

## Case Notes

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### Guilty? An Explanation of the Lockerbie Trial

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In 1988 Pan Am flight 103 exploded over Lockerbie, Scotland killing all 243 passengers and 16 crew on board as well as 11 residents on the ground below. This horrific air disaster was made more so because the killings were deliberate.<sup>1</sup> After years of piecing together the wreckage of PA103, in November 1991 the governments of the United States<sup>2</sup> and the United Kingdom<sup>3</sup> issued indictments accusing two Libyans of introducing an explosive device into the plane which caused it to explode.

The Libyans were initially charged with murder, conspiracy to murder, and contravention of the *Aviation Security Act* 1982. The charges were eventually amended to murder. On May 3, 2000 the trial of Abdel Baset Ali Mohmed Al-Megrahi and Al Amin Khalifa Fhimah began in the Netherlands at Kamp van Zeist.<sup>4</sup>

#### I. Jurisdictional battle

Because the aeroplane was destroyed in Scottish airspace, Scotland claimed jurisdiction. The two accused were present in Libya when the indictments were issued. The United Kingdom and the United States immediately requested their extradition for trial, however, since Libya does not have an extradition treaty with the UK or the US and because Libyan domestic law prohibits extradition in the absence of a treaty, the request was refused.<sup>5</sup>

The Libyan government claimed that the applicable treaty in this case was *1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation*.<sup>6</sup> The treaty calls for member states to extradite or prosecute residents of their country who are accused of terrorist offences against aircraft.<sup>7</sup> Therefore, Libya claimed the right to prosecute the accused and had them arrested. A Supreme Court justice and examining Magistrate were appointed by the Libyan government to prepare a case against them.<sup>8</sup> The United States and United Kingdom refused to hand over the evidence against the accused which would have made this possible.<sup>9</sup>

In January 1992, the United Nations Security Council passed a resolution demanding

1 *HMA v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 2.

2 175 of the victims of the air disaster were United States citizens.

3 The explosion took place in United Kingdom airspace. All of the victims therefore died in United Kingdom territory.

4 This former US military base was designated Scottish territory for the purposes of the trial.

5 Libyan Code of Criminal Procedures article 493 section A of the Libyan Code of Criminal Procedures: Libya reserves its sovereign right to prosecute nationals when found on national territory, and does not extradite nationals to prosecution outside national territory. Libyan Penal Code Article 6 declares that Libya has the right to prosecute a Libyan national for crimes committed in foreign territory, if and when he returns to Libya.

6 Libya, the UK and the United States are all parties to this treaty.

7 Article 7 allows state parties to prosecute or extradite the accused.

8 Black, R, 'From Lockerbie to Zeist,' [www.thelockerbietrial.com](http://www.thelockerbietrial.com), visited 24.4.01.

9 Libya took its case to the International Court of Justice on 3 March 1992. After long delays the court ruled on 27 February 1998 that it has jurisdiction to deal with the merits of the case brought by Libya against the United States and the United Kingdom concerning the aerial incident at Lockerbie, Scotland. It also found that the Libyan claims are admissible. This case was not pursued. In light of evidence that at least one of the accused was an employee of the Libyan government there is some doubt whether Libya would have been ultimately successful in this claim.

extradition of the accused.<sup>10</sup> This was an unprecedented move. Under international law, there is no obligation to extradite in the absence of a treaty.<sup>11</sup> A second resolution followed in March of 1992 requiring Libya to comply and indicating that sanctions would be imposed if they failed to do so.<sup>12</sup> Sanctions were imposed on Libya in April 1992 and were expanded by a further resolution in November 1993.<sup>13</sup> In April 1999 when the accused agreed to be transferred to the custody of the United Kingdom,<sup>14</sup> the sanctions were lifted.<sup>15</sup>

## II. A neutral venue

The trial eventually took place in the Netherlands heard by a court of three Scottish judges applying Scottish law. This 'neutral venue' proposal was introduced to the Libyans in January 1994 because the accused were concerned about a trial in Scotland.<sup>16</sup> Their concerns were twofold, first they thought the pre-trial publicity would make a fair jury trial impossible.<sup>17</sup> Secondly, they feared for their physical safety.<sup>18</sup> The accused accepted this proposal the same month.<sup>19</sup> In September 1998 the proposal was agreed to by all concerned. Negotiations between the UK and the defence team as well as the Libyan government resolved the residual issues and the trial began in May 2000.

