APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 20
HCA/2024/000402/XC

Lord Justice Clerk
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD BECKETT, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

BARRY MARSHALL

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Barr, Advocate; Dunlop, Allen and Co. Solicitors
Respondent: Harvey, AD; the Crown Agent

29 April 2025

Introduction

[1] The appellant challenges his conviction under section 106(3) (a) of the Criminal Procedure (Scotland) Act 1995 on the grounds of evidence, not heard at trial, from Danielle Egan about certain interactions with Alan Craik. On 12 March 2025, we heard evidence from three witnesses: the appellant, Jade McDonald and Ms Egan under reservation of its significance and whether there is a reasonable explanation why it was not heard at trial,

subsection 3(A). The appellant gave evidence and called Ms McDonald in support of there being a reasonable explanation why he did not adduce the evidence of Ms Egan at trial.

The trial

[2] The appellant and his co-accused, Marion Hawkins, were convicted after trial of attempted murder and robbery. The appellant was sentenced to imprisonment for 10 years. The charge was in the following terms:

> "On 11 December 2019 at… Maybole, you BARRY THOMAS MARSHALL and MARION HAWKINS did assault Derek Robertson, born 31 December 1954, c/o Police Service of Scotland, St Marnock St, Kilmarnock and did strike him on the head with your hands causing him to fall back, kick the door of the house and force entry there, repeatedly attempt to strike him on the head with and did repeatedly strike him on the body all with a machete or similar implement, all to his severe injury, permanent disfigurement, permanent impairment, to the danger of his life and you did attempt to murder him and you did rob him of a mobile telephone."

[3] The live issue in the trial was identification, there being no dispute that the crime was committed. The complainer's evidence, agreed facts about injury and what the complainer's sister Lorna Robertson heard whilst on a telephone call with the complainer, amply established an assault on him at his home, the locus in Maybole, on 11 December 2019. Agreed facts established:

- the summoning of an ambulance at 1838 and that 4 minutes later ambulance crew met the complainer who was lying at his front door wearing a dressing gown soaked in blood;
- that paramedics observed wounds on his arms and right thigh and took him to hospital; and the detail of his injuries, including lacerations and cuts to the complainer's arms, shoulder, hand, thigh and left cheek and their consequences;
- the subsequent recovery of the complainer's mobile telephone at a roadside some distance away bearing DNA matching Marion Hawkins which provided further support for the commission of the crime.

[4] Shortly before the trial both accused lodged notices of intention to incriminate each other and special defences of incrimination naming an Alan Craik. The appellant had previously lodged a special defence of alibi but withdrew it at the start of the trial.

The evidence adduced at trial

[5] The complainer, Derek Robertson, then 64, lived at the flat in Maybole where he was assaulted and robbed. It was apparent from a number of witnesses that he was keeping his father's safe containing about £125,000 in cash whilst his father was in hospital, and that he continued to do so thereafter. His father suffered from dementia. The complainer is one of five siblings, the others being Lorna Robertson, Tommy Robertson, Greta Robertson and a sister who was not involved with her siblings and did not feature in the trial. The complainer, Lorna and Tommy were content that the complainer kept the money in accordance with their father's wishes and that the arrangement should continue. Greta did not agree and considered that the safe and contents should be returned to their father. She is the mother of the appellant's partner Jade McDonald. Greta would regularly visit their father and had recently posted a message on a family Whatsapp group chat to the effect that the safe should be returned to him. Tommy Robertson spoke to receiving a message from her on 9 December 2019 reporting that their father was phoning to say that he wanted his money and safe back and she would go to the police about it.

[6] The complainer was unwell and in his flat during the late afternoon of 11 December 2019. At a time when he was speaking on the telephone to Lorna, his doorbell rang. He looked outside to see if there were any unfamiliar cars there as Greta had said she would send someone to his house to retrieve the safe and they would get it back one way or another. Eventually he opened the door to a woman who asked him where the safe was.

She scraped his face and eyes with something she was holding and another person's foot then kicked the front door in. A man with a big machete entered and swung it at him repeatedly, aiming at his head and body, causing the complainer to raise his arms to protect himself. The machete struck him on the arm, back and legs. He managed to run in and out of other rooms to try to escape but found himself cornered. They trapped him in the kitchen, both demanding to know where the safe and the money were. They spoke with Glasgow accents and at one point the woman shouted "Barry, Barry that's enough" and stood between the attacker and the complainer. They had not yet noticed that the complainer had his phone in his hand and, when they did, the woman snatched it from him and left, saying they would be back. He thought they had been there for about half an hour. He could not use his hands to phone for help on his landline and crawled outside to see them walking up the street. He asked a neighbour for help.

