *HM Advocate* 2005 SC (PC) (Lord Rodger at para [47] *et seq*) and, as already observed, is well known to judges.

[78] The existence of factors which may undermine evidence of an identification does not normally render that evidence inadmissible (*ibid* at para [57]). Such factors, in one form or another and of varying strengths, are relatively commonplace in criminal trials. The presence of such factors does not *per se* render the identification valueless. It falls upon the finder of fact to decide whether these have influenced the witness in such a material way that the evidence of identification, whether using a photospread, at a parade or in court, should be regarded as irretrievably flawed and thus given no weight. Whether it is so influenced depends upon the particular facts and circumstances and, in particular, the court's assessment of the particular witness' credibility and reliability. That assessment is not carried out by looking solely at the testimony of that witness or his or her demeanour in

the witness box, but by taking into account all of the evidence which points towards, or away from, the accuracy of the identification.

[79] The credibility of Mr Gauci as a person who was doing his best to assist in the identification of the purchaser of the clothes was not impugned at the trial. That would have been particularly important when it came to an examination of his testimony by the trial court. The court accepted him as a person who was trying to tell the truth. The court was well entitled to form this view having regard to the manner in which he gave his evidence and the caution which he applied to his identifications. In that regard, the vast experience of the particular judges in such matters is not without significance.

[80] The trial court considered Mr Gauci's reliability with considerable care. In doing so, the court recognised that there were "undoubtedly problems" with his identification of Mr Megrahi. That was, and is, obvious. It was the focus of a significant part of the trial, as it is in many trials.

[81] The defence attempted to undermine Mr Gauci's reliability in a number of different ways. One was by the oblique use of the prior statements. The court had regard to the content of some of the prior statements at least in so far as Mr Gauci had had an opportunity to, and did, comment upon them. Specific mention was made of the discrepancies in height and age. Once more, such discrepancies, occurring in the course of an investigation and as they are explored in court, are common features of criminal trials. Their materiality is for the trial court to assess in the context of the evidence as a whole.

[82] Another means of undermining Mr Gauci's reliability was by pointing out that, by the time of the identity parade and the dock identification, Mr Gauci would have seen many images of Mr Megrahi in the media. That was not in dispute. It featured in the previous appeal (2002 JC 99 at para [300]). The fact that, having identified Mr Megrahi on

15 February 1991, Mr Gauci saw other images of Mr Megrahi, did not mean that his identifications at the parade and in court were valueless. Rather, as the court saw matters, they were consistent with his identification on 15 February 1991, which occurred before Mr Gauci had seen any photograph of Mr Megrahi. In that regard, contrary to the trial court's reasoning, it could also have had regard to the photofit and subsequent drawing, which Mr Gauci had helped to compose on 13 September 1999, and compared them, *quantum valeat*, with photographs of Mr Megrahi or even his appearance in court. Be that as it may, and the court makes no comment on what that may have led to, in a situation in which a court holds that a witness is doing his or her best to make an accurate identification at a parade or in court, a close resemblance identification at a parade or in the dock may be, as here, an important element in the proof, especially if there has been a prior identification from a selection of images, as occurred in this case.

[83] There was particular focus on the reliability of Mr Gauci in relation to the date of the purchase under reference to the Christmas lights, the weather conditions and the televising of certain football matches. Although the trial court resolved these matters in a manner which established a consistency of Mr Gauci's testimony with all three features, it is important to observe that, in an appeal based upon a contention of unreasonable verdict, the fact that a witness may be unreliable in one or more aspects of his recollection but not others may be of particular significance. Whether the Christmas lights were, or were not, up at the time of the purchase appears to be of peripheral significance when compared to whether Mr Gauci correctly identified Mr Megrahi as the purchaser. Similarly, whether it was raining on the day of the purchase may be seen as of marginal interest in determining the reliability of Mr Gauci's identification. The same applies to whether Mr Gauci's brother had been watching football on television. The pursuit of these matters at the trial certainly

provided scope for submissions concerning Mr Gauci's reliability. Nevertheless, the important testimony remained that: (1) a Libyan purchased the clothes at Mr Gauci's shop sometime between 18 November (when some of the clothes were delivered to the shop) and 20 December 1988; (2) Mr Gauci identified Mr Megrahi as closely resembling that person.; and (3) there was several other factors linking Mr Megrahi to the ingestion of the bomb at Luqa.

[84] The trial court resolved the question concerning the date of the purchase by reference to Mr Gauci's testimony that the clothes were purchased about a fortnight before Christmas. At the risk of unnecessary repetition, whether this was a variant on what he had been recorded by the police as having said previously did not, in the court's reasoning, materially undermine the estimate of time which he supplied under oath. If the defence had proved the prior statements, they could legitimately have commented that none of them had mentioned this two week timescale, but that is but one small factor in the equation. The trial court were entitled to regard it of little importance in the overall assessment of whether Mr Megrahi had been the purchaser.