## III. The case for the prosecution

The bomb that destroyed PA103 was in a brown Samsonite suitcase. The investigators used the contents of the suitcase to help determine its ownership and thereby the identity of the bomber. The suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow. The bomb itself was housed in a twin speaker radio/cassette player.<sup>20</sup> The trigger for the bomb that destroyed PA103 was an MST-13 timer of the single solder mask variety a substantial quantity of which had been sold to Libya.<sup>21</sup>

### 1. First Defendant

The clothing in the suitcase was found to be purchased by the first defendant at a shop in Malta owned by Mr. Gauci on 7 December 1988.<sup>22</sup> Mr. Gauci testified that the purchaser was Libyan.<sup>23</sup>

The Court recognised that Mr. Gauci's identification of Mr. Megrahi was 'not an unequivocal identification',<sup>24</sup> however, the Court could infer from the statements made by Mr. Gauci, whom they found to be reliable, and the other evidence, that Mr. Megrahi was

10 United Nations Resolution number SCR731.

11 Extradition occurs only where a bi-lateral (or less often a multi-lateral) treaty is in place. The plethora of treaties on extradition is evidence of the fact that in the absence of a treaty there is no requirement to extradite under international law.

12 United Nations Resolution number SCR748.

13 United Nations Resolution number SCR883.

14 Libya maintained throughout that they would only release the prisoners to the UK if they agreed to the transfer of their own accord.

15 United Nations Press Release SC/6664.

16 'The Lockerbie Proposal' 1997 Scots Law Times (News) 304.

17 Black, R, 'From Lockerbie to Zeist,' [www.thelockerbietrial.com](http://www.thelockerbietrial.com), visited 24.4.01.

18 According to Professor Black, their fear was that the United States would abduct them and put them on trial in the US.

19 Black, R, 'From Lockerbie to Zeist,' [www.thelockerbietrial.com](http://www.thelockerbietrial.com), visited 24.4.01.

20 This was found to be a Toshiba RT-SF 6 BomBeat radio cassette player (Case No 1475/99 at 9).

21 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 82.

22 Note 21 at 82.

23 The identification of the first defendant was problematic and faced criticism which is addressed below.

24 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 88.

the purchaser of the clothing which surrounded the bomb. The evidence the Court relied upon included:

- The clothing was purchased on 7 December 1988 the day that Mr. Megrahi arrived in Malta (Mr. Megrahi then left Malta on December 9, 1998);
- Mr. Megrahi stayed at the Holiday Inn, Sliema which is close to Mary's House, the shop where the clothing was purchased;
- If he purchased this miscellaneous collection of garments, it is not difficult to infer he knew the purpose for which they were being bought;
- He was a member of the Libyan Intelligence Agency at fairly high rank;<sup>25</sup>
- One of his jobs was head of airline security so the court inferred knowledge of the nature of security precautions at airports;
- He was involved in military procurement for Libya;
- He had a connection to MEBO, the Swiss company that built the timer in the explosive device; and
- He entered Malta on December 20 (two days before the disaster) using an assumed name and could offer no explanation for why he was in Malta on that day and left the next morning.

This evidence and the inferences drawn from it were enough to convict the first defendant, Mr. Megrahi of murder. The second defendant was acquitted.

## 2. *Second Defendant*

From the evidence present it was accepted that the second defendant, Mr. Fhimah, knew Mr. Megrahi.<sup>26</sup> Further Mr. Fhimah was an employee of Air Malta. As such, the prosecution argued, he would have known how to get unaccompanied bags onto the airline. Mr. Fhimah went to Tripoli on December 18 and returned on 20 December on the same flight as Mr. Megrahi.

While the Court found this to be suspicious, they found no evidence to show that Mr. Fhimah assisted Mr. Megrahi in carrying a suitcase through customs in Malta.<sup>27</sup> In fact, there was no evidence that either carried a suitcase. The Court found in the case against the second defendant that there was no acceptable evidence to support or confirm an inference that he was aware that any assistance he gave to Mr. Megrahi was in connection with a plan to destroy an aircraft by the planting of an explosive device.<sup>28</sup>

## IV. Application of Scottish law

In spite of its position as a part of the United Kingdom, the law of Scotland differs somewhat from that of the rest of the UK. The burden of proof is of course the same. The Crown was required to prove guilt 'beyond reasonable doubt.' Differences in the law relevant to this case are outlined here.