[7] The complainer gave a description of items worn by the male attacker: trainers, tracksuit bottoms, a tracksuit top with a hood on it, and a dark scarf round his face. He could see his forehead round to the top of his nose, his eyes and the top of his cheek, but a thin black scarf covered his face lower down. The assailant had blue eyes and was pale, not tanned, freckly or anything, with a clear skin. The complainer could not remember if he had gloves. He had never met him before. The complainer accepted he was in pain, in a state of panic and terror, and fighting for his life, and the man was moving around and had a face covering. He refuted a suggestion that he had limited opportunity to see who was attacking him. He was looking at the assailant constantly whilst under attack.

[8] On 13 December 2019, the complainer told the police that the only Barry he knew who had a connection with the family was his niece Jade's boyfriend. He had also said to the police that he had never met him, and did not know if it was he who attacked him. He

had described his assailant to the police as tall, maybe 6 feet, with a thin build but strong as an ox, wearing a white sweatshirt with no hood, with a red circle design in the middle, and said he was not sure of the colour of his eyes. On 18 December 2019 his daughter Claire visited. She showed him a picture of Jade with the appellant. He gave a further statement on 19 December 2019 saying he was 100% sure the appellant was the male attacker. He had been more certain about him than the woman. He recognised his eyes, his build, his height and his pale skin. It was partly because he had seen him in the photo. He thought the attacker would have a lot of blood on him. The two initial interviews by the police were at a time he was still in hospital on morphine.

[9] On 3 April 2021, the complainer had been with his brother Tommy at his father's garden when a white car approached and, through a lowered window, the appellant was swearing at him and accusing them of bullying Greta. The complainer recognised the appellant from the attack in December 2019. The complainer identified him as his male assailant in charge 1 on 23 July 2021 at a VIPER procedure. Agreed facts established that the complainer identified the appellant from a number of moving images of different men. In due course, the appellant testified and confirmed his involvement in this incident.

[10] Tommy Robertson spoke to the encounter on 3 April 2021 when the appellant drove up in a white BMW car, stopped beside them, opened his window and, in a threatening manner, told them to "stop bullying wee Greta" and said, "you think you're a fucking hard man" and that this was a warning. The encounter heightened Tommy Robertson's suspicions that the appellant was involved in the attack on his brother.

[11] Lorna Robertson confirmed that she was speaking to the complainer by telephone at about 6.00pm on 11 December 2019 when she heard his doorbell ringing. It persisted for about 5 minutes and she told him not to answer. She then heard a commotion, a kind of

bang and her brother exclaiming, "they are trying to kill me." She also spoke to a message she had posted in response to a message from Greta, to the effect that she (Lorna) agreed with the complainer and her brother Tommy that the safe should remain where it was as it was more secure there. She had added that the animosity between siblings would tear the family apart.

[12] Claire Robertson, the complainer's daughter, spoke to Greta phoning her to speak about the safe on 10 December 2019. Claire said she would speak to her father about it. She went to her father's flat after hearing from another relative about the attack on 11 December. She used an application on her own mobile phone to help the police locate the appellant's stolen mobile phone. She visited her father in hospital when he told her that his attackers had demanded the safe and he heard the name Barry during the incident.

[13] DC Robert Docherty had compiled and spoke to CCTV evidence captured in Maybole commencing at 1824 on 11 December 2019. The joint minute established its provenance. A white BMW X5 with a distinctive sunroof could be seen driving through Maybole, past the Co-op, in the direction of where the complainer lived. It was not in dispute that the appellant owned a white BMW X5. The white car braked and reversed into Whitehall Court at about 1824. It then came out and appeared to park either on Whitehall or a side street. At about 1834, the shadows of two people could be seen, including their walking away from the direction of the locus. Then the white BMW drove away more quickly, north-east out of Maybole. Zooming in disclosed a number of figures walking in the area. The Maybole Arms pub was on one of the streets nearby, as were some residential houses. Other officers had picked up a registration plate from motorway national recognition cameras of a car leaving Minishant, the next village from Maybole in the direction of Glasgow. The registration started B055, like BOSS, then BTM, matching the

appellant's initials. It had a dark sunroof. Police checks revealed the registered owner to be the appellant.

[14] The appellant told DC Docherty on 18 December 2019 that he lived in Glasgow with his partner Jade Robertson, worked as a driver doing deliveries and had driven to Maybole before. After describing his appearance to the police, he asked for a break and to speak to his solicitor.

[15] He thereafter said he had worked from 4am to 3.00pm on 11 December 2019. He then went to East Kilbride and took £1000 from his bank account to do Christmas shopping. He visited shops, a McDonald's restaurant and his mum. His partner was attending their son's medical appointment at this time but they got home before he did. He denied driving down the A77 to Ayrshire, passing Minishant or going through Maybole. Accordingly, he gave what he later accepted was a false alibi to the effect he was at home with Jade when the crime was committed.