[85] The appellant put considerable emphasis on the evidence which was led to prove that the clothes were bought on either 23 November or 7 December. The contention was that the meteorological evidence from Mr Mifsud pointed away from 7 December and towards 23 November. If it had been 23 November, there would, it was argued, have been no extraneous link to Mr Megrahi. This court was unable to ascertain from the parties what had led the prosecution and defence to focus on these two Wednesdays (as distinct from 30 November or 14 December). It may have been linked to the absence of the televising of football matches on other Wednesdays or what Mr Gauci's brother, who did not testify, had informed the authorities about his viewing. What degree of certainty was being placed on

Mr Gauci's ability to recall that the purchase had been on a Wednesday, as distinct from a Tuesday or a Thursday, was also unclear. If he was wrong about it being a Wednesday, which might not seem particularly surprising, a number of additional dates would have been opened up as potential purchase dates, including possibly even 20 December itself. The court must refrain from speculating, but it is unable at this juncture to place much emphasis on the date of purchase as of material significance. Although Mr Megrahi was proved to have been in Malta on 7 December, 16 or 17 December and 20 and 21 December, it is tolerably clear that his status with the Libyan JSO would have enabled him to have been present there, whether under another false passport or not, on other dates too, including those in November. The court is, in short, not persuaded that the evidence pointing away from 7 December as the date of the purchase ought to have undermined his identification of Mr Megrahi as a matter of reason or logic.

[86] Similar considerations apply to the evidence about the weather. Certainly, if the only options had been 7 December or 23 November, the testimony of Mr Mifsud could well be seen as pointing towards the latter. That, however, is to look at his contribution in isolation. Once the other evidence is taken into account, including Mr Gauci's testimony on the two week estimate, and it is realised that Mr Mifsud did not exclude the possibility of rain on 7 December, the trial court's conclusion, that the date of purchase was then, can only be seen as a rational one, even if it was not the only one open to it. It remains the case that neither the trial court nor this court perceived that the ascertainment of the precise day of the purchase was a crucial element of the proof.

(vi) Conclusion

[87] For these reasons, the contention that the trial court reached a verdict that no

reasonable court could have reached is rejected. On the evidence at trial, a reasonable jury, properly directed, would have been entitled to return a guilty verdict.

3. Non-Disclosure

(1) Non-disclosed Material relating to Mr Gauci

(i) Focus and It Torca

[88] The SCCRC referred the case to the court on the basis that certain documents, which were said to be pertinent to the credibility and reliability of Mr Gauci, ought to have been disclosed to the defence. The first document (doc 1) is an undated statement by Sergeant Mario Busuttil. This statement referred to Sgt Busuttil's visit with Detective Inspector Godfrey Scicluna to Mr Gauci's shop on 1 April 1999 when Mr Gauci had told DI Scicluna that in December 1998 a local shopkeeper had shown him *Focus* magazine. Mr Gauci said that it had contained a photograph of the purchaser of the clothes. On 9 April, Sgt Busuttil went back to speak to Mr Gauci and took possession of the magazine. Mr Gauci pointed to the photograph and said, in Maltese, "Dan Hu", meaning "That's him". The photograph was of Mr Megrahi. Sgt Busuttil had the magazine in his possession when he accompanied Mr Gauci to the Netherlands for the identity parade on 13 April. Sgt Busuttil gave the magazine to DCI Henry Bell in the Netherlands on 12 April.

[89] The second document (doc 2) was a report dated 20 March 1999 and entitled "Threat Assessment - Gauci Brothers". This revealed that, prior to the identity parade, Mr Gauci had seen a newspaper article in *It Torca*. This had contained a photograph of both accused. It was recorded as having had a "profound effect" on the brothers. As the title of this report indicates, it was about a potential threat to the Gauci brothers. *It Torca* was the local Maltese language newspaper and its coverage of the Lockerbie investigation had been on

28 February 1999. Mr Gauci's involvement had already been published by the *Sunday Times* in 1991, but the *It Torca* article related to the re-invigorated enquiry in early 1999. The profound effect related to the prospect of Mr Gauci being harmed as a result of his involvement. The report noted that persons, who had said that they were lawyers and whom Mr Gauci had identified as Libyans, had come into his shop in February 1999. Mr Gauci feared that his life might be in danger; in particular that his shop could be bombed. The report concluded that "he will make a good witness as his open honesty will shine through his evidence".

(ii) Reward Documents

[90] The next block of documents relates to the potential for the payment of a reward to Mr Gauci. These were, first, a memo from DCI Bell entitled "Security of… Gauci…" dated 21 February 1991 (doc 3). This followed Mr Gauci's identification of Mr Megrahi a few days earlier. It concerned the security arrangements which might be advisable should there be a leak of the fact of an identification. Such a leak was predicted to result in a withdrawal of cooperation by Mr Gauci. Mr Gauci was described as a reserved and introverted individual with a limited command of English. Consideration was given to Mr Gauci going abroad. It was noted that during recent meetings, Mr Gauci had expressed an interest in receiving money. He spoke of his awareness of the reward being offered by the United States, which had been reported in the press. It was thought that an offer of money might prompt Mr Gauci to consider a witness protection scheme. There was another memo from DCI Bell dated 14 June 1999 (doc 4). This noted that DCI Bell had had no contact with Mr Gauci since the "partial" identification on 15 February 1991.