### 1. *Evidence*

Scottish Rules of Evidence are similar to the common law in that admissible evidence may be: oral evidence of observation,<sup>29</sup> expert evidence, real or circumstantial evidence or

25 This fact raises the spectre of Libya's responsibility for this bombing. This issue has yet to be addressed by an international court.

26 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 84.

27 It was submitted that because he was the station manager Mr. Fhimah's bags would not be searched.

28 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 85.

29 See Bonnington, A, 'Why we must listen to our critics,' *The Journal of the Law Society of Scotland*, May 2000, 45:5 at 22.

written evidence.<sup>30</sup> However, in Scots law special importance attaches to corroboration.<sup>31</sup> Every essential fact entered in evidence must be supported by independent evidence from another witness or from facts and circumstances justifying an inference to the same effect.<sup>32</sup>

The Court has been criticised<sup>33</sup> for the inferences it drew and for accepting some evidence of witnesses and rejecting other evidence from the same witness in its decision to convict the first defendant Mr. Megrahi. In paragraph forty-nine of judgment the court said:

We do . . . accept certain parts of Mr. Bollier's evidence despite finding him at times an untruthful and at other times an unreliable witness. We have done so when his evidence has not been challenged and appears to have been accepted, or where it is supported from some other acceptable source.<sup>34</sup>

This statement would seem to be in accord with Scots rules of evidence. As long as there are two pieces of evidence proving the essential elements of the crime, the requirements of corroboration are met.

Another witness, a CIA informant, testified that he saw the accuseds at the Malta airport on a critical day. His testimony was completely rejected by the court because there was no corroboration for his evidence. In that situation, the Court considered that if he had really seen the accuseds that day, he would have reported it to the CIA at the time in standard fashion. No such reports were made.<sup>35</sup>

## 2. *Special Defence*

Under Scots law if the accused wishes to rely on a special defence,<sup>36</sup> he must lodge a notice at least 10 days before trial.<sup>37</sup> The burden of proof remains on the Crown to prove the charges against the accused. The only purpose for filing the notice of special defence is to give notice to the Crown as to the possible effect of evidence that the defence might lead.<sup>38</sup> In this case both defendants filed identical notices which were treated as Special Defence of Incrimination.<sup>39</sup>

In their notices the defendants accused:

1. Members of the Palestinian Popular Struggle Front;
2. Members of the Popular Front for the Liberation of Palestine — General Command; and
3. Parviz Taheri.

The Court considered the evidence presented regarding Parviz Taheri, however, there was no indication that he played any role in the bombing. In fact, at the end of his closing submissions the first defendant's attorney said at the end of his closing statement that 'he was not suggesting that Parviz Taheri may have been responsible for the crime charged.'<sup>40</sup> The Court did not consider further any incrimination of Mr. Taheri. Taheri simply happened to be on the flight PA103A from Germany to London. He then disembarked before the plane left London.

30 *HMA v Kidd*, 1960 J.C. 61; *Ryrie v Campbell*, 1964 J.C. 33.

31 Walker, D, *The Scottish Legal System*, W.Green/Sweet & Maxwell, Edinburgh, 1997 at 542.

32 E.g. *Sinclair v MacLeod*, 1964 J.C. 19; *HMA v W.B.*, 1969 J.C. 72.

33 Dr. Hans Köchler, international observer of the International Progress Organisation nominated by United Nations Secretary-General Kofi Annan issued a report (2 February 2001/P/HK/17032) which will be addressed fully below.

34 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 49.

35 Note 34 at 43.

36 Special defences include alibi, incrimination, insanity, self-defence, coercion, and automatism.

37 Criminal Procedure (Scotland) Act 1995, s78(3)(a).

38 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 71.