[16] When the police asked why a white BMW, registration number B055 BTM could be seen on cameras travelling to Ayrshire, he asked for another break to speak to his solicitor. After resuming, he said that he had not told the whole truth about his whereabouts. It was true that he had gone to visit his mother in East Kilbride, but after that he had driven to Galston to see Jade's sister Stacey with whom he was having an affair. They met and she entered his car. They drove into Maybole only to turn around. They spent some time together in his car before he took her back to her own car after which he went to visit his mother. He had nothing to do with the attack and was nowhere near Derek Robertson's house.

Defence evidence

[17] In his evidence, the appellant confirmed he is engaged to Jade McDonald, the daughter of Greta Robertson. He had known his co-accused Marion Hawkins since they were 13 or 14. They were in regular contact in recent times. He was present when Greta spoke with Jade about the safe and he knew there was a dispute about it between the siblings. About a week before the attack, he and Jade had visited Ms Hawkins, the latter telling him about the ongoing dispute about the safe. Ms Hawkins suggested to Jade that she, Ms Hawkins, could go to speak to the complainer about retrieving the safe. Jade seemed agreeable. The appellant knew that Greta was intending to report the safe stolen on 11 December 2019.

[18] On that date, Ms Hawkins called to suggest they go down to the complainer's house and he agreed to do so. His intention was to speak and not to become violent. He had driven her down, parked nearby and Ms Hawkins returned after five minutes or so, told him the complainer had been difficult and instructed him to drive off. He saw that she had the complainer's telephone. She threw it out of the window on a single carriageway. He dropped Ms Hawkins home and returned to his own home. When he learned from Jade that the complainer had been attacked, he thought it impossible that Ms Hawkins could have done it but he had come to realise that she must have because her DNA was on the phone.

[19] When she intimated a notice of intention to incriminate him, he decided to tell the truth. He heard that she was incriminating a well-known criminal named Alan Craig (sic) and decided to incriminate him too. He offered an innocent explanation for £1000 in cash and a baseball bat found in his car. He had lied to the police as he was terrified because of the extent of the complainer's injuries. He did not tell the police about Ms Hawkins as he did not want to get her into trouble. When he learned that Ms Hawkins would incriminate

Alan Craig, he researched him on the internet and found he was a well-known criminal and decided also to incriminate him at trial. He did not know him.

[20] Jade Robertson (now McDonald), the appellant's partner, testified that, in contrast to the complainer's evidence, she knew the complainer well. In early December, she and the appellant had visited Ms Hawkins, whom the appellant had known since his teens. Ms Hawkins asked to be taken to see the complainer to speak to him but it did not happen. On 11 December 2019, a few hours before the attack, Jade and her mother reported to the police that the complainer had stolen a safe. She later received a call to tell her that the complainer, her uncle, had been stabbed before the appellant came home at about 8.00pm that evening.

[21] Greta Robertson claimed to have been the principal family carer for their father. She had been present when he had asked the complainer to return his safe but thereafter the complainer declined to answer telephone calls or would hang up. She got on well with the appellant but claimed ignorance of any plan between the appellant and Ms Hawkins to call at the complainer's house to discuss the safe with him.

[22] Peter Conway lived in the area where the attack occurred and saw a man and a woman in the vicinity of the locus with the woman telling the man, "Don't speak, don't talk." His estimate of the time would put this shortly before the attack occurred. He could not see the man's face as he had a hood up but estimated he may be 6'2" tall.

[23] Ms Hawkins gave evidence in her own defence. She said she had known the appellant since she was 13. She had not offered to go to Maybole to speak to anyone. She did not know Jade McDonald and had never spoken to her. On 11 December 2019, the appellant had turned up at her house with Alan Craig, a violent man better known as Alby, who lived in East Kilbride. She decided to go with them when the appellant invited her to

go down to Ayr with them. She did not know the complainer and knew nothing of the safe or any plan relating to it. The appellant asked her to knock on a door at Maybole as he wanted to have a word with Greta's brother, who had been giving her a hard time. She knocked on the door and then walked away. The appellant remained in the car. She did not assault the complainer and was not in the flat when he was assaulted with a machete. She did not hear or see anything until Alby came running out of the flat and told her to run up the hill. When she returned to the appellant's car, Mr Craig was already in the back seat. She identified Mr Craig as a figure on the CCTV footage.

[24] She touched the complainer's mobile phone when it was thrown onto her lap. The appellant rubbed the phone on his jumper, threw it out of the window and then threw out his own jumper. Alby threw his jumper out of the window. She was dropped off at home and when she later tried to speak with the appellant, he was acting strangely and telling her not to speak over the phone. She refuted counsel for the appellant's suggestion that she had arranged to meet Alby in Maybole.