[91] The next document was a police report dated 10 June 1999 (doc 5). This provided an overview of where the enquiry had reached at that time; looking towards a trial in the Netherlands. It referred to Mr Gauci as follows:

> "4.2 … His recollection of events has remained very clear and consistent over the years and this was reinforced when he identified one of the accused at a recent identification parade. This witness is well aware of his importance to the case.
>
> 4.3 … He is a humble man who leads a very simple life which is firmly built on a strong sense of honesty and decency. He accepts and understands his position as a witness, his integrity would not allow him to do otherwise. Although nervous he relates to his evidence in assured tones and his value lies, not only as it does critically with the content of his evidence but with him as an honest individual which will without doubt be apparent to the court.
>
> 4.4 His character is complemented by an appreciation of honesty and openness in others who deal with him. During his interview he became quite emotional when he reflected on his own position and how isolated he felt. He understands the role of the police agencies dealing with him but is somewhat frustrated that he will not be compensated in any financial way for his contribution to the case. … The witness has not any stage been offered any inducements of any kind in return for providing his evidence. Great care has been taken in that regard and if alleged at trial there is no doubt that the witness would refute it strongly. Nevertheless given the statements he has provided… there is now a need to review that situation. Other than when it is absolutely necessary for evidence gathering purposes, this witness should not be visited by the enquiry team. The need for officers who are not part of the current enquiry team and are not themselves witnesses should deal with all matters relating to this witness and his position as a witness."

The report recorded that Mr Gauci's brother, Paul, had a clear desire to gain financial benefit from the position that he and his brother were in. It continued by considering steps which might be required to protect Mr Gauci from harm. There was reference to him being approached by a Maltese solicitor who was acting for the defence and who pressed him on how much he had been offered or already paid. Mr Gauci continued to fear media intrusion. He had already refused money from the media and had no desire to accept offers of cash.

[92] There were then several entries in DCI Bell's diary. The first of those (doc 6) was dated 19 April 1990 and noted that the FBI were offering $3 million for information relating

to the terrorists. The next (doc 7) was on 9 May 1990 and recorded that DI Scicluna had said that there was to be no publicity about the offer of a reward. There is then one of 8 January 1992 (doc 8), which recorded discussions between the police and the FBI, whereby a reward would be paid to Mr Gauci only if he gave evidence. The final entry (doc 9) in this batch is on 23 March 1999. It noted Mr Gauci's misgivings about a trial, stating that he was afraid and wanted to go back to Malta.

[93] The next document is a report dated 12 January 2001 (doc 10). This was a post-trial nomination to the US Embassy for a reward under the Rewards for Justice programme. It recorded the Gaucis' contribution and observed that they had turned down paid press interviews. Although financial remuneration had not been discussed in detail, it said that the brothers may harbour expectations, although these could not be explored while proceedings were live. It was vital that the Gaucis continued to perceive that their position would be recognised. There is an updated report entitled "Anthony and Paul Gauci reward/compensation payments" (doc 11). This stated that, prior to the conclusion of the trial, the subject of a reward/compensation had not been discussed. The motivation of the Gaucis was not financial. Paul Gauci's contribution, in maintaining his brother's resolve, was referred to. It was considered critical that his contribution was recognised to preserve the brothers' relationship and to prevent any difficulties in the future.

[94] The final two documents are further entries from DCI Bell's diary. The first (doc 12) was dated 28 September 1989. It recorded that an FBI agent had said that he had authority to arrange "unlimited money" for Mr Gauci and $10,000 immediately. The second (doc 13) was from 5 March 1990. It said that, in discussions with the FBI, "Reward money mentioned but as a last resort".

(2) Submissions

(i) Appellant

(a) *Focus* and *It Torca*

[95] The appellant submitted that the statement of Sgt Busuttil (doc 1 *supra*) fell to be disclosed (*McDonald* v *HM Advocate* 2008 SCCR 954 at para [51]; *Holland* v *HM Advocate* 2005 JC (PC) 3 at paras [72]-[75]). The police had contacted the Crown regarding *Focus* magazine as they had raised an action on the HOLMES computer system "to note a statement from Mr Gauci specifically in relation to the viewing and handing over of the Focus magazine". The Crown had instructed that no statement should be taken from Mr Gauci regarding *Focus* as this had been covered in precognition. The precognition was not disclosed. There was no mention in DCI Bell's statement of the matter. Although DCI Bell told the defence that he had obtained the magazine when he was in the Netherlands for the identity parade, he did not mention the proximity of time between Mr Gauci's possession of the magazine and the parade or the length of time during which Mr Gauci had possessed it. There was information in Sgt Busittil's statement that would have assisted the identification of Mr Megrahi as Mr Gauci was reported to have said "that's him". However, that statement was made whilst pointing at a highly incriminating photograph of Mr Megrahi. The defence may have been able to argue that the value of such an identification was very low and the possibility of prejudicing any subsequent identification of Mr Megrahi was very high. Had the defence received Sgt Busittil's statement, it is likely that he would have revealed that Mr Gauci had been aware that Mr Megrahi was to be one of the people on the parade.

[96] The report dated 20th March 1999 (doc 2) indicated that, before the parade, Mr Gauci had been shown the article in *It Torca* which had contained photographs of both accused. This had had, in the view of the reporter, a "profound effect" on the Gauci brothers. This

information might have materially weakened the identifications at the parade and in the dock. Both documents could have been used as a basis for objecting to the identity parade and the subsequent dock identification (*RMM* v *HM Advocate* 2013 JC 153; *Holland* v *HM Advocate* (*supra*) at paras [47] – [50]).