39 Note 38 at 70.

40 Note 38 at 72.

The Court turned next to consideration of the evidence presented regarding the members of the Popular Front for the Liberation of Palestine — General Command (PFLP-GC).<sup>41</sup> None of the members of this group gave evidence at the trial, however, officers of the German Police testified. In addition, a statement from Marwan Khreesat, a Jordanian agent who had infiltrated the group as their principal bomb maker, was put into evidence.<sup>42</sup>

Officers of the German police force testified that the PFLP-GC did have both the means and intention to manufacture bombs which could destroy an aircraft.<sup>43</sup> However, the timers and cassette players used for bomb making by the PFLP-GC seized by the police were not of the types used to destroy PA103. Khreesat's evidence was that he was instructed not to prime bombs he made and that he never used radio cassette players with twin speakers to convert into explosive devices.<sup>44</sup> This evidence led the Court to conclude that the PFLP-GC did not make the bomb which destroyed PA103.<sup>45</sup>

The Court further considered the suggestion that the PFLP-GC had used a US/Lebanese national to plant a bomb on board the plane. This man was a 20 year-old<sup>46</sup> who travelled from Frankfurt to Heathrow on Pan Am Flight 103A<sup>47</sup> and then died on flight 103.<sup>48</sup> The Court was 'quite satisfied on the evidence, however, that he only had two bags with him and these were checked into the hold for PA103A at Frankfurt.'<sup>49</sup> There was also evidence that these bags had suffered no explosive damage in the cargo hold.<sup>50</sup> The only evidence against him was from a fellow passenger on the London leg of the journey who thought he looked suspicious.

Finally the Court considered the members of the Palestinian Popular Struggle Front (PPSF). The evidence was of travel between Norway and Malta of Abo Talb who was arrested and convicted in 1989 of bombings in Copenhagen and Amsterdam in 1985.<sup>51</sup> The Court concluded after considering all of the evidence related to the PPSF that, while there were suspicious activities, 'there was no evidence to indicate that they [members of the PPSF] had either the means or the intention to destroy a civil aircraft in December 1988.'<sup>52</sup>

### 3. Witnesses

The Scots Court in the *Lockerbie* case had to rely on witnesses who chose to attend because the court was unable to compel a non-resident to testify. Interestingly, a witness was allowed to testify from behind a screen with his voice disguised,<sup>53</sup> however, Lord Sutherland had indicated before the trial that if the disguise would prevent the court or the defence from observing the witnesses reaction to questions, the disguise would not be permitted.<sup>54</sup>

41 Note 38 at 73.

42 Note 38 at 74.

43 Note 38 at 73.

44 Note 38 at 74.

45 Note 38 at 73.

46 Mr. Khaled Jaafar.

47 This is the flight on which it was alleged and later proved that the brown Samsonite bag carrying the bomb travelled on.

48 *HMA v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No 1475/99) at 75.

49 Note 48 at 75.

50 Note 48 at 75.

51 Note 48 at 76–79.

52 Note 48 at 81.

53 Abdul Majid is in the witness protection program in the United States as a former double agent for the Libyan and US intelligence agencies.

54 [www.law.gla.ac.uk/lockerbie/evidence/cfm](http://www.law.gla.ac.uk/lockerbie/evidence/cfm) at 3.

## V. Report of Professor Köchler

Köchler, a professor of philosophy at Innsbruck University, was one of five people appointed by U.N. Secretary-General Kofi Annan to observe the trial. None of the other observers have published reports on the conduct of the trial nor has the United Nations made comment regarding the Professor's report.<sup>55</sup> The Professor bases his claim that the trial was unfair on the following:

The first point of objection was the extraordinary length of detention.<sup>56</sup> It should be noted that under Scots law there are strict time limits for detention.<sup>57</sup> In this case, the defence and prosecution agreed to a delay so that the defence could prepare its case. The court granted their joint request pursuant to its power under s65(7) of the Criminal Procedure (Scotland) Act 1995.

Professor Köchler's second point was that the presence of foreigners at the prosecution and defence table negatively impacted on the Court's ability to find the truth and introduced a political element into the proceedings in the courtroom.<sup>58</sup> It is unclear the role these two 'foreigners' played in the trial,<sup>59</sup> however, the implication in this report is that these people influenced the decision of a three judge panel. Perhaps if this had been a jury trial that sort of influence may have been anticipated, however, there is no evidence that these judges were influenced by the presence of 'foreigners'. Interestingly, the Professor did not see the presence of a foreign national at the defence table to be as serious as the presence of a foreigner at the prosecution table.<sup>60</sup>

In his report the Professor attacks every aspect of the trial including the failure of the court to force foreign governments to hand over evidence he believed they had.<sup>61</sup> As noted above, the Scottish Court did not have the power to compel testimony or the delivery of evidence, however, there is no indication from any other source that material evidence was withheld from the Court. Köchler also questions the defence team's decisions to 'drop its special defence' and cancel the appearance of almost all defence witnesses. He does not explain his concerns and was refused an interview with defence lawyers.<sup>62</sup> The underlying message in the report is that the trial and conviction of Mr. Megrahi was affected by political considerations. There is no evidence to support this claim.