Grounds of appeal

Danielle Egan's affidavit 11 September 2024

[25] Along with his note of appeal, the appellant offered an affidavit by Danielle Egan in which she swore that her former partner Alan (Alby) Craik confessed that he and Marion Hawkins had committed the crime. Ms Egan knew Mr Craik to be a friend of Ms Hawkins and she had met the latter through the former. Mr Craik had used Ms Egan's bank card in about May 2019 to buy a machete. She recalled an occasion in December 2019 when he had attended at her house between 11.00pm and midnight wearing a heavily bloodstained white jumper. He had blood around his nostrils.

[26] He said he had chopped up a man in a house in Ayrshire, having gone there with Marion Hawkins. He said he had used the machete bought with her card and disposed of it by burying it somewhere. He acted out blows with a knife and said he had struck the man all over his body. He said someone had told Ms Hawkins they stood to get about £150,000 from the house. They did not get any money and Alby said he was angry as Ms Hawkins had touched the door handle. He had covered his face up to avoid identification.

[27] She thought he was lying or exaggerating and thought little more about it until, in June 2024, she read about a trial involving Marion Hawkins and Barry Marshall in a newspaper report of an attack on an elderly man with a machete in his home in December 2019. She realised it was the incident Alby had spoken about. After reading that Barry Marshall had been convicted she told her friend Kelly Ann Cavanagh, who knew the appellant's partner Jade McDonald, about what Alby had told her. Ms McDonald contacted her around 20 July 2024 and she agreed to make a statement to the appellant's lawyers.

[28] She described Mr Craik as being about 6'1", muscular and weighing 15 to 16 stones. He has strawberry blonde hair. He has size 10 or 11 feet and wears distinctive white Nike trainers.

Appellant's affidavit 30 September 2024

[29] The only relevance of the appellant's affidavit to this appeal is what he has to say about his knowledge of Mr Craik's suggested involvement in the commission of the crime. He had never heard of Mr Craik until 5 June 2024 when solicitors for Ms Hawkins lodged, late, a special defence of incrimination naming Mr Craik at the same time as she gave notice under section 78(2) of her intention to incriminate the appellant. Assuming there was some basis to implicate Mr Craik, he instructed his solicitors to lodge a notice of incrimination of

Mr Craik. The trial commenced on 6 June 2024. He does not suggest that he sought to adjourn the trial in order to investigate Mr Craik. For what it is worth, he refutes the evidence given by Ms Hawkins at the trial that he had given both her and Mr Craik a lift in his car to the locus.

[30] He goes on to explain that Kelly Ann Cavanagh had contacted the appellant's partner Jade McDonald to say that Mr Craik had confessed (to Ms Egan) that he had attacked a man with a machete in the man's house in Maybole in December 2019 with Ms Hawkins. The appellant states that he does not know Ms Egan and has never met her.

[31] The appellant confirms that he knew of the dispute between his partner's mother Greta Robertson and her siblings about the safe. The appellant states it contained £134,000 in cash. The dispute caused Greta Robertson great stress.

Jade McDonald's affidavit 1 October 2024

[32] Ms McDonald confirms she is the complainer's niece and the appellant's partner. She gave evidence at his trial. In July 2024, a friend of hers named Susan Scott contacted her to say that Kelly Ann Cavanagh, who lives near to the appellant's mother, reported what Ms Cavanagh had been told by Ms Egan. Ms Cavanagh provided a Facebook account for Ms Egan and Ms McDonald contacted her on 20 July 2024. Ms Egan telephoned Ms McDonald to say that she was the former partner of Alan Craik, who had told her about attacking a man in Maybole in 2019 along with Marion Hawkins. A few days later, she met Ms Egan, who gave her more details and agreed to make a statement to the appellant's solicitor. This was the first she had ever heard of Alan Craik and his involvement.

Evidence adduced in the appeal

The appellant

[33] He confirmed that he had lodged a false alibi and changed his instructions before trial. He gave his solicitors different instructions and they gave notice incriminating Alan Craik on the basis that his co-accused had incriminated Mr Craik, although his only basis was an assumption based on his co-accused's notice. He had researched Mr Craik on the internet and learned that he came from East Kilbride and that he was dangerous. He first learned of the basis of Mr Craik's involvement when Ms Hawkins gave evidence after him in the trial. He had no information to suggest Mr Craik's involvement until Ms Hawkins named Mr Craik in a notice. Whilst he had known Ms Hawkins for 30 years or so, and they were friends, she had never mentioned Mr Craik.