[97] Alternatively the documents would have provided significant ammunition in the cross-examination of Mr Gauci. It would have prompted consideration of different tactical decisions. The defence may have decided to object to the admissibility of all of the identification evidence, based on the irregular procedure of the original photographic identification of Mr Megrahi, together with the possession of *Focus* in advance of the parade. There was a risk that Mr Gauci would have been influenced by the content of *Focus* especially as it could have been argued that Mr Gauci had already been influenced by media reports and had identified Mr Talb after he had seen media reports identifying him.

(b) Reward Documents

[98] If the court was not satisfied that the failure to disclose these documents alone was enough to satisfy the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28 (Lord Hope at para 24), it would be satisfied once the failure to disclose documents in relation to the reward monies (docs 3 to 8) was considered. Any information which would suggest that Mr Gauci was motivated by money would satisfy the test of being material to the proper preparation or presentation of the defence or was likely to have been of real importance in undermining the Crown case or casting reasonable doubt upon it (*McLeod* v *HM Advocate* 1998 JC 67). The failure to disclose these documents had denied Mr Megrahi a fair trial in terms of Article 6 of the European Convention.

[99] The Crown had been unaware of document 3 (memo from DCI Bell) pre-trial. Document 5 (police report) had been given to them by the police. It was of some importance in showing that Mr Gauci had expressed his frustration that he would not be financially compensated. Paul Gauci had shown a desire to gain financial benefit. The Crown had been under a duty to re-examine their case in light of the emerging lines of defence (*McDonald* v *HM Advocate* (*supra*) at para [60]). Information that Mr Gauci had expressed an interest in payment prior to the identification of Mr Megrahi, and his brother's desire to gain financially, was information which might have materially assisted the defence. Had the Crown made an inquiry into this, they would have been made aware of the reward documents 3 and 4, 6 to 8 and 12 and 13. The later documents 10 and 11 would have had to be disclosed when they became available.

[100] Document 5 (police report) was relevant for the same reasons, as were the further entries in DCI Bell's diary. The FBI had put out a notice about a $3 million reward for any information on the terrorists (doc 6). There was to be "no publicity" about this (doc 7). DCI Bell, DC Henderson and FBI Agent Bhiel had discussions about the payment of £2 million to Mr Majid. DCI Bell had been asking about the "Gauci reward"; the response being "only if he gives evidence" (doc 8). Mr Gauci had misgivings about going to trial (doc 9). FBI Agent Murray had the authority to arrange "unlimited money" (doc 12); DCI Bell discussed reward money with the FBI (doc 13). Document 10 would have fallen to be disclosed as it nominated the Gauci brothers for a reward. The fact that financial remuneration had not been discussed "in detail" suggested that it had been discussed and the brothers had some expectation of payment. Document 9 raised similar issues.

[101] At the trial the defence did not challenge Mr Gauci's credibility. It could have been put to him that he had tailored his evidence, having regard to the prospect of a reward,

either consciously or sub-consciously. Examination of the statements of Mr Gauci highlighted that, over time, his account and statements became more consistent with the police theory that the purchaser of clothing had been Mr Megrahi and the date of the purchase had been 7 December 1988.

[102] If Mr Gauci had denied that he had ever expressed an interest in money, this would have caused his credibility to be put in issue. Mr Gauci knew, as a result of the *Focus* article, that his original description of the purchaser did not fit that of Mr Megrahi. The defence would have been in a position to explore "the murky role of the FBI". It could have been pointed out that, on the occasion on which Mr Gauci identified Mr Talb as the purchaser, reward money had been mentioned. Had the defence been made aware of the exposure of Mr Megrahi to *Focus* and *It Torca* and the reward monies, there would have been a considerably different cross-examination. The "undoubted problems" with the identification would have been significantly exacerbated by finding out about: the close connection that the *Focus* article had to the identity parade; the fact that Mr Gauci knew that Mr Megrahi would be on the parade; and the comment that the *It Torca* article had had a "profound effect" on Mr Gauci and his brother. The disclosure of the reward monies would have provided a strong line of cross-examination, which would have suggested reasons why he might have changed that testimony.

[103] This ground of appeal raised a compatibility issue. The issues which were currently before the court had not been conclusively determined at an earlier stage. The issue had not been considered and determined previously.

(c) <u>The Majid Cables</u>

[104] The Court had not granted leave to introduce into the Note of Appeal a ground

which was based upon an allegation that the Crown's system of disclosure had not been fit for its purpose and that there had been systematic failure of disclosure and bad faith on the part of the Crown. The ground which included the Majid cables had been allowed in order to permit the Crown to explain the gradual disclosure of the CIA cables, but not to permit argument that the failure to disclose in a timeous fashion was an example of systematic failure in the disclosure process. The undertaking which had been given to the United States' authorities in relation to the cables should not have been given as it placed the Crown in difficulty with its disclosure obligations. The process by which the defence came to have these documents was highly irregular. It was only because of the perseverance of the defence that all relevant unredacted documents had been disclosed. The 26th cable had been disclosed to the defence and the defence did not take issue in that regard. The appellant had no further submissions on this part of the appeal.