## VI. International Criminal Court

Many criticisms of the Lockerbie trial can be explained by three factors: the Scots rules of evidence are generally unfamiliar; people are suspicious when one or two powerful nations seem to have control over the conduct of a very high profile trial; and the political situation underlying the facts of this case are undeniable. These particular concerns would be addressed if the International Criminal Court<sup>63</sup> were constituted to conduct trials for crimes of this type. Like the International Court of Justice, this court would have the neutrality required to remove politics as a potential concern during the conduct of the trial.

55 At a meeting co-sponsored by the Arab League, the Professor Köchler emphasised that the views were his own and not those of the United Nations.

56 Dr. Hans Köchler report 2 February 2001/P/HK/17032 at 3.

57 Criminal Procedure (Scotland) Act 1995 s65(4)(a) requires an indictment within 80 days of committal and s65(4)(b) requires the trial begin within 110 days of committal.

58 Dr. Hans Köchler report 2 February 2001/P/HK/17032 at 4-6.

59 The American was reportedly a lawyer from the Justice Department. The Libyan was reportedly formerly employed at the Libyan UN mission in New York.

60 Dr. Hans Köchler report 2 February 2001/P/HK/17032 at 6.

61 Note 60 at 7-8.

62 Note 60 at 10.

63 The Rome Statute forming the International Criminal Court will come into force after the 60th instrument of ratification is deposited with the United Nations. As of 19 July 2001, 37 parties have ratified the statute and 139 countries have signed the treaty.

For the time being, the jurisdiction of the International Criminal Court (ICC) will be limited to (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.<sup>64</sup> It is unlikely that placing a bomb on board PA103 would fall under the jurisdiction of the court as a crime against humanity. 'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder. . .'.<sup>65</sup> Because the bombing of Pan Am flight 103 was not widespread or systematic, this matter probably could not have been heard by the ICC.<sup>66</sup>

An addendum to the Final Act establishing the International Criminal Court<sup>67</sup> indicates that while the parties to the statute recognise that terrorist acts are serious crimes, there is no generally acceptable definition of terrorism. For that reason, crimes of terrorism are not currently included in the jurisdiction of the International Criminal Court. However, Article 111 of the Statute of the Court allows for expansion of the jurisdiction of the court. Annex I to the final act recommends that this review take place with a view to placing crimes of terrorism within the jurisdiction of the court.

## VII. Leave to appeal

Leave to appeal has been granted to Abdelbasset Ali Mohamed Al-Megrahi against his conviction. The High Court of Scotland has fixed a date for a preliminary hearing at which a number of procedural and administrative matters will be considered. This hearing has been scheduled to take place on Monday 15 October 2001 in the Scottish Court in the Netherlands at Kamp van Zeist. The Court will fix a date for hearing the merits of the appeal in due course. There is no automatic right of appeal under Scots law.<sup>68</sup> This appeal will be conducted on the face of the record.

An international team of lawyers from the US, UK, and Libya has been hired to conduct Mr. Megrahi's appeal. Although the grounds of appeal have not yet been released, they are likely to challenge the strength of the evidence connecting Mr. Megrahi to the placement of the bomb in the suitcase and the suitcase on PA flight 103.

## VIII. Conclusion

While there have been claims that this trial was unfair, none of them have been official and there have been few.<sup>69</sup> There is no substantial evidence to suggest that the trial was not conducted exactly as it should have been. However, it is clear that there are questions as to the strength of the evidence against the accused. Given the difficulties encountered throughout this process, if a trial of this type and magnitude were to be conducted in the future it would be prudent for an international court to conduct the trial.

64 Rome Statute of the International Criminal Court Article 5(1).

65 Note 64 Article 7(1).

66 If it were proved to be a part of a larger campaign then perhaps it would fall within this definition.

67 Available at [www.un.org/icc/addendum/htm](http://www.un.org/icc/addendum/htm).

68 Criminal Procedure (Scotland) Act 1995, ss 106 and 107.

69 Only one out of five observers made a report at all. The United Nations has not commented.