Jade McDonald

[34] She confirmed that she told the truth in her affidavit and repeated her account of how she came to be in contact with Ms Egan. She had never previously heard of her or Alan Craik. She had never discussed her partner's case with Ms Kavanagh or Susan Scott before his conviction but did so shortly afterwards with Ms Scott. It was the end of June 2024 before she discussed his conviction with Ms Kavanagh, who asked her what size the appellant's feet were because, she understood, Mr Craik's feet were size 10 or 11 in common with footprints found at the locus. She then said that she had first raised the question of shoe sizes with Ms Kavanagh, asking her to find out about the size of Mr Craik's feet.
Ms McDonald confirmed that she is still in a relationship with the appellant, that she visited him in prison in June 2024, discussed the evidence and Ms Hawkins blaming Mr Craik and who he might be. The appellant did not know.

Danielle Egan

[35] She had a son by Mr Craik in 2019 but theirs was really a drug-based relationship. They were both addicted to heroin. She confirmed that she has not personally met the appellant but has known his partner for about 6 months. She got to know Ms McDonald after Kelly Ann Cavanagh approached Ms Egan in the street to ask about a man named Alby and asked about his shoe size. This was after Ms Egan had read the Sunday Mail of 23 June 2024 reporting on the conviction of the appellant and Ms Hawkins. Ms Egan volunteered in her evidence that she knows that the appellant is 100% innocent and that Mr Craik, her former partner, should go to prison for this crime.

[36] Jade McDonald contacted her, in September or October 2024, and Ms Egan told her what she knew from what Mr Craik had told her. He had made his comments in about the middle of December 2019. He had come back at night, at about 11.00pm or midnight, wearing a heavily bloodstained white hoodie. He also had on jeans and Nike trainers. He had blood around his mouth. He said he had to tell her as Marion had closed the door with her bare hands and might have left evidence. He had chopped up a man quite severely. She thought he was making it up as it seemed so far-fetched. He was taking a lot of anti-psychotic medicine. He believed he was sent to this world to do greater good. She did not believe him as he was always saying he had shot or stabbed somebody. Given the size of the machete he said he had used, such an attack would surely have killed the victim and she had not heard or read of a murder in the media. He said he had used the knife he had ordered with her card. She had seen that knife when it had first arrived. He said he had done this with Marion Hawkins. Mr Craik cannot drive and so she assumed his friend Scott must have driven him there. Scott would regularly drive for him. Since she did not believe Mr Craik, it did not occur to her to report this to the police.

Cross-examination

[37] She has known Marion Hawkins for years. She suspected that Mr Craik was seeing Ms Hawkins behind her back and that he stayed with her at weekends. She volunteered that Mr Craik would not know the appellant at all.

[38] She gathered from what Mr Craik had said that the attack had not been in East Kilbride, he had travelled down somewhere. When shown her affidavit to the effect that he had said he had travelled down with Marion Hawkins, she then said that Mr Craik told her he had travelled down separately. She insisted he must have gone down with Scott. He had said he was doing it as he stood to get a lot of money, there was about £130,000 in a safe and he and Marion were going to split it.

[39] When the Advocate Depute introduced the subject of her police statement, Ms Egan volunteered that she was not sure what she said to the police as she suffers from epilepsy and had a seizure earlier that day. The court should rely on her affidavit. She explained that she volunteered the question of seizures lest her police statement was different to her affidavit. She denied that she knew this to be so. When the Advocate Depute put to her that in her statement to the police on 6 December 2024 she had said (in contrast to her affidavit and evidence), "I can't remember seeing any blood on him," she said she had a seizure at 5.00am. She was still disorientated when speaking to the police.

[40] When the Depute put to her that she had told the police that Mr Craik did not say who he had chopped up or where he had done it, she insisted that he did say where it occurred. When the Depute showed her a passage in her police statement to the effect that Mr Craik had told her about him and Marion chopping up a guy with a machete, but that she did not remember why he had done it, she said it was because of her epilepsy. This contrasts with her affidavit and evidence that it was for a large sum of money. She

explained that even when she linked newspaper reports of the trial to Mr Craik's statements, she did not report him to the police as she was terrified of him on account of his violence to her.

[41] In re-examination, Ms Egan said that the police did not give her a choice about making a statement, they just appeared at her house and were really pushy. Mr Craik had definitely told her that he was driven to the locus separately from Ms Hawkins. It was usually his friend Scott who drove him.

CCTV footage

[42] Counsel for the appellant played some of the CCTV footage adduced at trial of cars and people in the general area of the locus between 1824 and 1835 hours on 11 December around the time of the incident. The footage is taken in hours of darkness and illumination of car lights makes it extremely difficult to make out any significance in figures seen in proximity to the locus, itself near to a pub. We did not consider any conclusion could reasonably be reached from the footage whether in favour of or undermining the appellant's position in the appeal.