(ii) Crown

(a) Focus and *It Torca*

[105] In order to put the undisclosed items into context, it was necessary to consider the evidence relating to them and the issue of prejudicial pre-trial publicity which had been raised in the first appeal. The defence had objected to the identity parade on the basis that Mr Megrahi's photograph had appeared in the media "thousands" of times. The December 1998 edition of *Focus* was lodged as a production and labelled as found in the possession of Sgt Busutill on 12 April 1999. The defence knew that 13 April was the day of the identity parade and that Sgt Busuttil had accompanied Mr Gauci to the Netherlands. Mr Gauci was asked about *Focus* in examination-in-chief. The defence did not cross-examine him on whether it had influenced his identification. The trial court took account of the fact that

Mr Gauci had seen photographs of the appellant prior to the parade and dock identifications. The court stated that its view was that, in making these identifications, Mr Gauci "genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser."

[106] When rejecting Mr Megrahi's submissions on pre-trial publicity, the appellate court said (para [302]) that:

> "… the defence must have been aware that Mr Gauci had seen the magazine containing the appellant's photograph. If it was going to be suggested that Mr Gauci's identification… had been influenced by seeing the photograph … that should have been put to Mr Gauci in cross-examination so that consideration could have been given to his response."

The Crown accepted that, in accordance with the authorities which post-dated the trial, it had a duty to disclose Sgt Busuttil's statement even if it contained little, if anything that the defence did not know from other sources.

[107] The information in the confidential report about Mr Gauci having been shown the article in *It Torca* may not have been disclosable given that the defence assumed that Mr Gauci would have seen a picture of Mr Megrahi in the press before the identity parade. During the trial, Inspector Wilson accepted in his evidence that Mr Gauci must have seen a picture of Megrahi in the press on many occasions. Prior to the trial, the defence had been told that *Focus* had been brought to the attention of the police in Malta in 1999 and that it contained a photograph of Mr Megrahi which Mr Gauci had said showed the purchaser. In DCI Bell's defence precognition, it was said that, at the identity parade, he had received from the Maltese police a magazine which had been given to them by Mr Gauci and which contained photographs of the appellant and his co-accused. The Maltese police had told DCI Bell that Mr Gauci had pointed out the photograph of Mr Megrahi.

[108] Any non-disclosure did not add significantly to what the defence knew, or assumed, prior to the trial. The material would not have provided a valid ground to challenge the admissibility of the identification evidence. The information of potential value to the defence in the confidential report was that, in early March 1999, Mr Gauci had been shown the photograph of Mr Megrahi in *It Torca*. The defence must have been aware that Mr Gauci might very well have seen a photograph of Mr Megrahi shortly before the identity parade, but they did not cross-examine Mr Gauci about his exposure to any such photograph.

[109] Putting the undisclosed material to Mr Gauci would have been risky. The defence had been highly risk averse when cross-examining him. The information revealed that, when Mr Gauci handed *Focus* to the Maltese police on 9 April 1999, he had said "dan hu" ("that's him"). That was a more definite identification than the resemblance identifications which Mr Gauci had made on other occasions. The use of Sgt Busuttil's statement would have run the risk of turning Mr Gauci's testimony from a resemblance into a positive identification. The confidential report contained information on the risks which Mr Gauci, and his brother, faced. The reference to *It Torca* having "had a profound effect on both brothers" was made in the context of their fears for their safety. It would not have been in the defence's interest to draw the attention of the court to Mr Gauci having identified Mr Megrahi when he considered that his life might be at risk. The report's assessment that Mr Gauci would "make a good witness as his open honesty will shine through his evidence…" was not something which the defence would have wished to highlight.

[110] At no point did the defence suggest to Mr Gauci that he was wrong or mistaken in his identification of Mr Megrahi. The defence were working on an assumption that Mr Gauci had seen photographs of Mr Megrahi in the media many times. They knew that Mr Gauci had seen *Focus*. Prior to trial the defence had considered cross-examining

Mr Gauci on his exposure to pre-trial publicity. It was thought that it would be otiose to go down that road in evidence. Mr Megrahi's trial counsel had reported that he did not think that *Focus* was a significant point. The approach to be taken in cross-examination had been discussed at length. This included whether there should be a "full scale frontal attack". All were agreed that *a "softly softly"* approach should be taken. The defence regarded Mr Gauci as an unpredictable witness and were conscious of the danger of his firming up his evidence.

[111] The question of whether or not an accused is truly identified by a witness is a question of fact for the jury; not a question of law for the court (*Kerr* v *HM Advocate* 2002 SLT 582, at 588; see also *Holland* v *HM Advocate* (*supra*) at [51]-[53]). Neither the information contained in Sgt Busuttil's statement nor that in the confidential report would have provided any basis for challenging Mr Gauci's identification of Megrahi from the photospread on 15 February 1991. Even if the court had come to the view that the parade and dock identifications were unreliable, it would have treated the earlier identification from the photographs as reliable. That identification, taken in conjunction with the other evidence which incriminated Mr Megrahi, fitted together to form the same "real and convincing pattern" which the court found established.

[112] If Mr Gauci had simply been picking out the person whose image had been in the newspapers, his identification would have become more definite. Instead, what he said in picking out Mr Megrahi disclosed the same careful, qualified approach which he had taken earlier and which had commended itself to the trial court. The court would have known that Mr Gauci was not consciously or sub-consciously seeking to do his best to bolster the Crown case (see *Affleck* v *HM Advocate* 2010 SCCR 782 at [39]). The court had given careful consideration to Mr Gauci's identification. It took account of the nature of what was a

resemblance identification, the passage of time, the witness's demeanour and the care with which he expressed himself. When all of these factors are taken into account, it is highly unlikely that the court would have reached a different verdict.

