

Lockerbie and the Law

Robert Black

The author is Professor of Scots Law at the University of Edinburgh. He was one of the architects of the trial of the two Libyans at Camp Zeist. Here he gives his views on the original investigation, Megrahi's trial, his appeal, and the impact of the case on the Scottish justice system. This article was originally published in the Scottish newspaper The Herald on 21 August 2009.

The Investigation

Within a week of the tragedy the joint team of British and American investigators had formed the view that this had been no accident and that the cause of the destruction of the aircraft had been a bomb. There then followed the most extensive criminal investigation ever conducted in Scotland – or, it seems probably, anywhere else – into an act of terrorism.

It came as something of a surprise when on November 14th 1991, the prosecution authorities in Scotland and the US simultaneously announced that they had brought criminal charges against two named Libyan nationals who were alleged to be members, and to have been acting throughout as agents, of the Libyan intelligence service.

Until then all of the leaks were that the atrocity had been committed by Ahmed Jibril's Syrian-backed Popular Front for the Liberation of Palestine-General Command.

Until the trial actually started I had no idea what the evidence was going to be and had no idea what the outcome was going to be. My job was to try to ensure that the trial would take place. It was what I heard at the trial that then gave rise to grave concerns.

The Trial at Camp Zeist

The prosecution in their closing submissions conceded that the case against the accused was entirely circumstantial. That, of course, is no bar to a verdict of guilty. But to many observers, including me, it seemed that the case presented by the prosecution was a very weak circumstantial one, and was further undermined by the additional prosecution concession that they

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

Before the verdicts in the original trial were delivered, I expressed the view that for the judges to return verdicts of guilty they would require:

- (i) to accept every incriminating inference that the Crown invited them to draw from evidence that was on the face of it neutral and capable of supporting quite innocent inferences,
- (ii) to be satisfied beyond reasonable doubt that the Maltese shopkeeper, Tony Gauci, positively identified Megrahi as the person who bought from his shop in Sliema the clothes and umbrella contained in the suitcase that held the bomb, and
- (iii) to accept that the date of purchase of these items was proved to be December 7th 1988 (as distinct from November 23rd 1988 when Megrahi was not present on Malta).

I went on rashly to express the opinion that, for the judges to be satisfied of all these matters on the evidence led at the trial, they would require to adopt the posture of the White Queen in *Through the Looking-Glass*, when she informed Alice: ‘Why, sometimes I’ve believed as many as six impossible things before breakfast’. In convicting Megrahi, it is submitted that this is precisely what the trial judges did.

I am absolutely convinced that if the evidence had come out in front of a Scottish jury of fifteen there is absolutely no way he would have been convicted.

The judges didn’t appear to give themselves the instructions that they always give to a jury – the perfectly bog standard instructions that every jury in every Scottish criminal trial gets about how to approach the evidence.

The Appeals Process

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

I had hoped that the appeal court in the second appeal would have addressed the fundamental issues of:

- (i) whether there was sufficient evidence to warrant the incriminating findings,
- (ii) whether any reasonable trial court could have made those findings (and could have been satisfied beyond reasonable doubt of the guilt of Megrahi) on the evidence led at Camp Zeist and
- (iii) whether Megrahi's representation at the trial and the appeal was adequate.

This will not happen, because Mr. Megrahi sadly felt he had to abandon his second appeal, and I will continue to maintain that a shameful miscarriage of justice has been perpetrated and that the Scottish criminal justice system has been gravely sullied.

Kenny MacAskill's Role

I have a great deal of sympathy with him. I am sorry he had to take so long to reach the decision. However, in some respects it is just as well he did. He actually rejected the prisoner transfer application. If Megrahi hadn't belatedly put in an application for compassionate release he would still be in prison today. Perhaps the delay did serve a useful purpose. As Kenny correctly said in making his decision, he has to assume that Megrahi was properly convicted.

Impact of the Case

If the approach is that everybody simply says, 'He abandoned his appeal and has been released on compassionate grounds, everything is therefore for the best', then it is a very sad day for the Scottish criminal justice system because no lessons have been learned.

My God, lessons need to be learned out of Lockerbie.

We have relied too much on those professionals in the system knowing what is the right thing to do and doing it almost instinctively. I am afraid that is simply no longer good enough.

There is still a cloud hanging over Megrahi's conviction. Until that cloud is removed then the criminal justice system cannot legitimately claim to be one of the best in the world.