Submissions

For the appellant

[43] The court should conclude that there was a third person involved from the absence of blood stains linking the appellant to the crime, that his height is different to that estimated by the complainer and that his shoe size does not match the size of footprints found in blood at the locus. The CCTV footage disclosed that there was a person seen to approach the direction of the locus who could not be the appellant. The court could regard the actions

represented by Mr Craik as behaviour and not hearsay. Even if what Mr Craik represented and told to Ms Egan was inadmissible hearsay, her evidence of his purchase of a machete in May 2019 and his bloodstained appearance in December 2019 were significant pieces of incriminating evidence. Whilst there may appear to be inconsistencies between what Ms Egan said in evidence (and her affidavit) on the one hand and a police statement on the other, the court should accept her explanation. The court should apply the approach to fresh evidence set out by the full bench in *Megrahi* v *HM Advocate* 2002 JC 99 at para [219]. We should conclude that the key elements of the evidence from Ms Egan were capable of acceptance as credible and reliable by a reasonable jury. Whilst it could not be said that a jury would be bound to acquit in light of it, it was of such significance that we should be satisfied that a miscarriage of justice occurred in its absence. It was evidence likely to have had a material part to play in the jury's determination of a critical issue at the trial.

The Crown

[44] The appellant's representatives did not invite the trial Advocate Depute to carry out any inquiry into Mr Craik. The trial Depute had concluded that the matter, arising so late, did not merit further investigation by the Crown.

[45] The material parts of the evidence from Ms Egan, what Mr Craik said to her, were inadmissible as hearsay. The appellant's representatives did not attempt to adjourn the trial to investigate Mr Craik in light of Ms Hawkins lodging a notice of incrimination of him. Accordingly, the court should follow the reasoning of the court in *Mills* v *HM Advocate* 1999 JC 216 and reject the appeal on the basis it is not in the interests of justice to consider such evidence as there is. Further, there is no reasonable explanation for the appellant not adducing this evidence at trial. The crux of the evidence of Ms Egan was not capable of

being viewed by a reasonable jury as credible and reliable in light of material discrepancies. In any event, even if a jury could find it credible and reliable, the evidence was not of such significance as to demonstrate its absence gives rise to a miscarriage of justice.

Decision

The relevant statutory provisions

[46] The relevant parts of section 106(3) of the 1995 Act provide that an appellant, in appealing against conviction on indictment, may with leave:

> "…bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—
> (a) subject to subsections (3A) … below, the existence and significance of evidence which was not heard at the original proceedings; …
> (3A) Evidence such as is mentioned in subsection (3)(a) above may found an appeal only where there is a reasonable explanation of why it was not so heard."

[47] In *Megrahi* at para [219], a full bench issued authoritative guidance as to how a court must approach an appeal based on these provisions:

> "(1) The court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice.
>
> (2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.
>
> (3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.
>
> (4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.
>
> (5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

[48] Section 259 of the 1995 Act provides exceptions to the rule that hearsay evidence is inadmissible. Subsection 1 allows that evidence of a statement made by a person, other than while giving oral evidence in court in criminal proceedings, shall be admissible as evidence of any matter contained in the statement where the judge is satisfied:

- that the person who made it will not give evidence for any of the reasons in subsection 2;
- that evidence of the matter would be admissible if that person gave direct oral evidence of it;
- that the person who made the statement would have been a competent witness when the statement was made; and
- the statement is either contained in a document or can be spoken to by a witness with direct knowledge of its making.

[49] Subsection 2 contains the following reasons: the person

- a) who made the statement has died or is unfit to give evidence in any competent manner;
- b) is outwith the UK and otherwise sufficiently identified and it is not reasonably practicable to secure his attendance at trial or to obtain his evidence in any other competent manner;
- c) is named and otherwise sufficiently identified, but cannot be found and all reasonable steps which, in the circumstances, could have been taken to find him have been so taken;
- d) is authorised to refuse to give evidence on the grounds such evidence might incriminate and does refuse to testify; and
- e) is called as a witness and either refuses to take the oath or refused to give evidence.

[50] Section 262 of the 1995 Act defines the term “statement” for the purposes of sections 259-261A as any representation however made or expressed and any part of a statement not including a precognition other than a precognition on oath.

Significance

[51] The appellant is not able to suggest that what Ms Egan reports Mr Craik as saying to her comes within any of the exceptions in section 259(2). Accordingly, it is inadmissible hearsay. The actions she says she saw Mr Craik demonstrate were representations as defined in section 262 and inadmissible hearsay. It would be different if what he did was truly behaviour, if for example she saw him wash bloodstained clothing, as opposed to a physical representation of the information he was conveying to her through both his words and actions.

[52] In *Fraser* v *HM Advocate* 2008 SCCR 407, at para 133 the court referred to *Gallacher* v *HM Advocate* 1951 JC 38 and *Megrahi (ibid* at para [249]), in highlighting the risk of new evidence assuming undue significance when viewed in isolation and the correlative importance of assessing it in the context of the whole evidence led at trial. Accordingly, we have set out in some detail at paras [5] to [24] above material parts of the evidence providing the background against which we must evaluate the proposed new evidence.