(b) Reward Documents

[113] There was no suggestion that the Crown had the memos from DCI Bell (docs 3 and 4 prior to the trial. The police report (doc (5) contained no information relating to Mr Gauci which the Crown were under a duty to disclose.

[114] The extracts from DCI Bell's diary were not disclosable. Some (docs 6 to 8) contained no information which is attributed to Mr Gauci or about him. One (doc 6) was about something which was in the public domain by the time a petition warrant had been issued for Mr Megrahi in 1992. By that date the comment attributed to DI Scicluna in another extract(doc 7) had been overtaken by events. The defence had been well aware of the existence and the publication of the offer of a reward. The comment attributed to Mr Gauci in the other extract (doc 8) had nothing to do with rewards. Far from suggesting that Mr Gauci was motivated to give evidence favourable to the Crown by an expectation of obtaining a reward, it suggests that he did not want to give evidence at all.

[115] The reports (docs 10 and 11) post-dated the trial. They did not fall to be disclosed. The possibility that the Gauci brothers could be nominated for a reward from the US Government was public knowledge before the trial and was known by the defence. Both documents contained favourable comments about the integrity of the Gauci brothers and the absence of any motivation on their part to obtain financial gain from their involvement. The two further extracts from DCI Bell's diary (docs 12 and 13) were not disclosable. They contain nothing in the nature of a statement from Mr Gauci.

[116] None of the documents would have materially altered the defence approach at the trial or caused them to mount a challenge to Mr Gauci's credibility. Prior to the trial the defence were aware from Mr Gauci's statement of 4 November 1991 (Pro 471) that he had discussed a witness protection scheme. They would have known that this might involve payments to him to cover travel or living expenses and to compensate him for loss of income. A Maltese lawyer, who had been acting for Mr Megrahi, had asked Mr Gauci about any payments which he had received from the police. Had the documents been disclosed prior to Mr Gauci giving evidence the defence might have precognosced the persons involved. They would have then have discovered the true context and meaning of DCI Bell's observations in the memorandum of 21 February 1991 that Mr Gauci was not asking for a reward or how to obtain one. They would have discovered that Mr Gauci had refused offers of payment in exchange for press and media interviews. The defence would have seen that cross-examination on this issue would have proved fruitless. They would have been aware that it could have been counter-productive because Mr Gauci might have revealed that he had been offered inducements by the Libyans before he gave evidence. This was put on record by the senior investigating officer on 7 February 2001. They would in all likelihood have concluded that the risks attached to cross-examination using this material outweighed any potential gain.

[117] There was no comparison with Mr Majid, who was an informer paid by the CIA and had a known expectation of receiving further rewards. The trial court found Mr Gauci to be "entirely credible". No contrary submission was made by the defence. Expressing an interest in a payment was not the same as asking for a reward for giving evidence. Mr Gauci was not a paid informant. He had already provided information to the police about the purchaser before any of the events referred to in the documents.

[118] The prospect of a reward could not explain Mr Megrahi's connection to the MST-13 timers or his use of the false passport on the day of the bombing. The suggestion that Mr Gauci's evidence was coloured by his expectation of a reward was inconsistent with his careful approach to identification at every stage. There was no enhancement of Mr Gauci's identification of Mr Megrahi from the first identification in February 1991 to the trial. Even when it was put to him that, referring to the photograph of Mr Megrahi in *Focus*, he had said "*dan hu"* he adhered to a resemblance identification. Similarly he did not play down his resemblance identification of Mr Talb. Equally speculative were the suggestions that the expectation of a reward may have changed Mr Gauci's view on the date of purchase to nearer Christmas and that his police statements became more consistent with the theory that Mr Megrahi was the purchaser and that the date of purchase was 7 December. His police statements did not support these suggestions and they are in any event not equivalent to his testimony.

[119] It was apparent that Mr Gauci was not trying to match the *Focus* information in his evidence. He said only that the purchaser was under six feet and under 60 years of age. It was obvious that this alleged change in his position did nothing to enhance or detract from the resemblance identification which dated back to February 1991. In the absence of any attempt by Mr Gauci to enhance his identification the trial court would not have concluded that his evidence on height and age was motivated by a desire to obtain a reward.

(c) <u>The Majid cables</u>

[120] Disclosure of redacted versions of the 25 cables was made on 5 November 1999 prior to the trial. A further set with annotations explaining the redactions was disclosed on 29 February 2000. The Crown were able to view copies of largely unredacted

versions of the 25 cables on 1 June 2000, after the commencement of the trial. The purpose of this was to look for any redacted passages which might fall within the scope of disclosure. The conclusion reached was that there were none. On 21 August 2000 the Crown told the defence about the viewing of the unredacted cables. On 22 August 2000 the defence raised this matter with the Court. The Crown informed the court that the Crown had disclosed details of payments made to Majid in a separate production. On 25 August 2000 a third version of less redacted cables was disclosed. Some of these cables revealed information about Majid, about payments received by him from the CIA and about information which he had given to the CIA. On the same date the 26th cable was disclosed. The Court heard lengthy submissions about the cables. The Crown undertook to carry out a review. As a result, 35 additional cables were disclosed to the defence on 19 September 2000 and a further cable on 21 September. The Crown did not know of any of these additional cables prior to 30 August 2000. On 21 September the court refused further defence motions for orders inviting the Crown to call upon the CIA to produce more information and for letters of request.

[121] The circumstances surrounding the Crown's handling of these cables were exceptional and difficult. The cables were the property of the CIA and were subject to stringent conditions of secrecy. The Crown were initially given access only to redacted versions and, with one exception, all of these were lodged in court. Prior to the trial, the Crown also lodged documents itemising payments received by Mr Majid from the CIA for information supplied by him as an undercover informant. The Crown lodged other productions concerning Mr Majid which were used in cross-examination of him. The Crown had no knowledge of the additional material in the original 25 cables until the less redacted versions were viewed on 1 June 2000. It was as a result of the Crown

examining the less redacted versions in June 2000 and informing the defence about these that the issue was raised in court and the less redacted cables, the 26th cable and the additional cables were disclosed. The assessment made, that the redacted passages in the original 25 cables and the 26th cable did not contain disclosable material, had been in good faith. The Crown did procure the lodgement of the less redacted cables and the 26th cable following the undertakings given on 22 August. They obtained and lodged the previously unseen 36 cables in pursuance of the undertaking given by the Crown on 30 August 2000. There was no question of Mr Megrahi having been deprived of a fair trial by the late disclosure of the less redacted versions of the original 25 cables or the copies of the other cables. All of these had been available for use in discrediting Mr Majid by the time he gave evidence. There was no question of any enduring breach of the Crown's disclosure obligations giving rise to a miscarriage of justice. All of the relevant passages in the cables were disclosed before Mr Majid gave evidence.

[122] A redacted version of the 26th cable was in the possession of the Crown before the trial. At the pre-trial stage this cable was not considered to fall within the scope of the Crown's disclosure obligations. Dumfries and Galloway Police had taken statements from Mr Vassallo in 1991. The information provided by him was helpful to the Crown. He was known to be an associate of the co-accused and had been in contact with Mr Megrahi. By 1999 he was known to be a reluctant witness. Mr Vassallo was questioned under oath by a Magistrate at Valletta on 6 September 1999. He said that he was willing to travel abroad from Malta to give evidence at a trial provided that his expenses were paid. In November 1999 a decision was taken not to disclose the 26th cable because of the risk that its content would become known to Mr Vassallo if he was asked about it by the defence. In this cable Mr Vassallo was said, by Mr Majid, to be an asset of the Libyan External Security

Organisation to whom he passed documents, including a report typed in Arabic on an individual of interest to them. This information was believed to be inaccurate because it was known that Mr Vassallo did not speak (and could not write) Arabic. It was thought that Mr Vassallo might go back on his commitment to attend the trial if he knew that he might face an allegation of being an asset of the ESO.

(3) Decision on Disclosure

(i) The Legal Test

[123] At the time of the trial, a document would be disclosable if it would have been material to the preparation or presentation of the defence (*Macleod* v *HM Advocate (No. 2)* 1998 SC 67, LJG (Rodger) at 78). This would occur when the crown were aware of a document which either materially weakened the Crown case or materially strengthened that of the defence (*McDonald* v *HM Advocate* 2008 SCCR 954, Lord Rodger at para 50).

[124] It was not disputed that, at the appellate stage, the critical question was whether, after taking full account of all the circumstances of the trial, there was a real possibility that the jury might have come to a different verdict if the material, which ought to have been disclosed, had been available to the defence (*McInnes* v *HM Advocate* 2010 SC (UKSC) 28 , Lord Hope at para 24).

(ii) Focus and It Torca

[125] It is clear that, prior to the identity parade and the trial, Mr Gauci would have seen several photographs of Mr Megrahi in the media. The defence were aware of this. The fact that Mr Gauci had seen Mr Megrahi's photograph in the December 1998 edition of *Focus*, not long before the identity parade in April 1999, was raised by the Crown in evidence-in-chief. In answer to a somewhat leading question, Mr Gauci spoke to taking the magazine and

showing it to DI Scicluna after a fellow shopkeeper had shown it to Mr Gauci at the end of 1998 or the beginning of 1999. The Crown asked Mr Gauci to identify the magazine, which he did. Mr Gauci was directed to the photograph in the centre of the page "of a man wearing glasses". He was asked: "Did you recognise that photograph (*sic*)?" He replied: "That day I thought he looked like the man who bought from me, but his hair was much shorter and he didn't wear glasses". Mr Gauci's recollection was that he had said "This chap looks like the man … Something like that I told him". It was put to Mr Gauci that he had said to DI Scicluna "that's him", but Mr Gauci did not accept that. He said that he could not remember what he had said other than that: "This man looks like the man …". The Crown did not pursue the matter and neither did the defence.

[126] The content of Sgt Busuttil's statement, which covered this matter, would have made no difference to the defence's preparation or presentation of the case. The defence had already determined that a confrontational cross-examination of Mr Gauci was a high risk strategy since they were apprehensive that he might firm up in his identification. Had the content of Sgt Busittil's statement been used, it would have emerged, as already noted relative to its content, that Mr Gauci had positively identified Mr Megrahi as the purchaser to DI Scicluna and later to Sgt Busittil, to whom he had given the magazine. The reference to "That's him" would have become evident, thereby potentially altering the identification from resemblance to positive.