[53] The case against the appellant at trial did not rest simply on requiring acceptance of identification of the appellant from the complainer and finding a source of corroborative material. It was palpably a circumstantial case, the strength of which can be considerable; *Little* v *HM Advocate* 1983 JC 16, Lord Justice General (Emslie) at page 20; *Megrahi* (*ibid*) at paras [31]-[36]. The opinion of the court in *Geddes* v *HM Advocate* 2015 JC 229 well illustrates the strength and effect of a circumstantial case. Discrepancies between descriptions of the assailant and the appellant were not found to be a significant problem by a full bench in *Megrahi* (*ibid*) or a posthumous appeal determined by another full bench following a referral by the Scottish Criminal Cases Review Commission in *Al-Megrahi* v *HM Advocate (No.3*) 2021

SLT 73. The opinion of the court, notably at para [73], illustrates how circumstantial evidence may strengthen identification evidence where its reliability is challenged.

[54] It was a highly material consideration that the complainer spoke to his female assailant referring to his male assailant as Barry during the attack. This was part of the event itself, the *res gestae*, and admissible as evidence to implicate the appellant even though it was not corroborative of the complainer's identification evidence. It was a material part of it; *Finnegan* v *HM Advocate* 2025 JC 20 at para [19]. It hardly existed in isolation. The undisputed altercation in 2021 involving the appellant, as spoken to by the appellant and persons other than the complainer, offered further strength to his identification. In that incident, Tommy Robertson spoke of the appellant speaking up for "wee Greta." The connection between the appellant and his partner and her mother (Greta Robertson) who sought return of the safe and contents to Mr Robertson senior was another material circumstance. Intensifying efforts to achieve restoration of the safe in the days before the attack amplify the significance of this connection. The appellant gave a series of false and inconsistent accounts to the police, going so far as to lodge an alibi he later accepted to be false and withdrew. This was capable of being viewed as incriminating conduct; *Docherty v HM Advocate* 2010 SCL 874 at para 64; *Bovill* v *HM Advocate* 2003 SCCR182; *Ryan* v *HM Advocate* [2011] HCJAC 83; *Winter* v *Heywood* 1995 JC 60; *Brown* v *HM Advocate* 2002 SCCR 1032. In any event, the appellant's changes of position were plainly material to the jury's assessment of his evidence of denial; *Williamson* v *HM Advocate* 1980 JC22.

[55] The appellant's own evidence placed him in a car near to the locus, having gone there at the instigation of his co-accused Marion Hakwins. The evidence of Ms Hawkins placing the appellant very near the locus, on her account the journey being at the appellant's instigation, was also available in support of the Crown case. DNA findings on the

complainer's mobile telephone linked her to the commission of the crime. She testified that she attended at the door of the complainer's flat.

[56] Against that body of evidence, all that is admissible from Ms Egan is evidence that Mr Craik bought a machete in May 2019, some 7 months before the commission of the crime, and that he had blood on his white jumper when he attended at her house late one night in December 2019, also bearing blood on his nose. There was no evidence that the male attacker received any blow to his nose. Ms Hawkins gave evidence that Mr Craik had thrown his jumper out of the car on the return from Maybole, long before Ms Egan could have seen him in the circumstances she described. There is nothing in the trial judge's report to tell us what, if any, evidence was led about footprints at the locus or their size. If they were larger than the appellant's feet, he had every opportunity to say so in the trial. We are not in a position to determine if what Ms Egan said about Mr Craik's shoe size would match any evidence at trial about footprints. If it did, we do not consider a man having size 10 or 11 shoes to be a significant feature in this country.

[57] Viewed against the body of evidence available to implicate the appellant, we cannot accept that the absence of such limited admissible evidence as there is from Ms Egan is of such significance that its absence from the trial has given rise to a miscarriage of justice. Even if a jury accepted it, we are not persuaded that it would have had a material bearing on a critical issue at trial. For these reasons alone, the appeal cannot succeed.

[58] We note also that the jury heard evidence from Ms Hawkins that the crime was committed not by her and not by the appellant but by Alan Craik. In convicting both Ms Hawkins and the appellant, the jury rejected her evidence. To that extent, such minor adminicles of circumstantial evidence as might arise from the evidence of Ms Egan lack material significance.

Mills

[59] This case is not identical to the situation in *Mills* where the incriminee was cited and the appellant's lawyers determined not to adduce him. For that reason, the court on policy grounds was not prepared to hear evidence of post-trial admissions by the incriminee in writing and to two witnesses as it was not significant. In delivering the opinion of the court, the Lord Justice General (Rodger) explained at page 221 that if the defence decide for tactical reasons not to lead the evidence of an incriminee at trial, it would be difficult, if not impossible, to admit his evidence at the stage of appeal:

> "[The] limit on an accused's room for manoeuvre at the appeal stage is not arbitrary but is, rather, a concomitant of the wide discretion enjoyed by an accused and his advisers as to how his defence should be deployed at his trial. An accused person who is served with an indictment receives a list of the witnesses against him. He and his advisers have the opportunity to investigate the case, to precognosce potential witnesses for the Crown and for the defence and then to decide in general how his case can best be presented and in particular what witnesses are to be led. Inevitably these decisions may be complex and may involve an assessment of the potential benefits and potential disadvantages of one course or another. The pros and cons may have to be constantly reassessed in the light of the evidence as the trial proceeds. But, for better or for worse, these decisions shape the trial and the evidence which the jury hear and on which they decide the case. The verdict is intended, wherever possible, to be final. That is in the interests both of the public and of the accused. It follows that an accused person and his advisers cannot decide, for strategic or tactical reasons, not to lead a particular witness and then, when the accused is convicted, ask this court to order a new trial so that he can adopt a different strategy or different tactics in the hope of achieving an acquittal at the new trial…."

This passage has been cited with approval on several occasions by this court in a variety of contexts eg *Burzala* v *HM Advocate* 2008 SLT 61 at para [28] where it was considered relevant to both defective representation and new evidence grounds.

[60] We recognise that Mr Craik was not cited. Nevertheless, the appellant could have sought to adjourn the trial and investigate what evidence there might be in support of incrimination. Since the appellant knew of the name of a person he sought to incriminate by

late lodging of a special defence and found out details about him online, including that he was "a well-known criminal", Mr Craik could have been found, and cited, relatively quickly had the appellant wanted to do so. He and his advisers chose not to. That was a tactical decision which they made. In this case, unlike *Mills*, we did hear the evidence concerning the proposed incriminee. We did so as in preparation for the appeal the Crown proposed in writing that we hear evidence from the three witnesses, reserving questions of admissibility, reasonable explanation and significance before determining the appeal. Nevertheless, in addition to our determination for the reasons set out above that the evidence adduced lacks the necessary significance, these further considerations also lead us to conclude that it ought not to be admitted.

Is the evidence capable of being considered by a reasonable jury to be credible and reliable?

[61] The reasons we have given on the significance *et separatim* of the tactical decision made at the time of the trial are sufficient to dispose of the appeal, but we would add this. We doubt whether Ms Egan's evidence is capable of acceptance by a reasonable jury. The difficulties exceed mere discrepancies. Ordinarily, any potential significance of discrepancies between testimony and an earlier statement would be for a jury to resolve. In this case, there is a highly material discrepancy between Ms Egan's affidavit and her evidence on oath before us. There is no satisfactory explanation for it. She insisted that Mr Craik told her that he travelled separately from Ms Hawkins despite having stated under oath to the appellant's solicitor that he had gone there with Marion Hawkins; affidavit at para [7]. Since it is undisputed that Ms Hawkins and the appellant travelled in the same car to Maybole, we consider that Ms Egan changed her account because she saw danger for the appellant's prospects of success if we concluded that Mr Craik travelled in the appellant's

car as well as Ms Hawkins. Plainly there could be no reasonable explanation if the appellant knew all along that Mr Craik participated in the crime; *Hughes* v *HM Advocate* [2024] HCJAC 48 at paras [45] to [47]. We need not determine questions of a criminal concert including the appellant and Mr Craik that did not feature in the trial.

[62] We were wholly unconvinced by Ms Egan's attempts to attribute the discrepancies between her affidavit and her evidence on the one hand and her statement to the police on the other. In our experience, there is no prospect of a police officer taking a statement of such importance in circumstances where the witness was unfit. Even if, as she maintains, she truly had a fit at 5.00am, a Detective Constable took her statement at her home address between 1442 and 1556. He read it over to her and she signed it as a true and accurate record. We do not accept that she was unfit to give that statement. A reasonable jury would have difficulty understanding why she went to such lengths to explain away these discrepancies if she was simply telling the truth.

[63] A reasonable jury would have difficulty understanding Ms Egan's vehement insistence on the innocence of the appellant when she maintains that she did not generally believe what Mr Craik told her for the reasons she gave. She gave us every impression of a witness trying far too hard to convince the court of the position she was here to support. We think that a reasonable jury would reach the same conclusion.

Reasonable explanation

[64] We accept that there was a reasonable explanation for Ms Egan's evidence that Mr Craik bought a machete in May 2019 or attended at her home in December 2019 with blood-stained clothing not being adduced at the trial. The appellant could not reasonably

have anticipated that she would give evidence to that effect. However, for the reasons we have given we do not consider that evidence to be significant.

Disposal

[65] The appeal is refused.