[127] None of the material provided grounds for objecting to either the parade or dock identifications beyond those already available to the defence. It had already been the defence's position, relative to their plea in bar of trial on the basis of pre-trial publicity, that Mr Gauci had seen many images of Mr Megrahi prior to the identity parade (see 2002 JC 99 at para [300]). The fact that he had seen a photograph of Mr Megrahi in *Focus* prior to the

parade was known to the defence and brought out during the trial. If it had been the defence's contention that seeing such images had influenced Mr Gauci's identification, that is something which ought to have been put to him for comment (see 2002 SC 99 at para [302]). It was not. Although that would not debar the defence from making the point in submissions, the trial court would have been entitled to have regard to the absence of cross-examination in determining the materiality of this prior exposure to photographs of Mr Megrahi. Since the defence elected not to pursue the matter with Mr Gauci, it is not surprising that it did not feature prominently in the court's reasoning. The court determined that Mr Gauci was not a person who was doing other than his best when identifying the purchaser.

[128] The information in the confidential report that Mr Gauci had also seen a photograph of Mr Megrahi in *It Torca* is in a similar category. Seeing such a photograph in *It Torca*, when it was already known that he had seen one in *Focus*, added nothing to the defence's case in terms of undermining the prosecution. Rather, the fact that Mr Gauci was prepared to proceed with an identity parade and to identify Mr Megrahi at trial in the face of perceived dangers to his life would have been seen only to strengthen that identification. The context of the report was the potential harm to Mr Gauci as a witness in the case. It did not contain anything which would have undermined the Crown case or augmented that of the defence. On the contrary, the terms of the report would have portrayed Mr Gauci as an honest citizen who was trying to do his best in a very difficult and potentially threatening situation. Had the information in these documents been available to the court, they would have made no difference to the verdict. The availability of photographs of Mr Megrahi prior to the identifications at the parade and in court was known to the court. It was something which the court took into account. Of significance was that none of these images had been

available to Mr Gauci prior to his identification of Mr Megrahi from the photospread on 15 February 1991.

(iii) Reward Documents

[129] The undisclosed documents do not indicate that Mr Gauci was motivated to testify, or to identify Mr Megrahi, because of the prospect of a reward. Quite the contrary; they portray a person with a reserved and introverted personality but with a strong sense of honesty and decency. The documents illustrate a situation in which Mr Gauci, as such a person, was naturally concerned about his own safety but who was nevertheless compelled by his character to provide such information to the investigating authorities as he could and to testify accordingly. The passages quoted (*supra*) from the police report of 10 June 1999 exemplify this and perhaps also show a degree of frustration that he would not be compensated for the trouble he had taken and the perceived risks that he was facing. The police and prosecuting authorities were careful not to make any inducements to Mr Gauci in return for him giving evidence. In the case of Mr Gauci, with his strong attachment to his home, the offer of witness protection does not fall into the category of an inducement.

[130] The potential for reward monies to be paid was an obvious line for the defence to have run, if there was any basis for it to have been used in cross-examination or otherwise. It was a matter for the defence to make suitable inquiries in that regard. It is tolerably clear that the defence would have been aware of the existence of a potential reward at the instance of the United States' government, but this was not pursued at the trial. This was no doubt advisedly so. All that would have been achieved would have been a strengthening of Mr Gauci's credibility. He would have been able, as the police report of 10 June 1999 states, to refute this strongly. The defence had attempted to precognose Mr Gauci on what money

he had been offered or paid. The defence could have asked Mr Gauci whether he had been offered a reward, but would only have succeeded in obtaining an unhelpful answer.

[131] The submissions in relation to a potential challenge to Mr Gauci's credibility based on the prospect of a reward are purely speculative. The information available would suggest that, contrary to that speculation, the defence line on credibility would have been unchanged. A decision was taken to avoid a head-on confrontation. That decision cannot be faulted, even when the undisclosed material is properly considered. The contention that there was a significant change in Mr Gauci's evidence as time went by is also unfounded. In relation to the close resemblance identification of Mr Megrahi, it remained essentially unchanged from 15 February 1991 to the date of his evidence in court.

[132] The documents do disclose that there were discussions between the police and the FBI about a possible reward, but there is nothing substantial to suggest that Mr Gauci had been offered a reward even if he may have been optimistic that his information and testimony would one day be recognised.

[133] The undisclosed reward documents were largely undisclosable because they did not provide any information which would have materially undermined the Crown case or materially strengthened that of the defence. They do not suggest an improper motive relative to any reward monies. Even if they were disclosable, there is no real possibility that the trial court would have reached a different verdict. When the whole evidence, and the circumstances of the trial in general, are taken into account, the content of these documents would have been of no significance relative to the undermining of the careful reasoning of the court on the credibility and reliability of Mr Gauci.

(iv) Majid Cables

[134] In light of the appellant's submissions on these cables, no further consideration by the court is required. These cables were disclosed, albeit belatedly, at the trial. The Crown have explained why the gradual disclosure took place. The matter became academic since the court rejected the evidence of Mr Majid except in relation to the structure of the Libyan JSO, which was not challenged.

(v) Conclusion

[135] The contention that the Crown failed to disclose material which would have created a real prospect of a different verdict is rejected.

4. Disposal

[136] Both grounds of appeal having been rejected, the appeal against conviction is refused.